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

Winston & Strawn LLP
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 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)

Case No. C 09-cv-5812 RS (PVT)
DOCUMENT SUBMITTED UNDER SEAL
(HIGHLIGHTED PORTIONS CONTAIN
CONFIDENTIAL OR HIGHLY
CONFIDENTIAL MATERIAL)
 PLAINTIFFS' OPPOSITION TO
 DEFENDANT FUSION GARAGE'S MOTION
 TO DISMISS THE COMPLAINT
 Date: May 13, 2010
 Time: 1:30 P.M.
 Place: Courtroom 3, 17th Floor

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1 **I. INTRODUCTION**

2 For more than a year, beginning in September 2008, plaintiffs Interserve, Inc. (“Interserve”)
3 and CrunchPad, Inc. (“CP”) (collectively “TC”) and defendant Fusion Garage (“FG”) collaborated to
4 develop and market the CrunchPad, an innovative, “dead simple and dirt cheap” tablet computer
5 initially proposed and developed by TC. TC hired staff and consultants, provided important
6 direction on technical aspects of the project, met with vendors and investors, promoted the product
7 on its widely read blog, and devoted hundreds of thousands of dollars in the service of the
8 CrunchPad project, which was to make its public debut at Interserve’s “Real Time CrunchUp S.F.”
9 event on November 20. But unknown to TC, FG had no intention of debuting the CrunchPad, then
10 or ever. Instead, starting in September, FG ended its relationship with the CrunchPad’s original
11 ODM manufacturer, secretly hired PR agency McGrath Power (“MP”), falsified a bogus “meeting of
12 investors” in Miami, in its own words strung along Michael Arrington (CP’s CEO), and then at the
13 last minute aborted the joint project on November 17. A week later it relaunched the same
14 CrunchPad product, rebranded the “JooJoo,” thus usurping more than a year’s worth of joint efforts
15 for its own separate benefit and leaving Plaintiffs in the cold. FG fraudulently leveraged its joint
16 effort with TC, and the massive publicity that TC brought to the project, to its sole advantage. FG’s
17 initial marketing materials (written while FG deceived TC that FG was still collaborating with them)
18 emphasized that “crunchpad is now going to be called joojoo” and continued “[w]e need to clearly
19 make the link that *this is crunchpad with a different name.*” (Decl. of Matthew Scherb in Opp. to
20 Mot. to Dismiss (“Scherb Decl.”) ¶ 2 & Ex. A.)

21 FG dwells at length on the failed merger between CP and FG. The merger failed because FG
22 pulled out after CP thought a deal had been struck. In June 2009, CP and FG reached what CP
23 believed was a clear understanding on the material terms of an eventual merger, to be consummated
24 when FG cleared its books of some highly questionable loans. The notion that FG was planning to
25 walk away from the joint enterprise altogether was, in FG’s own words, “out of the blue.”

26 In any event, even if one were to consider the outcome of the relationship a “failed merger,”
27 that takes nothing away from the fact that, pending the anticipated merger, the parties had
28 unambiguously joined forces on a collaboration, a joint project intended to commercialize a single

1 product to which they both committed money, staff, and effort. Indeed, absent some definitive
2 agreement to merge, which might have reordered their relationship in other aspects, their conduct – a
3 joint enterprise between Interserve, through CP, and FG – created rights and responsibilities of the
4 companies with respect to each other, in relation to the CrunchPad project.

5 In the Complaint, TC describes the venture and its collapse in detail. Its allegations, which
6 the Court must take as true at this stage of the case, more than adequately pleaded claims for false
7 advertising under the Lanham Act, breach of fiduciary duty, misappropriation of business ideas,
8 fraud, and violations of California unfair competition and false advertising law.

9 **II. STATEMENT OF THE ISSUES**

10 Does TC’s Complaint state a claim for (i) False Advertising in Violation of the Lanham Act;
11 (ii) Breach of Fiduciary Duty; (iii) Misappropriation of Business Ideas; (iv) Fraud and Deceit; and
12 (v) Unlawful Business Practices and False Advertising under California Law?

13 **III. STATEMENT OF FACTS**

14 In July 2008, Interserve proposed to design and develop “a dead simple web tablet for \$200.”
15 (Compl. ¶11.) Interserve, on its own, created a first prototype of what came to be called the
16 CrunchPad. In September, 2008, Interserve met with FG, a Singapore software start-up, and the
17 parties agreed to collaborate on the CrunchPad project. (Compl. ¶ 15.) Interserve and CP, an
18 offshoot of Interserve created for the CrunchPad project, turned down several other companies that
19 also expressed interest in a collaboration. (Compl. ¶ 49.) This was a tremendous opportunity for
20 FG, an obscure Singaporean company, to work with a well-known Silicon Valley institution.

21 By January 19, 2009, the parties had constructed a second prototype. (Compl. ¶ 18.) TC and
22 FG worked in close collaboration, mostly out of TC’s Bay Area headquarters, where FG’s CEO and
23 software team came to work for several months. (Compl. ¶¶ 20, 33.) Numerous communications
24 confirm the parties’ close connection: each touting their shared vision, each praising the other’s
25 efforts, and each clearly moving toward a joint goal. Despite significant friction over the summer of
26 2009, during which TC considered leaving the joint project, the parties forged ahead, and FG agreed
27 to the material terms of a merger with CP. (Compl. ¶¶ 28, 29.) Relying on FG’s representation that
28 they had a deal, TC continued with the mutual development effort. (Compl. ¶ 30.)

1 But then, on November 17, 2009 – in an email that FG concedes “came out of the blue” – FG
2 suddenly aborted the partnership, asserting that it owned all rights in the CrunchPad product and
3 would manufacture and market the CrunchPad product on its own. (Compl. ¶¶ 38, 79.) FG cast the
4 email at the beginning of this string as the message of a disgruntled shareholder, Dr. Bruce Lee.
5 (Compl. Ex. D.) The evidence suggests that FG had planned to push TC out of the CrunchPad
6 project for months. For example, in October and November 2009, TC believed that Pegatron would
7 manufacture the CrunchPad. In fact Pegatron terminated its relationship with FG on October 9 – a
8 fact FG concealed from TC even as FG personnel set up shop at TC’s headquarters. (Compl. ¶¶ 33,
9 51.) FG registered the domain “thejoojoo.com” on November 10, 2009, but continued to assure TC
10 in writing that it would meet the November 20 launch date for the CrunchPad. (Compl. ¶¶ 54, 55.)

11 Through discovery, additional details of the scope of FG’s misconduct are emerging,
12 consistent with TC’s initial allegations. As noted, TC continued to work closely with FG up until
13 November 17, 2009, when FG pulled the plug. But FG had been engineering this rupture for
14 months. At least as early as September 2009, FG had secretly started working with Silicon Valley
15 PR agency MP to work on “the launch of the Fusion Garage tablet computer.” (See Scherb Decl. ¶ 3
16 & Ex. B (agreement following weeks of informal discussion).) [REDACTED]

17 [REDACTED] *Id.* ¶ 4 & Ex. C. The November 17 email from FG’s
18 investor, Dr. Bruce Lee, turns out instead to have been written by Mr. Rathakrishnan himself with
19 input from his PR agency. *Id.* ¶¶ 5-6 & Exs. D, E. Mr. Bloom wrote, “[i]t is our understanding that
20 [Mr. Rathakrishnan] will send this to Bruce and he will send it back via email so that it appears like
21 a legitimate email communication.” *Id.* ¶ 11 & Ex. J. And there was no “meeting in Miami” with
22 FG’s shareholders that allegedly led to Dr. Lee’s email -- Mr. Rathakrishnan was in San Jose the
23 whole time. Mr. Rathakrishnan’s comment: “sure being in Miami wld have been fun!” *Id.* ¶ 7 &
24 Ex. F.

