



1 Plaintiffs allege that “Fuhu, Inc., is the creator of NABI, the world’s first full-featured  
2 Android tablet made especially for kids.” *Id.* at 2. Plaintiffs met with TRU, a large toy  
3 retailer, several times in September and October 2011 to discuss the NABI product including  
4 business strategy, marketing, and rollout plans. On September 28, 2011, the parties signed a  
5 non-disclosure agreement (“NDA”) which states, in relevant part:

- 6 1. Each party acknowledges that all of the information provided to the other  
7 party (the “Receiving Party”) is confidential, proprietary and a trade secret of the  
8 party disclosing such information (the “Disclosing Party”)....  
9 4. The Receiving Party’s obligation regarding the Confidential Information shall  
10 not apply to Confidential Information, which ...  
11 a. was already known to the Receiving Party prior to disclosure of it to the  
12 Receiving Party by the Disclosing Party...  
13 d. was known to the public or generally available to the public prior to the  
14 date of disclosure by the Disclosing Party; ...  
15 f. is independently developed by the Receiving Party....  
16 8.... If the Receiving Party breaches this Agreement or discloses any  
17 Confidential Information other than as permitted by this Agreement, the  
18 Disclosing Party shall suffer immediate and irreparable harm for which money  
19 damages shall not constitute a full and adequate remedy....

20 (ECF No. 50). On October 29, 2011, the parties signed an exclusive distribution agreement  
21 (“Exclusivity Agreement”) under which TRU would be the exclusive distributor of NABI.  
22 Under the terms of the Exclusivity Agreement, TRU agreed to place orders for 10,000 NABI  
23 tablets by December 31, 2011, and to place orders for 500,000 more NABI tablets throughout  
24 2012. TRU also agreed to undertake specific marketing and merchandising actions to support  
25 the NABI sales in their stores. In January 2012, Plaintiffs terminated the Exclusivity  
26 Agreement with Defendants.

27 Plaintiffs allege that “on September 10, 2012, TRU announced with great fanfare its  
28 ‘proprietary’ tablet for children, TABEO.” (ECF No. 1 at 2). Plaintiffs allege that “[t]he  
TABEO product and related marketing bear a striking and not coincidental similarity to Fuhu’s  
NABI product and the collateral proprietary information that Fuhu disclosed to TRU under  
strict confidentiality. TRU used Fuhu’s trade secrets and confidential information to start  
selling TABEO, which systematically attempts to replicate the NABI experience ....” *Id.* at 4.  
Plaintiffs allege that “TABEO not only is confusingly similar to NABI’s iconic butterfly shape  
reflected in the Nabi trademarks and trade dress, but also TRU’s advertising and promotional  
materials are derived from the business plan Fuhu shared with TRU on a basis of strict

1 confidentiality.” *Id.* Plaintiffs allege that “TRU has used and continues to use Fuhu’s  
2 confidential information, trade secrets, and other intellectual property [regarding NABI] to  
3 prepare, market, and sell TABEO.” *Id.*

4 On September 25, 2012, Plaintiffs filed an Ex Parte Motion for Temporary Restraining  
5 Order and Order to Show Cause for Issuance of Preliminary Injunction. (ECF No. 11).  
6 Plaintiffs seek a temporary restraining order enjoining Defendants:

- 7 (1) from taking pre-orders from consumers for: (i) the TABEO product (or ...  
8 the functional equivalent ...) or (ii) the TABEO product’s bumper with flared  
9 corners (or ... the functional equivalent ...);  
10 (2) from selling to consumers or otherwise delivering to consumers (i) the  
11 TABEO product (or ... the functional equivalent ...) or (ii) the TABEO  
12 product’s bumper with flared corners (or ... the functional equivalent ...);  
13 (3) from having the word “nabi,” which is trademarked to Fuhu (NABI),  
14 included in any keyword search functionality for any website controlled by  
15 TRU (including but not limited to www.toysrus.com) .... ;  
16 (4) from further using any of Fuhu’s trade secrets and other confidential  
17 information disclosed to TRU pursuant to the parties’ Non-Disclosure  
18 Agreement, including in marketing materials promoting the TABEO product  
19 (or ... the functional equivalent ...);  
20 (5) from further infringing Fuhu’s Flared Corner Trade Dress, including in  
21 marketing materials promoting the TABEO product (or ... the functional  
22 equivalent ...).

