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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

FUHU, INC., FUHU HOLDINGS, INC.,

Plaintiffs,

vs.

TOYS “R” US, INC., TOYS “R” US -
DELAWARE, INC.,

Defendants.

CASE NO. 12cv2308-WQH-WVG

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss the Complaint, filed by Defendants Toys “R” Us, Inc. and Toys “R” Us - Delaware, Inc. (collectively, “TRU”). (ECF No. 63).

I. Background

On September 24, 2012, Plaintiffs Fuhu, Inc. and Fuhu Holdings, Inc. (collectively, “Fuhu”) initiated this action by filing a Complaint against TRU, asserting the following claims for relief: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) fraud; (4) trade secret misappropriation; (5) conversion; (6) false designation of origin and unfair competition under 15 U.S.C. § 1125(A); (7) trade dress infringement under 15 U.S.C. § 1125(A); (8) trademark infringement under Cal. Bus. & Prof. Code § 14335; (9) common law trademark infringement; (10) common law trade dress infringement; (11) trademark infringement; (12) false advertising under the Lanham Act; (13) common law unfair competition; (14) unfair competition under Cal. Bus. & Prof. Code § 17200; (15) unjust

1 enrichment; and (16) replevin. (ECF No. 1 at 1).

2 **A. Allegations of the Complaint**

3 “Fuhu ... is the creator of NABI, the world’s first full-featured Android tablet made
4 especially for kids.” *Id.* ¶ 2. TRU operates retail toy stores. *Id.* ¶ 8. On September 7, 2011,
5 September 19, 2011, and September 30, 2011, Fuhu and TRU held meetings in which they
6 explored the possibility of entering into a business relationship in which TRU would become
7 the exclusive distributor of NABI tablets. *Id.* ¶¶ 47-50. Before the parties’ first meeting, TRU
8 had already begun exploring the possibility of developing its own children’s tablet. *Id.* ¶ 48.
9 During the parties’ meetings, Fuhu provided TRU with the NABI tablet brochure and
10 explained Fuhu’s NABI business strategy with TRU, and provided details on the accessories
11 Fuhu was planning to roll out with NABI. *Id.* ¶ 47. “Fuhu shared with TRU trade secrets
12 regarding NABI and demonstrated an actual NABI tablet in detail.” *Id.* ¶ 48.

13 On September 28, 2011, the parties entered into a Non-Disclosure Agreement (the
14 “NDA”). *Id.*, Ex. B; ECF No. 100 at 6.

15 On October 29, 2011, the parties entered into an Exclusivity Agreement. (ECF No. 1
16 ¶ 56, Ex. C). The Exclusivity Agreement contains an integration clause which provides as
17 follows: “This letter comprises the entire agreement of the parties with respect to the Exclusive
18 Right granted by Fuhu to TRU hereunder, and supersedes all prior and current communications
19 and agreements between the parties regarding this subject matter.” *Id.*, Ex. C at 2; ECF No.
20 100 at 9. Pursuant to the Exclusivity Agreement, TRU agreed to undertake marketing
21 initiatives set forth in Exhibits A and B to the Agreement, and to purchase 10,000 tablets by
22 December 31, 2011. (ECF No. 100 at 9). TRU agreed that, to remain the exclusive distributor
23 of the NABI, it must purchase an additional 500,000 units between January 1, 2012 and
24 December 31, 2012, on an agreed schedule. *Id.* The Exclusivity Agreement states:

25 Notwithstanding the foregoing or anything to the contrary under this Agreement,
26 in the event TRU fails to perform any of the obligations set forth on Exhibit A,
27 Exhibit B, or Exhibit C of this Agreement, then Fuhu’s sole and exclusive
28 remedy shall be to terminate the Exclusive Rights granted to TRU under this
Agreement.

Id.

1 On November 17, 2011, “the NABI tablet was available for pre-ordering online on the
2 TRU website, and the majority of those tablets sold out online within a few weeks.” (ECF No.
3 1 ¶ 57). On November 29, 2011, TRU placed a purchase order for 10,000 NABI tablets, and
4 Fuhu started delivering the tablets on December 2, 2011. *Id.* ¶ 58. “Because of such high
5 demand for the NABI tablet, on about December 1, 2011, TRU made multiple requests to order
6 more product with an estimated volume of 100,000 units. TRU followed up later in the week
7 with a much smaller volume commitment, closer to 10,000 units on December 12, 2011.” *Id.*
8 ¶ 59.

9 On December 14, 2011, Fuhu met with TRU’s “sales team” and “accessory team” and
10 Fuhu “provided all the detailed information about the accessories Fuhu was building and
11 launching along with trade secrets as to why they had picked these specific accessories.” *Id.*
12 ¶ 60. On December 18, 2011, “TRU started selling the NABI tablet in stores, and the majority
13 of those tablets were sold out within a few days.” *Id.* ¶ 61.

14 In January of 2012, Fuhu executives showed TRU executives “new features and
15 functions [of Fuhu’s products] that were not publicly available, including their music solution
16 and related sourcing information.” *Id.* ¶ 62. “At the meeting [in January of 2012], Fuhu
17 requested that TRU start to fulfill their responsibilities under the exclusivity contract and
18 explained that very little of TRU’s responsibilities were met in the areas of marketing and
19 merchandising.” *Id.* “Fuhu and TRU continued to correspond through email regarding TRU’s
20 responsibilities in the area of marketing and merchandising for the year 2012 as well as volume
21 commitments.” *Id.* ¶ 63. “TRU confirmed by email dated January 30, 2012, ... that TRU
22 agreed ‘it’s best to move forward with our partnership as non-exclusive’ but also that TRU did
23 ‘not expect to achieve the purchase amounts and marketing support under the agreement going
24 forward.’” *Id.* “TRU’s failure to perform its obligations led Fuhu to terminate the exclusivity
25 of TRU’s distribution rights in January, 2012.” *Id.* ¶ 14.

