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and CRUNCHPAD, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

INTERSERVE, INC. dba TECHCRUNCH, a Delaware corporation, and CRUNCHPAD, INC., a Delaware corporation,

Plaintiffs,

vs.

FUSION GARAGE PTE. LTD., a Singapore company,

Defendant.

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

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I. INTRODUCTION

Plaintiffs' opening brief on this motion for preliminary injunction rested upon the limited information available at the time about Fusion Garage's perfidy and plans to usurp the fruits of the CrunchPad project for itself. Now, however, Fusion Garage ("FG") – after dragging its feet for months – has given up "smoking gun" documents that lay its fraudulent and deceitful conduct bare. Buried in 31,000 pages of documents delivered the night before the deposition of FG's CEO were emails in which he admitted to stringing along Michael Arrington (TechCrunch's founder and CrunchPad's CEO) and concocting an email from an investor as a pretext to abort the relationship.

The day before abandoning the venture, Mr. Rathankrishnan revealed his true thinking to the PR firm, McGrath/Power ("McGrath"), that was surreptitiously helping FG launch the JooJoo alone:

> Got a call from Arrington last night. Answered as did not recognize the number.
>
> Essentially he wanted to know where we were with software and that he wants to meet on Tues and to discuss and launch product at the their realtime event on Friday.
>
> Told me how this deadline cannot be missed and that he was excited about it.
>
> **Played along** and told him will let him know about meeting on Tuesday tomorrow and that have not been able to connect with investors but have a call on Monday with them.
>
> **left that door open to use as a reason to cite inability to accept terms at the last minute**.
>
> As you can see **its becoming really hard to play along and i do think this it is going to lead to a massive blowup on his part (not perhaps translated in his writing) when realization hits that <u>I have strung him along.</u>**
>
> This is going to be one helluva of a week.

(Decl. of Andrew P. Bridges in Support of Reply ("Bridges Decl.") Ex. A (emphasis added).) The email eloquently exposes FG's deceptions. The "investor problems" Mr. Rathankrishnan discussed in his November 17, 2009, termination email were no more than a pretext to obscure FG's long-made decision to abandon the joint venture. Mr. Rathankrishnan expected a "massive blowup" from Mr. Arrington "when realization hits that I have strung him along." Along the same lines, while FG personnel were in California to work with TC's personnel in TechCrunch's offices in September 2009, FG's director of operations, Stuart Tan, exposed his thoughts – and the deception – in an email to his wife back home in Singapore: "Really sucker these people" but "still got to deal with them[;] . . . we have another meeting with Michael" later today. (Bridges Decl. Ex. B.)

Other documents show FG's CEO working closely with McGrath in secret to orchestrate the

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

> Chandra is in the **final stages of "divorcing**" himself from Michael Arrington of TechCrunch fame.

(Bridges Decl. Ex. C (emphasis added).) That was over six weeks *before* FG pulled the plug on the collaboration. On October 19, 2009, FG and McGrath discussed "Arrington Positioning," which "must be dealt with first" – obviously as a prelude to snatching the joint project away from Arrington's companies. (Bridges Decl. Ex. D.) On November 11, 2009, as part of that "positioning," Mr. Rathakrishnan commented on a PR script that he would later use to announce the JooJoo to the public:

> We have to clearly make the case that we could not agree on biz terms, and that the crunchpad is now going to be called JooJoo. Not that this is an offshoot of crunchpad or to that effect. We need to clearly make the link that this is crunchpad with a different name.

(Bridges Decl. Ex. E.)

FG's opposition brief ignores each of these documents.

Based on these and other revelations, there can no longer be any doubt about FG's fraud and breach of fiduciary duty. Plaintiffs[1] have a very strong likelihood of success in light of the unambiguous evidence that has been uncovered.

Likewise, the danger to TC has become clearer. [redacted] (Rathakrishnan Dep. Tr. at 45:15-24.)[2] [redacted]. *Id.* at 45:15-25, 159:11-16. [redacted] *Id.* at 160:8-19; Bloch Decl. [Dkt. 26-2] Ex. A [redacted]

[1] We refer to both Plaintiffs collectively as "Plaintiffs" or "TC." Where there is reason to distinguish 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.