23 *Id.* at 2. Plaintiffs seek this injunction on the merits of their claims for trade secret  
24 misappropriation, trade dress infringement, and trademark infringement.

25 On October 4, 2012, Defendants filed an opposition and a motion to exclude the  
26 declaration of William Bleuel filed in support of Plaintiffs’ motion. (ECF Nos. 35, 39). On  
27 October 10, 2012, Plaintiff filed a reply. (ECF No. 74). On October 13, 2012, Defendants  
28 filed a motion to strike the declaration of James Mitchell filed in support of the reply. (ECF  
No. 83). On October 17, 2012, the Court heard oral argument on the motion. (ECF No. 94).

### DISCUSSION

23 “[A] preliminary injunction is an extraordinary and drastic remedy, one that should not  
24 be granted unless the movant, by a *clear showing*, carries the burden of persuasion.” *Mazurek*  
25 *v. Armstrong*, 520 U.S. 968, 972 (1997) (quotation omitted). When the nonmovant has  
26 received notice, as here, the standard for issuing a temporary restraining order is the same as  
27 that for issuing a preliminary injunction. *See Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*,  
28 240 F.3d 832, 839 n.7 (9th Cir. 2001).

1 The party seeking preliminary injunctive relief has the burden to show “that he is likely  
2 to succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
3 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the  
4 public interest.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

5 The Court of Appeals for the Ninth Circuit has articulated a standard “under which a  
6 preliminary injunction could issue where the likelihood of success is such that serious  
7 questions going to the merits were raised and the balance of hardships tips sharply in  
8 [plaintiff’s] favor.” *Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1131 (9th Cir. 2010)  
9 (citation omitted). The test applies a sliding scale approach in which “the elements of the  
10 preliminary injunction test are balanced, so that a stronger showing of one element may offset  
11 a weaker showing of another.” *Id.*; see also *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir.  
12 2011) (holding that the sliding scale approach to preliminary injunctions continues to be viable  
13 after *Winter* “so long as a certain threshold showing is made on each [*Winter*] factor”).

14 The Court of Appeals for the Ninth Circuit has held that, in a trademark infringement  
15 claim, irreparable injury may be presumed from a showing of likelihood of success on the  
16 merits. *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1038 (9th Cir. 2003), quoting  
17 *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 n.4 (9th Cir. 2000); see also *Marilyn*  
18 *Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 877 (9th Cir. 2009)  
19 (upholding district court’s finding of irreparable harm in trademark infringement matter when  
20 party is likely to prevail on merits).

21 **A. Likelihood of Success on the Merits**

22 **1. Trade Secret Misappropriation**

23 Plaintiffs contend that their business plans and related strategies for NABI were  
24 developed through great expense and effort, and qualify as trade secrets. Plaintiffs contend  
25 that NABI has a uniquely branded ecosystem, including hardware, software, content and  
26 service bundles, accessories, application stores, parental controls, marketing strategy and  
27 merchandising, that was discussed in detail with Defendants along with planned technical  
28 features and implementation for the tablet. Plaintiffs contend that Defendants purposefully

1 misappropriated Plaintiffs' confidential business plans for NABI, which were disclosed to  
2 Defendants in strict confidence, to assist them in the development and marketing of TABEO.  
3 Plaintiffs contend that Defendants used Plaintiffs' trade secrets to develop their own children's  
4 tablet and that the advertising and promotional materials for TABEO were derived from  
5 Plaintiffs' business plan for NABI.