26 “In addition to the distinctive NABI trademarks, Fuhu’s NABI products have
27 consistently and continuously featured distinctive, non-functional trade dress. Specifically,
28 all NABI tablets feature a removable ‘bumper’ that fits snugly around the outer edge of the

1 tablet.” *Id.* ¶ 39. “The NABI bumpers come in a range of colors, but all feature exaggerated,
2 flared comers, giving the NABI tablet an original, unique, soft, and friendly look, reminiscent
3 of the four wings of a butterfly.” *Id.* “To further emphasize and tie the iconic butterfly shape
4 with its NABI products, Fuhu often displays one or more of its NABI trademarks in
5 conjunction with the butterfly trade dress, including, for example, by featuring the NABI &
6 Butterfly Design trademark on the bumper of each NABI tablet, near the ‘wings’ embodied in
7 the butterfly trade dress....” *Id.* ¶ 40.

8 “To reverse its downward business trajectory, on September 10, 2012, TRU announced
9 with great fanfare its ‘proprietary’ tablet for children, TABEO.” *Id.* ¶ 9. “TRU adopted
10 Fuhu’s iconic butterfly shape and trade dress, incorporating it into the trade dress of its own
11 bumper in order to promote its competing TABEO tablet. Specifically, TRU’s TABEO tablet
12 wears a bumper displaying flared comers (the ‘Infringing Trade Dress’) that is identical or
13 nearly identical to Fuhu’s butterfly trademarks and trade dress.” *Id.* ¶ 66. The TABEO “was
14 TRU’s ... first move into house brand electronics.” *Id.* ¶ 10 (quotation omitted). The
15 Complaint alleges:

16 This lawsuit is about how TRU was able to make this complex and difficult
17 move: by breaching a strict non-disclosure agreement..., by misappropriating the
18 trade secrets of Fuhu, and by infringing the intellectual property rights of Fuhu,
19 the first-mover in this area and TRU’s previous partner. TRU entered into direct
20 competition with Fuhu, shamelessly using Fuhu’s confidential information
21 obtained after fraudulently becoming Fuhu’s exclusive distributor..., promising
22 millions of dollars worth of marketing, merchandising, and sales.

23 *Id.* ¶ 11. “The TABEO product and related marketing bear a striking and not coincidental
24 similarity to Fuhu’s NABI product and the collateral proprietary information that Fuhu
25 disclosed to TRU under strict confidentiality.” *Id.* ¶ 18. “TRU used Fuhu’s trade secrets and
26 confidential information to start selling TABEO, which systematically attempts to replicate the
27 NABI experience, far earlier than TRU could have done otherwise, if at all.” *Id.* “TABEO not
28 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 confidentiality.” *Id.* ¶ 19. “TRU has
used and continues to use Fuhu’s confidential information, trade secrets, and other intellectual

1 property [regarding NABI] to prepare, market, and sell TABEO.” *Id.* ¶ 15.

2 **B. Motion for Temporary Restraining Order**

3 On September 25, 2012, Fuhu filed an Ex Parte Motion for Temporary Restraining
4 Order and Order to Show Cause for Issuance of Preliminary Injunction (“Motion for
5 Temporary Restraining Order”). (ECF No. 11). Fuhu sought a temporary restraining order
6 enjoining TRU from selling or delivering the TABEO product. Fuhu sought the injunction on
7 the merits of its claims for trade secret misappropriation, trade dress infringement, and
8 trademark infringement. The Court received briefing and evidence from both parties and heard
9 oral argument on the Motion for Temporary Restraining Order. (ECF Nos. 11, 35, 39, 74, 83,
10 94).

11 On October 19, 2012, the Court issued an Order denying the Motion for Temporary
12 Restraining Order. (ECF No. 97).

13 **C. Motion to Dismiss**

14 On October 10, 2012, TRU filed the Motion to Dismiss and a Request for Judicial
15 Notice. (ECF Nos. 63, 81). TRU contends that the Complaint should be dismissed “on the
16 grounds that Fuhu failed to allege its fraud claims with the requisite specificity, and that each
17 of Fuhu’s sixteen claims fail to state a claim upon which relief can be granted.” (ECF No. 63
18 at 9).

19 On November 5, 2012, Fuhu filed an opposition to the Motion to Dismiss and
20 objections to TRU’s Request for Judicial Notice. (ECF Nos. 106, 108). Fuhu contends that
21 the Motion to Dismiss should be denied “because Fuhu’s allegations meet the lenient notice
22 pleading requirements of the Federal Rules of Civil Procedure.” (ECF No. 106 at 8). Fuhu
23 contends that “TRU repeatedly seeks to have this Court: (1) look beyond the four corners of
24 the Complaint – and documents therein upon which Fuhu expressly relies, and, (2) read the
25 facts alleged in the Complaint (and documents that TRU claims are subject to judicial notice)
26 in TRU’s favor – despite this being a motion to dismiss.” *Id.*

27 On November 9, 2012, TRU filed a reply brief and a response to Fuhu’s objections to
28 TRU’s Request for Judicial Notice. (ECF Nos. 110, 111).

1 **II. Discussion**

2 **A. Standard of Review**

3 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a claim
4 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “A pleading that states a claim
5 for relief must contain ... a short and plain statement of the claim showing that the pleader is
6 entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under Rule 12(b)(6) is appropriate where
7 the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal
8 theory. *See Balistreri v. Pac. Police Depot*, 901 F.2d 696, 699 (9th Cir. 1990).

9 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’
10 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
11 of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting Fed. R.
12 Civ. P. 8(a)(2)). When considering a motion to dismiss, a court must accept as true all
13 “well-pleaded factual allegations.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). However, a
14 court is not “required to accept as true allegations that are merely conclusory, unwarranted
15 deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d
16 979, 988 (9th Cir. 2001). “In sum, for a complaint to survive a motion to dismiss, the
17 non-conclusory factual content, and reasonable inferences from that content, must be plausibly
18 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962,
19 969 (9th Cir. 2009) (quotations omitted).

20 **B. First Claim – Breach of Contract**

21 TRU contends that Fuhu’s first claim for breach of contract should be dismissed
22 because the Complaint “fails to identify any contractual provision in the NDA that TRU
23 allegedly failed to perform or allege how it is that TRU’s purported breach caused damages
24 to Fuhu”; the NDA “was superseded by the parties’ Exclusivity Agreement”; and the Court’s
25 Order denying the Motion for Temporary Restraining Order “disposes of the first claim, for
26 breach of the Non-Disclosure Agreement, because the Court necessarily decided that the same
27 information at issue in the trade secret claim was known to the general public.” (ECF No. 63
28 at 15-16, ECF No. 110 at 7).

