QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
Claude M. Stern (Bar No. 96737)
claudestern@quinnemanuel.com
Patrick Doolittle (Bar No. 203659)
patrickdoolittle@quinnemanuel.com
50 California Street, 22nd Floor
San Francisco, California 94111
Telephone: (415) 875-6600
Facsimile: (415) 875-6700

Attorneys for Defendant Fusion Garage PTE. Ltd

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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. 09-cv-5812 RS **DEFENDANT FUSION GARAGE'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** Date: May 13, 2010 Time: 1:30 p.m. Dept.: Hon. Richard Seeborg

FILED UNDER SEAL

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

FACTS 3

ARGUMENT 8

I. PLAINTIFFS CANNOT SHOW THEY ARE ENTITLED TO A PRELIMINARY INJUNCTION 8

A. Plaintiffs Cannot Show Likelihood of Success on the Merits 9

1. Plaintiffs' Claim for Breach of Fiduciary Duty Fails. 9

(a) Mr. Arrington's Declaration and Oral Testimony Is Inconsistent with a Partnership 9

(b) Plaintiffs' Scheme to "Poach" Fusion Garage's Employees and "Kill" Fusion Garage Proves That No Partnership Existed 10

(c) A Partnership Could Not Exist Where Plaintiffs Had the Unilateral Right to End It. 11

(d) Plaintiffs Present No Evidence that the Parties Were Co-Owners of a Business. 12

(e) The Parties' Relationship Was Subject to Contingencies That Never Took Place 13

(f) Plaintiffs Proposed an Agreement with a "No Shop" Provision 14

(g) No Partnership Can Be Created by Mere Acquisition Negotiations 15

(h) No Partnership Existed Because the Terms were Impermissibly Vague or Disputed 16

2. Plaintiffs' Claim for Fraud and Deceit Fails 17

3. Plaintiffs' Lanham Act Claim Fails 18

4. Plaintiffs' Claim for "Misappropriation of Business Ideas" Fails 19

B. Plaintiffs Will Not Suffer Irreparable Harm if the Injunction Is Denied 20

C. The Balance of Equities Weighs Against Plaintiffs 23

D. A Preliminary Injunction Would Harm the Public Interest 24

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Baden Sports, Inc. v. Molten USA, Inc.,
556 F.3d 1300 (Fed. Cir. 2009) 18

Bank of Cal. v. Connolly,
36 Cal. App. 3d 350 (1973) 9

Bustamante v. Intuit, Inc.,
141 Cal. App. 4th 199 (2006) 13, 14, 15, 16, 17

In re CMR Mortg. Fund, LLC,
416 B.R. 720 (Bankr. N.D. Cal. 2009) 9

City Solutions, Inc. v. Clear Channel Comm'ns,
201 F. Supp. 2d 1035 (N.D. Cal. 2001) 13

City Solutions, Inc. v. Clear Channel Commn's,
201 F. Supp. 2d 1048 (N.D. Cal. 2002) 14, 15

Clean Energy v. Applied LNG Tech. USA, LLC,
No. 08-746, 2008 WL 4384179 (C.D. Cal. Sept. 3, 2008) 20

In re Dimas, LLC,
2007 WL 2127312 (Bankr. N.D. Cal. July 23, 2007) 15

DuFour v. Be LLC,
No. 09-3770, 2009 WL 4730897 (N.D. Cal. Dec. 7, 2009) 22

Freudenberg Household Prods. LP v. Time, Inc.,
No. 06-399, 2006 WL 1049569 (N.D. Ill. April 18, 2006) 24

Green Book Intern. Corp. v. InUity Corp.,
2 F. Supp. 2d 112 (D. Mass. 1998) 23

Gulf Coast Produce, Inc. v. Am. Growers, Inc.,
No. 07-80633, 2007 WL 2302109 (S.D. Fla. Aug. 8, 2007) 21

Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.,
407 F.3d 1027 (9th Cir. 2005) 18

K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.,
171 Cal. App. 4th 939 (2009) 19

Love v. The Mail on Sunday,
489 F. Supp. 2d 1100 (C.D. Cal. 2007) 12

Mazurek v. Armstrong,
520 U.S. 968 (1997) 8

Natural Selection Foods, LLC v. Premium Fresh Farms, LLC,
No. 07-197, 2007 WL 128230 (N.D. Cal. Jan. 11, 2007) 22

Nelmida v. Shelly Eurocars, Inc.,
112 F.3d 380 (9th Cir. 1997)..23

Pellegrini v. Weiss,
165 Cal. App. 4th 515 (2008)..10, 11

Reebok Intern. Ltd v. Marnatech. Enter., Inc.,
970 F.2d 552 (9th Cir, 1992)..22

Robert Bosch LLC v. Pylon Mfg. Co.,
632 F. Supp. 2d 362 (D. Del. 2009) 18

Smith v. MPIRE Holdings, LLC,
No. 08-0549, 2009 WL 804069 (M.D. Tenn. March 25, 2009)...21

In Re Tower Automotive Sec. Litig.,
483 F. Supp. 2d 327 (S.D.N.Y. 2007)...17

Weiner v. Fleischman,
54 Cal. 3d 476 (1991)...9

Winter v. Natural Res. Def. Council, Inc.,
129 S. Ct. 365 (2008) 8, 19, 20, 22

Statutes

Cal. Corp. Code § 16202 9

Miscellaneous

Charles Alan Wright & Arthur Miller, Federal Practice & Procedure § 2948 (2d ed. 1995) 8

Preliminary Statement

Plaintiffs' Motion for a Preliminary Injunction (the "Motion") is baseless and should be denied.[1] Plaintiff Interserve, Inc. dba TechCrunch ("TechCrunch") is an Internet "blog" founded by blogger Michael Arrington. Mr. Arrington also formed another company, Plaintiff CrunchPad, Inc. ("CP Inc.") to acquire Defendant Fusion Garage PTE Ltd. ("Fusion Garage") and its software and web tablet technology. After the parties' acquisition talks fell through, plaintiffs filed this lawsuit.[2]

Plaintiffs' motivation in bringing the Motion was to use this Court to strangle Fusion Garage's business. The ill-conceived Motion seeks specific, yet drastic, relief: plaintiffs seek to impound Fusion Garage's revenues in a Court-controlled account, a move designed to kill Fusion Garage. Plaintiffs present no competent evidence to support the Motion. To the contrary, the declaration of Michael Arrington in support of the Motion contains—as is proven by his subsequent deposition—foundationless, false or misleading testimony. Rather than seeking legal redress based on colorable claims, Mr. Arrington (through his companies) is acting like a jilted girlfriend because he is embarrassed that he was unable to close an acquisition and offer a product he had promised his Internet blogging community. Having failed to acquire Fusion Garage, plaintiffs claim that, in the course of acquiring Fusion Garage, they became "partners" with Fusion Garage. Although plaintiffs and Mr. Arrington state as a conclusion that they made material contributions to Fusion Garage's product, their deposition testimony and documentation shows that is a fabrication. Plaintiffs' argument that a partnership existed is absurd in light of Mr. Arrington's own declaration. He attests that "[t]he parties agreed that each would bear its own losses of time energy and money if the project was not successful, and share profits if it was." (Arrington Decl. ¶ 31). A partnership is an agreement to share profits and losses—not, as Mr. Arrington wants, an agreement for him to share in Fusion Garage's upside but have Fusion Garage bear the entire downside risk. (Remarkably, although Mr. Arrington swore to this "partnership"

---

[1] To be blunt, the Motion constitutes sanctionable conduct.
[2] In discovery, plaintiffs have disavowed any intellectual property infringement claim.