25 On Monday, December 7, FG followed through with its threat to go forward with the
26 CrunchPad on its own. In a webcast, it advertised the CrunchPad, now re-branded as the JooJoo, for
27 sale. (Compl. ¶ 60.) At this staged event, FG’s CEO made multiple false and misleading statements
28 about the nature, characteristics, and qualities of the CrunchPad/JooJoo device, and FG’s and TC’s

1 commercial activities in relationship to the product. For example, FG represented that it had
2 “developed the hardware platform on our own” and “made all the hardware design decisions for the
3 final prototype.” (Compl. ¶ 61.) It also represented that it was “FG shareholders who have
4 provided the necessary funds” for the CrunchPad project. (Compl. ¶ 61.) FG repeatedly asserted
5 that it took “all the risk” in the endeavor, “did all the work needed to move forward and bring the
6 product to market,” and undertook “all of the physical and intellectual business actions required to
7 take the product to market.” (Compl. ¶ 61.) These representations were false. TC had conceived
8 the CrunchPad device, developed its original prototype with no input from FG, and contributed
9 substantial intellectual and financial resources at all stages of the product’s development and
10 preparation for launch.

11 FG, with MP’s assistance, plotted and lied to cut TC out of the project that TC had conceived
12 and then invited FG to join. The truth is, FG “strung [TC’s Michael Arrington] along” (Scherb Decl.
13 ¶ 8 & Ex. G), and now is fighting desperately to avoid the consequences of its own bad faith.

14 **IV. ARGUMENT**

15 TC has adequately pleaded claims for false advertising under the Lanham Act, breach of
16 fiduciary duty, misappropriation, fraud, and California unfair competition and false advertising law.
17 FG’s motion to dismiss fails to offer any sound argument for dismissal of any of TC’s claims.¹

18 **A. FALSE ADVERTISING IN VIOLATION OF THE LANHAM ACT**

19 TC states a valid claim under the Lanham Act for false advertising. TC has proper standing.
20 The false advertising in question is not “true” as FG argues, and FG cannot win a motion to dismiss
21 with a manufactured fact dispute. Finally, the alleged false advertising is actionable, as it concerns
22 the nature, characteristics, or qualities of the CrunchPad and the parties’ commercial activities.

23 **1. Plaintiffs Have Standing Under the Lanham Act.**

24 **a. TC Adequately Alleged It Has Suffered a Competitive Injury, as 25 Required for Standing.**

26 Standing for a false advertising claim under the Lanham Act requires an allegation of

27 ¹ On a motion to dismiss, courts must accept as true all material allegations in the complaint as well
28 as reasonable inferences to be drawn from them, and view all allegations in the light most favorable
to the plaintiff. *Stewart v. Leland Stanford Junior University*, No. 05-04131, 2006 WL 889437, at
*2 (N.D. Cal. Apr. 5, 2006) (Ware, J.); *Resnick .v Hayes*, 213 F.3d 443, 447 (9th Cir. 2000).

1 “competitive” injury. *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d
2 1027, 1037 (9th Cir. 2005). Where false advertising seeks “to divert business from [plaintiff] to
3 [defendant],” there is “no question that the injury ... is competitive.” *Coastal Abstract Serv., Inc. v.*
4 *First Am. Title Ins. Co.*, 173 F.3d 725, 734 (9th Cir. 1999). Such conduct is “the type [of injury] that
5 section 43(a) of the Lanham Act was intended to remedy.” *Id.* at 734. But Ninth Circuit standing
6 doctrine does not require “an exact congruence between the businesses of the plaintiff and
7 defendant.” *Nat’l Servs. Group, Inc. v. Painting & Decorating Contractors of Am., Inc.*, No.
8 SACV06-563, 2006 WL 2035465, at *3-4 (C.D. Cal. Jul. 18, 2006). Rather, “the Court must
9 determine whether or not the two parties vie for the same dollars from the same consumer group, and
10 whether the conduct of the defendant ... could be said to create ‘competitive injury.’” *Kournikova v.*
11 *Gen. Media Commc’ns, Inc.*, 278 F. Supp. 2d 1111, 1117 (C.D. Cal. 2003).

12 Indeed, standing may be found where there is *potential* future competition, even when a
13 competitor is not yet in the market. *Tercica, Inc. v. Insmmed Inc.*, No. C 05-5027, 2006 WL 1626930
14 (N.D. Cal. Jun. 9, 2006) (Armstrong, J.). The defendant in *Tercica* was a pharmaceutical company
15 that had received FDA approval but not actually brought its drug to market; it moved to dismiss a
16 Lanham Act false advertising claim brought by a rival pharmaceutical company, on the grounds that
17 the two companies “were not actually engaged in commercial competition at the time the ...
18 Complaint was filed.” *Id.* at *16. The court rejected defendant’s standing argument, holding that “a
19 future potential for a commercial or competitive injury can establish standing.” *Id.* at *17
20 (quotations marks and citations omitted).

21 TC alleges that it is in competition with FG, in developing and commercializing separate but
22 nearly identical products. (Compl. ¶ 65.) It follows that TC and FG “vie for the same dollars from
23 the same consumer group.” *Kournikova*, 278 F. Supp. 2d at 1117. At the Rule 30(b)(6) deposition
24 of Interserve, Mr. Arrington [REDACTED]

25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 (Scherb Decl. ¶ 9 & Ex. H (Interserve Dep. Tr. at 379:7-24, designated AEO).) TC (through CP)
7 and FG are competitors, and FG’s conduct has caused TC competitive injury.

8 In response, FG points to a series of irrelevant cases establishing that *consumers* lack
9 standing under the Lanham Act. (Mot. at 12, citing *Barrus* and *Von Grabe*.) These cases are not
10 germane, because TC is not a consumer. FG further argues that TC cannot allege a competitive
11 injury because FG supposedly drove TC from the field. (Mot. at 11.) But, as Mr. Arrington
12 confirms, it has not. FG’s conduct has been a grievous, but not a fatal, setback to Mr. Arrington’s
13 vision of achieving a dead simple web tablet for under \$200. Moreover, it is nonsense to argue that
14 the Lanham Acts affords no relief to TC when FG’s attempt to divert business to itself has, to date,
15 succeeded. *See, e.g., Thorn v. Reliance Van Co.*, 736 F.2d 929, 931-33 (3d Cir. 1984) (finding
16 individual investor in bankrupt company had standing to sue for allegedly false advertisements by
17 competitor of the bankrupt company).

18 Whether an actual or future competitor, TC has sufficient standing.

19 **b. Whether an Injury Is “Competitive” Requires Detailed Inquiry**
20 **into the Facts of the Particular Case.**

21 Furthermore, although the Complaint adequately alleges standing, whether an injury is
22 “competitive” may require detailed inquiry into the facts of a particular case. *See, e.g., Jack Russell*
23 *Terrier* at 1032 (upholding Lanham Act standing ruling made “[a]fter a seven-day bench trial”);
24 *Summit Tech., Inc. v. High-Line Medical Instruments Co., Inc.*, 933 F. Supp. 918, 939 (C.D. Cal.
25 1996) (declining to dismiss Lanham Act claim for standing on a 12(b)(6) motion where plaintiff’s
26 allegations “could reasonably include some form” of competition with defendant); *Kournikova*, 278
27 F. Supp. 2d at 1113 (stating, in granting summary judgment, that “Plaintiff might have overcome the
28 absence of any allegation regarding competitive injury by presenting evidence”). Because the
purpose of a 12(b)(6) motion is to determine the sufficiency of the pleadings, not the facts, dismissal

1 on standing grounds would be inappropriate.²

2 **2. FG's Statements Were False.**

3 FG next argues that TC's Lanham Act claim fails because four of the eleven false or
4 misleading statements that TC identifies in the Complaint are actually true. FG does not dispute the
5 falsity of the other seven statements. And in fact, each of the four statements it disputes is false and
6 actionable. The Court could only construe the four statements as true if it decides contested fact
7 issues against TC. Because a 12(b)(6) motion tests the sufficiency of allegations in the Complaint,
8 not competing evidence, the Court must deny FG's motion.

9 FG contends these statements, made at its December 7, 2009 press conference, were true:

- 10 • "We had many discussions about a future potential deal whereby TechCrunch would
acquire our company, but nothing tangible ever came out of that."
- 11 • "[W]e were never able to reach an agreement for a mutually acceptable business deal."
- 12 • "There was never any agreement of any kind between the two companies. This was
nothing more than a potential acquisition that didn't occur as the parties would never
13 come to terms."
- 14 • "Nothing has been signed, nothing was ever on the table."

15 (Mot. at 13, quoting Compl. ¶ 61.) These four statements can be true only in the absence of "any
16 agreement of any kind" between the parties or any agreement "on the table" for merger. But there
17 was both a joint venture in place and a merger under consideration.