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

Finally, FG's CEO has made it clear that the imposition of a constructive trust would not harm FG. [redacted] (Rathakrishnan Dep. Tr. at 173:24 to 175:16.) [redacted] *Id.* at 160:8-19; Bloch Decl. Ex. A. [redacted] (Rathakirshnan Dep Tr. at 187:11-12; 189:9-14.) Given these facts, the balance of harms tips decidedly in favor of a constructive trust to protect TC.

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

II. FACTS

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

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

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

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

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discussions on collaboration and to move things forward etc. when needed. Looking forward to working with you and the team on this tablet project." (Bridges Decl. Exh. G.)

The Merger As Tangential to the Collaboration. The parties began merger discussions early in their relationship, but these talks occurred on a separate track from their ongoing collaboration. In fact, when merger talks were not progressing rapidly in November of 2008, Mr. Rathakrishnan explicitly acknowledged that FG and TC were going to "work together in the meantime," *i.e.*, without waiting for completion of a merger. (Bridges Decl. Ex. H.)

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

> It's our software running on the tablet ... **We continue to work with [TC's] Louis Monier on the feature set and the user experience.** We ... would like to take the opportunity to thank Michael [Arrington] and Louis for giving us the opportunity to **work with them** on the TechCrunch Tablet.
>
> The collaboration with the Crunchpad project happened as a result of meetings we had with Mike Arrington and co, subsequent to [TechCrunch50]. **We worked closely with Louis Monier** in getting the software in shape for the hardware prototype B. **We continue to work with them in getting the software in shape to make crunchpad an easy to use device.**

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

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

[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.)

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from Prototype C, Mr. Rathakrishnan believed in May of 2009 that Prototype C was part of "the evolution of the collaboration with techcrunch … prototype a, prototype b then prototype c." (Bridges Decl. Ex. I.) Mr. Rathakrishnan, back in April, told a friend that FG was only "kind of" responsible for product design on the prototype. (Bridges Decl. Ex. J.) Meanwhile, within a day of unveiling Prototype C, Plaintiffs had attracted, to FG's delight, a possible deal with Time Inc. (Bridges Decl. Ex. K.)

Weathering the Rocky Summer Months. Undeniably, the venture endured friction through the summer months. One person at CrunchPad, after visiting FG in Asia, even suggested poaching FG's personnel and cutting FG out of the project. But Mr. Arrington chastised him for making the rogue suggestion and confirmed that the only way forward was with FG. (Arrington Dep. Tr. at 373:23 to 375:4, 390:10-11;[4] Rathakrishnan Dep. Tr. at 317:14-23.)

Full Speed into Fall. The parties appeared to emerge from the summer perils with renewed energy. In September 2009, FG obtained visas for FG personnel to come to California to drive the project home. The letters supporting the visa applications reaffirmed the collaboration: "TechCrunch and Fusion Garage have been working as partners for the last 12 months on a web tablet product." (Bridges Decl. Ex. L.) Photographs show the parties working feverishly in September 2009 at TC's office. (Bridges Decl. Ex. M; Rathakrishnan Dep. Tr. at 227:7-12; Arrington Decl. ¶ 23.)

FG Secretly Plans a "Divorce." While FG led Plaintiffs to believe its commitment to the venture was strong – and as the parties worked together in each other's offices – FG was well underway with "divorcing" from TC and implementing its plan to sell the CrunchPad on its own as the JooJoo.

- Just before FG's hosted TC personnel in Asia in August 2009, FG investor Bruce Lee and Mr. Rathakrishnan exchanged an email on August 6 in which Mr. Lee wonders whether Mr. Arrington ever considered "he might not be a part of the project" and cautioned FG to be "careful with the CrunchPad name" if the parties split ways. (Bridges Decl. Ex. N.)
- In September 2009, FG's Mr. Rathakrishnan worked with McGrath to manage "final stages of 'divorcing' himself from Michael Arrington of TechCrunch fame." (Bridges Decl. Ex. C.)
- FG formally contracted McGrath on October 6 to assist with launching "the Fusion Garage tablet computer." (Bridges Decl. Ex. O.) On October 12, 2009, FG exchanged emails with its PR firm in which it secretly discussed plans for the "JooJoo." (Bridges Decl. Ex. P.)
- In late October, FG was secretly corresponding with its new manufacturer for the JooJoo.

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

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(Bridges Decl. Ex. Q.)