1 Fuhu contends that “[t]he Complaint sufficiently alleges breach of contract under the
2 parties’ NDA”; “TRU’s argument that the NDA was superseded is also without merit” because
3 “TRU is apparently raising a factual dispute that should not be resolved on a motion to
4 dismiss” and “if Fuhu succeeds on its claims that the Exclusivity Agreement was fraudulently
5 obtained, the Exclusivity Agreement’s integration clause would be deemed void”; and “a
6 district court’s preliminary findings regarding a request for a preliminary injunction (or
7 temporary restraining order) are not binding on later proceedings, including on a motion to
8 dismiss following an initial determination that plaintiff is not likely to prevail on the merits.”
9 (ECF No. 106 at 8, 10, 13, 14).

10 Under New Jersey law,¹ “[t]o state a claim for breach of contract, [a plaintiff] must
11 allege (1) a contract between the parties; (2) a breach of that contract; (3) damages flowing
12 therefrom; and (4) that the party stating the claim performed its own contractual obligations.”
13 *Frederico v. Home Depot*, 507 F.3d 188, 203 (3d Cir. 2007) (applying New Jersey law).

14 The breach of contract claim in the Complaint contains the following allegations:

15 The NDA, attached as Exhibit B, is a valid and enforceable contract....

16 Fuhu either performed its obligations under the NDA or was legally excused
17 from doing so....

18 TRU did not perform its obligations under the NDA and thereby breached the
19 NDA....

20 TRU’s breaches of the NDA caused harm to Fuhu in an amount to be proven at
21 trial, most of which cannot be adequately compensated by monetary damages....

(ECF No. 1 ¶¶ 79-82). The NDA contains a broad definition of “Confidential Information”²

22
23 ¹ The NDA states that “[t]his agreement shall be governed by and construed in
24 accordance with the internal laws of the State of New Jersey.” (Compl. Ex. B; ECF No. 100
25 at 4). TRU contends that the Exclusivity Agreement supercedes the NDA, and that the terms
26 of the Exclusivity Agreement state that California law shall apply to any disputes between the
27 parties. TRU states: “The distinction between the choice of law provisions is of no
28 consequence, however, because the substantive law of both jurisdictions is the same.” (ECF
No. 63 at 15 n.3). For the purposes of deciding the Motion to Dismiss, the Court will assume
New Jersey law applies to the claim for breach of contract.

² The NDA defines “Confidential Information” as follows:

Each party acknowledges that all of the information provided to the other party
(the ‘Receiving Party’) is confidential, proprietary and a trade secret of the party

1 and provides that “the Receiving Party shall use such Confidential Information only for such
2 purposes as the Disclosing Party may agree to in advance.” (ECF No. 100 at 2-3). The
3 Complaint alleges:

4 TRU’s revealed business strategy for TABEO is a copy of the confidential and
5 proprietary business strategy that Fuhu developed and disclosed to TRU in strict
6 confidence in reliance on ... the NDA....

7 TRU entered into direct competition with Fuhu, shamelessly using Fuhu’s
8 confidential information....

9 The launch of the TABEO ... will ... continue to cause irreparable harm to Fuhu,
10 which will continue to lose its first-mover advantage and the goodwill and
11 market share that go along with it.

12 (ECF No. ¶¶ 11, 20-21).

13 The Court finds that the allegations of the Complaint are sufficient to state a claim for
14 breach of contract under New Jersey law. The Court finds that the issue of whether the
15 Exclusivity Agreement supercedes the NDA—including the issue of whether the agreements
16 concern the same “subject matter” (Compl., Ex. C at 2; ECF No. 100 at 9)—is not appropriate
17 for resolution at the motion to dismiss stage. TRU fails to cite authority holding that the law

18 disclosing such information (the ‘Disclosing Party’). Such information shall
19 include, without limitation, the following: the existence of the Proposed
20 Transaction, any proposed terms and conditions thereof, and any
21 communications sent to each other in connection therewith, any business secrets
22 or methods, processes, formulas, designs, inventories, techniques, marketing
23 plans, strategies, forecasts, new products, blueprints, specifications, maps,
24 computer software programs, promotional ideas, unpublished financial
25 statements, budget projections, licenses, prices, costs, policies, manuals or
26 instructions, reports, lists of names and/or addresses of customers, prospective
27 customers, suppliers or prospective suppliers, other customer or supplier or
28 prospective customer or supplier information or requirements, personnel
information, the terms of any of the Disclosing Party’s contracts, leases or other
arrangements or leasing information or any other confidential or proprietary
information, records, observations or data of the Disclosing Party (whether or
not patented, copyrighted or otherwise protected under applicable law) or
information or materials created, discovered, developed, or made known to the
Disclosing Party (including, without limitation, information or materials created,
discovered, developed, or made known by the Receiving Party or any of its
representatives to the Disclosing Party) along with any reports, analyses,
compilations, memoranda, notes and other writings or recordings prepared by
the Receiving Party, or any of its representatives or any other employee, agent
or representative of the Disclosing Party, which contain, reflect or are based
upon such confidential information, material, observations or data (collectively,
‘Confidential Information’).

(ECF No. 100 at 2).

1 of the case doctrine applies to findings by a court when ruling on a motion for temporary
2 restraining order. *See* TRU Reply Supp. Mot. Dismiss at 2-5, ECF No. 110 at 6-9. The Court
3 declines to apply the law of the case doctrine or otherwise grant the Motion to Dismiss based
4 upon the findings in the Order denying the Motion for Temporary Restraining Order. *See*
5 *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007) (“Garcia also
6 complains that the district court’s grant of summary judgment at this stage is contrary to its
7 earlier findings at the preliminary injunction stage. Specifically, Garcia notes that the district
8 court found that there was no likelihood of confusion between the two marks and that the
9 statements on Garcia’s website were not false or misleading. Garcia’s argument is unavailing
10 because such findings were made before discovery was completed and before the evidence was
11 fully developed at trial. As such, they are not binding on the district court at this stage of the
12 litigation.”).