18 The Complaint contains numerous allegations supporting the conclusion that the parties were
19 joint venturers. TC alleges that FG itself said FG was in a "collaboration with the CrunchPad
20 project." (Compl. ¶ 16.) FG personnel "worked closely with" TC personnel. (Compl. ¶16.) "From
21 April to July, 2009, Mr. Rathakrishnan [of FG] worked with TC personnel in TC's offices in
22 California on virtually a daily basis as part of the joint development of the project." (Compl. ¶ 20.)

23 ² As FG notes, its standing argument is really a motion for dismissal for lack of subject matter
24 jurisdiction under Rule 12(b)(1). (See Mot. at 11, n.5.) See also *Fleck & Assoc., Inc. v. City of*
25 *Phoenix*, 471 F.3d 1100, 1107 n.4 (9th Cir. 2006); *Akhenaten v. Najee, LLC*, 544 F. Supp. 2d 320,
26 333 n.17 (S.D.N.Y. 2008). Rule 12(b)(1) "jurisdictional dismissals in cases premised on federal
27 question jurisdiction are exceptional." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038 (9th
28 Cir. 2004) (finding trial court erred by basing Rule 12(b)(1) dismissal on plaintiff's failure to state a
claim). "Federal question jurisdiction exists unless the cause of action alleged is patently without
merit, or the allegation is clearly immaterial and made solely for the purpose of obtaining
jurisdiction." *Thompson v. Thompson*, 798 F.2d 1547, 1550 (9th Cir. 1986). In the context of a
12(b)(1) motion, even if a court finds that plaintiff has failed to state a claim, it may not dismiss on
that ground. *Id.* Because FG actually brings its standing motion under Rule 12(b)(1) the court
should be exceptionally cautious before dismissing on this basis.

1 Further, TC alleges that “[FG] and TC mutually agreed and acknowledged that they would each
2 make capital investments of money, time, and services to achieve their common interests.” (Compl.
3 ¶ 75.) “[FG] and [TC] also agreed ... that they would both benefit from the profits in selling the
4 CrunchPad to consumers.” (Compl. ¶ 76.)

5 Further, there can be no doubt that a detailed merger agreement was “on the table.” TC
6 alleges that FG assented to “the material terms of a merger in which CP would acquire [FG] in
7 exchange for 35% of the merged company’s stock.” (Compl. ¶ 26.) FG committed to the deal,
8 writing that “*I will do this deal.*” (Compl. ¶ 29.) FG repeatedly referred to TC’s “offer” (Compl, Ex.
9 B), and TC relied on “FG’s representation that it accepted.” (Compl. ¶ 30). If anything, the absence
10 of a signed *writing* is evidence of FG’s bad faith and ill intent in denying what had been a series of
11 verbal understandings. After FG sent the email destroying the collaboration with TC, a nervous
12 Jonathan Bloom, FG’s Silicon Valley-based PR advisor, inquired of his client: “No trademarks,
13 contracts, written agreements or inferences in emails, right?” Mr. Rathakrishnan replied, “none
14 whatsoever. *everything been verbal.*” (Scherb Decl. ¶ 7 & Ex. F (emphasis added).)

15 Given the joint venture and potential merger, TC has properly alleged that the four
16 statements that FG challenges were false advertising. FG has conceded the falsity of the other seven
17 statements. The Court should therefore deny FG’s 12(b)(6) motion.²

18 **3. FG’s Other False Statements Concern the Nature, Characteristics, and**
19 **Qualities of the CrunchPad / JooJoo, as Well as the Commercial**
20 **Activities of TC and FG, and Provide the Basis for a Valid Lanham Act**
21 **False Advertising Claim.**

22 FG does not dispute that the following seven statements are false:

- 23 • “We took the following actions under the FG umbrella. We completed development
24 of our operating system. We hired in the necessary expertise to make key hardware
25 design decisions and developed the hardware platform on our own. We solved the
remaining technical issues and developed a new and more finished prototype.”
- “If anyone was led on here, it was us as Michael was never willing to come to terms
and instead stepped back while we took all the risk, did all the work needed to move
forward and bring the product to market.”

26 ² As to FG’s related Rule 12(f) motion to strike these statements from the false advertising claim,
27 such a motion is highly disfavored, and “should be denied unless the matter has no logical
28 connection to the controversy at issue.” *In re UTStarcom, Inc. Securities Litig.*, 617 F. Supp. 2d
964, 969 (N.D. Cal. 2009) (Ware, J.). Because the logical connection between the statements and
TC’s Lanham Act claim is clear, and because FG has failed to demonstrate that the statements
cannot be the basis of a false advertising claim, FG’s motion to strike should likewise be denied.

- 1 • “FG made all the hardware design decisions for the final prototype and getting a
- 2 successful contractual relationship with an ODM.”
- 3 • “It was the FG shareholders who have provided the necessary funds.”
- 4 • “Even after taking all of the risk and undertaking all of the physical and intellectual
- 5 business actions required to take the product to market, we provided Michael with
- 6 suggested terms for a possible business deal.”
- 7 • “Michael made many promises, many assurances suggesting that he would deliver on
- 8 the hardware, deliver on the software, deliver on the funding, none of which came
- 9 through. And we had been working with him for the last one year trying to strike a
- 10 deal but nothing came out of [inaudible]. Despite those assurances, nothing
- 11 happened.”
- 12 • “Michael did not deliver on his promises.”

(Compl. ¶ 61.) Instead, FG contends that these statements (but not the four previously discussed) “concern inventorship” and so “cannot give rise to false advertising liability.” (Mot. at 15.) But these statements have no relationship to “inventorship,” a patent-law concept that has nothing to do with this case.

In any case, FG is incorrect when it argues that Ninth Circuit law recognizes a broad “authorship or inventorship” exception to the Lanham Act. The Ninth Circuit – and the Supreme Court – have explicitly recognized that claims such as TC’s are *not* foreclosed. Also, FG’s arguments do not address TC’s actual claims. TC alleges false advertising with respect to the goods, *and the commercial activities*, of both TC and FG. (Compl. ¶66.) FG’s arguments address only the allegations as they relate to the goods. (Mot. at 15-16.) Because FG does not fully address TC’s Lanham Act claim, it cannot show that the allegations fail to state a claim, as Rule 12(b)(6) requires. The Court should therefore deny FG’s motion.

a. There Is No Generalized “Authorship or Inventorship” Exception to the Lanham Act under Ninth Circuit Law.

FG argues that the Lanham Act offers no relief for false advertising about the provenance of goods or services. But *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008), the sole Ninth Circuit case that FG cites to support this argument, actually implies the existence of false authorship claims under the false advertising provisions of the Lanham Act. *Sybersound* noted that “the nature, characteristics, and qualities of karaoke recordings under the Lanham Act are more properly construed to mean characteristics of the good itself, *such as the original song and artist* of the karaoke recording.” *Id.* (emphasis added). Other courts, including the Supreme Court, conclude

1 that the Lanham Act may reach claims about the authorship of works. *See, e.g., Dastar Corp. v.*
2 *Twentieth Century Fox Film Corp. et al.*, 539 U.S. 23, 38 (2003) (“respondents might have a cause
3 of action ... for misrepresentation under the ‘misrepresents the nature, characteristics [or] qualities’
4 provision of § 43(a)(1)(B)”); *Zyla v. Wadsworth*, 360 F.3d 243, 252 n. 8 (1st Cir. 2004) (*Dastar* left
5 open the possibility of false authorship claims); *Clauson v. Eslinger*, 455 F. Supp. 2d 256, 261-62
6 (S.D.N.Y. 2006) (allowing false advertising claim on a 12(b)(6) motion where song advertised as
7 being created and performed solely by defendants); *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d
8 1300, 1308 (Fed. Cir. 2009) (acknowledging cases).

9 None of the other cases that FG cites for its “authorship exception” to the Lanham Act
10 compels a different result. *Baden Sports* is a Federal Circuit case without binding effect and
11 misconstruing Ninth Circuit law. *Robert Bosch*, a district court case, simply parrots *Baden Sports*
12 with a minimum of analysis. Both the *Baden Sports* and *Robert Bosch* profess a concern to prevent
13 overlap between the Lanham Acts and copyright and patent law, *Robert Bosch LLC v. Pylon Mfg.*
14 *Corp.*, 632 F. Supp. 2d 362, 367 n.4 (D. Del. 2009); *Baden Sports*, 556 F.3d at 1307, but here, TC
15 makes no copyright or patent claims and, unlike the plaintiff in *Sybersound*, is not attempting to win
16 copyright-flavored remedies. Misleading the public about who created or designed a product is core
17 false advertising that Congress intended the Lanham Act to redress.

