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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

HANGINOUT, INC.,
 Plaintiff,
 vs.
 GOOGLE INC.,
 Defendant.

CASE NO. 13-CV-2811 AJB NLS
**REPLY MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT OF GOOGLE'S
 MOTION TO DISMISS
 HANGINOUT'S FIRST AMENDED
 COMPLAINT**

ORAL ARGUMENT REQUESTED
 Date: April 25, 2014
 Time: 2:00 p.m.
 Courtroom 3B
 Judge: Hon. Anthony J. Battaglia

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INTRODUCTION AND BACKGROUND

Hanginout filed its First Amended Complaint (“FAC”) instead of opposing Google’s motion to dismiss the original complaint. Among other things, it dropped one of its challenged claims entirely (15 U.S.C. § 1114), and it added allegations that it had “commercialized” its name in 2011, even though it had sworn to the USPTO that it had first used HANGINOUT in commerce a year later, in June 2012. Hanginout’s efforts to remedy its original pleading defects have only introduced new problems. The FAC’s allegations are legally insufficient to allege priority of common law trademark rights, which is required for Hanginout to state a claim.

Recognizing the FAC’s deficiencies, Hanginout now suggests that the Court look to the evidence submitted in connection with its motion for a preliminary injunction and allow its Complaint to survive based on facts outside of the pleadings. (Opp. at 7.) Hanginout’s suggestion is procedurally improper, and even if Hanginout were allowed to rely on that evidence, it confirms that Hanginout lacks sufficient evidence to support that it has priority of trademark rights. Hanginout has exclusive knowledge and control of the possible facts that would support the existence of such rights, and it does not identify any discovery that would yield facts that could salvage its claims. Google’s motion to dismiss therefore should be granted with prejudice, as further amendment would be futile.

ARGUMENT

I. HANGINOUT’S FEDERAL TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION CLAIMS (COUNTS I & II) SHOULD BE DISMISSED

A. The Allegations Hanginout Relies On In Its Opposition Should Not Be Credited Or Are Legally Irrelevant.

Hanginout contends that “Google ignores” relevant allegations that support its trademark and unfair competition claims. (Opp. at 1.) But Hanginout does not point to any plausible factual allegations that, if proven, would be sufficient to establish the foundational element of its claims: that it had common law trademark

1 rights in HANGINOUT before Google began using HANGOUTS in commerce.
2 Instead, it points to legal conclusions, allegations pled “on information and belief”
3 that are contradicted by facts raised in the complaint, abstract allegations that do not
4 convey meaningful facts, and allegations that are legally irrelevant to the question of
5 its common law rights. None of these is sufficient to defeat Google’s motion.

6 1. Hanginout Improperly Relies On Legal Conclusions.

7 Many of the allegations Hanginout relies on in its opposition are legal
8 conclusions of “substantial use” and “market penetration.” (Opp. at 1, 3, 5, 7
9 (citing FAC at ¶¶ 40, 41).) These cannot be credited on a motion to dismiss. Mere
10 “labels and conclusions, and a formulaic recitation of the elements of a cause of
11 action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
12 Summarily stating the required elements of a claim is not enough for a plaintiff to
13 defeat a motion to dismiss. In *Klein Elecs., Inc. v. Boxwave Corp.*, for example, the
14 plaintiff alleged for its dilution claim that it “has extensively advertised, marketed,
15 manufactured, and distributed goods under the Mark to dealers and the public
16 throughout the United States and worldwide and as a result has built up substantial
17 goodwill recognition in the Mark.” Case No. 10CV2197, 2011 WL2560238, at *2
18 (S.D. Cal. June 27, 2011). The court found that such a “formulaic recitation of the
19 elements” was insufficient and dismissed the complaint. *Id.* at *3. Similarly, here,
20 Hanginout’s “formulaic recitations” of use in commerce and market penetration (*see*
21 Opp. at 1; FAC ¶¶ 40, 41), are bare legal conclusions, which, without more, are
22 insufficient to withstand Google’s motion to dismiss.

23 2. Hanginout’s Legal Conclusion That Google’s First Use Date Is
24 May 15, 2013 Is Contradicted By Hanginout’s Own Complaint.