relationship in his declaration, at his deposition, he conceded that no such agreement was ever actually reached or made). TechCrunch has also produced internal documents showing they were considering "poaching" Fusion Garage's employees or "killing" Fusion Garage as a business. Those are not the actions of a partner. Plaintiffs nowhere define the terms of the supposed partnership, either.[3]

Plaintiffs also cannot show irreparable injury. Plaintiffs have no product of their own. Mr. Arrington attests that "it is not inconceivable that TechCrunch could start over and develop a new device." (Arrington Decl. ¶ 33). This is almost comical: perhaps it is not inconceivable that Mr. Arrington could one day become President of the United States, but this is no basis to seek a recount of the 2008 Presidential election. The Ninth Circuit has not yet endorsed a "not inconceivable" test for the award of injunctive relief. TechCrunch's 30(b)(6) witness (Mr. Arrington) also admitted in deposition that TechCrunch has never even seen or handled Fusion Garage's product, the JooJoo. (Arrington Tr. 107:2-15; 158:7-12). Plaintiffs argue in conclusory fashion that "Fusion Garage is a financially unstable start-up that can only remain viable by dissipating revenues," but they proffer no competent evidence to support this contention. In fact, the opposite is true: Fusion Garage has raised significant funding and has released its product.

Finally, plaintiffs are asking this Court to do equity, but plaintiffs' misconduct in this case does not entitle them to equity. They supported the Motion with a lawyer-concocted declaration, then proffered a 30(b)(6) deponent who could not support the declaration and refused to answer questions regarding key issues in the case, claiming he was not "comfortable" doing so. While Plaintiffs have used their public position and blog to embark on a public relations campaign designed to tarnish and embarrass Fusion Garage, they designated the entire 30(b)(6) deposition confidential to shield the testimony. (Fusion Garage does not believe almost anything in the transcript is confidential, but has lodged it under seal to comply with the Protective Order in the case.) Equity is not in Plaintiffs' favor and the Motion should be denied.

---

[3] Plaintiffs do not allege or argue the existence of any acquisition agreement, partnership agreement, joint venture agreement, NDA, or any contract at all between the parties.

Facts

The TechCrunch Blog and Arrington's Public Offer regarding Development of a Web Tablet. Plaintiff TechCrunch is a publisher of technology-oriented blogs and other web media. (Cmpl. ¶ 3). Its founder and editor is Michael Arrington. (Arrington Decl. ¶ 1). In July 2008, Mr. Arrington publicly posted a challenge on the Internet "to himself and the world" to build "a dead simple web tablet for $200." (Cmpl. ¶ 11). He solicited the public at large to assist on the project and stated "[i]f everything works well, we'd then open source the design and software and *let anyone build one that wants to*." (*Id.*) (emphasis added). This point cannot be over-emphasized: Mr. Arrington conceded in his deposition that the public offer "to let anyone can build it" was a proposal he never retracted, even to Fusion Garage. (Arrington Tr. at 364:9-368:6.) TechCrunch eventually planned to call the web tablet a "CrunchPad." (Cmpl. ¶¶4 & 13). Mr. Arrington also formed a corporation CP Inc. to "commercialize the CrunchPad." (*Id.* ¶ 4).

Prototype A. Plaintiffs allege that by August 30, 2008, they had constructed a Prototype A of the web tablet. The prototype was still crude as it "was still far from having beta units." (*Id.* ¶ 12). Plaintiffs "posted pictures and a description" of the prototype on the Internet in a blog post. (*Id.*) Plaintiffs revealed in that post that it was "[a] humble (and messy) beginning. Prototype A has been built. It's in a temporary aluminum case that a local sheet metal shop put together." (Rathakrishnan Decl., Ex. E).[4] Fusion Garage had no involvement with Prototype A. (*Id.* ¶ 31).

Fusion Garage Meets TechCrunch/Arrington in September 2008. Fusion Garage, a Singapore-based software and technology company, formed in February 2008. (*Id.* ¶ 2). Fusion Garage's CEO, Chandrasekhar Rathakrishnan, first met Arrington at a conference called "TechCrunch 50" in September 2008. (*Id.* ¶ 10). Fusion Garage had already developed a customized browser operating system by this point. (*Id.* ¶ 9). After learning about Fusion Garage's technology and development efforts, TechCrunch eventually offered to pursue an acquisition of Fusion Garage. (*Id.* ¶ 10).

---

[4] In addition to his declaration, Fusion Garage is submitting certain excerpts of Mr. Rathakrishnan's deposition transcript.

The Early Acquisition Negotiations. In December 2008, Plaintiffs sent a Letter of Intent to acquire Fusion Garage. (Rathakrishnan Decl. ¶ 11 and Ex. B). The Letter of Intent contained a 60 day no-shop clause, clearly indicating that even Plaintiffs understood there was no perpetual partnership relationship between the parties. (Arrington Tr. 229:2-230:2). The parties never signed this Letter of Intent, although they continued over the ensuing months to have on-and-off verbal and email discussions about a potential acquisition. (Rathakrishnan Decl. ¶ 11). The parties' acquisition discussions during this period were relatively limited, due in part to the fact that Mr. Arrington took time off from TechCrunch for personal reasons in early 2009. (*Id.* ¶ 12).

Prototype B. In January 2009, while the parties were still in sporadic acquisition discussions, TechCrunch published a blog post announcing "Prototype B" of the web tablet. (*Id.* ¶ 32). Prototype B did not use Fusion Garage's customized operating system, nor did Fusion Garage have any input into the hardware for this prototype. (*Id.* ¶ 33). In fact, the hardware for Prototype B was essentially components scavenged from personal computers and other devices, held together by case that TechCrunch had designed. (*Id.* ¶ 34).

Fusion Garage Creates Its Own Web Tablet. Around February 2009, Louis Monier – someone hired by TechCrunch to help build Prototype B – informed Fusion Garage that the TechCrunch web tablet project "had no legs." (*Id.* ¶ 35). Mr. Monier advised Fusion Garage to figure out its own plans. (*Id.*) Before this exchange with Mr. Monier, Fusion Garage had largely focused on developing its browser-based software rather than building hardware for a web tablet. After this exchange, however, Fusion Garage started in earnest to develop both web tablet hardware and software. (*Id.* ¶ 36).

"All the Credit Should Go to Fusion Garage." Fusion Garage presented its new web tablet (running software that Fusion Garage had begun developing in late 2008) to Mr. Arrington and TechCrunch in April 2009. (*Id.* ¶ 37). Impressed with Fusion Garage's web tablet, Mr. Arrington wrote a blog post highlighting this device – which TechCrunch adopted and called "Prototype C." (*Id.* ¶ 38). Mr. Arrington's blog post stated that "the ID and hardware work was driven by Fusion Garage, "referred to Fusion Garage as "rock stars," and stated that "[i]n fact, all the credit should go to Fusion Garage." (Rathakrishnan Decl., Ex. G). Indeed, TechCrunch itself had played no role in the development of the web tablet that Mr. Arrington called "Prototype C." The hardware and software for this device were designed and developed entirely by Fusion Garage. (Rathakrishnan Decl. ¶ 40; *see also* Arrington Tr. 136:23-138:8).