13 The Motion to Dismiss the first claim for breach of contract is denied.

14 **C. Second Claim – Breach of Implied Covenant of Good Faith and Fair**
15 **Dealing**

16 TRU contends that Fuhu’s second claim for breach of the implied covenant of good
17 faith and fair dealing should be dismissed because the limitation of liability provision in the
18 Exclusivity Agreement bars the claim. (ECF No. 63 at 18).

19 Fuhu contends that “TRU’s argument not only lacks authority but is contrary to cases
20 ... recognizing that this claim is proper where a defendant’s bad faith actions frustrate the
21 contract’s benefits.” (ECF No. 106 at 16-17).

22 In the second claim for breach of the implied covenant of good faith and fair dealing,
23 the Complaint alleges:

24 TRU unfairly interfered with Fuhu’s right to receive the benefits of the
25 Exclusivity Agreement, including without limitation by TRU failing to provide
26 any of the marketing and merchandising support specified in Exhibits A, B, and
27 C to the Exclusivity Agreement....

28 TRU acted with bad motives or intentions and/or engaged in deception or
evasion in the non-performance of its obligations under the Exclusivity
Agreement.

(ECF No. 1 ¶¶ 87-88). The Exclusivity Agreement contains the following limitation of

1 liability provision:

2 Notwithstanding the foregoing or anything to the contrary under this Agreement,
3 in the event TRU fails to perform any of the obligations set forth on Exhibit A,
4 Exhibit B or Exhibit C of this Agreement, then Fuhu's sole and exclusive
remedy shall be to terminate the Exclusive Rights granted to TRU under this
Agreement.

5 (Compl., Ex. C at 2; ECF No. 100 at 9).

6 "California law implies the covenant of good faith and fair dealing in every contract to
7 ensure one contracting party does not unfairly frustrate the other party's right to receive the
8 benefits of their agreement." *Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 779
9 (9th Cir. 2003) (citation omitted). "The covenant 'cannot impose substantive duties or limits
10 on the contracting parties beyond those incorporated in the specific terms of their agreement.'" *Id.*
11 (quoting *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 349-50 (2000)).

12 "Generally, a limitation of liability clause is intended to protect the wrongdoer
13 defendant from unlimited liability. Clauses of this type have long been recognized as valid in
14 California." *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118, 1126
15 (2012) (quotations omitted). "With respect to claims for breach of contract, limitation of
16 liability clauses are enforceable unless they are unconscionable, that is, the improper result of
17 unequal bargaining power or contrary to public policy. Furthermore, they are enforceable with
18 respect to claims for ordinary negligence unless the underlying transaction affects the public
19 interest under the criteria specified in *Tunkl v. Regents of University of California*, 60 Cal. 2d
20 92, 98-100 (1963)." *Id.* In *Food Safety Net Services*, the California Court of Appeal held that
21 a limitation of liability clause which "prohibits a recovery for breach of contract ... necessarily
22 encompasses [plaintiff]'s bad faith claim, as breaches of the covenant of good faith implied
23 within contracts are not tortious outside the context of insurance policies." *Id.* at 1127 (citation
24 omitted); *see also id.* at 1126 (the limitation of liability "clause bars [plaintiff] from recovering
25 damages under its claims for breach of the contract, bad faith, and negligence").

26 Based upon the terms of the Exclusivity Agreement, "Fuhu's sole and exclusive remedy
27 [for TRU's failure to perform its obligation under the Exclusivity Agreement] shall be to
28 terminate the Exclusive Rights granted to TRU under this Agreement." (Compl., Ex. C at 2;

1 ECF No. 100 at 9). The Complaint does not allege that the limitation of liability provision in
2 the Exclusivity Agreement is “unconscionable ... or contrary to public policy.” *Food Safety*
3 *Net Servs.*, 209 Cal. App. 4th at 1126. Accordingly, based upon the allegations of the
4 Complaint and the Exclusivity Agreement attached to the Complaint, the limitation of liability
5 provision bars the claim for breach of the implied covenant of good faith and fair dealing. *See*
6 *id.* at 1127.

7 The Motion to Dismiss the second claim for breach of the implied covenant of good
8 faith and fair dealing is granted.

9 **D. Third Claim – Fraud**

10 TRU contends that Fuhu’s third claim for fraud should be dismissed because the
11 Complaint fails to allege the claim with the specificity required by Federal of Civil Procedure
12 9(b). (ECF No. 63 at 18).

13 Fuhu contends that the fraud claim is adequately pled. (ECF No. 106 at 17 (citing
14 *Givemepower Corp. v. Pace Compumetrics, Inc.*, No. 07cv157, 2007 WL 2345027 (S.D. Cal.,
15 Aug. 14, 2007)). Specifically, Fuhu contends that the following allegations are sufficient to
16 satisfy the requirements of Rule 9(b):

17 [TRU] fraudulently bec[ame] Fuhu’s exclusive distributor in an agreement
18 signed in October, 2011 (‘Exclusivity Agreement’), promising millions of
dollars worth of marketing, merchandising, and sales....

19 TRU’s revealed business strategy for TABEO is a copy of the confidential and
20 proprietary business strategy that Fuhu developed and disclosed to TRU in strict
21 confidence in reliance on TRU’s obligations under the NDA and Exclusivity
22 Agreement....

22 During the meeting [in El Segundo, California] on October 5, 2011, Fuhu and
23 TRU agreed orally that in exchange for exclusive distribution rights for NABI,
TRU would provide substantial merchandising, marketing, and volume
commitment....

24 To induce Fuhu to enter into the Exclusivity Agreement and not to sell NABI
25 through channels other than TRU, TRU represented to Fuhu that TRU would
perform the marketing and merchandising support specified in Exhibits A, B,
26 and C to the Exclusivity Agreement....

27 TRU’s representations that TRU would perform the marketing and
28 merchandising support specified in Exhibits A, B, and C to the Exclusivity
Agreement were false....

TRU intended to induce Fuhu to rely on the representations that TRU would

1 perform the marketing and merchandising support specified in Exhibits A, B,
2 and C to the Exclusivity Agreement by entering into the Exclusivity Agreement
and not selling NABI through channels other than TRU.

3 (Compl. ¶¶ 11, 20, 52, 92-93, 95).