25 Hanginout’s opposition also depends on its legal conclusion that “Google’s
26 first use of the ‘Hangouts’ mark is on or after May 15, 2013.” (Opp. at 2, FAC
27 ¶ 26; *see also* FAC ¶¶ 27, 41.) But that “on information and belief” allegation is
28 contradicted by the document incorporated by reference in the prior paragraph of the

1 FAC, which states that “on June 28, 2011 Google’s official blog contained an
2 announcement for the Google+ project.” (FAC ¶ 25.) Included within the
3 announcement for Google+ was Google’s announcement of Hangouts. (*Id.*) That
4 announcement is properly before the Court because “documents specifically
5 identified in the complaint whose authenticity is not questioned by [the] parties”
6 may be considered on a motion to dismiss, and “the court may consider the full text
7 of those documents, even when the complaint quotes only selected portions.” *Blue*
8 *Dolphin Charters, Ltd. v. Knight & Carver Yachtcenter, Inc.*, Case No. 11-cv-565-
9 L(WVG), 2012 WL1185945, at *3 (S.D. Cal. April 9, 2012) (citation omitted).

10 Google’s announcement unequivocally uses “Hangouts” on June 28, 2011 in
11 connection with the video conferencing service it has continuously offered since that
12 time: “With Google+ we wanted to make on-screen gatherings fun, fluid and
13 serendipitous, so we created Hangouts. By combining the casual meetup with live
14 multi-person video, Hangouts lets you stop by when you’re free, and spend time
15 with your Circles.” (Caruso Declaration, ¶ 2, Ex. 1 (emphasis added); *see also id.* ¶
16 3, Ex. 2.) Thus, the facts incorporated by reference in Paragraph 25 of Hanginout’s
17 FAC contradict the FAC’s other “information and belief” allegations concerning
18 Google’s first use (i.e., FAC ¶ 26), undermine Plaintiff’s argument that Google
19 “misreads” the complaint by focusing on the June 28, 2011 launch of Hangouts
20 (Opp. at 2-3), and render irrelevant all allegations of market penetration and use of
21 HANGINOUT that occurred *after* June 28, 2011 (e.g., FAC ¶ 27). *E.g., Optimal*
22 *Pets v. Nutri-Vet, LLC*, 877 F. Supp. 2d 953, 958 (C.D. Cal. 2012) (The issue “is
23 whether, as of the date that Defendants used the name ‘Optimal Pet’ in commerce
24 ..., OPI had acquired common law trademark rights with regard to a geographical
25 area in which Defendants used the name.”). Hanginout’s insistence on referring to
26 Google’s first use date of HANGOUTS as May 15, 2013, when Google launched
27 the instant *messaging* feature of Hangouts (e.g., FAC ¶ 27), is misleading and
28 contradicted by the plain text of the June 28, 2011 announcement Paragraph 25

1 incorporated by reference. A court is “not required to accept as true conclusory
2 allegations which are contradicted by documents referred to in the complaint.”
3 *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

4 Unable to avoid the June 2011 date, Hanginout invites the Court to consider a
5 Wikipedia page as conclusive proof of when Google first launched Hangouts.
6 (Opp. at 3.) That effort should be rejected. “Generally, a district court may not
7 consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion,”
8 other than material that “is properly submitted as part of the complaint.” *Hal*
9 *Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir.
10 1990). Moreover, Wikipedia is a website that anyone can edit. It is not an official
11 source of information about Google or Hangouts and is not a more reliable source of
12 information about Google than its own official June 28, 2011 blog post announcing
13 the launch of Hangouts.¹ *See, e.g., In re Yagman*, 473 Fed. Appx. 800, 801 n.1 (9th
14 Cir. 2012) (declining to take judicial notice of a Wikipedia page, citing Fed. R.
15 Evid. 201(b)(2), which permits judicial notice only of facts that “can be accurately
16 and readily determined from sources whose accuracy cannot reasonably be
17 questioned”); *Gonzales v. Unum Life Ins. Co. of America*, 861 F. Supp. 2d 1099,
18 1104 n.4 (S.D. Cal. 2012) (“The Court declines Plaintiff’s request to take judicial
19 notice of the Wikipedia definition [T]he Court prefers a more credible
20 source.”).

21 3. Hanginout’s Newly Alleged First Use Date Is Implausible.

22 Hanginout does not even address, let alone explain, the fact that in its sworn
23 statements to the USPTO, Hanginout claimed—four separate times—a first use date
24

25 ¹ The Wikipedia entry is contradicted not only by Google’s incorporated-by-
26 reference June 28, 2011 announcement, but also by a host of other third-party press
27 at that time, including those referenced in Paragraph 3 of the Declaration of Ellory
28 Long submitted in support of Google’s Opposition to Hanginout’s Motion for a
Preliminary Injunction and attached to that declaration as Exhibit 1 (Dkt. 30-25).