The Continued Acquisition Negotiations. The successful demonstration of "Prototype C" also had the effect of causing Mr. Arrington to reinvigorate acquisition discussions. (Rathakrishnan Decl. ¶ 37). Specifically, Mr. Arrington offered another deal in June 2009 in which Fusion Garage would be acquired in exchange for equity in CP Inc. – the company TechCrunch had set up to commercialize a web tablet. After Fusion Garage equivocated on whether this deal would be acceptable to Fusion Garage, Arrington rescinded the offer on June 27. (Cmpl. Ex. B) (e-mail from Arrington to Rathakrishnan, June 27, 2009 2:17 p.m.) ("You don't seem to be able to speak authoritatively for your imvestors [sic] and creditors. For reputation reasons I'm forced to notify our investors that the deal is off.") In response, Rathakrishnan proposed a counteroffer whereby Fusion Garage would be acquired for 40% interest in CP Inc., although he also expressed willingness to go forward on a 35% equity offer, so long as the deal addressed the treatment or repayment of certain loans. (*Id.*) (e-mail from Rathakrishnan to Arrington, June 27, 2009 3:01 p.m.); *see also* Rathakrishnan Decl. ¶ 17). After this exchange, no acquisition term sheet or letter of intent was sent to Fusion Garage, nor was one ever signed. (Rathakrishnan Decl. ¶ 18).

Nonetheless, throughout the middle of 2009, the parties continued engaging in meetings, due diligence, and product demonstrations in hopes of consummating an acquisition. For instance, Mr. Rathakrishnan spent time at TechCrunch's offices from April through June 2009 to engage in acquisition discussions and meet with potential third-party investors to fund an acquisition. (*Id.* ¶¶ 46-47). Likewise, TechCrunch personnel Brian Kindle and Nik Cubrilovic traveled to Fusion Garage's Singapore offices in the summer of 2009 to conduct due diligence on both Fusion Garage and Pegatron Corp., the designated original device manufacturer (ODM) for the web tablet. (*Id.* ¶¶ 49-51). However, plaintiffs have since produced documents showing that while in Singapore, Mr. Cubrilovic was reporting back to Mr. Arrington, suggesting that plaintiffs "poach" Fusion Garage's employees or "kill" Fusion Garage. (Doolittle Decl., Exs. B & C).

Arrington Threatens To Unwind "the Project." Neither the Complaint nor any other paper filed in this case defines the metes and bounds of what plaintiffs allege to be a joint venture or partnership between themselves and Fusion Garage. However, Mr. Arrington has since declared that the venture was only "joint" as to potential profits, not potential losses. (Arrington Decl. ¶ 31) ("The parties agreed that each would bear its own losses of time, energy, and money if the project was not successful, and to share profits if it was.") Even more remarkably, the "joint venture" was apparently terminable at will by plaintiffs, but not by Fusion Garage: While plaintiffs have sued Fusion Garage for walking away from the supposed joint venture, Arrington threatened to unilaterally "turn the project off" on at least two occasions. (*Id.* ¶ 21; Cmpl. ¶¶ 28 & 32).

The End of the Acquisition Negotiations. In October 2009, TechCrunch CEO Heather Harde sent Fusion Garage a capitalization table proposing that CP Inc. acquire Fusion Garage for 23.5% equity. (Rathakrishnan Decl. ¶ 19 and Ex. D). This figure was obviously less than the 35% that Plaintiffs *swear* (in the Arrington Declaration at ¶ 19) that Fusion Garage had previously agreed to. Fusion Garage, in turn, counter-offered with a different deal structure whereby TechCrunch and/or CP Inc. would obtain 10% equity in Fusion Garage as part of an acquisition. (Rathakrishnan Decl. ¶ 20). The parties never reached agreement on an acquisition. The parties never even agreed on how much equity TechCrunch and Fusion Garage each would have in a new acquiring entity, or whether TechCrunch would obtain an equity stake in Fusion Garage as part of a different deal structure. (*Id.* ¶ 21). Nor was any non-disclosure agreement, development agreement, or any other contract signed between the parties. (*Id.* ¶¶ 22-24).

The JooJoo Product. After discontinuing negotiations with TechCrunch, Fusion Garage publicly announced the release of its web tablet, the JooJoo, on December 7, 2009. (Cmpl. ¶ 44). Three days later, on December 10, 2009, plaintiffs filed this lawsuit.

TechCrunch's 30(b)(6) Deponent Refused to Answer Questions. Fusion Garage noticed the deposition of TechCrunch's 30(b)(6) witness on a number of topics relevant to this lawsuit. (Doolittle Decl., Ex. D (deposition notice)). TechCrunch designated Mr. Arrington—the same person who submitted the declaration in support of the Motion—as its witness. Remarkably, in response to question after question, Mr. Arrington refused to provide substantive testimony, stating he was not "comfortable" doing so.[5] *Fusion Garage's counsel repeatedly told Mr. Arrington that Fusion Garage did not care about Mr. Arrington's comfort level (Arrington Tr. 115:21-22; 116:1-4; 118:8-14; 133:4-8), but he still declined to answer questions.* Mr. Arrington was asked when the parties had agreed that each party would bear its own losses of time energy and money if the project was not successful and share profits if it was (as he had attested in his declaration), but Mr. Arrington was not "comfortable" giving a response. (Arrington Tr. 86:21-87:8). Mr. Arrington was asked when the supposed partnership was formed, but Mr. Arrington declined to respond, stating he was not "comfortable" doing so. (*Id.* at 115:12-19). Mr. Arrington was asked if a partnership was formed the first date he met Fusion Garage's CEO, but Mr. Arrington stated he was not "comfortable" giving a response. (*Id.* at 117:1-12). Mr. Arrington was asked if a partnership was formed when TechCrunch first began working with Fusion Garage, but Mr. Arrington was not "comfortable forming legal conclusions." (*Id.* at 117:24-118:6).

Counsel asked Mr. Arrington if it was his belief that a partnership was formed between Fusion Garage, TechCrunch, and CrunchPad, but Mr. Arrington stated he was not "comfortable" providing a response. (*Id.* at 120:9-15). Mr. Arrington was asked whether TechCrunch and Fusion Garage ever agreed to share profits, but Mr. Arrington would not provide a response because he was "not comfortable forming legal conclusions." (*Id.* at 120:17-22). When asked if Fusion Garage and TechCrunch had formed an agreement to create a partnership in late October 2008, Mr. Arrington stated he was not comfortable so stating. (*Id.* at 187:22-188:4). He was not "comfortable" stating whether the parties had reached agreement in December 2008, either. (*Id.* at 233:17-234:7). Mr. Arrington was not comfortable—and refused to provide a substantive response—regarding whether a partnership between the parties existed or when one started. (*Id.* at 188:6-22; 190:1-16). Mr. Arrington was not comfortable stating whether partners owe each other fiduciary duties, either. (*Id.* at 214:10-215:13). When asked why Mr. Arrington was "comfortable" stating in his

---

[5] Fusion Garage plans to bring an appropriate motion to compel to make Mr. Arrington answer.

declaration when a partnership ended, but was not comfortable testifying in deposition when the partnership began, Mr. Arrington testified "I don't have an answer." (*Id.* at 192:2-10).

Mr. Arrington was "not comfortable making legal conclusions" about patents that Fusion Garage's product might be associated with that plaintiffs claim to own. (*Id.* at 136:4-21). Mr. Arrington was "not comfortable" stating what aspects of Fusion Garage's product are associated with intellectual property or proprietary rights of TechCrunch. (*Id.* at 136:23-137:7). Mr. Arrington was "not comfortable" stating what aspects of Fusion Garage's product were owned by TechCrunch or CP Inc. (*Id.* 137:8-14). Based on a lack of "comfort," Mr. Arrington would not answer what property Fusion Garage allegedly misappropriated from TechCrunch or CP Inc. (*Id.* at 137:25-138:8). Mr. Arrington was "not comfortable" responding what ownership rights plaintiffs have in intellectual property rights relating to the CrunchPad. (*Id.* at 332:19-25). He was similarly not comfortable—and refused to provide a substantive response—regarding what contributions TechCrunch or CP Inc. had made to Fusion Garage's product. (*Id.* at 333:2-17). Despite the fact that Louis Monier plays a prominent role in plaintiffs' complaint, Mr. Arrington was not "comfortable" stating whether Monier was an employee or contractor of TechCrunch. (*Id.* at 203:6-10).