6 Defendants contend that the information Plaintiffs shared with them regarding business  
7 strategies and product ideas was publicly-available and already well known within the retail  
8 consumer electronics community. Defendants contend that children's tablets and accessories  
9 were already sold on the market when Fuhu and TRU first met, and that TRU had been  
10 independently developing their own children's tablet before meeting with Fuhu. Defendants  
11 contend that Fuhu is an electronic software company with no experience in marketing or  
12 product design, and that Fuhu did not disclose any marketing or product design trade secret  
13 information to TRU in their 2011 meetings.

14 To prevail on a claim for misappropriation of trade secret under New Jersey law<sup>1</sup>, the  
15 trade secret owner must establish that: (1) a trade secret exists; (2) information comprising a  
16 trade secret was communicated in confidence; (3) the secret information was disclosed in  
17 breach of that confidence; (4) the secret information was acquired by someone else with  
18 knowledge of the breach; (5) the secret information was used to the detriment of the trade  
19 secret owner; and (6) the trade secret owner took precautions to maintain the secrecy of the  
20 trade secret. *Rycoline Products, Inc. v. Walsh*, 334 N.J. Super. 62, 71 (N.J. Super. A.D. 2000).  
21 The subject matter of trade secret must not be a matter of public or general knowledge within  
22 an industry. *Sun Dial Corp. v. Rideout*, 16 N.J. 252, 257 (N.J. 1954). "A trade secret may also  
23 include pricing and marketing techniques." *Communications Workers of Am. v. Rousseau*, 417  
24 N.J. Super. 341, 361 (N.J. Super. A.D. 2010). However, "the definition of trade secret does not  
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26 <sup>1</sup>The NDA states that "[t]his agreement shall be governed by and construed in  
27 accordance with the internal laws of the State of New Jersey." (Compl. Exh. B; ECF No. 50).  
28 Defendants argue that the Exclusivity Agreement supercedes the NDA, and the terms of the  
Exclusivity Agreement state that California law shall apply to any disputes between the parties.  
However, both parties apply New Jersey law in discussing Plaintiffs' claim for trade secret  
misappropriation.

1 include a marketing concept or a new product idea.” *Johnson v. Benjamin Moore & Co.*, 347  
2 N.J.Super. 71, 96 (N.J.Super.A.D. 2002) (finding that plaintiff’s “broad concept of marketing  
3 materials for murals for the masses are not trade secrets.”).

4 In order to identify the trade secrets conveyed to TRU, Plaintiffs submit a chart prepared  
5 by Fuhu CEO James Mitchell titled “Summary of Trade Secrets Fuhu Provided to TRU.”  
6 (ECF No. 13-8). Plaintiffs also submit a “List of [NABI] Products and Accessories” that was  
7 emailed to Defendants in October 2011. (ECF No. 13-4). The “Summary of Trade Secrets  
8 Fuhu Provided to TRU” contains general business strategies for the NABI including the broad  
9 principles of “Volume, Quality, Accessories, Category Dominance, and Digital Distribution”  
10 to be applied in marketing a new product. (ECF No. 13-8). The Court concludes that the  
11 concepts and ideas that Plaintiffs have identified as “trade secrets,” summarized in Exhibit G  
12 to James Mitchell’s declaration, are general business concepts and broad marketing ideas that  
13 do not fit within the definition of trade secret under New Jersey law. *See Benjamin Moore &*  
14 *Co.*, 347 N.J.Super. at 96. Based on the evidence in the record, Plaintiffs have failed to meet  
15 their burden of showing a likelihood of success on the merits of their claim for trade secret  
16 misappropriation.