1 of June 6, 2012, almost a year later than the first use date it now claims in this
2 lawsuit. (FAC ¶ 22, Exs. A, B.) This omission is glaring. Because Hanginout
3 submitted sworn statements to the USPTO regarding its date of first use of the
4 marks anywhere and also the first date of the use of the marks in commerce, it must
5 prove any earlier date by clear and convincing evidence. *Wells Fargo & Co. v.*
6 *Stagecoach Props., Inc.*, 685 F.2d 302, 304 n.1 (9th Cir. 1982). Hanginout has not
7 demonstrated that it has any proof of a legally operative earlier first use date, let
8 alone clear and convincing evidence of one.

9
10 **B. Hanginout’s Allegations Of Prior Use and Market Penetration Are
Insufficient To Establish Common Law Trademark Rights.**

11 Hanginout’s factual allegations are also insufficient to adequately allege
12 priority of use, which is required for it to have a cognizable trademark infringement
13 claim. A complaint may be dismissed at the pleading stage “based on the lack of a
14 cognizable legal theory *or the absence of sufficient facts* alleged under a cognizable
15 legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
16 1990) (emphasis added). While Hanginout need not “plead every detail or prove
17 every fact” that it will rely upon at trial (Opp. at 6), “[t]o survive a motion to
18 dismiss, a complaint must contain sufficient factual matter, accepted as true, to
19 ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.
20 662, 678 (2009) (emphasis added) (quoting *Twombly*, 550 U.S. at 544, 570). “A
21 claim has facial plausibility when the plaintiff pleads *factual content* that allows the
22 court to draw the reasonable inference that the defendant is liable for the misconduct
23 alleged.” *Id.* (emphasis added). Hanginout does not and cannot do that.

24
25 1. Hanginout’s Factual Allegations Are Too Vague And Abstract
To Be Credited.

26 The FAC’s only “facts” relating to Plaintiff’s alleged pre-June 2011 use of
27 “HANGINOUT” are insufficient to state a cognizable claim. “Factual allegations
28 must be enough to raise a right to relief above the speculative level.” *Twombly*, 550

1 U.S. at 555. Hanginout’s vague allegations that it “began” an “advertising
2 campaign through Facebook” in March 2010 and had “an aggressive marketing
3 campaign” (Opp. at 4) (citing FAC, ¶¶ 17-20) are not sufficiently detailed to state a
4 plausible claim of priority. References to “an advertising campaign,” without any
5 allegations of what advertising made up the campaign, how many potential
6 consumers saw it, how much money, if any, Hanginout spent, where the ads ran, or
7 how successful the campaign was cannot establish facts that, if true, would prove
8 that Hanginout had meaningful public use in commerce or market penetration before
9 Google began using HANGOUTS. Likewise, the mere fact of posting a “Facebook
10 profile” provides no meaningful information about how many consumers saw or
11 noticed this page. *E.g., Future Domain Corp. v. Trantor Sys. Ltd.*, Civ. No. C 93
12 0812, 1993 WL270522, at *7 (N.D. Cal. May 3, 1993). The true test of an
13 advertising campaign’s success is the number of users it converts to the product.
14 *E.g., Art Attacks Ink, LLC v. MGA Entertainment Inc.*, 581 F.3d 1138, 1146 (9th Cir.
15 2009). Hanginout alleges no facts that allow the Court to draw a reasonable
16 inference that “an appropriate segment of the public mind” came to identify the
17 alleged mark with Hanginout’s goods or services. *Seltzer v. Green Day, Inc.*, 725
18 F.3d 1170, 1180 (9th Cir. 2013).

19 The remaining allegations that Hanginout relies on in its opposition (Opp. at
20 1, 4 (citing FAC, ¶¶ 10-16)) are legally irrelevant to the question of its ability to
21 establish common law trademark rights that it can enforce against Google.
22 Paragraphs 9 and 12 to 15 describe what Hanginout’s app does. They do not
23 mention dates on which the public actually acquired the app. (FAC, ¶¶ 9, 12-15.)
24 And Paragraphs 10, 11, and 16 describe activity that does not reflect public use in
25 commerce, such as when Plaintiff “adopted” HANGINOUT, internally developed
26 its platform, and began shooting promotional videos. (Opp. at 4 (citing FAC, ¶¶
27 10,11, 16).) Plaintiff does not challenge the authority cited in Google’s opening
28 brief that “[a]n intent to eventually commercially exploit an idea is not sufficient to