Accordingly, after he submitted a declaration attesting that the parties formed a partnership and that plaintiffs had contributed to Fusion Garage's product, in his capacity as a 30(b)(6) witness, Mr. Arrington would not support—or even talk about—those matters in his deposition. Moreover, Plaintiffs' lawyer objected to nearly every question in the 30(b)(6) deposition.[6]

Argument

I. <u>PLAINTIFFS CANNOT SHOW THEY ARE ENTITLED TO A PRELIMINARY INJUNCTION</u>

A party seeking a preliminary injunction has the burden to establish the following four elements: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4]

---

[6] Fusion Garage anticipates that plaintiffs will try to repair Mr. Arrington's declaration on reply, but submitting new evidence on reply is not allowed.

that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008). A preliminary injunction is an "extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A Charles Alan Wright & Arthur Miller, Federal Practice & Procedure § 2948 (2d ed. 1995)) (emphasis in original). Plaintiffs do not carry their burden of establishing any of the four elements necessary to secure an injunction.

A. Plaintiffs Cannot Show Likelihood of Success on the Merits

1. Plaintiffs' Claim for Breach of Fiduciary Duty Fails.

Plaintiffs' breach of fiduciary duty claim arises from their contention that they were members of a partnership or joint venture with Fusion Garage. Under California law, "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 "joint venture" is functionally similar to a partnership, except that a joint venture is usually formed for a specific set of transactions while a partnership is more indefinite. *See Bank of Cal. v. Connolly*, 36 Cal. App. 3d 350, 364 (1973). Due to the similarity of these two relationships, "the courts freely apply partnership law to joint ventures when appropriate." *Weiner v. Fleischman*, 54 Cal. 3d 476, 482 (1991).

(a) Mr. Arrington's Declaration and Oral Testimony Is Inconsistent with a Partnership

The declaration plaintiffs filed to support the Motion contains an admission that is fatal to plaintiffs' position that a partnership existed. *See* Arrington Decl. ¶ 31. Specifically, Mr. Arrington attests that "[t]he parties agreed that each would bear its own losses of time, energy, and money if the project was not successful, and to share profits if it was." *Id.* The existence of such an agreement is more than at issue, since Mr. Arrington denied any knowledge of such agreement in his deposition. (Arrington Tr. at 86:21-87:8). Nonetheless, Mr. Arrington's statement, were it true, conclusively establishes that there was no partnership, because a partnership is an agreement to share profits *and losses*. *See In re CMR Mortg. Fund, LLC*, 416 B.R. 720, 733 (Bankr. N.D. Cal. 2009) ("A partnership involves two or more people who contribute capital or labor with an understanding that they will proportionately share profits and losses"). There is no agreement to be partners if there is an upside and not be partners if there is a downside. Indeed, plaintiffs' position is convenient, because it allows them to claim most of Fusion Garage's profits if the JooJoo is successful but disclaim any financial responsibility if the JooJoo's costs end up exceeding its revenues. Simply put, Mr. Arrington's statements belie the existence of a partnership, and without a partnership there can be no breach of fiduciary duty.

Indeed, Mr. Arrington equivocated and backtracked on whether he believed that the parties ever had a partnership. For instance, Mr. Arrington's declaration attests that "on November 17 – in an email that Defendant concedes 'came out of the blue' – Fusion Garage aborted <u>the partnership</u>." (Arrington Decl. ¶ 25). At his deposition, however, Mr. Arrington repeatedly – and under significant cross-examination – declined to testify to any partnership, instead contending he was "not comfortable" stating whether the parties ever had a partnership. (*See, e.g.*, Arrington Tr. at 188:16-22 ("Q: Do you believe there was a partnership between Fusion Garage and TechCrunch? A: I'm not comfortable making legal conclusions.")) And when asked why he was comfortable opining about the alleged partnership in his declaration but not comfortable doing so in his deposition, Mr. Arrington admitted "I don't have an answer." (*Id.* at 192:13).

Ultimately, this Court and Fusion Garage are left wondering exactly how Mr. Arrington could swear to one thing in his declaration, and be unable to even discuss the subject matter in his deposition, when he was in the crucible of cross-examination. Perhaps Mr. Arrington's declaration was concocted by Plaintiff's counsel without having first consulted with Mr. Arrington. Perhaps Mr. Arrington simply had an unexplained loss of memory in the 4 weeks between the signing of his declaration and his deposition. Perhaps we will never know. Mr. Arrington's own inconsistent and shifting positions about whether the parties ever had a partnership underscores why plaintiffs have no likelihood of success on their partnership/fiduciary duty claim.

(b) <u>Plaintiffs' Scheme to "Poach" Fusion Garage's Employees and "Kill" Fusion Garage Proves That No Partnership Existed</u>

Fiduciary duties in a partnership are reciprocal. *See Pellegrini v. Weiss*, 165 Cal. App. 4th 515, 524-525 (2008) ("partners or joint venturers have a fiduciary duty to act with the highest good faith *towards each other* regarding affairs of the partnership or joint venture.") (emphasis added). Yet plaintiffs' own documents prove that they did not consider themselves to have any fiduciary duties to Fusion Garage. For instance, on August 17, 2009, TechCrunch officer Nik Cubrilovic wrote to Arrington proposing three possible strategies for TechCrunch. In relevant part, Cubrilovic stated that "option two is we kill the project and Fusion Garage also dies," while "option three is we just poach his guys, run it ourselves." (Doolittle Decl., Ex. B). In response, Arrington simply wrote back "if you're around, lets discuss this," *id.,* and never wrote that poaching Fusion Garage's employees or taking actions to kill Fusion Garage would breach plaintiffs' fiduciary duties. Indeed, six days later, Cubrilovic sent Arrington a more detailed plan for poaching Fusion Garage's employees.[7] (Doolittle Decl., Ex. C) ("i know all the FG employees well now, depending on what we do with FG I am sure we can take advantage of some internal resentment to poach the key guys away.") Given that fiduciary duties in a partnership are reciprocal, plaintiffs' clear belief that they did not owe fiduciary duties to Fusion Garage demonstrates that no partnership existed between the parties.

(c) A Partnership Could Not Exist Where Plaintiffs Had the Unilateral Right to End It.

Plaintiffs' allegations that Fusion Garage was working in a joint venture with them contradict their allegations that Michael Arrington tried to control "the project" by unilaterally threatening to end "the project" on numerous occasions. (Cmpl. ¶ 28 ("For reputational reasons I'm forced to notify our investors the deal is off. At this point it looks like our position is to turn the project off completely."); *id.* ¶ 32 ("On August 31 . . . TechCrunch again threatened to shut down the

---

[7] Mr. Arrington testified in his deposition that he criticized Mr. Cubrilovic after his first suggestion of poaching Fusion Garage employees. This is not even remotely credible. There is no writing evincing any such criticism from Mr. Arrington. And the fact that Mr. Cubrilovic sent emails one after the other over a week's period to Mr. Arrington making the same suggestion without any response from Mr. Arrington criticizing the suggestion proves that Mr. Arrington never made the criticism of Mr. Cubrilovic's poaching recommendation. Moreover, despite the nefarious intent demonstrated by Mr. Cubrilovic, Mr. Arrington concedes that he did not discharge Mr. Cubrilovic for his scheme to poach the employees of TechCrunch's alleged "partner." (Arrington Tr. 388:20-390:12).

collaboration.")). Mr. Arrington specifically attests that in summer of 2009, "[t]here was significant friction during this period, and TechCrunch seriously considered ending the joint project." (Arrington Decl. ¶ 21).