- On November 7, FG sought to "push giga [the manufacturer to replace Pegatron, which had terminated its work on the CrunchPad project] very hard and ensure we get board and bios etc. by 25th-27th Nov" for its JooJoo. (Bridges Decl. Ex. R.)
- On November 10, FG registered "thejoojoo.com" without informing TC. (Rathakrishnan Decl. ¶ 59.)
- On November 11, 2009, just days before the supposed CrunchPad launch, Mr. Rathakrishnan gave comments to his PR firm on the script he would use to announce the theft of the CrunchPad and the launch of the JooJoo. (Bridges Decl. Ex. E.) He speculated about Plaintiffs' reaction to, and how to spin, the usurpation.

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, in its words playing along and stringing Plaintiffs along, 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. Rathakrishan then writes "it's hard for me to turn this down." *Id.* But the investor's email was a forgery. Mr. Rathakrishnan himself drafted it with advice from McGrath on how to disguise its fabricated nature. (Bridges Decl. Ex. S) (suggesting different fonts and writing styles to disguise Mr. Rathakrishnan as the author).) Mr. Rathakrishnan also falsely asserted that he was "heading to Miami" to talk to his investors when he was actually plotting with McGrath, most likely in Silicon Valley. *Id.* Ex. T. Mr. Rathakrishnan not only lied, but he also lied about his lies. He had also fulfilled his explicitly stated goal of using investors to "as a reason to cite inability to accept terms at the last minute." *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

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

III. ARGUMENT

A. Plaintiffs are Likely to Succeed on the Merits

1. Plaintiffs Have Established Fusion Garage's Breach of Fiduciary Duty .

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

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

[5] The conduct included FG counsel's use of foul language, repeated threats to telephone the magistrate judge from the deposition (which TC counsel also urged to occur immediately in order to clear the air), repeated threats to file a motion to compel (which has never materialized), accusations 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.

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

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

b. TC and FG Formed a Joint Venture.

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

By the parties' own calculations, their joint venture began in September 2008, when Mr. Rathankrishnan and Mr. Arrington first met. Mr. Arrington said this. (Arrington Decl. ¶ 4.) FG's own statements confirm it. In September 2009, Mr. Rathankrishnan certified to U.S. government officials on visa requests that "TechCrunch and Fusion Garage have been working as partners for the last 12 months [i.e. since September 2008] on a web tablet product." (Bridges Decl. Ex. L.) Photographs show that the parties in fact worked feverishly together in September of 2009 at TC's office. (Bridges Decl. Ex. M; Rathakrishnan Dep. Tr. at 227:7-12; Arrington Decl. ¶ 23.) Back in February 2009, FG's blog stated "the collaboration with the Crunchpad project happened as a result of meetings we had with Mike Arrington and co, subsequent to [TechCrunch50]," which took place in September 2008 (Arrington Decl. ¶ 13 & Ex. E.) The existence of the venture was clear to FG's PR firm, which stated on September 29, 2009 (almost two months before FG pulled the plug) that "Chandra is in the final stages of 'divorcing' himself from Michael Arrington." (Bridges Decl. Ex. C.) Mr. Rathakrishnan responded to the PR firm's concerns about legal fallout from FG's abandonment by relying on the fact that "**everything been verbal** . . . nothing with their ideas being

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shared via email etc." (Bridges Decl. Ex. T (emphasis added).) Mr. Rathakrishnan could have denied the venture in that response; he did not. Instead, he wrongly believed that only documents could define a relationship.

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

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

The Parties Did Agree to Share in Losses and Profits, and Did So. TC invested $400,000 in the CrunchPad project, hiring contractors, paying FG's bills, and covering other expenses. (Arrington Decl. ¶¶ 18, 36 & Exh. J; Rathakrishnan Decl. ¶ 44.) It also contributed its vision, labor, branding power, leadership, and industry connections. (Arrington Decl. ¶¶ 7-24.) FG marveled during the venture that "Mike's reach is astounding." (Bridges Decl. Ex. V.) The buzz TechCrunch created for CrunchPad was so powerful that the JooJoo launched *completely* on the back of it. FG

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has done no advertising – no print, no television, no radio, no Internet. It has no ad agency. It relied entirely on PR efforts that leverage the TC/CrunchPad pedigree. (Rathakrishnan Dep. Tr. at 277:24 to 279:22.) To say that TC did not share investments and losses of the venture ignores reality.