## 17 2. Trade Dress Infringement

18 Plaintiffs contend that they have common law trade dress rights to the shape of NABI  
19 “bumpers,” or flexible contoured covers for the tablet. Plaintiffs contend that their use of the  
20 butterfly-shaped NABI bumper is non-functional and that the bumper shape has acquired  
21 secondary meaning in the market. Plaintiffs contend that secondary meaning is established by  
22 traffic to their website, the popularity of their facebook page, and NABI sales to date.  
23 Plaintiffs contend that the shape of TABEO is similar to the shape of NABI and will cause  
24 confusion in the minds of consumers between the two products. Plaintiffs contend that TRU  
25 infringed on Plaintiffs’ distinctive trade dress for the butterfly-shaped, flared corners of the  
26 NABI bumper when they designed the TABEO bumper.

27 Defendants contend that Plaintiffs cannot establish any protectable trade dress in the  
28 NABI bumper or any likelihood of confusion in the market between NABI and TABEO.

1 Defendants contend that the shape of the NABI bumper is inherently functional to protect the  
2 tablet from damage. Defendants contend that Plaintiff has submitted no evidence to carry its  
3 burden to show that the NABI bumper has acquired secondary meaning among consumers.  
4 Defendants contend that the functional shape and design of the NABI bumper is similar to  
5 many other bumpers on the market created to provide the same functional purpose.

6 “Trade dress refers to the total image of a product and may include features such as size,  
7 shape, color, color combinations, texture or graphics.” *Disc Golf Ass’n, Inc. v. Champion*  
8 *Discs, Inc.*, 158 F.3d 1002, 1005 n.3 (9th Cir. 1998). To establish trade dress infringement,  
9 a claimant must show: (1) that its product design is non-functional, (2) that the design is  
10 inherently distinctive or has acquired a secondary meaning, and (3) that there is a likelihood  
11 of confusion. *Cont’l Lab. Products, Inc. v. Medax Int’l, Inc.*, 114 F.Supp.2d 992, 997 (S.D.  
12 Cal. 2000); *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210 (2000) (“The text  
13 of § 43(a) provides little guidance as to the circumstances under which unregistered trade dress  
14 may be protected. It does require that a producer show that the allegedly infringing feature is  
15 not ‘functional,’ ... and is likely to cause confusion with the product for which protection is  
16 sought .... [A] product’s design is distinctive, and therefore protectable, only upon a showing  
17 of secondary meaning”).

18 To determine whether a product’s trade dress design is functional, the Court may  
19 consider four factors: (1) whether the trade dress yields a utilitarian advantage, (2) whether  
20 alternative designs are available, (3) whether advertising touts the utilitarian advantages of the  
21 design, and (4) whether the particular design results from a comparatively simple or  
22 inexpensive method of manufacture. *Disc Golf Ass’n*, 158 F.3d at 1006. “If a seller advertises  
23 the utilitarian advantages of a particular feature, this constitutes strong evidence of  
24 functionality.” *Id.* at 1009, citing *McCarthy on Trademarks and Unfair Competition* § 7:74 at  
25 7-152. There is evidence in the record that the NABI bumper, like contoured covers available  
26 as accessories to other tablets, serves to protect the tablet from damage. Based on the evidence  
27 in the record, the Court concludes that Plaintiffs have failed to show that the design of the  
28 NABI bumper is non-functional.

1           Secondary meaning exists when, “in the minds of the public, the primary significance  
2 of a [mark] is to identify the source of the product rather than the product itself.” *Wal-Mart*  
3 *Stores*, 529 U.S. at 211. To show secondary meaning, a plaintiff must demonstrate a mental  
4 recognition in buyers’ minds that products connected with the mark are associated with the  
5 same source. *Art Attacks Ink, LLC v. MGA Entertainment Inc.*, 581 F.3d 1138, 1145 (9th Cir.  
6 2009). Direct evidence of secondary meaning, such as consumer surveys and consumer  
7 testimony, provides the strongest evidence of secondary meaning. *Cont’l Lab. Prod.*, 114  
8 F.Supp.2d at 1000. Secondary meaning may also be established through circumstantial  
9 evidence such as “exclusivity, manner, and length of use, amount and manner of advertising,  
10 amount of sales and the number of customers, and plaintiffs established place in the market.”  
11 *Id.* “[P]laintiff bears the burden of showing its... design obtained secondary meaning before  
12 the defendant commenced its allegedly infringing activities.” *Id.* at 999. The Court concludes  
13 that Plaintiffs have failed to submit direct or circumstantial evidence sufficient to show that  
14 the design of the NABI bumper has obtained secondary meaning in the consumer market.  
15 Based on the evidence in the record, Plaintiffs have failed to meet their burden of showing a  
16 likelihood of success on the merits of their claim for trade dress infringement.