Plaintiffs' breach of fiduciary duty claim, premised on a partnership or joint venture, is flatly inconsistent with TechCrunch's and Arrington's position that they had the unilateral ability to "turn the project off completely" or "end[] the joint project," because the fiduciary duties in a partnership or joint venture are reciprocal. *Pellegrini*, 165 Cal. App. 4th at 524-525. Yet plaintiffs' position is that that Fusion Garage had a fiduciary duty to sustain the alleged partnership or joint venture at the whim of TechCrunch while TechCrunch and Arrington could end the relationship at any time. Such asymmetry is inconsistent with a partnership or joint venture under the law.

(d) Plaintiffs Present No Evidence that the Parties Were Co-Owners of a Business.

Another fundamental reason that the parties' relationship was not a partnership or a joint venture is that they were not in business together. TechCrunch's complaint is replete with allegations that the parties jointly created the CrunchPad device and that TechCrunch made contributions to the device. *See, e.g.,* Cmpl. ¶¶ 35; 71 ("Defendant and TechCrunch personnel collaborated to develop the CrunchPad's hardware, software, and industrial components"). However, a partnership is an association to carry on a *business*, and cannot simply be an association to create a device. For instance, in *Love v. The Mail on Sunday*, 489 F. Supp. 2d 1100 (C.D. Cal. 2007), Beach Boys member Mike Love brought suit against bandmate Brian Wilson alleging breach of fiduciary duty based on an alleged songwriting partnership. *Id.* at 1102. It was undisputed that Love and Wilson co-wrote songs. *Id.* at 1106. However, there was no evidence that they acted as co-owners of a business to sell or license those songs, and thus the court held that there was no partnership as a matter of law. *Id.* at 1106-07.

As in *Love*, there was no business understanding between plaintiffs and Fusion Garage, even assuming *arguendo* that they did collaborate to create the CrunchPad device. As discussed further below, plaintiffs have failed to prove any mutual understanding between the parties regarding: (a) how the profits from their alleged business would be divided; (b) how the equity in the alleged business would be divided; or (c) who would have managerial control over the alleged business. Absent any understanding on even the most basic aspects of a business, there could be no partnership as a matter of law.

(e) <u>The Parties' Relationship Was Subject to Contingencies That Never Took Place</u>

Plaintiffs' breach of fiduciary duty claim also fails because the alleged partnership was contingent upon certain events that did not occur. The project to commercialize the CrunchPad was contingent upon CP Inc. receiving adequate outside funding. (Rathakrishnan Decl. ¶ 13; Arrington Tr. at 316:9-11 ("$2 million [in funding] seemed to be roughly the amount needed to get to the point where we could start producing CrunchPads.")) Moreover, the project was contingent upon CP Inc. acquiring Fusion Garage – at which point the software and hardware that Fusion Garage had developed would be owned by the entity. Rathakrishnan Decl. ¶ 13; Arrington Tr. at 85:4-6 ("At that meeting, we, Chandra and I, agreed *that the only way to work together was a merger of the entities*.") (emphasis added).

If the "partnership" was contingent upon outside finding or an acquisition of Fusion Garage, and these events never occurred, then the partnership was stillborn and never truly existed. *Bustamante v. Intuit, Inc.*, 141 Cal. App. 4th 199 (2006). In *Bustamante*, plaintiff alleged breach of a joint venture to develop software adapted for users in Mexico. *Id.* at 207. The court, however, held that no enforceable joint venture existed. It reasoned that the alleged joint venture was contingent upon the parties' receiving outside funding – and until that funding was in place, there were no fiduciary obligations on the parties. *See id.* at 212-13 ("There could be no launch of Intuit Mexico without its formation, no formation without funding, and no funding without a commitment from venture capitalists or private investors. The failure of the parties' money-raising efforts meant that they were unable to create a working relationship with each other, and consequently, no obligation arose or *could* arise to 'form and launch' the company on any terms.") (emphasis in original); *id* at 213 ("the parties always understood that it would not be possible to 'form and launch' Intuit Mexico without significant third-party involvement in the enterprise.

Clearly there was no expression of mutual consent to create a company without investor financing").

Similarly, in *City Solutions, Inc. v. Clear Channel Comm'ns*, 201 F. Supp. 2d 1035 (N.D. Cal. 2001), the court rejected plaintiff's argument that the parties had entered into a joint venture to bid on a city contract to install newsracks. While the parties had several meetings about a joint bidding arrangement, the court reasoned that their "agreement" to submit a joint bid was subject to the condition that they *also* agree on what their joint business model would look like if they won the contract and had to install the newsracks. *See id.* at 1042 ("The evidence here unmistakably shows that plaintiff and Eller never reached a 'closed' and 'discrete' agreement to bid together on April 13. *Instead, it shows that any such agreement was always subject to agreement upon the parties' eventual business relationship*, making it nothing more than an unenforceable 'agreement to agree.'") (emphasis added). Here, plaintiffs' sworn interrogatory responses reveal that, at most, they had an agreement to collaborate—an "agreement to agree." Doolittle Decl., Ex. E (Supplemental Response to Interrogatory No. 8) ("In late September 2008, the Interserve, Inc. [sic] and Fusion Garage agreed to collaborate on the project.").

Under *Bustamante* and *City Solutions*, any partnership between the parties to develop and market the CrunchPad was conditioned on adequate outside investment and a mutually agreeable acquisition of Fusion Garage. Because neither of these conditions were satisfied,[8] no partnership existed and the parties did not owe fiduciary duties to each other. At best, they had an agreement to agree, which as a matter of law does not form a partnership.

(f) <u>Plaintiffs Proposed an Agreement with a "No Shop" Provision</u>

When the parties were in discussions for an acquisition, plaintiffs submitted a draft acquisition agreement to Fusion Garage. (Rathakrishnan Decl., Ex. B). That agreement contained a limited "no-shop" provision that allowed Fusion Garage to "shop" itself to other suitors if the

---

[8] *See, e.g.,* Arrington Tr. at 372:12-18 ("Q: Up through and including November 30, 2009, are you aware of any individual or group of investors who had committed to putting $2 million into CrunchPad? A: No.").

acquisition did not occur within 60 days. *Id.* This "no-shop" provision is flatly inconsistent with plaintiffs' partnership allegations. If the parties were in a partnership and owed fiduciary duties to each other, then plaintiffs' proposed language allowing Fusion Garage to abandon plaintiffs and merge with a third party after 60 days would be nonsensical. In short, plaintiffs' attempts to impose a contractual 60-day "no-shop" period on Fusion Garage proves that the parties did not have any *extra-contractual* fiduciary duties arising from a partnership or joint venture.

(g) No Partnership Can Be Created by Mere Acquisition Negotiations

Plaintiffs' breach of fiduciary duty claim also fails because the business relationship was nothing more than a set of acquisition negotiations that went sour. As the *City Solutions* court held (in a later opinion), mere negotiators are not subject to fiduciary duties. *City Solutions, Inc. v. Clear Channel Commn's*, 201 F. Supp. 2d 1048, 1051 (N.D. Cal. 2002) ("This Court will not chill future negotiations (and severely limit eligible pools of bidders in the process) by making negotiators subject to fiduciary duties, including an obligation not to compete for the same bid, where such negotiations fall short of an agreement to bid together.") At best, plaintiffs and Fusion Garage engaged in a set of unsuccessful acquisition discussions that did not create fiduciary duties between the parties.