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

That One Party Could End the Venture is Irrelevant to the Existence of a Joint Venture. . That TC made threats to end the joint venture during bouts of friction between the parties is not remarkable and does not impact the existence of the venture. TC does not sue simply for FG's ending the joint venture. Instead, it sues for FG's usurpation of the project that the joint venture carried out, for fraud and deceit during the course of the joint venture, and for false advertising regarding the parties' commercial activities connected with the joint venture.

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

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

Similarly irrelevant is FG's discussion of TC's Nik Cubrilovic presenting Mr. Arrington with options for how TC could hypothetically cut FG out of the project. Mr. Arrington considered them Mr. Cubrilovic's "options" an affront to the parties' joint venture, chastised Mr. Cubrilovic, and almost entirely removed Mr. Cubrilovic from the CrunchPad project. (Arrington Dep. Tr. at 373:23 to 375:4; 390:10-11.) FG's brief claims it is "not even remotely credible" that Mr. Arrington would have criticized Mr. Cubrilovic. (Opp. at 11 & n.7.) But Mr. Rathakrishnan himself admitted at deposition that Mr. Arrington held a face-to-face meeting with him and Nik Cubrilovic at which Mr. Arrington said "he'd remove Nik from the project." (Rathakrishnan Dep. Tr. at 317:14-23.) This not only confirms Mr. Arrington's credibility, it also shows that Mr. Rathakrishnan viewed Mr. Cubrilovic as part of a joint "project." Again Plaintiffs did not abort the venture. FG did.

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

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

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facilitated venture was not a condition precedent of a joint venture). A merger and financing were not "contingencies," though they may have helped the venture succeed and the parties may have desired them. The year-plus collaboration that FG would dismiss as "contingent" brought the release of three prototypes and enabled FG to run off to market, with the CrunchPad renamed as JooJoo for itself, with almost no delay. FG and TC did not simply "agree to form a company" as the parties in *Bustamante* (*cf.* Opp. at 13) or agree to submit an unspecified bid (*cf.* Opp at 14). Nor were FG and TC mere "negotiators" (*cf.* Opp. at 15) of a merger, and the joint venture was far more than an agreement to agree on merger terms. Such arguments ignore the facts: TC and FG partnered to develop and sell the CrunchPad for profit. (*E.g.*, Arrington Decl. *passim*.) This is obvious even from FG's earliest overtures to TC. (Bridges Decl. Ex. F (wanting to "discuss possible collaboration" in mid September of 2008 and noting "need to be working with you at a early stage of device conception"); *id.* Ex. G ("I can be in San Franc for discussions on collaboration and to move things forward etc. when needed. Looking forward to working with you and the team on this tablet project.").) In fact, Mr. Rathakrishnan explicitly acknowledged in November 2008 that FG and TC were going to "work together in the meantime" while attempting to finalize the financing and merger. *Id.* Ex. H. *Mr. Rathakrishnan could distinguish the merger and the venture back in November 2008; he cannot claim otherwise now*.

Proposal of a "No Shop" Term Has No Effect on the Venture's Existence. Finally FG claims the parties' joint venture cannot have ever existed because of one so-called "no shop" provision in a term sheet that TC sent to FG in December 2008. FG would have this Court invalidate a year-plus long venture based on a stock provision that slipped into a proposed agreement that FG interprets as contrary to a venture. The provision was likely left in a form agreement in the haste of quickly getting terms to paper for FG to share with its investors. (Arrington Dep. Tr. at 230:6-8.) In the end, the parties never agreed to the term and continued their collaboration for nearly another year. "The acts and conduct of the parties . . . speak above the expressed declarations of the parties to the contrary." *Boyd v. Bevilacqua*, 247 Cal. App. 2d 272, 285 (1966). The "no shop" provision has no bearing on the venture's existence.

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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.