4 Federal Rule of Civil Procedure 9(b) requires that a complaint “must state with
5 particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b)
6 “requires ... an account of the time, place, and specific content of the false representations as
7 well as the identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d
8 756, 764 (9th Cir. 2007) (quotation omitted); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d
9 1097, 1106 (9th Cir. 2003) (averments of fraud must be accompanied by “the who, what,
10 when, where, and how of the misconduct charged”) (quotation omitted).

11 The Complaint fails to adequately allege the speaker(s) of the allegedly false
12 representations. To the extent Fuhu alleges that any false representations were made on any
13 date other than October 5, 2011, the Complaint fails to allege the date, location and content of
14 those representations. The allegations of the Complaint are not sufficient to allege fraud with
15 the specificity required by Rule 9(b). *See Swartz*, 476 F.3d at 764; *cf. Givemepower Corp.*,
16 2007 WL 2345027, at *1-*3, *11 (holding that the complaint sufficiently alleged fraud against
17 two corporate officers, when the complaint alleged the specific date and location of a meeting
18 in which the two specified officers made specific representations which were alleged to be
19 false).

20 The Motion to Dismiss the third claim for fraud is granted.

21 **E. Fourth Claim – Trade Secret Misappropriation**

22 TRU contends that Fuhu’s fourth claim for trade secret misappropriation should be
23 dismissed because “Fuhu has not alleged: (1) which information is a trade secret and why; (2)
24 how any trade secrets were used by TRU.” (ECF No. 63 at 19). TRU contends that “[t]o truly
25 understand the basis for Fuhu’s trade secret claims, the Court must consider the Summary of
26 Trade Secrets Fuhu Provided to TRU, as set forth in Exhibit G to the Mitchell Declaration
27 [submitted in conjunction with the Motion for Temporary Restraining Order].” *Id.* at 22. TRU
28 contends that “[n]othing in Ex. G says anything unique or secret about how Fuhu planned to

1 market the NABI. The information consists entirely of obvious features and generic concepts.”
2 *Id.* TRU contends that in the Order denying the Motion for Temporary Restraining Order, the
3 Court found that the information alleged to be a trade secret does not fit within the legal
4 definition of a trade secret, and this finding is the law of the case. (ECF No. 110 at 7).

5 Fuhu contends that the Complaint adequately alleges a claim for trade secret
6 misappropriation, pointing specifically to the following allegations:

7 Fuhu owns trade secret information relating to NABI that has actual or potential
8 independent economic value because it was secret....

9 TRU improperly acquired and/or used and/or disclosed Fuhu’s trade secrets
10 relating to NABI and solicited at least one customer and/or manufacturer based
11 on the misappropriated trade secrets....

12 TRU’s advertising and promotional materials are derived from the business plan
13 Fuhu shared with TRU on a basis of strict confidentiality....

14 Fuhu provided TRU with the NABI tablet brochure and explained Fuhu’s
15 business case and rollout plans. Fuhu also shared its NABI strategy with TRU,
16 including why and how Fuhu sourced a general product and made it a unique,
17 branded experience with the iconic butterfly design, including as reflected in its
18 butterfly trademarks and trade dress, as well as the importance of preloaded
19 content and an instant on experience for reducing return rates. Fuhu also
20 provided details on the accessories Fuhu was planning to roll out with NABI....

21 On about September 19, 2011, Fuhu and TRU met again, this time at Fuhu’s
22 offices in El Segundo, California. At this meeting, Fuhu shared with TRU trade
23 secrets regarding NABI and demonstrated an actual NABI tablet in detail. Fuhu
24 reviewed again its business strategy and all the features, functions, and benefits
25 associated with this business model and its execution in connection with NABI.
26 Fuhu again provided TRU with Fuhu’s NABI brochure and showed examples
27 of accessories Fuhu planned to take to market. Fuhu shared the NABI product
28 and ecosystem and the unique focus targeted at a core audience, making the case
that Fuhu’s strategy was superior to that of any other tablet company in the
market at the time....

Fuhu walked the TRU executives through the entire suite, showed them all the
products, and educated them on why they fit into the overall business plan.
Fuhu showed TRU new features and functions that were not publicly available,
including their music solution and related sourcing information.

(Compl. ¶¶ 19, 47, 49, 62, 101, 103, ECF No. 1).

To state a claim for misappropriation of trade secrets under the Uniform Trade Secret
Act, a plaintiff must allege two elements: (1) the existence of a trade secret; and (2)
misappropriation of the trade secret. *See* Cal. Civ. Code § 3426.1(b); New Jersey Stats. §

1 56:15-2.³ “Misappropriation” is defined as:

2 (1) Acquisition of a trade secret of another by a person who knows or has reason
3 to know that the trade secret was acquired by improper means; or (2) Disclosure
4 or use of a trade secret of another without express or implied consent by a
5 person who ... [a]t the time of disclosure or use, knew or had reason to know that
6 his or her knowledge of the trade secret was ... [d]erived from or through a
7 person who had utilized improper means to acquire it....

8 Cal. Civ. Code § 3426.1(b). A “trade secret” is defined as:

9 information, including a formula, pattern, compilation, program, device, method,
10 technique, or process, that: (1)[d]erives independent economic value, actual or
11 potential, from not being generally known to the public or to other persons who
12 can obtain economic value from its disclosure or use; and (2)[i]s the subject of
13 efforts that are reasonable under the circumstances to maintain its secrecy.

14 Cal. Civ. Code § 3426.1(d). “[T]he complainant should describe the subject matter of the trade
15 secret with sufficient particularity to separate it from matters of general knowledge in the trade
16 or special knowledge of those persons who are skilled in the trade, and to permit the defendant
17 to ascertain at least the boundaries within which the secret lies.” *Diodes, Inc. v. Franzen*, 260
18 Cal. App. 2d 244, 253 (1968); *see also Computer Econ., Inc. v. Gartner Group, Inc.*, 50 F.
19 Supp. 2d 980, 984, 988-92 (S.D. Cal. 1999) (concluding that the *Diodes* rules apply in federal
20 courts applying California law). However, “[o]ne who seeks to protect his trade secrets from
21 wrongful use or disclosure does not have to spell out the details of the trade secret to avoid a
22 demurrer to a complaint.” *Diodes*, 260 Cal. App. 2d at 252.