Plaintiffs attempt to portray the acquisition negotiations as successful, suggesting that Fusion Garage agreed in June 2009 to merge into CP Inc. in exchange for 35% of CP Inc's equity. *See* Mot. at 3 ("By the end of June in 2009, the parties had agreed to the basic terms of their eventual plan to merge Fusion Garage into CrunchPad, Inc., with Fusion Garage receiving 35% of the merged company's stock.") Yet the parties' later actions confirm that that there was never an agreement to merge the companies on any terms. For instance, in October 2009 – four months after the parties supposedly agreed to a acquisition with a 35-65% equity split – TechCrunch CEO Heather Harde proposed an acquisition offer by which Fusion Garage would receive just 23.5% equity in CP Inc. (Rathakrishnan Decl., Ex. D). Harde's October 2009 counteroffer demonstrates that the acquisition negotiations were *not* successful back in June 2009. Indeed, the acquisition negotiations were not successful at *any* point. As *City Solutions* held, it is would be improper to impose fiduciary duties on negotiators (such as Fusion Garage and plaintiffs) where these negotiations never resulted in a binding agreement.

(h) <u>No Partnership Existed Because the Terms were Impermissibly Vague or Disputed</u>

Yet another reason that there was no partnership between the parties is that the material terms of the supposed partnership or joint venture were impermissibly vague, uncertain, or disputed between the parties. *See In re Dimas, LLC*, 2007 WL 2127312, *17 (Bankr. N.D. Cal. July 23, 2007) (finding no enforceable joint venture agreement because "[t]he evidence shows that the parties had agreed to different terms. There was no mutual consent between the parties with respect to the amount of capital to be invested, the equity contribution by the property owner, the valuation of the property, the profit distribution, the obligation to make the mortgage payments, and retention of the existing mortgages."); *Bustamante*, 141 Cal. App. 4^{th} at 211 ("rather than being definite, all of the following terms – which Bustamante represents as material – were actually unsettled both before and after the alleged commitment by Intuit: the form and amount of Bustamante's compensation; the extent, duration, and nature of his management role, if any; the amount of Intuit's royalty; the equity percentage held by him, 'the management team,' Intuit, and outside investors; and the liquidity path for both Bustamante and investors.")

Here, neither plaintiffs' Complaint, their Motion, nor the Arrington Declaration describe what the agreed-upon material terms were. *See, e.g.*, Arrington Tr. 149:3-9 ("We didn't get to that level of detail."). For instance, plaintiffs do not state how the profits of the alleged venture would be divided. They do not state how managerial control would be divided. They do not state how equity in the joint venture would be parceled out, other than their demonstrably false suggestion that the parties "agreed" to 35%-65% equity split. Nor do they explain how the planned introduction of third-party investment would alter or dilute the equity shares of the principal parties. This uncertainty and vagueness as to *every material term* of the alleged business collaboration means that no partnership could be created as a matter of law.

Similarly, plaintiffs do not explain when the partnership began, when Fusion Garage joined it, or when Fusion Garage became subject to fiduciary duties by virtue of its work. Indeed, the Complaint alleges that "the project" existed before Mr. Rathakrishnan of Fusion Garage had even been introduced to TechCrunch or Mr. Arrington in September 2008. (*Id.* ¶ 12). Mr. Arrington attested in his declaration when the "partnership" ended, (Arrington Decl. ¶ 25), but he refused to testify in deposition when the partnership began or any other aspect of the alleged "partnership." (Arrington Tr. at 86:21-87:19; 117:1-12).

Because plaintiffs' breach of fiduciary duty claim is hopelessly ambiguous as to what the terms of the partnership were, as to whom Fusion Garage owed a fiduciary duty, and when the partnership began, this claim cannot succeed as a matter of law. *See, e.g., Bustamante*, 141 Cal. App. 4^{th} at 211.

2. <u>Plaintiffs' Claim for Fraud and Deceit Fails</u>

Plaintiffs' fraud claim also has no likelihood of success – not least because Fusion Garage never made any misrepresentations. For instance, plaintiffs' Motion alleges that "Fusion Garage repeatedly promised to merge with TechCrunch" (Mot. at 10) and further specifies that "Mr. Rathakrishnan confirmed that he had spoken with his investors and creditors and they would agree to merge with CrunchPad in exchange for 35 percent equity in the new company." (*Id.* at 11). Yet this allegation is belied that fact that, just weeks before the acquisition talks broke down for good in November 2009, TechCrunch CEO Heather Harde sent Fusion Garage a written acquisition offer of 23.5% just equity. (Rathakrishnan Decl., Ex. D). As discussed above, this October 2009 counteroffer by Harde shows that Fusion Garage had never "promised" to be acquired at any previous juncture. The parties were still in acquisition *negotiations* until the bitter end.

Plaintiffs also allege fraud based on the fact that Fusion Garage registered the domain name "thejoojoo.com" on November 10, roughly a week before Rathakrishnan informed Arrington that the negotiations were seemingly at an impasse. (Mot. at 10). Yet by this point, the acquisition negotiations had been dragging on for months with no deal in sight. Fusion Garage's registry of "thejoojoo.com" was simply part of Fusion Garage's contingency plan for striking out alone, given the increasingly likely chance that it might never reach an agreeable business deal with plaintiffs. (Rathakrishnan Decl., ¶ 59). Plaintiffs can hardly complain about Fusion Garage setting up a contingency plan, given that, as early as August 2009, plaintiffs were considering their own "contingency plan" of poaching Fusion Garage's employees and marketing the product by themselves. Doolittle Decl., Ex. B ("option three is we just poach his guys, run it ourselves.") Likewise, the fact that Fusion Garage set up a contingency plan in case acquisition negotiations fell through does not show that Fusion Garage engaged in any fraudulent conduct. *See In Re Tower Automotive Sec. Litig.*, 483 F. Supp. 2d 327, 347-48 (S.D.N.Y. 2007) (holding that company did not engage in fraud for failing to disclose its "contingency plan" of possibly filing for bankruptcy).

Plaintiffs next argue that Fusion Garage fraudulently concealed the loss of Pegatron as an ODM in October 2009. (Mot. at 10). But this argument makes no sense in light of plaintiffs' allegations and arguments. If TechCrunch was involved in the development of Fusion Garage's product as it claims, and provided leadership, ongoing support, and contributions on a daily basis as it claims, it would have known that Fusion Garage parted ways with Pegatron. (Rathakrishnan Decl. ¶ 57).

Finally, plaintiffs allege that Fusion Garage fraudulently "claimed to have developed a browser-based operating system that turned out to be an off-the-shelf browser with minor variations." (Mot. at 10). Plaintiffs are wrong. It is *true* – not false – that Fusion Garage developed its own operating system. While this operating system did include a common Linux kernel, it merged this kernel with a webkit rendering engine to create a unique operating system. (Rathakrishnan Decl. ¶ 40).

3. Plaintiffs' Lanham Act Claim Fails

Plaintiffs' Lanham Act claim has no likelihood of success for the threshold reason that plaintiffs cannot show a "competitive injury" (as they have no competing product) and therefore lack standing. *See Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1037 (9^{th} Cir. 2005). Fusion Garage addressed plaintiffs' lack of standing in its Motion to Dismiss, to Strike, and for a More Definite Statement ("Motion to Dismiss") and incorporates those arguments by reference. Suffice it to say that Mr. Arrington admitted in his deposition that plaintiffs are not selling any competing or successor web tablet. Arrington Tr. at 351:9-10 ("Q: Do you sell a web tablet? A: We do not.") Nor do Plaintiffs have any concrete or imminent plans to sell a web tablet in the future – at most, Arrington conjectured that they *might* do so at some undetermined future time. Arrington Decl., ¶33 ("it is *not inconceivable* that TechCrunch *could* start over and develop a new device for the same market Fusion Garage presently is trying to misappropriate for itself.") (emphasis added). Because plaintiffs are not developing any product to compete with Fusion Garage, and have no concrete or imminent plans to do so, Fusion Garage's advertising statements are not "harmful to the plaintiffs' ability to compete with the defendant." *Jack Russell Terrier*, 407 F.3d at 1037.