1 confer trademark rights or meet the ‘in commerce’ requirement.” *Schussler v.*
2 *Webster*, Civ. No. 07cv2016 IEG (AGB), 2008 WL 4350256, at * 4 (S.D. Cal. Sept.
3 22, 2008), *amended and vacated in part on other grounds on reconsideration*. Nor
4 does it dispute that “[t]he fact that a party first conceived the mark and discussed it
5 with others in or outside of the organization in anticipation of and in preparation for
6 a subsequent use in trade does not constitute an ‘open’ use and therefore does not
7 establish priority as of the date of the conception or of these discussions.” *Future*
8 *Domain*, 1993 WL 270522 at *6 (citation omitted).

9
10 2. Hanginout’s Factual Allegations Of Alleged Public Uses Before
June 2011 Do Not Establish Common Law Trademark Rights.

11 The only indicia of any marketing “success” Hanginout achieved is its
12 allegation that “[b]y May of 2011, over 200 customers had actually registered for
13 and used Version 1.0 of the HANGINOUT Q&A platform.” (FAC, ¶ 20.) Even if
14 true, that is legally insufficient to plead the use in commerce or market penetration
15 necessary to establish common law trademark rights. (*See* Google’s Mot. at 3-8.)

16 Hanginout conspicuously fails to address the highly instructive *Glow*
17 *Industries, Inc. v. Lopez*, 252 F. Supp. 2d 962, 980-81 (C.D. Cal. 2002). In *Glow*,
18 the court found that “GLOW” beauty products had not achieved sufficient market
19 penetration to establish common law trademark rights in any specific geographic
20 area even though they were mentioned in *InStyle* and *Los Angeles* magazines and
21 had been sold to customers in all fifty states, including through prominent retail
22 stores, such as Nordstrom, Ritz Carlton Hotels, and its own website. *Id.* at 983-986.
23 Hanginout’s allegations of market penetration are far less—200 purported users, a
24 Facebook page and some failed social-media marketing efforts. (FAC ¶¶ 17-20.)

25 Of the authority Hanginout does attempt to distinguish, it argues those cases
26 (*see* Google’s Mot. at 4-8) are not on point because they were not decided at the
27 motion to dismiss stage. (Opp. at 4-7 (discussing *Future Domain*, *Garden of Life v.*
28 *Letzer*, 318 F.Supp. 2d 946, 958-60 (C.D. Cal. 2004) and *Optimal Pets*.) But they

1 nonetheless demonstrate that even what Hanginout has alleged at this stage is
2 insufficient to state a plausible claim of seniority of use and market penetration
3 because Plaintiff has alleged less than what those cases found insufficient.

4 Hanginout’s effort to distinguish these cases factually also fails. It cannot
5 escape that *Future Domain* found that advertising a product at the key domestic
6 industry trade show, where up to 143,000 people may have seen the mark,
7 distributing 3,500 information fliers and 1,000 corporate brochures containing the
8 mark, obtaining 2,400 completed inquiry forms, and receiving and fulfilling over
9 200 requests for preliminary versions of the product “did not create a sufficient
10 association in the public mind between the mark and [the company]” to establish
11 seniority of use because the fact that it “took no orders for its product at COMDEX
12 undermines its claim to have created a sufficient association in the public mind
13 between [the disputed mark] and Future Domain.” 1993 WL270522, at **1-8. As
14 Plaintiff recognizes, “market acceptance is a critical prerequisite for profitability to
15 facilitate goodwill and a customer base.” (Opp. at 5.) But it cites no authority that
16 its allegation of 200 users (of unidentified national or regional origin) is sufficient to
17 show market acceptance, much less “a sufficient association in the public mind
18 between” Plaintiff and HANGINOUT. *Future Domain*, 1993 WL270522, at *8.

19 Similarly, the court in *Garden of Life v. Letzer* found that evidence of
20 “sporadic” sales was insufficient to demonstrate priority of use. 318 F. Supp. 2d at
21 957-60. Hanginout argues that the party asserting priority “conceded” it did not use
22 the mark continuously. (Opp. at 5.) But that is not a basis for distinction here.
23 Although Hanginout’s FAC conclusorily recites that it engaged in continuous use, it
24 actually alleges only vague, sporadic activity before June 2011. (FAC ¶¶ 10-11,
25 16-20). Thus, its factual allegations are comparable to the declaration of use in
26 *Garden of Life*, which did “not describe how frequently the business made sales,
27 how many sales it made, to whom the sales were made or whether any sales were
28 made to out-of-state customers” during the relevant time period. 318 F. Supp. 2d at

1 958.

