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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TECHCRUNCH, INC., 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 (PVT)

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' CLAIMS FOR FRAUD AND UNFAIR COMPETITION

Preliminary Statement

Plaintiffs' Opposition fails to show that they adequately plead the reliance and damages elements of their fraud claim, and that claim should be dismissed with prejudice. The heightened Rule 9(b) pleading standard plainly applies to the reliance and damages elements of Plaintiffs' fraud claim. Both this Court's prior holding and the case law in this district (neither of which Plaintiffs adequately address in their Opposition) demonstrate that Rule 9(b) *does* apply to reliance and damages. Even if Plaintiffs were correct about the standard (they are not), however, the allegations they point to in their Opposition in an attempt to demonstrate adequate pleading consist of writing emails, observing product demonstrations, and allowing Fusion Garage to work out of TechCrunch offices. Such allegations fail to show legally sufficient reliance or damages. Accordingly, Plaintiffs' fraud claim and unfair competition claim (which, the Court has already ruled, rises and falls with Plaintiffs' ability to plead fraud) should be dismissed. Given Plaintiffs' *repeated* inability to plead fraud, the prejudice that these deficient pleadings have imposed on Fusion Garage, and the demonstrable futility of amendment, these claims should now be dismissed *with prejudice.*

Argument

I. PLAINTIFFS FAIL TO PLEAD THE RELIANCE OR DAMAGES ELEMENTS OF THEIR FRAUD CLAIM

A. Reliance and Damages Must Be Pled With Specificity Under Rule 9(b)

Plaintiffs are mistaken that they need not plead the reliance or damages elements of fraud with "specificity" under Rule 9(b). Reliance and damages are two of the required elements for fraud, and courts in this district have routinely held that *all* the required elements (including reliance and damages) must be pled with specificity.[1] *See, e.g., Roque v. Suntrust Mortg., Inc.*,

[1] Although the substantive elements of fraud are governed by California state law, the federal pleading standards of Rule 9(b) (and the federal cases applying this standard) govern the question of whether Plaintiffs have adequately pled fraud. *See Nevis v. Wells Fargo Bank*, No. 07-2568, 2007 WL 2601213, *3 (N.D. Cal. Sept. 6, 2007) ("In federal actions where state law governs fraud claims, the pleading requirements are nonetheless governed by the Federal Rules of Civil Procedure.")

No. 09-00040, 2010 WL 546896, *5 (N.D. Cal. Feb. 10, 2010) ("In order to state a claim for fraud, plaintiff must plead the following elements with specificity: (1) false representation as to a material fact; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance and resulting damages"); *Applied Elastomerics, Inc. v. Z-Man Fishing Prods., Inc.*, No. 06-2469, 2007 WL 703606, *3 (N.D. Cal. March 5, 2007) ("In order to state an affirmative defense for fraud, Defendant must plead with specificity the following elements: misrepresentation, scienter, intent to defraud, justifiable reliance and resulting damage.") As the *Roque* court held, in dismissing plaintiff's fraud claim on Rule 9(b) grounds, "such [fraud] actions require a strict pleading standard and a liberal construction will not be invoked to sustain a pleading defective in *any* material respect." *Roque,* 2010 WL 546896 at *5 (emphasis added).

Consistent with this precedent, this Court's prior order dismissing Plaintiffs' fraud claim held the reliance and damages elements of the claim must be pled with specificity under Rule 9(b). (*See* Dkt. 162 at 14) ("TechCrunch has not alleged *with adequate specificity* how and to what extent it reasonably relied on each alleged misrepresentation and was damaged thereby.") (Dkt. 162 at 14) (emphasis added).

In an attempt to evade the Court's holding, Plaintiffs argue that "[t]he Court did not define 'adequate' and never tied the word to Rule 9(b)." (Dkt. 185 (Opp. Br.) at 9). This argument fails. The Court held that Plaintiffs' fraud claim failed for lack of "specificity" on the reliance and damages elements, which clearly indicates that the "specificity" requirement of Rule 9(b) applies to these elements. (*See* Dkt. 162 at 14). While the order itself should be clear enough, the Court explained its view on this point during the hearing on Defendant's first motion to dismiss, which should have removed any remaining doubt: "*I think 9(b) applies*, and I'm not comfortable that there's been a sufficient amount of specificity, particularity on the [fraud] claim." (Sohn Decl., Ex. A (Dkt. 139) at 7:18-21) (emphasis added). Thus, Plaintiffs' attempt to re-litigate whether Rule 9(b) applies to reliance and damages is improper and should be rejected.