### 17           **3. Trademark Infringement**

18           Plaintiffs contend that Defendants infringed the NABI work mark because online search  
19 results for “nabi” on the TRU web page yield images of TABEO products and accessories.  
20 Plaintiffs submit a screen shot of the Toys “R” Us webpage after the word “nabi” has been  
21 entered into the website’s search screen. (Mitchell Decl. ¶ 116; ECF No. 13-1). The results  
22 show three different brands of children’s tablets, including TABEO, and numerous TABEO  
23 accessories. Plaintiffs contend that this demonstrates Defendants’ intent to trade off the  
24 goodwill and reputation of the NABI mark in marketing TABEO product and accessories.

25           Defendants contend that their products do not use any of Plaintiffs’ trademarks and that  
26 Plaintiffs cannot identify any TRU product that violates the NABI mark. Defendants contend  
27 that there is no confusion among consumers between NABI and TABEO. Defendants assert  
28 that they have changed their online search features to yield no results when the word “nabi”



1 is entered into the search field.

2 To establish a trademark infringement claim under the Lanham Act, plaintiff must  
3 establish that defendant is using a mark confusingly similar to a valid, protectable trademark  
4 of the plaintiff. *Brookfield Communications, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036,  
5 1046 (9th Cir. 1999). The test for likelihood of confusion in a trademark infringement action  
6 is whether a reasonably prudent consumer in the marketplace is likely to be confused as to the  
7 origin of the good or service bearing one of the marks. *Entrepreneur Media, Inc. v. Smith*, 279  
8 F.3d 1135, 1140 (9th Cir. 2002).

9 Plaintiffs do not provide any evidence that Defendants used the word “nabi” or the  
10 circular splatter design on any TRU product. Plaintiffs have shown that, at the time their  
11 motion for temporary restraining order was filed, a search for “nabi” on TRU’s website yielded  
12 results of TABEO and other children’s tablets available for sale. Plaintiffs have not provided  
13 evidence of customer confusion when viewing TRU’s website for children’s tablets. Based  
14 on the evidence in the record, Plaintiffs have failed to meet their burden of showing a  
15 likelihood of success on the merits of their claim for trademark infringement of the Nabi mark.

16 **B. Irreparable Harm**

17 In a trademark infringement claim, irreparable injury may be presumed from a showing  
18 of likelihood of success on the merits. *Hashim*, 316 F.3d at 1038. Plaintiffs have failed to  
19 meet their burden of showing a likelihood of success on the merits of their claims for trade  
20 secret misappropriation, trade dress infringement, and trademark infringement. Accordingly,  
21 there is no presumption of irreparable harm.

22 **CONCLUSION**


23 IT IS HEREBY ORDERED that the Ex Parte Application for Temporary Restraining  
24 Order and Order to Show Cause for Issuance of Preliminary Injunction filed by Plaintiffs Fuhu,  
25 Inc. and Fuhu Holdings, Inc. (ECF No. 11) is DENIED.

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IT IS FURTHER ORDERED that the Motion to Exclude the Declaration of William Bleuel (ECF No. 35) and Motion to Strike the Reply Declaration of James Mitchell (ECF No. 83) are DENIED as moot.

DATED: October 19, 2012

  
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WILLIAM Q. HAYES  
United States District Judge