2 Likewise, Hanginout’s allegations fail to exceed (or even equal) what the
3 court in *Optimal Pets* held to be insufficient evidence of market penetration—i.e.,
4 the plaintiff maintained a website, sold \$35,000 in pet supplies in 16 states, and
5 spent \$100,000 in advertising. 877 F. Supp. 2d at 962-964 . Hanginout admits
6 *Optimal Pets* had “meager evidence of market penetration” (Opp. at 7), but
7 Hanginout’s allegations are more meager. For the time period before June 2011, it
8 alleges scant promotional efforts, no sales, no geographic locations of its alleged
9 200 users, and no positive growth trends. (Cf. Opp. at 6-7.) For example, the
10 “extensive promotional efforts” that Hanginout points to in the FAC (Opp. at 7) are
11 either bald legal conclusions or vague assertions of “views” and “downloads,”
12 apparently before Hanginout’s incorrect (and internally contradicted) allegation of
13 Google’s first use date of *May 15, 2013*. (FAC ¶¶ 27, 40-41.) Bereft of legally
14 adequate allegations, Hanginout invites the Court to look to the Motion for
15 Preliminary Injunction for “factual support.” (Opp. at 7.) But a court may not
16 consider documents beyond the pleadings other than documents incorporated by
17 reference when deciding a motion to dismiss. *Hal Roach Studios*, 896 F.2d at 1555
18 n.19.

19 Hanginout also asserts that it should be held to a different standard than the
20 plaintiffs in *Future Domain*, *Garden of Life*, and *Optimal Pets* because it provides
21 services, not just products. (Opp. at 6.) This argument has no merit. “Service
22 marks and trademarks are governed by identical standards.” *Lahoti v. VeriCheck*,
23 586 F.3d 1190, 1194 n.1 (9th Cir. 2009) (citation omitted). Further, the
24 unpublished District Court of Tennessee decision *Taylor v. Thomas* (Opp. at 6) is
25 neither binding nor relevant. Case No. 2:12-CV-02309, 2013 WL228033 (W.D.
26 Tenn. Jan. 22, 2013). The *Taylor* court was not deciding whether the plaintiff had
27 *priority* of commercial use; instead, the question was whether the plaintiff’s use of
28 the service mark on the Internet was sufficient to show *continued* use and an implied

1 assignment. *Id.*, at *7-8. Here, the analysis centers on whether Hanginout has
2 sufficiently alleged priority of use, and for that inquiry, market penetration and
3 widespread recognition are required even where the mark is a service mark. *See*,
4 *e.g.*, *Credit One Corp. v. Credit One Financial, Inc.*, 661 F. Supp. 2d 1134, 1138
5 (C.D. Cal. 2009). Because Hanginout has not alleged plausible facts of market
6 penetration, the FAC should be dismissed.

7 **II. HANGINOUT’S STATUTORY AND COMMON LAW UNFAIR**
8 **COMPETITION CLAIMS (COUNT III) SHOULD BE DISMISSED**

9 Hanginout concedes its state unfair competition claims are “‘substantially
10 congruent’ to a Lanham Act violation.” (Opp. at 8.) Accordingly, they fail for the
11 same reasons as its federal Lanham Act claims.

12 **III. HANGINOUT SHOULD NOT BE GRANTED LEAVE TO AMEND**

13 Hanginout should not be granted leave to amend its complaint. “A district
14 court does not err in denying leave to amend where the amendment would be futile
15 or where the amended complaint would be subject to dismissal.” *Saul v. U.S.*, 928
16 F.2d 829, 843 (9th Cir. 1991) (internal citation omitted). Hanginout has already
17 amended its complaint once and has filed a motion for a preliminary injunction that
18 presumably contains its best evidence. Yet it is still unable to allege a plausible
19 claim for seniority of use or market penetration. It is apparent that amendment
20 would be futile. Therefore, Hanginout should not be granted leave to amend.

21 **CONCLUSION**

22 For the foregoing reasons, Hanginout’s FAC should be dismissed in its
23 entirety.

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DATED: April 4, 2014

Respectfully submitted,

/s/ Margret M. Caruso
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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2014, I will cause to be filed the foregoing **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GOOGLE’S MOTION TO DISMISS HANGINOUT’S FIRST AMENDED COMPLAINT** with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to counsel for Plaintiff Hanginout, Inc.

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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