23 The Complaint alleges that Fuhu disclosed to TRU, “on a basis of strict confidentiality,”
24 a detailed “business plan” and “strategy” related to the NABI tablet, which “has actual or
25 potential independent economic value because it was secret.” (Compl. ¶¶ 19, 47, 49, 101, ECF
26 No. 1). The Complaint alleges that “TRU improperly ... used ... Fuhu’s trade secrets relating
27 to NABI and solicited at least one customer and/or manufacturer based on the misappropriated
28 trade secrets,” and “TRU’s advertising and promotional materials are derived from the
business plan Fuhu shared with TRU on a basis of strict confidentiality.” *Id.* ¶¶ 101, 103; *see*
also id. ¶ 20 (“TRU’s revealed business strategy for TABEO is a copy of the confidential and

³ Both California and New Jersey have adopted the Uniform Trade Secrets Act. Each party relies primarily upon California law in addressing the claim for trade secret misappropriation. For the purposes of deciding the Motion to Dismiss, the Court will apply California law to this claim.

1 proprietary business strategy that Fuhu developed and disclosed to TRU in strict confidence
2 in reliance on TRU's obligations under the NDA and Exclusivity Agreement.""). Based upon
3 the standard of review applicable to motions decided pursuant to Rule 12(b)(6), the Court finds
4 that the Complaint adequately alleges a claim for misappropriation of trade secrets.

5 As discussed above, the Court declines to apply the law of the case doctrine or
6 otherwise grant the Motion to Dismiss based upon the findings in the Order denying the
7 Motion for Temporary Restraining Order. For the purposes of deciding the Motion to Dismiss,
8 the Court declines to take judicial notice of Exhibit G to the Mitchell Declaration.

9 The Motion to Dismiss the fourth claim for trade secret misappropriation is denied.

10 **F. Fifth Claim – Conversion**

11 TRU contends that Fuhu's fifth claim for conversion should be dismissed because Fuhu
12 has "not pled any specific money or property that was converted." (ECF No. 63 at 23). TRU
13 states that "[p]resumably [the allegedly converted property] is the TABEO, a tablet
14 manufactured by someone else with no claim of ownership or involvement by Fuhu." *Id.*

15 Fuhu contends that "TRU's Motion to Dismiss shows that TRU actually understands
16 and is on notice that 'the TABEO' is the property at issue – property that TRU wrongfully
17 possesses and is selling as a result of impermissibly developing the TABEO using Fuhu's
18 Confidential Information." (ECF No. 106 at 23-24).

19 "Conversion is the wrongful exercise of dominion over the property of another. The
20 elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the
21 property; (2) the defendant's conversion by a wrongful act or disposition of property rights;
22 and (3) damages." *Hernandez v. Lopez*, 180 Cal. App. 4th 932, 939-40 (2009) (quotation
23 omitted).

24 The Complaint alleges:

25 Fuhu is entitled to immediate possession of its property.

26 By the conduct alleged in this complaint, TRU has converted and continues to
27 convert Fuhu's property to their own use and benefit without authority to do so.

28 TRU's conversion of Fuhu's property has been knowing, intentional, wanton,
willful and an outrageous violation of Fuhu's rights.

1 As a proximate result of TRU's conversion of Fuhu's property, Fuhu has
2 suffered substantial damages in an amount to be proven at trial.

3 (Compl. ¶¶ 112-115, ECF No. 1).

4 The Complaint itself does not identify the property alleged to be converted. To the
5 extent Fuhu contends that the TABEO tablet is Fuhu's property, Fuhu fails to adequately allege
6 facts plausibly indicating that, under California law, a tablet alleged to be manufactured by
7 TRU is nonetheless the property of Fuhu.

8 The Motion to Dismiss the fifth claim for conversion is granted.

9 **G. Sixth through Tenth Claims – Lanham Act and State Law
10 Trademark/Trade Dress Infringement**

11 TRU moves for the dismissal of Fuhu's sixth through tenth claims alleging Lanham Act
12 and state law trademark/trade dress infringement related to the NABI's "butterfly" design.
13 TRU contends:

14 These claims all fail for the same two reasons. First, Fuhu has failed to, and
15 cannot, allege a protectable trademark or trade dress based on using a bumper
16 with reinforced or flared corners because a removable rubber bumper for a
17 children's computer tablet that has been reinforced against being dropped is
18 inherently functional and indistinct from the many other "butterfly" shaped
19 bumpers in the market. Second, Fuhu has failed to and cannot allege any basis
20 for the likelihood of confusion between the parties' products because the
21 TABEO bumper is clearly identified as a 'TABEO' bumper so a reasonable
22 consumer could not possibly conclude that the tablet was produced by Fuhu.

23 (ECF No. 63 at 25).

24 Fuhu contends that the Complaint, "especially in conjunction with the NABI Butterfly
25 Design pictures included in the Complaint, sufficiently allege a trademark/trade dress that is
26 (1) non-functional, and (2) distinctive, and whose use by TRU in connection with the TABEO
27 creates a (3) likelihood of confusion." (ECF No. 106 at 26). Fuhu contends that TRU's
28 motion "is not only asking this Court to go outside the record on a motion to dismiss, but TRU
is also asking this Court, in contravention of motion to dismiss standards, to read the contents
of numerous documents in TRU's (not Fuhu's) favor." *Id.* at 27 ("Each of TRU's essential
assertions to its arguments – 'any bumper ... has one obvious function,' '[t]his [butterfly]
design is and has been used on a myriad of tablets,' and 'there is no possibility of confusion
between the NABI and TABEO' – would require this Court to look outside the record on a

1 motion to dismiss and/or resolve disputed fact in TRU's (not Fuhu's) favor.") (quoting ECF
2 No. 63 at 26-28).