18 **b. FG’s Motion Does Not Address TC’s “Commercial Activities”**
19 **Allegations, so it is Undisputed that the Complaint States a Claim.**

20 FG’s “inventorship” argument also fails because FG does not address the entirety of TC’s
21 Lanham Act claim. The Complaint alleges that FG misrepresented not only the goods but also the
22 “commercial activities” of both FG and TC. (Compl. ¶ 66.) FG makes the conclusory statement that
23 its statements “do not constitute material misrepresentations about ‘the ... commercial activities ...’”
24 of FG and TC. (Mot. at 15, quoting Compl. ¶ 66.) But FG’s substantive arguments address the
25 Lanham Act claim *only* as it pertains to *goods*. (Mot. at 15 (“The advertising statements that
26 Plaintiffs rely on discuss ‘goods’ – *i.e.*, products”).) Because FG completely fails to address TC’s
27 allegations that FG misrepresented its own and TC’s *commercial activities*, FG has not shown that
28 TC has failed to state a claim in that respect, and the motion to dismiss should accordingly be
denied. *See Procter & Gamble v. Haugen*, 222 F.3d 1262, 1270-73 (10th Cir. 2000) (finding

1 summary judgment on false advertising claim was inappropriate, even though “the subject message
2 did not implicate the nature, characteristics, or qualities of [plaintiff’s] products,” where district
3 court did not consider “commercial activities” prong).

4
5 **4. A Lanham Act Claim May Arise From Statements Regarding an Officer
and Principal of a Company.**

6 FG’s final argument concerns two false statements about Michael Arrington, Interserve’s
7 founder and co-editor and CP’s CEO. (Compl. ¶ 16 (“Michael made many promises, many
8 assurances suggesting that he would deliver on the hardware, deliver on the software, deliver on the
9 funding, none of which came through. And we had been working with him for the last one year
10 trying to strike a deal but nothing came out of [inaudible]. Despite those assurances, nothing
11 happened”); *id.* (“Michael did not deliver on his promises”).) FG argues that these statements
12 cannot form the basis of a Lanham Act false advertising claim, because they are “about a *person*.”
13 (Mot. at 16, emphasis in original.) FG offers no authority for this novel, improbable proposition.

14 There is nothing in the Lanham Act prohibiting claims based on false statements about an
15 officer of a company acting on the company’s behalf. In fact, in *Procter & Gamble v. Haugen*, 222
16 F.3d 1262 (10th Cir. 2000), the court allowed a suit by Procter & Gamble based on false statements
17 about its president. Statements about its president implicated the “commercial activities” prong of
18 the Lanham Act. The Lanham Act, in short, permits exactly what FG claims it does not.

19 As to FG’s statement that “Plaintiffs cannot allege a false advertising claim on [Mr.
20 Arrington’s] behalf, it is sheer misdirection. Interserve and CP brings their claims on their own
21 behalf. (Compl. ¶ 67.) Mr. Arrington, as the founder, principal, and public face of Interserve, and
22 CEO of CP, is well known in the technology community. (Compl. ¶ 10.) It is futile for FG to
23 pretend that statements about Mr. Arrington have “no logical connection” to Plaintiffs’ claims, their
24 reputation, or business. FG’s ill-considered motion to dismiss and to strike should be denied.

25 **B. BREACH OF FIDUCIARY DUTY**

26 FG withheld crucial information during the parties’ collaboration and ultimately abused TC’s
27 trust when it “strung [TC’s Michael Arrington] along” before usurping the CrunchPad venture for
28 itself. Attempting to defeat TC’s breach of fiduciary duty claim, FG argues that TC’s statement that

1 it would walk away from the joint venture was inconsistent with the venture’s existence. This
2 erroneous conclusion is at odds with the allegations in the Complaint and, at most, exposes a factual
3 dispute rather than a pleading defect. And it misunderstands TC’s core allegations. TC does not
4 contend that the parties were somehow prohibited from walking away from the venture. It contends
5 instead that it is entitled to share in the benefits of that collaborative effort.

6 In addition, FG argues that it cannot tell from the Complaint to whom FG is supposed to have
7 owed its fiduciary duty. But the Complaint is clear.

8 **1. TC’s Allegations Are All Consistent with the Existence of a Partnership
9 between It and FG.**

10 The Complaint alleges in detail the parties’ collaboration. (Compl. ¶¶ 69-77.) FG, however,
11 argues that TC’s threat to “turn the project off” is fatally inconsistent with the existence of a
12 partnership to develop the CrunchPad. (Mot. at 19.) This argument is specious. The very fact that
13 the parties could contemplate ending their joint venture shows that one existed. Partnerships and
14 joint ventures do not endure forever. *See* Cal. Corp. Code § 16801 (listing events that may trigger
15 dissolution of a partnership). FG cites no legal authority for the proposition that one partner may not
16 even *propose* to halt a collaboration without obliterating the venture. Moreover, TC *did not* end the
17 project—and certainly did not usurp the project for itself—but continued in the partnership, a
18 decision it made because of FG’s false statements and omissions. (Compl. ¶¶ 30, 94-101.)

19 In contrast, FG not only ended the parties’ joint venture, it systematically misled TC about its
20 intentions and abilities in order to lure it into partnership; abuse its trust; and usurp a jointly-
21 developed product for its sole commercial benefit. *See Sime v. Malouf*, 95 Cal. App. 2d 82 (1949)
22 (“while [the joint venture agreement] is in force, ordinarily one joint adventurer has no right to
23 exclude another, or to withdraw himself from the arrangement, in order to act independently in
24 respect to the subject matter of the joint venture”).

25 The suggestion that TC’s mere threat to stop collaboration with FG proves the non-existence
26 of a joint venture is preposterous. FG’s argument merely underscores the existence of the venture.
27 At the very most, it suggests a factual dispute, which the Court cannot resolve on the pleadings.
28

1 **2. TC’s Complaint Clearly Alleges a Joint Venture Between Both Plaintiffs**
2 **and FG.**

3 FG next argues that the Complaint does not identify to whom FG owed a fiduciary duty.
4 But the Complaint is clear: “This complaint uses ‘TechCrunch’ to refer to both Interserve[] and
5 [CP]” The Complaint further states that CP is “an offshoot of Interserve[]” formed to
6 “commercialize the CrunchPad project” in conjunction with Interserve. (Compl. ¶ 4.) It follows
7 that the Complaint alleges a partnership or joint venture among Interserve, CP, and FG. (Compl. ¶¶
8 73-74.) As such, FG owed a fiduciary duty to both Interserve and CP. (Compl. ¶ 78.) FG points to
9 two instances where the Complaint uses the word “both” to refer to TechCrunch and FG. FG
10 suggests that “both” must imply only two entities. This is nothing more than a grammatical quibble
11 about whether “TechCrunch” should be referred to in the singular or the plural. The distinction
12 between Interserve and CP is important only insofar as Interserve created CP to be the vehicle for its
13 collaboration with and eventual acquisition of FG. So the fiduciary duty originally ran to Interserve,
14 and then expanded to encompass CP when it was incorporated.

15 FG also cavils at TC’s use of the word “project” to refer to different things at different times.
16 FG does not explain why it believes that this common word should be a term of art. At any rate, the
17 notion that this is somehow “unclear” is belied by FG’s own explanations of what the word means in
18 the various contexts in which it appears.

19 Finally, and confusingly, FG complains that non-party Michael Arrington of TC “figures
20 prominently in the Complaint.” (Mot. at 18.) While this is true, it is not clear why it should pose
21 any difficulty. The Complaint does not seek to vindicate Mr. Arrington’s rights as an individual, and
22 does not allege that FG owed him a fiduciary duty. Mr. Arrington is the founder, co-editor,
23 principal, and public face of Interserve, as well as CEO of CrunchPad, Inc. It would be surprising if
24 he did *not* figure prominently in the Complaint.