Fusion Garage also explained in their Motion to Dismiss that the Lanham Act claim fails because statements that merely take credit for the creation of a product cannot give rise to false advertising liability under the Lanham Act. *See Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1307 (Fed. Cir. 2009); *Robert Bosch LLC v. Pylon Mfg. Co.*, 632 F. Supp. 2d 362, 366 (D. Del. 2009). Fusion Garage further explained in its Motion to Dismiss that the Lanham Act claim fails because plaintiffs are complaining about *true* statements. For instance, Fusion Garage *did* design the hardware for the JooJoo. (Rathakrishnan Decl. ¶ 40). For the reasons explained in the Motion to Dismiss, the Lanham Act claim fails and certainly does not warrant injunctive relief.

4. Plaintiffs' Claim for "Misappropriation of Business Ideas" Fails

Tellingly, plaintiffs' Motion does not even *allege* a likelihood of success on their "misappropriation of business ideas" claim. The Motion does not even mention this claim, except to argue defensively in two sentences that this claim is not pre-empted by the California Uniform Trade Secrets Act (CUTSA). (Mot., 13).

Because plaintiffs do not allege a likelihood of success on the "business ideas" claim, Fusion Garage will not address this claim at length here and respectfully refers the Court to Fusion Garage's Motion to Dismiss for a more complete analysis of why this claim fails as a matter of law. Nonetheless, it should be noted that plaintiffs' attempt to avoid CUTSA pre-emption is unfounded. It would wholly vitiate the principles of CUTSA pre-emption if plaintiffs were allowed to repackage their would-be trade secrets as "business ideas" and bring a common-law "business ideas" claim, especially given that "CUTSA's 'comprehensive structure and breadth' suggests a legislative intent to occupy the field." *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 957 (2009). The Court should reject plaintiffs' artful attempt to plead around CUTSA and should find that the "misappropriation of business ideas" claim is pre-empted.

B. Plaintiffs Will Not Suffer Irreparable Harm if the Injunction Is Denied

A plaintiff cannot show it will suffer irreparable harm in the absence of a preliminary injunction "based only on a possibility of irreparable harm." *Winter*, 129 S. Ct. at 375. Rather, "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* (emphasis in original). Moreover, a plaintiff must make a "clear showing" that it is entitled to the "extraordinary remedy" of injunctive relief. *Id.* at 376. Plaintiffs cannot come close to satisfying this standard. To the contrary, *Fusion Garage* would suffer irreparable injury if an injunction issue, and plaintiffs face no irreparable injury if one does not.

First, plaintiffs have no product, yet claim "it is not inconceivable that TechCrunch could start over and develop a new device." (Arrington Decl. ¶ 33). Such a mere possibility is insufficient. *Winter*, 129 S. Ct. at 375

The only "irreparable injury" that plaintiffs argue is that Fusion Garage may "dissipate" its assets and leave plaintiffs with no money to collect should plaintiffs ultimately win this case on the merits. *See* Mot. at 7 ("Fusion Garage is a financially unstable foreign start-up that can only remain viable by dissipating revenues from sales of the JooJoo.")

However, plaintiffs have no competent evidence to support these fears of dissipation and inability to collect on a judgment. (Arrington Tr. at 327:10-14; 349:19-350:2 (showing TechCrunch 30(b)(6) deponent lacked information regarding Fusion Garage's finances)). To the contrary, the evidence shows that Fusion Garage is a well-capitalized company. For instance, Fusion Garage has raised $3.4 million in funding to date and expects to close on another round of $3 million funding within a month. (Rathakrishnan Decl. ¶ 64). This significant funding belies plaintiff's suggestion that Fusion Garage is so "financially unstable" that the Court must freeze its revenues to preserve plaintiffs' hypothetical recovery down the road. *See Clean Energy v. Applied LNG Tech. USA, LLC*, No. 08-746, 2008 WL 4384179, *4, 7 (C.D. Cal. Sept. 3, 2008) (denying preliminary injunction and rejecting argument that defendant would be unable to satisfy a money judgment given that defendant had recently acquired $2.1 million "that has improved [defendant's

] financial condition").[9] Fusion Garage has also entered into an arrangement with a company, CSL Group, regarding the manufacturing of the JooJoo device. Under the arrangement, CSL advances the manufacturing costs to make the JooJoo device, and obtains recoupment on the backend. Fusion Garage does not need to incur large manufacturing costs since they are being advanced by CSL. However, if the Court impounded Fusion Garage's revenues, Fusion Garage would not be able to meet its obligations to CSL. (Rathakrishnan Decl. ¶ 62).

Unable to show that Fusion Garage is undercapitalized, plaintiffs next argue that "payments for JooJoo pre-orders are going directly into a PayPal account in the name of Fusion Garage's CEO, not in the company's name." (Mot. at 7). Plaintiffs do not explain the relevance of this information, but presumably they mean to suggest Fusion Garage would be unable to draw upon a PayPal account in Mr. Rathakrishnan's name to satisfy an eventual money judgment.

However, plaintiffs are wrong that the PayPal account holding the JooJoo's revenues is "not in the company's name." Rather, the account specification sheet – which plaintiffs attached to their own Motion – clearly lists the "Account Type" as "Business," not personal. (Bloch Decl., Ex. A). Moreover, "FusionGarage" is listed as the business for which the account was created. *Id.* Mr. Rathakrishnan is simply registered as the "user" of the account, and only because PayPal requires at least one individual person to register as a user whenever a business account is created. (Rathakrishnan Decl. ¶ 67). In any event, Fusion Garage is not even using PayPal for payment processing any more. (*Id.*)

---

[9] Plaintiffs' allegations that Fusion Garage "was on a shoestring budget" and "[o]n several occasions, TechCrunch even paid Fusion Garage's bills" (Mot. at 14) does not show that Fusion Garage is *presently* so undercapitalized that the Court should take the extraordinary step of freezing its revenues. These allegations refer to a prior time period, before Fusion Garage began marketing the JooJoo and received millions of dollars in funding. *See Clean Energy*, 2008 WL 4384179 at *7 (citing defendant's "improved [] financial condition" as reason why plaintiff could not show defendant's inability to satisfy a money judgment). In any event, the allegation that TechCrunch "paid Fusion Garage's bills on several occasions" is vastly exaggerated. In fact, TechCrunch advanced just a single $23,500 payment to a touchscreen vendor on Fusion Garage's behalf, back in 2009. (Rathakrishnan Decl., ¶ 44).

In short, plaintiffs have offered no competent evidence to support their "bare concerns" that Fusion Garage is financially unstable or is likely to dissipate the JooJoo revenues. *See Smith v. MPIRE Holdings, LLC,* No. 08-0549, 2009 WL 804069, *7 (M.D. Tenn. March 25, 2009) (denying preliminary injunction motion to freeze defendant's assets where "plaintiffs have offered no evidence beyond their bare 'concerns' that any particular defendant is presently absconding with or dissipating assets that might be required to satisfy a judgment.") Conversely, Mr. Rathakrishnan has offered evidence that Fusion Garage is adequately capitalized, which only strengthens the conclusion that plaintiffs have failed to show irreparable injury. *See Gulf Coast Produce, Inc. v. Am. Growers, Inc.*, No. 07-80633, 2007 WL 2302109, *2 (S.D. Fla. Aug. 8, 2007) ("Glenn C. Thomason, principal of American Growers, testified that American Growers is solvent and has sufficient funds to pay all accounts payable, including Gulf Coast Produce's claim in its entirety . . . Gulf Coast Produce had no evidence to suggest that Thomason's representations were inaccurate. The conclusion of dissipation or threat of dissipation based on an allegation of a rumor about flagging profitability with no personal knowledge or supporting evidence is plainly insufficient to satisfy the burden of proving irreparable damage.")