3 To state a claim under the Lanham Act, as well as under California law, for false
4 designation/unfair competition and for trade dress and trademark infringement, a plaintiff must
5 allege: (1) a distinctive, (2) non-functional trademark, including a trade dress; and, (3) use that
6 creates a likelihood confusion. *See Kendall-Jackson Winery Ltd. v. E & J Gallo Winery*, 150
7 F.3d 1042, 1046-47 (9th Cir. 1998) ("To state an infringement claim under § 43(a) [of the
8 Lanham Act]—whether it be a trademark claim or a trade dress claim—a plaintiff must meet
9 three basic elements: (1) distinctiveness, (2) nonfunctionality, and (3) likelihood of
10 confusion."); Cal. Bus. & Prof. Code § 14272 (California Trademark Act intended to be
11 consistent with Lanham Act).

12 The Complaint contains the following allegations:

13 TABEO ... is confusingly similar to NABI's iconic butterfly shape reflected in
14 the Nabi trademarks and trade dress....

15 The launch of TABEO, including, without limitation, currently ongoing
16 marketing, advertising, and pre-sales ...will ... cause irreparable harm to Fuhu
... in the form of customer confusion regarding the source of the TABEO and
NABI products....

17 Fuhu's development of its NABI products and ecosystem included its creation
18 of fanciful words and a corresponding iconic shape that could be reflected ... in
its trademarks and trade dress ... across its entire product line and ecosystem....

19 Fuhu incorporated the abstract concept of a butterfly..., later developing the
20 unique NABI trademarks for its tablets. 'Nabi' means 'butterfly' in Korean....

21 Fuhu's NABI products have ... featured distinctive, non-functional trade dress.
22 Specifically, all NABI tablets feature a removable 'bumper' that ... all feature
exaggerated, flared corners, giving the NABI tablet an original, unique, soft, and
friendly look, reminiscent of the four wings of a butterfly.

23 The iconic butterfly shape of Fuhu's trademarks and trade dress is
24 nonfunctional. Moreover, by virtue of Fuhu's consistent and exclusive use of
the iconic butterfly shape..., the butterfly design trademarks and the butterfly
25 trade dress have acquired secondary meaning: they have become associated in
the minds of the consuming public with Fuhu and its high-quality tablets and
26 related products, and they serve to identify these products as emanating solely
from Fuhu....

27 TRU's conduct ... create[s] a likelihood of confusion, mistake or deception as
28 to the affiliation, connection or association of TRU with Fuhu, or as to the
origin, sponsorship or approval of [TRU]'s goods with those of Fuhu. TRU's
conduct is likely to induce consumers to believe, contrary to fact, that the goods

1 and services of TRU [the TABEO] are rendered, sponsored, sold, approved by
2 or connected with Fuhu.

3 (Compl. ¶¶ 19, 21, 36-37, 39, 46, 118, ECF No. 1). The Complaint alleges that “Fuhu owns
4 ... the following trademarks,” and includes pictures of the “iconic butterfly shape of Fuhu’s
5 trademarks.” *Id.* ¶ 38.

6 The Court finds that the Complaint adequately alleges the “three basic elements” of a
7 trademark claim and a trade dress claim: “(1) distinctiveness, (2) nonfunctionality, and (3)
8 likelihood of confusion.” *Kendall-Jackson Winery Ltd.*, 150 F.3d at 1046-47.

9 TRU contends that the Court should rule that these elements are not satisfied based
10 upon the Court’s examination of photos and videos on Fuhu’s website, media articles
11 referencing the NABI tablet, Fuhu’s September 19, 2011 application to the United States
12 Patent and Trademark Office, and the Declaration of James Mitchell and attached exhibits
13 submitted in connection with the Motion for Temporary Restraining Order. TRU cites to no
14 similar case in which such an analysis of materials extrinsic to the complaint was performed
15 at the motion to dismiss stage.⁴ The Court declines to address TRU’s arguments concerning
16 matters outside the Complaint, finding them inappropriate for consideration at the motion to
17 dismiss stage.

18 The Motion to Dismiss the sixth through tenth claims of the Complaint is denied.

19 **H. Eleventh and Twelfth Claims – Trademark Infringement and False**

20
21 ⁴ See, e.g., *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 26 (2001) (claims
22 decided on summary judgment); *Disc Golf Ass’n, Inc. v. Champion Discs, Inc.*, 158 F.3d 1002,
23 1005 (9th Cir. 1998) (claims decided on summary judgment); *Kendall-Jackson Winery, Ltd.*,
24 150 F.3d at 1045 (one claim decided on summary judgment, other claim decided after jury
25 trial); *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 725 F.2d 1240, 1242 (9th Cir. 1984) (findings
26 made after a bench trial); *Seirus Innovative Accessories, Inc. v. Gordini U.S.A. Inc.*, 849 F.
27 Supp. 2d 963, 968 (S.D. Cal. 2012) (claims decided on summary judgment).

28 Although TRU cites to a single Court of Appeals decision approving of the resolution
of a trade mark claim at the motion to dismiss stage, the court did so on the basis that, “[t]aking
the facts alleged by [plaintiff] to be true, we agree with the district court that the parties’
services are unrelated and there is no likelihood of confusion.” *Murray v. Cable Nat’l Broad.
Co.*, 86 F.3d 858, 861 (9th Cir. 1996) (“Because the parties’ services are unrelated, there is no
likelihood of consumer confusion as a matter of law.”) (citing *Toho Co. Ltd. v. Sears, Roebuck
& Co.*, 645 F.2d 788, 790-91 (9th Cir. 1981) (holding that the use of “BAGZILLA” on garbage
bags was unrelated as a matter of law to the protected literary and toy merchandising of
“GODZILLA”)). By contrast, Fuhu alleges that Fuhu and TRU target the same customers with
similar products.

1 **Advertising under the Lanham Act**

2 TRU moves for the dismissal of Fuhu’s eleventh and twelfth claims for trademark
3 infringement and false advertising under the Lanham Act. TRU contends that “the eleventh
4 and twelfth claims (for false advertising under the Lanham Act) fail because Fuhu has not
5 alleged: (1) a false statement of fact about a product; or (2) any basis for deception of
6 consumers.” (ECF No. 63 at 29).

7 Fuhu contends that the Complaint, “especially in conjunction with pictures related to
8 search results from the TRU website that are included with the Complaint, sufficiently alleges
9 that TRU is using the NABI wordmark so as to make a material false statement about the
10 TABEO products that have a tendency to deceive a substantial segment of TRU’s audience (in
11 interstate commerce and injuring Fuhu).” (ECF No. 106 at 29). Fuhu contends that TRU
12 improperly makes “fact-based determinations regarding the alleged false statements” and “is
13 effectively asking this Court (... in contravention of motion to dismiss standards) to disregard
14 Fuhu’s allegations and read the Complaint in TRU’s (not Fuhu’s) favor.” *Id.* at 29-30.