25 In sum, the language of the Complaint is far from being “hopelessly ambiguous.” (Mot. at
26 18.) FG owed a fiduciary duty to Plaintiffs, and its own arguments demonstrate that it understands
27 the allegations in that regard. No ambiguity provides a basis for dismissal. Nor is there a basis for
28 FG’s alternate request for a more definite statement. (Mot. at 17.) Motions for more definite

1 statement are disfavored and are rarely granted; they are “proper only where a complaint is so
2 indefinite that the defendant cannot ascertain the nature of the claim being asserted.” *Advanced*
3 *Microtherm, Inc. v. Norman Wright Mechanical Equip. Corp.*, No. C 04-02266, 2004 WL 2075445,
4 at *5 (N.D. Cal. Sep. 15, 2004) (Ware, J.). The Complaint is clear on its face, and FG cannot
5 plausibly claim to be confused as to “the nature of the claim being asserted.”

6 C. FRAUD AND DECEIT

7 TC has successfully pleaded a fraud claim. FG has not shown that any of the alleged
8 fraudulent misrepresentations were, as it argues (Mot. at 20-21), actually and necessarily true, and its
9 attempt to focus the Court on a fact dispute is improper on a motion to dismiss. Further, TC has met
10 the pleading requirements of Rule 9(b) and has adequately pleaded proximate harm flowing from
11 FG’s fraudulent acts and omissions.

12 1. TC Properly Alleged Fraud Regarding the Joint Venture, and FG’s 13 Reference to Emails Regarding a Failed Merger is Both Beside the Point 14 and Improper.

15 FG first argues that its alleged fraudulent misrepresentations related to the prospects of a
16 *joint venture* were true, and therefore not actionable, because of emails in which it kept TC apprised
17 of the failed *merger*. FG confuses its statements about the failed merger with its fraud in
18 misrepresenting by words and omissions the health of the joint venture itself. FG’s “evidence” of
19 truth is irrelevant and entirely improper in response to a motion to dismiss.

20 FG argues that its destruction of the joint venture was really nothing more than a refusal to
21 enter into a *prospective merger* with CP. This argument depends upon a gross mischaracterization
22 of TC’s actual allegations. TC does not allege that FG promised a joint venture by merger that never
23 materialized, but rather that TC and FG were partners in a joint venture well before November 17,
24 2009. (Compl. ¶¶ 68-74.) FG’s fraudulent conduct “was intended to and *did induce* [TC] to enter
25 into a joint venture.” (Compl. ¶ 45, emphasis added.) FG, through its further fraud and deceit,
26 leveraged the joint venture relationship to its own advantage. (Compl. ¶ 45.) FG continued to
27 deceive TC, even as it conspired to release the CrunchPad under the “JooJoo” name. (Compl. ¶¶ 54-
28 55.) The email exchange that FG offers as purported evidence of its honesty and good faith started
seven days *after* FG secretly registered the domain name under which it intended to market the

1 stolen CrunchPad. (Compl. ¶ 38.) The exchange concerns the ill-fated merger, not the already-
2 existing joint venture. It has no bearing on the truth of FG’s previous statements or on the
3 misleading nature of its omissions related to the joint venture, or, for that matter related to the
4 merger, which had been in the works for months.

5 Indeed, recent discovery shows that the evidence of fraud and deceit is overwhelming. FG
6 formally hired MP to promote “the Fusion Garage tablet computer” on October 6, 2009. (Scherb
7 Decl. ¶ 3 & Ex. B.) It never informed TC of this hiring. MP, at FG’s direction, reached out to [REDACTED]
8 [REDACTED], and others
9 (like the New York Times) where it was actively pursuing options that previously had been
10 discussed in the context of the joint venture. The November 17 email is in fact a fiction, drafted by
11 FG and its PR agency and falsely asserting that Mr. Rathakrishnan was meeting with investors in
12 Miami when he was in fact meeting with MP in San Jose. *Id.* ¶¶ 5-6 & Exs. D-E. Mr.
13 Rathakrishnan was merely “playing along” with TC until a convenient time to breach. And its
14 deceptions to TC were designed to manage the fallout FG expected when news of its breach
15 emerged: “its becoming really hard to play along and I do think this it is [sic] going to lead to a
16 massive blowup on [Mr. Arrington’s] part (perhaps not translated in his writing) when realization
17 hits that I have strung him along.” *Id.* ¶ 8 & Ex. G. As FG’s Stuart Tan wrote on September 23
18 from TC’s offices, “*Really sucker these people.*” *Id.* ¶ 10 & Ex. I.

19 FG’s entire argument on this point depends on ignoring key facts, taking statements out of
20 context, and interpreting them in the light most favorable to FG while ignoring FG’s guilty
21 admission and knowledge of what in fact transpired. This the exact opposite of the Rule 12(b)(6)
22 standard. The Complaint’s allegations, taken as true, establish a plausible claim that FG’s
23 supposedly honest exchanges with TC *about the merger* were merely the final pieces of a pattern of
24 misrepresentation, fraud, and deceit intended to benefit FG at TC’s expense. (Compl. ¶¶ 99, 101.)

25 **2. TC Adequately Pleaded Damage from FG’s Fraud and Deceit.**

26 FG also wrongly argues that there is a heightened pleading standard for proximate causation
27 for injury due to fraud, and that TC’s allegations do not meet that standard. (Mot. at 21.) In fact,
28 there is no heightened standard and the Complaint adequately pleads causation.

1 Neither of the decisions that FG cites supports the heightened standard for which it argues.
2 Neither concerns pleading standards at all, heightened or otherwise. The first, *Fladeboe*, simply
3 repeats a basic tenet of tort law: “a plaintiff must prove loss proximately caused by the defendant’s
4 tortious conduct.” The second, *O’Hara*, is nothing more than a recitation – artfully elided by FG –
5 of the elements of a fraud cause of action. Moreover, both are state decisions and have no bearing
6 on federal rules, such as Rule 9(b). The plain-statement standard of Rule 8 applies.

7 Under the Rule 8 standard, the Complaint adequately pleaded that TC suffered injury as a
8 result of FG’s conduct: “[s]ubstantially as a result of [FG’s] conduct, [TC] has suffered damage in its
9 business or property.” (Compl. ¶ 101.) A pleading need contain only “a short and plain statement of
10 the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *cf. Erickson v.*
11 *Pardus*, 551 U.S. 89, 92-93 (2007) (applying Rule 8(a)(2) standard in approving petitioner’s
12 “conclusory allegations” “concerning harm caused petitioner.”).

13 TC’s allegation of harm in Paragraph 101 is sufficient, and the Court should end its inquiry
14 into the adequacy of pleading harm here. But even the Court demanded a higher standard of
15 pleading, the Complaint goes well above and beyond the allegation of Paragraph 101, alleging injury
16 to TC in detail and with relation to the very misrepresentations that FG raises in its opposition.

17 **i. TC Adequately Alleges Harm from FG’s Misrepresentation
18 of Its Credentials.**

19 The Complaint adequately alleges that TC suffered harm from FG’s misrepresentation of its
20 credentials. “Based on Defendant’s misrepresentations, [TC] selected Defendant over ... other
21 prospective partners.” (Compl. ¶ 49.) As a result, TC contributed its money, effort, and services to
22 help develop and market the CrunchPad in partnership with FG. (Compl. ¶ 59.) FG argues that its
23 ultimate “success” – after more than a year of work – proves that TC was not harmed by its
24 misrepresentations. (Mot. at 22.) But FG’s success is, first, still sheer speculation. More to the
25 point, it owes any success it may attain to usurping the fruits of the CrunchPad project from TC.

26 **ii. TC Adequately Alleged Harm from Overstating Costs.**

27 FG overstated to TC the costs of the CrunchPad’s components by \$20-30 per unit. (Compl. ¶
28 51.) FG’s misrepresentation and concealment of the true costs was “material and critical to TC’s
decision to ... continue [the] partnership.” (Compl. ¶ 57.) Because FG concealed the true state of

1 affairs, TC “continu[ed] its collaboration and its contribution of money, effort, and services to help
2 develop and market the CrunchPad.” (Compl. ¶ 59.)