Plaintiffs' "authority" to the contrary is also unpersuasive. Plaintiffs cite just two cases from this district to support their argument that Rule 9(b) does not apply to reliance or damages – *Asis Internet Serv's v Subscriberbase Inc.*, 2009 WL 4723338 (N.D. Cal. Dec. 4, 2009) and

Menjivar v. Trophy Prop. IV DE, LLC, 2006 WL 2884396 (N.D. Cal. Oct. 10, 2006). Neither applies here.

Asis involved a statutory false advertising claim, not a common-law fraud claim, and the *Asis* court expressly found that reliance and damages were not necessary elements for this statutory claim. *See Asis*, 2009 WL 4723338 at *3 ("section 17529.5 only requires Plaintiffs to plead knowledge of a likelihood of misleading a reasonable person, thereby eliminating the elements of reliance and damages that would be present in a common law fraud claim"). Thus, *Asis* had no cause to decide (and did not decide) whether Rule 9(b) would apply to the reliance or damages elements of a fraud claim.

In *Menjivar*, the court did hold that the damages element of fraud is not subject to Rule 9(b), but it based its holding on the sole fact that "defendants cite no case law, and the Court finds none, requiring that fraud damages be pled with more specificity than required under normal notice pleading." *Menjivar*, 2006 WL 2884396 at *13. Even if this statement was true when *Menjivar* was decided in 2006, it no longer is the case. Rather, as recounted above, multiple courts in this District have recently held that *all* the elements for fraud (including reliance and damages) must be pled with specificity under Rule 9(b). *See Roque*, 2010 WL 546896 at *5; *Applied Elastomerics*, 2007 WL 703606 at *3. Plaintiffs do not even cite, let alone seek to distinguish, these more recent cases.

This Court has already held that Rule 9(b) pleading standards apply to the reliance and damages elements of Plaintiffs' fraud claim – a holding plainly supported by the case law. Plaintiffs' attempt to re-litigate this issue is procedurally improper and unpersuasive.[2]

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[2] Plaintiffs' out-of-district authority is also inapplicable here. *United Air Lines, Inc. v. Gregory*,2010 WL 2037283 (D. Mass. May 20, 2010) was decided under Massachusetts law, which does not even require damages as a distinct element of the claim. *See id.* at *3 ("To state a claim for intentional misrepresentation, United must allege that 1) the defendants knowingly made a false statement of material fact, 2) the defendants intended that it be relied on by United and 3) United actually and reasonably relied on the statement.") Likewise, *Smith v. Short Term Loans*, 2001 WL 127303 (N.D. Ill. Feb. 14, 2001) involved a claim under the Illinois Consumer Fraud Act (ICFA), which also does not require damages as an element of the claim. *See Siegel v. Shell Oil Co.*, 612 F.3d 932, 934 (7th Cir. 2010) ("The elements of a claim under ICFA are: (1) a deceptive or unfair act or practice by the defendant; (2) the defendant's intent that the plaintiff rely (footnote continued)

B. Plaintiffs Fail to Plead Reliance and Damages Under Any Pleading Standard

As noted above, the Court previously dismissed Plaintiffs' fraud claim for failure to plead reliance and damages with specificity. (Dkt. 162 at 14) ("TechCrunch has not alleged with adequate specificity how and to what extent it reasonably relied on each alleged misrepresentation and was damaged thereby.") Yet, as explained in Fusion Garage's Opening Brief, the allegations from the Amended Complaint are virtually identical in content and specificity to the allegations from the Original Complaint that this Court found lacking. (*See* Opening Br. (Dkt. 181) at 5-6.)

In response, Plaintiffs' Opposition cites a hodgepodge of allegations from the Amended Complaint that supposedly demonstrate reliance and damages.[3] As shown in the chart below, the vast majority of these cited allegations are (once again) virtual copies of the reliance and damages allegations from the Original Complaint that the Court found lacking under Rule 9(b):

RELIANCE AND DAMAGES ALLEGATIONS FROM *ORIGINAL* COMPLAINT	**RELIANCE AND DAMAGES ALLEGATIONS FROM *AMENDED* COMPLAINT**
"TechCrunch was approached by multiple software and hardware developers with offers to assist it in developing the CrunchPad. Based on Defendant's misrepresentations, TechCrunch selected Defendant over these other prospective partners, and thus relied upon Defendant's misrepresentations to its detriment." (¶ 49) "TechCrunch reasonably relied on Defendant's representations, promises and deceptions and	"Plaintiffs reasonably relied on Defendant's representations and omissions in continuing the collaboration; forgoing other business opportunities; and contributing money, time, effort, and services." (¶ 125) (Opp. Br. at 3.)

on the deceptive or unfair practice; and (3) the unfair or deceptive practice occurred during a course of conduct involving trade or commerce.") Because damages were not even an *element* of the claims in *United Air Lines* and *Smith,* it is self-evident that the plaintiffs in those cases were not required to plead damages with specificity under Rule 9(b).