Executing the "Divorce" Behind TC's Back	***Reassurances to TC***
On August 6, 2009, FG investor Bruce Lee and Mr. Rathakrishnan exchanged an email in which Mr. Lee wondered whether Mr. Arrington ever considered "he might not be a part of the project" and cautioned FG to be "careful with the CrunchPad name" if he split ways. (Bridges Decl. Ex. N.)	TC personnel came to Asia to work with FG just weeks later.
In September 2009, FG's Rathakrishnan was working with McGrath to help with "the final stages of divorcing himself from Michael Arrington of TechCrunch fame." (Bridges Decl. Ex. C.)	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.) To obtain the visas, FG certified in letters to the U.S. government that "TechCrunch and Fusion Garage have been working as partners for the last 12 months on a web tablet product." *Id.* Ex. L.
On October 12, 2009, FG exchanged emails with its PR firm in which it secretly discussed plans for the "JooJoo." (Bridges Decl. Ex. P.) FG formally contracted the PR firm on October 6 to assist with launching "the Fusion Garage tablet computer." *Id.* Ex. O.	On the same day, FG and TC exchanged emails discussing the CrunchPad's status. (Bridges Decl. Ex. W.) (discussing status of panels).)
On October 25, 2009, FG was secretly corresponding with its new manufacturer for the JooJoo. (Bridges Decl. Ex. Q.)	On October 27, 2009, FG operated the CrunchPad *at TechCrunch's Silicon Valley office*, and said nothing about abandoning the venture. (Bridges Decl. Ex. X.)
On November 7, FG sought to "push giga very hard and ensure we get board and bios etc. by 25th-27th Nov" for its JooJoo. (Bridges Decl. Ex. R.)	Just days before, FG told TC, in response to a call for status, "so yes, we should do this." (Bridges Decl. Ex. Y.)
On November 10, FG registered "thejoojoo.com" without informing TC. (Rathakrishnan Decl. ¶ 59.)	The same day, FG assured TC "we are almost there" and "ready to go live on stage." (Bridges Decl. Ex. Z.)
On November 11, Mr. Rathakrishnan gave comments to his PR firm on the script he would use to announce the theft of the	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

CrunchPad and the launch of the JooJoo. (Bridges Decl. Ex. E.) He speculated about TC's reaction to, and how to spin, the usurpation.	. . . shd target the event in sf.").)

While the earliest documentary evidence so far showing FG plan to abandon the project is Mr. Lee's August 6, 2009 email, at deposition, Mr. Rathakrishnan admitted that FG's "Plan B" – to "go out on our own" – was "always in place." (Rathakrishnan Dep. Tr. at 80:13-25.) Thus, FG made misrepresentations at essentially every point in the relationship, including the numerous times it referred to TC as its collaborator. (*E.g.*, Arrington Decl. ¶ 13; Bridges Decl. Ex. F (wanting to "discuss possible collaboration"); *id.* Ex. G ("Looking forward to working with you and the team on this tablet project."); *id.* Ex. H (FG and TC would continue to "work together").)

These misrepresentations, standing alone, are egregious. But they are shocking when taken with Mr. Rathakrishnan's candid confession of November 16, 2010 that he had "strung along" and "played along" TC and that he had fabricated an investor email to make it look as though investors, rather than he himself acting for FG, wanted to kill the CrunchPad venture. *Id.* Ex. A.

FG's admission that Mr. Rathakrishnan's November 17, 2009, termination email came "out of the blue" (Arrington Decl. ¶ 25) underscores FG's concealment and misrepresentations. The email was itself a forgery, drafted by Mr. Rathakrishnan with advice from McGrath on how to disguise it. McGrath suggested to FG how to best fabricate the purported email from Bruce Lee contained in the November 17 email, suggesting that FG use a different font, formatting, and tone of voice to obscure Mr. Rathakrishnan's writing and style. (Bridges Decl. Ex. S.) Mr. Rathakrishnan also falsely asserted that he was meeting with investors in Miami when he was plotting with McGrath. *Id.* Exs. A, T. Mr. Rathakrishnan not only lied but he also lied about his lies.

FG defends its duplicity as "contingency planning." (Opp. at 18.) This is untenable given its actions and its admission that it had been stringing TC along. FG was not "planning": it was executing a secret plan for months while deceiving Plaintiffs as the CrunchPad project rolled on. FG pursued an alternate manufacturer to build its JooJoos after losing the manufacturer on the CrunchPad project (without telling TC about the loss of the manufacturer), worked with a PR firm for the purpose of managing the expected fallout from its treachery, and informed its investors about

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its plans. The only people it kept in the dark were those at TC. TC does not fault FG for exploring business options; it faults FG for engaging in a pattern of deception regarding its intentions and the status of the CrunchPad project, "playing along" with and "stringing along" Plaintiffs in their reasonable reliance on FG's continued participation and commitment to the joint venture, and for breaching its fiduciary duty to them.