3 **iii. TC Adequately Alleges Harm from FG’s Concealment of
4 the Loss of Pegatron.**

5 “Pegatron [was] the company preparing to manufacture the CrunchPad.” (Compl. ¶ 51.) In
6 the fall of 2009, Pegatron terminated its relationship with FG because FG had not paid its debts.
7 (Compl. ¶ 53.) FG’s misrepresentation and concealment of the loss was “material and critical to
8 [TC]’s decision to ... continue [the] partnership.” (Compl. ¶ 57.) Because FG concealed the true
9 state of affairs, TC “continu[ed] its collaboration and its contribution of money, effort, and services
10 to help develop and market the CrunchPad,” all to its detriment. (Compl. ¶ 59.)

11 Under any pleading standard, TC has adequately pleaded harm from FG’s fraud.

12 **3. TC’s Allegations of Fraud Meet the Standard of Rule 9(b).**

13 Finally, FG makes the conclusory and meritless argument that TC has not set forth with
14 particularity its allegations of fraud, as Fed R. Civ. P. 9(b) requires. While Rule 9 does create a
15 higher pleading standard for fraud claims, where the circumstances of those claims are uniquely
16 within the defendant’s knowledge, the particularity requirement is satisfied if the pleading “identifies
17 the circumstances constituting fraud ... so that the defendant can prepare an adequate answer from
18 the allegations.” *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993); *Moore v. Kayport Package*
19 *Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989). As FG’s motion makes clear, it understands the
20 allegations against it. And it fails to point to a single allegation of fraud supposedly lacking in
21 specificity to support its claim that TC has not met the Rule 9 standard.

22 Moreover, a plaintiff alleging fraud by omission, as in this case, need not meet the same
23 heightened pleading standard as plaintiffs alleging other types of fraud. *Falk v. General Motors*
24 *Corp.*, 496 F. Supp. 2d 1088, 1098-99 (N.D. Cal. 2007) (Alsup, J.). “Clearly, a plaintiff in a fraud
25 by omission suit will not be able to specify the time, place, and specific content of an omission as
26 precisely as would a plaintiff in a false representation claim.” *Id.*; *accord, Washington v. Baenziger*,
27 673 F.Supp. 1478, 1482 (N.D. Cal. 1987) (“he is not alleging an act, but a failure to act”); *Kinkade v.*
28 *Trojan Express, LLC*, No. SACV 08-1362, 2009 WL 799390, at *3 (C.D. Cal. Mar. 23, 2009). In
such cases, “Rule 9(b)’s requirement ... may be relaxed.” *Wood v. Apadoca*, 375 F. Supp. 2d 942,

1 949 (N.D. Cal. 2005) (Trumbull, J.). Insofar as TC alleges that FG fraudulently failed to disclose its
 2 plans to thwart the joint venture, Rule 9(b) does not require the specifics that FG erroneously claims
 3 are lacking.

4 Though FG refused to tag any particular allegation of fraud as improperly pleaded under
 5 Rule 9, TC offers the Court this chart showing how its allegations meet the standard:

| | | |
|----|-----------------------------|--|
| 6 | Compl. ¶ 50 | “[FG] promised [TC] that it would agree to a merger with [CP] and “represented further that its investors and creditors had agreed.” |
| 7 | Who: Mr. | Rathakrishnan (Compl. ¶ 29) |
| 8 | What: “the | merger transaction would go forward on [TC]’s terms.” (Compl. ¶ 29) |
| 9 | When: | June 27, 2009 (Compl. ¶ 26) |
| 10 | Where: Via | email. (Compl. ¶ 26; Compl. Ex. B.) |
| 11 | How conduct was fraudulent | FG never intended to consummate the merger. (Compl. ¶ 57.) “Defendant destroyed the joint venture only three days before the scheduled November 20 launch.” (Compl. ¶ 56.) FG stated that “we were never able to reach an agreement for a mutually acceptable business deal.” (Compl. ¶ 61.) |
| 12 | Loss causation: | TC would have discontinued the CrunchPad project had FG not agreed. (Comp. ¶¶ 28, 50.) “Relying on FG’s representation . . . [TC] proceeded forward with the parties’ mutual development effort.” (Compl. ¶ 30.) “[TC] reasonably relied on [FG]’s representations ... in continuing its collaboration and its contribution of money, effort, and services to help develop and market the CrunchPad.” (Compl. ¶ 59.) |
| 13 | | |
| 14 | | |
| 15 | Compl. ¶ 51 | FG falsely represented to TC the costs of the product components as \$20-30 per unit higher than they were. |
| 16 | Who: FG | (Compl. ¶ 51.) |
| 17 | What: FG | misrepresented the costs of product components. (Compl. ¶ 51.) |
| 18 | When: | Prior to August, 2009. (Compl. ¶ 51.) |
| 19 | Where: | In cost estimates prior to August, 2009. (Compl. ¶ 51.) |
| 20 | How conduct was fraudulent: | FG misrepresented its progress and induced TC to continue the joint venture, especially in light of other material concealments from TC. (Compl. ¶ 57.) |
| 21 | Loss causation: | TC continued “its collaboration and its contribution of money, effort, and services to help develop and market the CrunchPad.” (Compl. ¶ 59.) |
| 22 | | |
| 23 | Compl. ¶ 52 | “Beginning at a point unknown to Plaintiff, [FG] misrepresented its intention to continue working on the joint project in collaboration with [TC]. FG made the misrepresentations while secretly making its own plans to divert the joint project to its own exclusive purposes and to exclude [TC] from the project.” |
| 24 | Who: FG | (Compl. ¶ 52); Mr. Rathakrishnan (Compl. ¶¶ 34, 37) |
| 25 | What: FG | misrepresented its intention to collaborate on the joint project. FG implied that the CrunchPad project was on track. (Compl. ¶ 34.) |
| 26 | When: | Much of this information is uniquely within the knowledge of FG. In fact, FG may never have intended to play fairly in its joint venture with TC. On August 31, 2009, FG pleaded with TC not to shut down the project. (Compl. ¶ 32.) On November 10, 2009, FG secretly registered the domain name thejoojoo.com, and fraudulently concealed that information. (Compl. ¶¶ 34, 37). On November 13, 2009, FG asserted the project was “[on] course for getting a lockdown device” and that the CrunchPad should launch on November 20, 2009. (Compl. ¶ 34.) |
| 27 | Where: | Much of this information is uniquely within the knowledge of FG. |
| 28 | | |

| | | |
|----|-----------------------------|--|
| 1 | | At least some misrepresentations were made by email. (Compl. ¶ 34 & Ex. C.) |
| 2 | How conduct was fraudulent: | “At the time [FG] made these promises, they were false and [FG] knew they were false.” (Compl. ¶ 58.) Four days after stating that the project was on track, Mr. Rathakrishnan reported that it would be a “challenge” to meet the target date. (Compl. ¶ 38.) Had TC known the truth, it might not have continued the partnership, especially given other material concealments. (Compl. ¶ 57.) |
| 3 | | |
| 4 | | |
| 5 | Loss causation: | TC continued “its collaboration and its contribution of money, effort, and services to help develop and market the CrunchPad.” (Compl. ¶ 59.) |
| 6 | Compl. ¶ 53 | FG concealed the loss of a critical supplier, and continued to represent that the CrunchPad project was on track. |
| 7 | Who: FG | (Compl. ¶ 53) |
| 8 | What: | FG concealed the fact that Pegatron, the most critical supplier for the CrunchPad project, had terminated its relationship with FG because of FG’s failure to pay its debts. “Defendant both represented that the project was moving forward satisfactorily and concealed the loss of the most critical supplier to the project.” (Compl. ¶ 53.) |
| 9 | | |
| 10 | When: | The Complaint alleges concealment beginning Fall of 2009 (Compl. ¶ 53.) Discovery now shows FG lost Pegatron as a supplier on October 9, 2009. |
| 11 | Where: | Concealment of facts does not have a location. |
| 12 | How conduct was fraudulent: | FG misrepresented its progress and induced TC to continue the joint venture, especially in light of other material facts which were also concealed from TC. (Compl. ¶ 57.) |
| 13 | Loss causation: | TC continued “its collaboration and its contribution of money, effort, and services to help develop and market the CrunchPad.” (Compl. ¶ 59.) “[TC] shared its expertise, ideas, advice, resources, and connections with [FG] privately for [FG]’s shared benefit in the joint project.” (Compl. ¶ 36.) |
| 14 | | |
| 15 | | |
| 16 | Compl. ¶ 54 | FG secretly registered the domain name thejoojoo.com. |
| 17 | Who: FG. | |
| 18 | What: | On November 10, 2009, FG secretly registered the domain name thejoojoo.com. (Compl. ¶¶ 37, 54.) |
| 19 | When: | November 10, 2009. (Compl. ¶¶ 37, 54.) |
| 20 | Where: | Domain name was registered online. (Compl. 37.) |
| 21 | How conduct was fraudulent: | Registration thejoojoo.com indicates FG’s intent to appropriate the CrunchPad product. (Compl. ¶ 37.) FG continued to imply it was dedicated to the joint venture even after it registered the domain name. (Compl. ¶ 55.) On November 10, 2009, Mr. Rathakrishnan informed Mr. Arrington that FG was preparing “to show off a final product demo either on the 16th or 17th of nov.” (Compl. ¶ 54.) TC had no inkling of FG’s plans. (Compl. ¶ 55.) |
| 22 | Loss causation: | FG led TC on so that it would continue the collaboration. (Compl. ¶ 59.) FG’s concealment of its domain name registration, and its past and continuing misrepresentations, allowed FG to continue to benefit from TC’s investments and involvement in the project. (Compl. ¶ 58.) |
| 23 | | |