[3] Plaintiffs repeatedly cite the *length* of their Amended Complaint, as if length alone could satisfy their pleading obligations. *See* Opp. Br. at 2 ("[t]he Amended Complaint is 24 pages long and includes 39 exhibits"); *id.* at 1 (same). However, the length of a Complaint does not establish that the Complaint is adequately pled. *See, e.g., Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997) ("a complaint can be long-winded, even prolix, without pleading with particularity. Indeed, such a garrulous style is not an uncommon mask for a lack of detail.")

contributed its money, effort, and services to help develop and market the CrunchPad." (¶ 100)	
"Substantially as a result of Defendant's conduct, TechCrunch has suffered damage in its business or property." (¶ 101)	"As a result of Defendant's conduct, Plaintiffs have suffered damage in their business and property." (¶ 126) (Opp. Br. at 4.)
"TechCrunch reasonably relied on Defendant's representations, promises and deceptions and contributed its money, effort, and services to help develop and market the CrunchPad." (¶ 100)	"Plaintiffs relied on the representations and omissions, were deceived by them, and were damaged by them." (¶ 100) (Opp. Br. at 4.)
"TechCrunch was approached by multiple software and hardware developers with offers to assist it in developing the CrunchPad. Based on Defendant's misrepresentations, TechCrunch selected Defendant over these prospective partners, and thus relied upon Defendant's misrepresentations to its detriment." (¶ 49)	"Plaintiffs attracted offers of assistance from multiple other software and hardware developers in developing the CrunchPad. Plaintiff declined these offers because of the joint venture arrangement it had with Fusion Garage." (¶ 101) (Opp. Br. at 4)
"TechCrunch's detailed contributions included the following: . . . the hosting of Fusion Garage personnel at TechCrunch's headquarters in California to promote the collaboration, the sponsorship of United States visas for Fusion Garage personnel . . ." (¶ 35)	"Fusion Garage asked Plaintiffs to sponsor visas for Fusion Garage personnel to come to the U.S. and finish the CrunchPad's development. Fusion Garage personnel came." (¶ 98) (Opp. Br. at 4.)[4]

Besides these recycled allegations from the Original Complaint, Plaintiffs cite only a few threadbare allegations to support their supposed reliance and damages. They allege, for instance, that "[t]he parties exchanged emails regarding the CrunchPad," "TechCrunch provided its Palo Alto offices as a workspace for Fusion Garage personnel working on the CrunchPad," "the parties communicated about the status of the CrunchPad," "Fusion Garage conducted a demonstration of the CrunchPad," and "Mr. Rathakrishnan t[old] Mr. Arrington and Mr. Kindle that he 'need[s] the LOI from you end.'" (Opp. Br. at 4 (citing Amended Complaint at ¶¶ 47, 48, 50, 52, 98 and Exs.

[4] The Amended Complaint does not allege that TechCrunch *actually* sponsored these visas; it merely alleges that Fusion Garage *asked* TechCrunch to sponsor these visas.

38-39).) As discussed below, these allegations are insufficient to plead reliance or damages.

1. Reliance

As the California Supreme Court has held, "[r]eliance exists where the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct *which altered his or her legal relations*." *Alliance Mortgage Co. v. Rothwell*, 10 Cal.4th 1226, 1239 (1995) (emphasis added); *see also Cal-Agrex, Inc. v. Van Tassell*, No. 07-0964, 2008 WL 191330, *3 (N.D. Cal. Jan. 22, 2008) (finding that plaintiff Cal-Agrex had not adequately pled reliance because "Cal-Agrex does not allege that it did anything which changed the legal relationship between it and Defendants after the waiver. It did not bind itself to new contractual obligations or release Goodwin or Van Tassell from existing obligations.")