For this reason, the cases that plaintiffs cite to support their "irreparable injury" argument are inapposite. In each cited case, it was either undisputed or painfully obvious that the defendant was wasting its assets or would otherwise be unable to pay any adverse judgment. For instance, in *DuFour v. Be LLC*, No. 09-3770, 2009 WL 4730897 (N.D. Cal. Dec. 7, 2009), one defendant *admitted* to being "on the verge of bankruptcy" when the Court ordered its assets placed into trust. *Id.* at *3. Notably, the Court refused to freeze the assets of the other defendants, given that "[t]here is no evidence that these other defendants are on similarly weak financial footing." *Id.* In *Natural Selection Foods, LLC v. Premium Fresh Farms, LLC*, No. 07-197, 2007 WL 128230 (N.D. Cal. Jan. 11, 2007), the Court found that "Defendants *are presently engaged in dissipating assets* it [sic] is required to keep in trust." *Id.* at *1 (emphasis added). And in *Reebok Intern. Ltd v. Marnatech. Enter., Inc.*, 970 F.2d 552 (9th Cir, 1992) the principal defendant *did not dispute* that it and the other defendants "may hide their allegedly ill-gotten gains if their assets are not frozen." *Id.* at 563 (internal quotation marks omitted). There is nothing besides plaintiffs' say-so to suggest that Fusion Garage will improperly dissipate assets in the future. Similarly, plaintiffs' assertions about Fusion Garage's "financial instability" are devoid of evidentiary support. Accordingly, plaintiffs have failed to establish a likelihood of "irreparable injury" if Fusion Garage's revenues are not placed into trust, and plaintiffs' Motion should be denied.

C. The Balance of Equities Weighs Against Plaintiffs

To decide whether the balance of equities tips in plaintiffs' favor, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 129 S. Ct. at 376 (internal quotes and citation omitted). Here, an improperly granted injunction would result in substantially more harm to Fusion Garage than plaintiffs would face in the absence of an injunction.

An injunction would cause Fusion Garage severe harm by likely forcing it out of business. A company cannot survive for long without revenues, and plaintiffs seek to freeze and impound the revenues from Fusion Garage's only product. Moreover, while Fusion Garage has obtained significant third-party investment to support it during its nascent phase, this investment would dry up quickly if the JooJoo's revenues were impounded. In other words, an injunction would likely kill Fusion Garage altogether by choking the revenue stream of its only product and deterring continued third-party investment in Fusion Garage. (Rathakrishnan Decl. ¶¶ 60-63). Driving Fusion Garage out of business would also end the jobs of Fusion Garage's employees. The severe harm that an injunction would inflict on Fusion Garage and its employees strongly suggests that the equities tip in favor of Fusion Garage, not plaintiffs. *See Green Book Intern. Corp. v. InUity Corp.*, 2 F. Supp. 2d 112, 125 (D. Mass. 1998) ("even if GBIC had made a minimally sufficient showing of likelihood of success, the balance of equities would still tip in InUnity's favor, given that an injunction would likely put it out of business, resulting in a loss of approximately forty jobs and a large portion of whatever remains of a $2 million private placement that it recently completed.")

Plaintiffs, however, face little hardship from the denial of an injunction. They may continue to prosecute their claims against Fusion Garage and seek monetary relief absent an injunction, and plaintiff TechCrunch's blogging business will not be harmed in the interim if an injunction is denied.[10] The equities therefore tip heavily in Fusion Garage's favor.

Furthermore, plaintiffs have engaged in repeated wrongful conduct both before and after this suit was filed, and equity will not support a plaintiff who has engaged in such wrongdoing. *See generally Nelmida v. Shelly Eurocars, Inc.*, 112 F.3d 380, 384 (9th Cir. 1997) ("A cardinal maxim of equity jurisprudence is that he who comes into equity must come with clean hands.") Here, plaintiffs' wrongdoing has deprived them of clean hands both before and after suit was filed. For instance, as discussed above, plaintiffs concocted a scheme to "poach" Fusion Garage's employees and "kill" Fusion Garage. Moreover, after this suit was filed, plaintiffs publicized Fusion Garage's business information in an attempt to tar Fusion Garage in the media. Most notably, plaintiffs' Motion *publicly* disclosed that there were 90 per-orders for the JooJoo as of last month – a fact that several media sources picked up on to suggest that the JooJoo will not succeed in the marketplace. (Doolittle Decl., Ex. F). There can be no legitimate purpose for plaintiffs to parade the JooJoo's pre-order numbers in a public filing without even attempting to place this information under seal. Indeed, the only apparent reason for this action is that plaintiffs wanted to embarrass Fusion Garage and create negative publicity for the JooJoo. Plaintiffs also submitted a declaration that is misleading and which their 30(b)(6) deponent could not support. Their lawyer obstructed the deposition. They forced Fusion Garage to file a motion to compel to obtain their documents. Simply put, plaintiffs do not deserve equitable relief.

In sum, plaintiffs' wrongful conduct tips the equities even further towards Fusion Garage and away from plaintiffs. Plaintiffs should not be entitled to the extraordinary equitable remedy of a preliminary injunction when they have behaved in such an inequitable manner.

D. A Preliminary Injunction Would Harm the Public Interest

Finally, a preliminary injunction would not be in the public interest. As stated above, the injunction would likely drive Fusion Garage out of business, thereby removing the JooJoo from

---

[10] Plaintiff CP Inc. does not even *have* an ongoing business, so it obviously will not suffer any interim business harm if an injunction is denied.

the market and harming the public's interest in a diverse marketplace of competing products. *See Freudenberg Household Prods. LP v. Time, Inc.*, No. 06-399, 2006 WL 1049569, *9 (N.D. Ill. April 18, 2006) (denying preliminary injunction given the public interest in "the natural competition in the marketplace, from which the consumers ultimately benefit in the form of lower prices and higher-quality goods.") Removing the JooJoo from the marketplace would be particularly inimical to the public interest given that plaintiffs do not even accuse this product of infringing their intellectual property or trade secrets. Doolittle Decl., Ex. E (TechCrunch's Supplemental Interrogatory Response No. 7). Moreover, driving Fusion Garage and the JooJoo from the marketplace would particularly harm those members of the public who already purchased JooJoos, since the product comes with a warranty. (Rathakrishnan Decl. ¶ 63).

For these reasons, plaintiffs' arguments about the public interest are particularly misguided and ironic. Plaintiffs argue that "an injunction benefits the public by ensuring that pre-order funds are available to be refunded in the event Fusion Garage cannot deliver the JooJoo as promised" (Mot. at 7) and "sequestering pre-order and sales revenues will ensure that early JooJoo buyers can be made whole." (*Id.* at 15). This argument is paternalistic; plaintiffs are not suing for the benefit of consumers. Moreover, early JooJoo buyers would not be served by an injunction that seeks to *kill Fusion Garage altogether*.

Conclusion

For the foregoing reasons, Defendant Fusion Garage respectfully requests that the Court deny the Motion.

DATED: April 26, 2010

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By */s/ Patrick Doolittle*
Patrick C. Doolittle
Attorney for Defendant Fusion Garage PTE. LTD