Each of these allegations is particular as to speaker, content, time, and place, and each explains how and why the statement or conduct was fraudulent, satisfying Rule 9(b). Where information is uniquely within the knowledge of FG, the Complaint provides sufficient particulars

1 that “the defendant can prepare an adequate answer from the allegations.” *Neubronner v. Milken*, 6
2 F.3d at 671.³ TC has met the requirements of Rule 9(b) and has adequately pleaded its fraud claim.

3 **D. MISAPPROPRIATION OF BUSINESS IDEAS**

4 FG makes several flawed arguments for dismissal of TC’s claim for misappropriation of
5 business ideas. First, it wrongly argues that the tort does not exist. It does. Second, FG argues that
6 TC’s business ideas are unprotectable because they were publicly disclosed. But the Complaint
7 alleges appropriation of business ideas not publicly disclosed. Third, FG argues that TC’s claim is
8 preempted by California’s Uniform Trade Secrets Act (“CUTSA”). As this Court has already ruled,
9 TC does not make a trade secret claim and there can be no preemption. Finally, FG purports to be
10 confused as to who brings the claim against it, but this is clear from the face of the Complaint.

11 **1. California Law Provides a Tort Remedy for Misappropriation of
12 Business Ideas.**

13 The elements of California’s common law tort of misappropriation are laid out in *Hollywood*
14 *Screentest of Am., Inc. v. NBC Universal, Inc.*, 151 Cal. App. 4th 631, 650 (Ct. App. 2007). The tort
15 protects intangible property. *Id.* at 650; *see also City Solutions, Inc. v. Clear Channel Commc’ns,*
16 *Inc.*, 365 F.3d 835, 842 (9th Cir. 2004) (“Common law misappropriation ... protect[s] something of
17 value *not otherwise covered by ... trade secret law*”) (emphasis added). The tort protects, among
18 other things, business ideas. *Hollywood*, 151 Cal. App. 4th at 650. In *Hollywood*, plaintiff had
19 pitched an idea for a reality television show to NBC Universal. After learning that NBC Universal
20 had bought a similar reality television series, plaintiff sued. *Id.* at 636. Among the ideas that
21 plaintiff alleged were misappropriated were the use of “multimedia ... utilizing the Internet, utilizing
22 movie screens, utilizing the TV show to promote the film component of the show in order to garner
23 greater ratings”; “having an acting coach on the set interacting with the contestants to assist them in
24 their various challenges”; “[u]sing celebrities to act within a particular scene during various
25 challenges”; “[u]tilizing the movie as not only the grand prize but also utilizing it as part of the

26
27 ³ As part of its Rule 9(b) argument, FG also attacks the Complaint on the spurious ground that the
28 fraud claims is based on allegations incorporated by reference. (Mot. at 19.) To say that the
Complaint should fail because its allegations are contained within it is bizarre. Moreover,
incorporation by reference is a common technique, which FG itself has used repeatedly in this case.

1 television show.” *Id.* Summary judgment for the defendant was appropriate only because
2 uncontradicted evidence showed independent development by an unrelated third party. *Id.* at 647.

3 FG does not really dispute the existence of the misappropriation tort, but argues that the tort
4 does not apply here because TC’s specific business ideas were “mere” ideas, “abstract ideas,” and
5 “not property.” (Mot. at 8.) The Court should reject these conclusory, unsupported characterizations.

6 The Complaint alleges FG misappropriated specific business ideas, among them ideas
7 relating to: the use of a large-screen touch-screen device; the function of booting extremely rapidly
8 and straight to a browser; the lack of a desktop; having no hard drive other than for the software
9 footprint; the use of a white instead of a black background to better display web pages; the use of
10 large icons on the home screen so that users can quickly navigate to their favorite web pages; the use
11 of proxying video directly to the device so that video can be played without the use of a flash player;
12 the application programming interface, or API, with the browser for custom applications; the idea
13 and know how for empowering the device to play video output to a resolution of 1080p, also known
14 as full high definition. (Compl. ¶87.) TC furnished business ideas to FG in the course of the parties’
15 collaborative work on screen visibility; touch screen performance; the use of “gestures” for
16 commands; and specific design issues. (Compl. ¶33.) TC also contributed business ideas relating to
17 performance and user experience specifications; software architectures; hardware platform design
18 and component interface; and documentation. (Compl. ¶35.) These business items are similar in
19 nature to those in *Hollywood*. Taking the allegations in the complaint as true, it is clear that TC has
20 stated a claim upon which relief can be granted.

21 **2. TC’s Business Ideas Were Not Publicly Disclosed and a *Desny* Claim, if**
22 **Asserted, Would Survive.**

23 Assuming that the Court would reject TC’s misappropriation claim and treat it instead as a
24 claim for breach of implied contract under a so-called *Desny* claim, FG next argues that TC’s
25 business ideas were public and therefore not subject to *Desny*. (Mot. at 9-10.) The Court need not
26 address this argument at all if it holds that a misappropriation claim exists. If the Court does reach
27 this argument, it should reject it.

28 This argument fails, first, because disclosure to the public is a factual inquiry not appropriate
for resolution on the pleadings. *See Memry Corp. v. Kentucky Oil Tech., N.V.*, No. C-04-03843,

1 2006 WL 3734384, at *4 (N.D. Cal. 2006) (Whyte, J.) (denying summary judgment where trade
2 secrets were allegedly published and publicly disclosed, noting that “[t]he secrecy requirement ...
3 requires a fact-intensive analysis”); *Metrano v. Fox Broad. Co., Inc.*, No. 00-02279, 2000 WL
4 979664, at *8 (C.D. Cal. 2000) (declining to dismiss breach of confidence claim on 12(b)(6) motion,
5 despite plaintiff presenting TV series ideas in other pitch meetings and making registrations with
6 Writers’ Guild of America; these acts were not necessarily public disclosure).

7 In any case, TC’s allegations are consistent with its business ideas remaining private, and
8 none of its statements in the Complaint or supporting documents undermine these allegations. FG
9 argues that TC publicly disclosed its business ideas by blog posts and pictures while the CrunchPad
10 was being developed. But FG does not explain how the mere mention or display, in general terms,
11 of various aspects of the CrunchPad, amounts to “public disclosure.” FG’s other examples of
12 supposed TC disclosures, which it cites at the bottom of page 9 of its brief, reveal little more than
13 that TC planned to make a simple web tablet costing about \$200 (Compl. ¶ 11); that TC and FG
14 were working on it (Compl. ¶¶ 12,19); that it was called the CrunchPad (Compl. ¶ 18); and pictures
15 and demos of prototypes (Compl. ¶¶ 12, 19). TC’s generalized statements utterly lack the specificity
16 that would give rise to a “public disclosure” of an actionable idea. In addition, the posts came only
17 *after* disclosure of the ideas to FG and use by the joint venture. Essentially, FG appears to argue that
18 TC’s marketing efforts for the joint venture somehow destroyed TC’s rights in its own product.