Similarly, Plaintiffs here do not allege that they altered their legal relations with Fusion Garage or anyone else in "reliance" on Fusion Garage's alleged misrepresentations. The alleged misrepresentations occurred between September and November 2009 (*see* Amended Complaint at ¶ 98), well after the alleged "joint venture" between Plaintiffs and Fusion Garage had already supposedly come into being. (*See* Opp. Br. at 12) (alleging that the "joint venture" started in 2008). Thus, Plaintiffs cannot allege that they created the joint venture in reliance on Fusion Garage's alleged misrepresentations during the September '09 - November '09 period. Nor have Plaintiffs alleged that they entered into or abrogated any *third-party* relationships in supposed reliance on Fusion Garage's misrepresentations during this period. In short, Plaintiffs have failed to show that they "altered their legal relations" because of Fusion Garage's alleged misrepresentations, as is required to show reliance. Under *any* pleading standard – whether Rule 9(b) or Rule 8(a) – Plaintiffs' allegations fail to plead reliance under California law. Plaintiffs' attempt to turn a failure to perform a promise case into a fraud case must therefore be rejected. *See Legal Additions LLC v. Kowalski*, 2010 WL 335789, at *5 (N.D. Cal. Jan. 22, 2010) (dismissing plaintiff's fraud claim related to a breach of joint venture allegation because it was "essentially a cause of action for promissory fraud…").

2. Damages

Plaintiffs have also failed to plead damages. As discussed above, most of Plaintiffs'

damages allegations are vague and nonspecific. They simply allege in conclusory terms that Fusion Garage's alleged misrepresentations caused them to "contribut[e] money, time, effort, and services" (¶ 125) and "suffer[] damage in their business and property" (¶ 126); *see also* ¶ 100 ("Plaintiffs relied on the representations and omissions, were deceived by them, and were damaged by them.") These conclusory allegations are virtually identical to the damages allegations from the Original Complaint, which the Court already found insufficient under Rule 9(b). Thus, the Court should hold that the damages allegations from the Amended Complaint are also insufficient under Rule 9(b).

Moreover, even under a Rule 8(a) pleading standard, Plaintiffs would have to make a "plausible" case for damages. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"). Plaintiffs have not satisfied this burden. Rather, on the few occasions where the Amended Complaint *does* seek to specify the "time, effort, and services" that Plaintiffs expended in reliance on Fusion Garage, these allegations show inescapably that Plaintiffs did not suffer any *damages*.

For instance, as recounted in Plaintiffs' Opposition, Fusion Garage's alleged misrepresentations caused the parties to "exchange[] emails regarding the CrunchPad" and "communicate[] about the status of the CrunchPad." (Opp. Br. at 4 (citing Amended Complaint at ¶¶ 50, 98 and Ex. 38.)) It is implausible that Plaintiffs suffered cognizable *damages* merely because they wrote emails and engaged in communications. Similarly, Plaintiffs claim that "TechCrunch provided its Palo Alto offices as a workspace for Fusion Garage personnel" and "Fusion Garage conducted a demonstration of the CrunchPad at TechCrunch's Silicon Valley office." (Opp. Br. at 4 (citing Amended Complaint at ¶¶ 47, 48, 52.)) Again, it is implausible to infer that Plaintiffs suffered any damages merely by observing a product demonstration or letting Fusion Garage work out of their offices for some undisclosed period.

A fraud plaintiff needs to show ***actual, concrete damages*** to sustain a fraud claim; merely nominal damages are insufficient. *See Lusa Lighting, Int'l, Inc. v. Am. Elex, Inc.*, No. 07-674, 2008 WL 4350741, *9 (C.D. Cal. Sept. 22, 2008) ("neither nominal damages nor loss of profits

satisfy the element of damages in a fraud claim"); *Rasidescu v. Midland Credit Mgmt., Inc.*, 435 F.Supp.2d 1090, 1097 (S.D. Cal. 2006) ("In California, recovery under common law fraud is limited to 'actual damages suffered by the plaintiff.' 'Actual' is defined as 'existing in fact or reality,' as contrasted with 'potential' or 'hypothetical,' and as distinguished from 'apparent' or 'nominal.'). Thus, even if Plaintiffs could show some amorphous, nominal injury from their writing emails, observing product demonstrations, and opening up their offices to Fusion Garage, this would not show the *actual* damage necessary to sustain a fraud claim. There is no suggestion (or plausible inference) that Plaintiffs lost a single dollar as a result of these aforementioned actions. Similarly, Plaintiffs cannot show damages by alleging that they turned down other hardware and software developers in reliance on Fusion Garage. (*See* Amended Complaint, ¶ 101). It is purely speculative and hypothetical that these "other hardware and software developers" would have created a profitable product for Plaintiffs to share in, and hypothetical damages do not suffice for fraud. *See Rasidescu*, 435 F.Supp. 2d at 1097.

In sum, Plaintiffs have not made a "plausible" case under *any* pleading standard for the damages element of their fraud claim. Accepting all their allegations as true, Plaintiffs did not suffer any cognizable damages or injury from Fusion Garage's alleged misrepresentations during the September-November '09 time period.[5] Accordingly, Plaintiffs have failed to plead fraud, and their claim should be dismissed.