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

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

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

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

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

3. The Lanham Act Claim Will Succeed.

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

Standing Exists. It first argues that TC is not a FG competitor and lacks prudential standing. For reasons explained more fully in its opposition to FG's motion to dismiss, standing exists. Both TC and FG were "vying for the same" dollars throughout their development of the CrunchPad. *See Kournikova v. Gen. Media Commc'ns, Inc.*, 278 F. Supp. 2d 1111, 1117 (C.D. Cal. 2003). Where TC and FG once vied together, they now vie separately. FG's made its false statements to belittle TC and prevent it from being an immediate competitive threat. A competitor driven from the field may still sue. *See Thorn v. Reliance Van Co.*, 736 F.2d 929, 931-33 (3d Cir. 1984). Additionally, potential competitors have standing. *Tercica, Inc. v. Insmed Inc.*, No. C 05-5027, 2006 WL 1626930 (N.D. Cal. Jun. 9, 2006) (Armstrong, J.) Given TC's plans to re-enter the tablet computer market (Arrington Dep. Tr. at 379:7-24), it has standing.

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

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

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

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

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

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

The case for irreparable harm is stronger now than when TC filed its motion. Before Mr. Rathakrishnan's deposition on April 22, 2010, TC knew only of FG's PayPal account in the United States. [redacted] (Rathakrishnan Dep. Tr. at 157:10 to 158:1), [redacted] *id.* at 158:15 to 159:16. [redacted] *Id.* at 45:15-24 ([redacted] FG has no bank accounts in the United States. *Id.* at 42:14-17. In addition, FG's known investors are abroad, making it less likely that FG would develop any U.S.-based assets. *Id.* at 26:15 to 27:12. [redacted] Where, as here, it is "probable that [the defendant] could 'easily dispose' of the [its] holdings and could transfer any proceeds to foreign enterprises" the court could not doubt "that plaintiffs' rights to restitution and an accounting would be irreparably harmed in the event [defendant] was successful in removing defendants' assets from the [U.S.]." *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 98 (6th Cir. 1982); *Bushnell, Inc. v. Brunton Co.*, 673 F. Supp. 2d 1241, 1263 (D. Kan. 2009). In *Bushnell*, defendant was:

> a foreign corporation with few assets in the United States. Plaintiffs assert that they will face significant difficulty collecting damages from Lanshuo. The Court agrees that the prospect of 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.

[6] Other statements by FG, identified in TC's Complaint are also demonstrably false. For example, 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.

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

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

FG refuses to disclose the names of two of its recent investors, claiming their names are highly proprietary information subject to Magistrate Judge Trumbull's protective order regarding so-called "business ideas" discovery.[7] *See id.* at 186:3-21. FG's persistent refusal to disclose this information makes it likely that the investors are either providing money on terms embarrassing or dangerous to FG or have significant information about FG's wrongdoing that FG hopes to keep secret for as long as possible.

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

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

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[redacted] *see id.* at 189:9-14, [redacted] *Id.* at 50:14 to 51:5. [redacted] *Id.* at 166:7-12.

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

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

C. The Balance of Hardships Tips in Plaintiffs' Favor.

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

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

Second, FG own statements undermine any hardship argument it makes. [redacted] (Rathakrishnan Dep. Tr. at 173:24 to 175:16.) [redacted] *Id.* at 175:14-15. [redacted]. *Id.* at 187:11-12; 189:9-14.

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

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

D. The Public Interest Favors Granting Relief.

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

IV. CONCLUSION

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

Dated: May 3, 2010

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[8] FG's brief unclean hands argument (Opp. at 24) is baseless. First, TC deserves no blame for allegedly disclosing public information to the public. The number of preorders could be easily deduced from documents that PayPal produced to TC pursuant to subpoena with no confidentiality designation 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. FG's counsel instructed Mr. Rathakrishnan to not answer questions about the number of preorders at deposition. (Rathakrsihnan Dep. Tr. at 53:2-13.) Second, no matter how many times FG reprints the word "poaching" FG cannot escape the fact that no poaching by TC ever occurred and that TC's Mr. Arrington straightened the rogue employee out on that subject. Third, FG's unexplained insinuations about misleading declarations and discovery disputes are inflammatory, meritless, and irrelevant to this motion. Finally, for an unclean hands defense to have 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).

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