19 In support of its argument for public disclosure, FG cites *Jonathan Browning v. Venetian*
20 *Casino Resort*, No. 07-3983, 2007 WL 4532214 (N.D. Cal. Dec. 19, 2007) (White, J.). But
21 *Jonathan Browning* is inapposite. While the ideas in *Jonathan Browning* were disclosed in detail,
22 TC’s ideas were available, if at all, only in vague, general terms. In *Jonathan Browning*, a designer
23 submitted a bid to supply a hotel chain with lighting sconces. The hotel rejected his bid, but later
24 ordered and installed “nearly identical, unauthorized copies” of the sconces. *Id.* at *1. Plaintiff
25 brought an action alleging breach of contract. *Id.* *7. Because plaintiff’s detailed design ideas, not
26 merely images or vague descriptions, had been “widely disclosed” by appearing in numerous
27 magazines and newspapers and being available for public purchase, the Court dismissed the contract
28 cause of action. *Id.* at *8. While public display, as in a magazine or newspaper photograph, might

1 suffice to disclose the entirety of a *visual* idea, it does not follow that public display is the same as
2 public disclosure of concepts embedded in a complex electronics product, such as the CrunchPad.

3 Simply put, the citations FG makes to the Complaint do not show that the ideas TC
4 contributed to FG and the CrunchPad project were publicly disclosed. Therefore, even if the Court
5 converted TC misappropriation claim into a *Desny* claim, it would still survive a motion to dismiss.⁴

6 **3. Because the Uniform Trade Secrets Act Requires an Explicit Trade
7 Secret Claim, and TC Does Not Bring Such a Claim, FG’s Preemption
8 Argument Fails.**

9 FG next argues for dismissal of TC’s misappropriation of business ideas claim because of
10 preemption by CUTSA. There is no preemption. This Court already reached this conclusion in its
11 ruling on FG’s motion for protective order. (Dkt. 62, at 5.) That ruling was correct.

12 FG itself quotes the pertinent statutory provision: “[CUTSA] does not affect ... other civil
13 remedies that are *not based upon misappropriation of a trade secret.*” Cal. Civ. Code §3426.7(b)
14 (emphasis added). Because TC does not bring any claim for misappropriation of a trade secret,
15 CUTSA is inapplicable on its face. The text of CUTSA aside, there is no authority in case law for
16 FG’s preemption argument. When courts have found that CUTSA preempts claims, it has been
17 because those claims rested upon the same common nucleus of operative facts as claims for
18 misappropriation of trade secrets. *See, e.g., Callaway Golf Co. v. Dunlop Slazenger Group*
19 *Americas, Inc.*, 318 F. Supp. 2d 216, 220 (D. Del. 2004) (applying California law) (“The issue is
20 whether [the claim] merely restates the operative facts that plainly and exclusively spell out only
21 trade secrets misappropriation.”); *Digital Envoy, Inc. v. Google, Inc.*, 370 F. Supp. 2d 1025, 1035
22 (N.D. Cal. 2005) (Seeborg, J.). Because TC does not allege trade secret misappropriation or even
23 the existence of trade secrets, there can be no “common nucleus of operative facts.” In this case, no
24 preemption analysis is warranted – or, indeed, possible.

25 FG misstates the law in an attempt to elide the distinction between common law
26 misappropriation and misappropriation of trade secrets. (Mot. at 10.) The plain fact is that CUTSA
preempts only common law *trade secret* misappropriation, not other sorts of confidential

27 ⁴ Pursuant to the Court’s Order, TechCrunch has now provided an itemized list describing its
28 business ideas with the same degree of specificity required under Cal. Code of Civil Procedure §
2019.210. The Court made this order for purposes of case management and accepted as true the
proposition that misappropriation of business ideas is a distinct tort from trade secret theft. Dkt. 62.

1 information or business ideas or concepts. *Phoenix Techs. Ltd. v. DeviceVM*, No. 09-4697, 2009
2 U.S. Dist. LEXIS 114996, at *10-11 (N.D. Cal. Dec. 8, 2009) (Walker, J.); *Think Village-Kiwi, LLC*
3 *v. Adobe Sys. Inc.*, No. 08-04166, 2009 U.S. Dist. LEXIS 32450, at *5-8 (N.D. Cal. Apr. 1, 2009)
4 (Illston, J.). In *Phoenix*, this Court found that CUTSA did not preempt tort and unfair competition
5 claims based on “proprietary information” as opposed to trade secrets. *Id.* In *Think Village-Kiwi*,
6 this Court held, on a motion to amend, that amendment of claims for misappropriation and breach of
7 confidence was not futile because plaintiff could allege that the information in question was not
8 based on a trade secret. 2009 U.S. Dist. LEXIS 32450, at *5-8. The court found that “defendants’
9 current argument – that the ‘trade secret’ allegations are preempted by CUTSA – contradicts their
10 primary defense that TVK's information does not constitute ‘trade secrets.’” *Id.* at *6. The Court
11 then noted that cases finding preemption only did so when “the proponent of the common law claim
12 either alleged common law trade secrets misappropriation or had a viable claim under CUTSA.” *Id.*
13 at *8. The Court found “no authority holding that CUTSA preempts common law claims even if the
14 confidential information is a protectible interest other than a trade secret.” *Id.* Here, TC has no
15 trade secret claim and asserts no trade secrets. There can be no preemption. *See Hollywood*
16 *Screentest*, 151 Cal. App. 4th at 650 (stating elements of the business-idea misappropriation claim
17 22 years after CUTSA took effect).

18 Finally, FG has already advanced this argument in opposing expedited discovery and in its
19 request for a protective order, and this Court has rejected its argument twice. (Dkt. 19, at 3; Dkt. 62,
20 at 5.) The argument failed then, and it should fail now.

21 **4. The Complaint Unambiguously Names the Plaintiffs, and FG Cannot**
22 **Plausibly Claim to Be Confused.**

23 Finally, FG demands that TC identify the “proper” plaintiff and asks the Court to order a
24 more definite statement under Rule 12(e). (Mot. at 7-8.) As already discussed, the Complaint is
25 unambiguous: “This complaint uses ‘TechCrunch’ to refer to both Interserve, Inc. and CrunchPad,
26 Inc.” (Compl. ¶ 4.) Further, it alleges that “Defendant has appropriated to itself the exclusive
27 benefit of TechCrunch’s contributions to the project.” (Compl. ¶ 90.) “The entire concept of the
28 project derived from Michael Arrington at *TechCrunch*.” (Compl. ¶ 87 (emphasis added).) As

1 previously noted, motions for a more definite statement are disfavored. *Advanced Microtherm, Inc.*
2 2004 WL 20754445. FG’s pretense of confusion does not justify its request.

3 **V. UNLAWFUL BUSINESS PRACTICES AND FALSE ADVERTISING IN**
4 **VIOLATION OF CALIFORNIA LAW**

5 FG finally argues for dismissal of TC’s claims for unlawful business practices and false
6 advertising in violation of Cal. Bus. & Prof. C. §§ 17200 and 17500. Rather than offer any
7 arguments of substance, though, FG simply argues that these claims fail because TC’s other claims
8 fail. First, as discussed throughout this opposition, none of TC’s claims fail. Second, FG is simply
9 wrong that the state law claims are identical to the Federal claims. *See Consumer Advocates v.*
10 *Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1362 (Ct. App. 2003) (noting, with regard to a
11 Section 17500 false advertising claim, that “[f]ederal cases ... do not accurately reflect California
12 law”); *see Brockey v. Moore*, 107 Cal. App. 4th 86, 98 (Ct. App. 2003) (disapproving federal cases
13 that “imported” federal Lanham Act standards into Section 17200). Notably, California law on
14 unfair competition and false advertising is broader than the Federal counterpart, clearly making it
15 unlawful to misrepresent that a person sponsors, approves, or produces a particular product. *See Cal.*
16 *Bus. & Prof. C. §§ 17500, 17505; Cal. Civ. C. § 1770(a)*. FG fails to meaningfully address TC’s
17 state law claims, and fails to even mention the common law claim. The Court has no basis to
18 dismiss these legitimate claims for relief.

19 **CONCLUSION**

20 For the foregoing reasons, FG’s motions to dismiss, to strike, and for a more definite
21 statement fail. Plaintiffs respectfully requests that the Court deny the motions.

22 Dated: April 26, 2010

WINSTON & STRAWN LLP

23
24 By: _____

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25
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28