II. PLAINTIFFS' UNFAIR COMPETITION CLAIM CANNOT SURVIVE IN THE ABSENCE OF THEIR FRAUD CLAIM

Plaintiffs' Opposition ignores the Court's previous holding that "TechCrunch's claim

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[5] Perhaps recognizing that they have not adequately pled damages, Plaintiffs argue that they "could itemize damages with greater particularity but Plaintiffs have already provided Fusion Garage with detailed responses to its interrogatories nos. 13 and 14 in which Plaintiffs provided both a spreadsheet itemizing costs and a collection of receipts and invoices." (Opp. Br. at 5.) This reference to interrogatory responses is categorically improper, since it says nothing about whether Plaintiffs have adequately *pled* damages in their Amended Complaint. In any event, Plaintiffs' interrogatory responses did not purport to show what expenses Plaintiffs incurred during the critical September-November '09 time period (after Fusion Garage made its alleged misrepresentations).

under California's unfair competition law, Business & Professions Code § 17200, rises and falls with its ability to allege fraud adequately." (Dkt. 162 at 16.) Because Plaintiffs' have failed to adequately plead fraud, they cannot plead unfair competition.

III. PLAINTIFFS' FRAUD AND UNFAIR COMPETITION CLAIMS SHOULD BE DISMISSED *WITH PREJUDICE*

Plaintiffs' Opposition correctly states that: "In considering whether to grant leave to amend, a court may consider (1) bad faith; (2) undue delay; (3) prejudice to the defendant; (4) futility of amendment; and (5) whether the plaintiff has previously amended his or her pleadings." (Opp. Br. at 14.) Here, Plaintiffs have already had one opportunity to amend their pleadings. Moreover, as explained in Fusion Garage's Opening Brief, Fusion Garage is a small company that has already suffered significant economic prejudice by being forced to defend against Plaintiffs' legally insufficient pleadings. Plaintiffs should not be allowed to continue their "war of attrition" by filing yet *another* version of their fraud and unfair competition claims.

Moreover, any attempt to amend would be futile, and futility alone is sufficient to deny leave to amend. *See Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988) ("if a complaint is dismissed for failure to state a claim upon which relief can be granted, leave to amend may be denied, even if prior to a responsive pleading, if amendment of the complaint would be futile.") In *Albrecht*, the Ninth Circuit upheld the district court's decision to dismiss plaintiff's fraud claim with prejudice on the grounds that the alleged "misrepresentations" in the parties' conversation were mere statements of belief that could not support a fraud claim. *See id.* at 195-96. Plaintiff's request to amend his complaint and "allege more facts concerning the conversation" would have been futile, because the allegations in the *existing* complaint conclusively showed that there could be no actionable misrepresentation. *See id.*

Similarly, the allegations from Plaintiffs' Amended Complaint in this case conclusively show that there could be no reliance. The alleged misrepresentations upon which Plaintiffs base their fraud claim all occurred between September '09 and November '09. (*See* Amended Complaint, ¶ 98). Plaintiffs could not possibly allege that they "altered their legal relations" based on Fusion Garage's statements during this period, as necessary to show reliance, because Plaintiffs

also allege that the "joint venture" was formed long *before* this period and continued until Fusion Garage supposedly ceased its misrepresentations and disclosed its true plans in late November. (*See* Amended Complaint ¶ 84.) Because Plaintiffs could not possibly show that they "altered their legal relations" (*e.g.*, commenced or abrogated the alleged joint venture) in reliance on Fusion Garage's alleged misrepresentations, leave to amend would be futile.

Nor can Plaintiffs evade this conclusion by arguing that "discovery continues" and "this Court only recently ordered Fusion Garage to produce, by October 22, 2010, an assortment of allegedly 'trade secret' documents." (Opp. Br. at 5.) The "trade secret" documents that Plaintiffs refer to are technical documents and source code comments for Fusion Garage's product -- documents that have no bearing on the question of whether Plaintiffs "altered their legal relations" in reliance on Fusion Garage's alleged misrepresentations. In any event, Fusion Garage has already produced roughly 35,000 pages of documents, has provided original and supplemental responses to Plaintiffs' interrogatories, and has offered up its CEO for deposition. (*See* Opening Br. at 3-4.) Plaintiffs have had ample opportunity to take discovery on their fraud claim and could have pled it with particularity if the evidence supported it. Plaintiffs have not done so. They simply have no legally valid fraud claim to plead. Accordingly, their fraud and unfair competition claims should be dismissed with prejudice.

Conclusion

For the foregoing reasons, Fusion Garage respectfully requests that the Court dismiss Plaintiffs' fraud and unfair competition claims with prejudice.

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