15 The Complaint alleges that “TRU uses the NABI wordmark to advertise the TABEO
16 tablet and TABEO accessories.” (ECF No. 1 at 21). The Complaint alleges:

17 TRU currently is not an authorized reseller of any Fuhu product, including the
18 NABI or NABI 2. Neither the NABI nor the NABI 2 is available from TRU,
including via the TRU website at toysrus.com....

19 In connection with the promotion of its tablet product and third party tablet
20 products, TRU has made a number of false or misleading representations of fact
about its own products....

21 [S]earching for ‘nabi’ on the TRU webpage at www.toysrus.com results in a
22 page with TABEO and third party tablet products. Although the page states that
the search was for ‘nabi’, no Fuhu or NABI products are displayed and none are
23 available from TRU through www.toysrus.com....

24 Through the behavior of TRU’s website at www.toysrus.com and through the
display of affirmative search results when ‘nabi’ is searched for, including a
25 reminder on the resulting page that ‘nabi’ was the search term, TRU is
presenting false and/or misleading information.

26 TRU’s advertising and website in connection with its TABEO products ... is use
27 in commercial advertising or promotion of false and/or misleading descriptions
of fact that misrepresent the characteristics and qualities of Fuhu’s goods and
28 TRU’s goods ... [that] tended to deceive a substantial number of consumers and
were material to consumers’ purchasing decisions....

1 TRU has specifically designed and implemented toysrus.com to display
2 non-Fuhu products, including the TABEO and other NABI competitors, in
response to a user searching for NABI, as described above....

3 *Id.* ¶¶ 70, 77, 169, 171, 172, 176.

4 **1. Trademark Infringement**

5 “To prevail on its trademark infringement claim, [a plaintiff] must show that: (1) it has
6 a valid, protectable trademark, and (2) that [defendant]’s use of the mark is likely to cause
7 confusion.” *Applied Info. Sciences Corp. v. eBay, Inc.*, 511 F.3d 966, 969 (9th Cir. 2007); *see*
8 *also Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir.
9 2011) (“To prevail on a claim of trademark infringement under the Lanham Act, 15 U.S.C. §
10 1114, a party must prove: (1) that it has a protectible ownership interest in the mark; and (2)
11 that the defendant’s use of the mark is likely to cause consumer confusion.”) (quotation
12 omitted).

13 TRU does not challenge the sufficiency of the allegations related to the first element.
14 TRU contends that “Fuhu has not alleged ... any basis for deception of customers.” (ECF No.
15 63 at 29). The Complaint alleges that “TRU has specifically associated its TABEO tablet and
16 associated accessories with the NABI trademark and continues to do so.... TRU ... has used
17 and continues to use NABI in such a manner to cause a likelihood of confusion, mistake, or
18 deception as to either TRU’s connection with Fuhu or the origin, sponsorship, or approval
19 of TRU’s goods or services.” (Compl. ¶¶ 162-63, ECF No. 1). These allegations, and those
20 quoted above, adequately allege that TRU’s alleged use of Fuhu’s mark is likely to cause
21 confusion. At the motion to dismiss stage and under the circumstances of this case, the Court
22 finds it inappropriate to weigh the fact-specific “factors for determining whether consumers
23 would likely be confused by related goods.” *Network Automation*, 638 F.3d at 1145 (applying
24 factors in the context of a motion for preliminary injunction); *see also Brookfield Commc’ns,*
25 *Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1047, 1053-54 (9th Cir. 1999) (same).

26 TRU also contends: “These claims [i.e., the eleventh and twelfth claims for trademark
27 infringement and false advertising] also fail because they are moot. Shortly after the
28 Complaint was filed, the search engine function of which Fuhu complains was modified so that

1 a search of ‘NABI’ now returns a null set.” (ECF No. 63 at 31). Consideration of this
2 contention requires the Court to take judicial notice of screenshots taken of TRU’s website
3 after the Complaint was filed. (ECF No. 63-1 at 2). “The court may judicially notice a fact
4 that is not subject to reasonable dispute because it: (1) is generally known within the trial
5 court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources
6 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). The Court does not
7 find that evidence of a search TRU performed on its own website is an appropriate subject for
8 judicial notice pursuant to Rule 201.

9 The Motion to Dismiss the eleventh claim for trademark infringement is denied.

10 2. False Advertising

11 “The elements of a Lanham Act § 43(a)2 false advertising claim are: (1) a false
12 statement of fact by the defendant in a commercial advertisement about its own or another’s
13 product; (2) the statement actually deceived or has the tendency to deceive a substantial
14 segment of its audience; (3) the deception is material, in that it is likely to influence the
15 purchasing decision; (4) the defendant caused its false statement to enter interstate commerce;
16 and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either
17 by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated
18 with its products.” *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir.
19 1997) (citation omitted). “[A] false advertising cause of action under the Act is not limited
20 to literal falsehoods; it extends to false representations made by implication or innuendo.”
21 *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 245 (9th Cir. 1990).
22 However, the alleged false statement must “contain the kind of detailed or specific factual
23 assertions that are necessary to state a false advertising cause of action under the Act.” *Id.* at
24 246.

25 The Complaint alleges that “[i]n connection with the promotion of its tablet product and
26 third party tablet products, TRU has made a number of false or misleading representations of
27 fact about its own products....” (Compl. ¶ 169, ECF No. 1). The Complaint alleges that
28 “[t]hrough the behavior of TRU’s website at www.toysrus.com and through the display of

1 affirmative search results when ‘nabi’ is searched for, including a reminder on the resulting
2 page that ‘nabi’ was the search term, TRU is presenting false and/or misleading information.”
3 *Id.* ¶ 172. The Complaint fails to specify the contents of the alleged “false statement of fact
4 by the defendant in a commercial advertisement about its own or another’s product.” *Cook,*
5 *Perkiss & Liehe, Inc.*, 911 F.2d at 245. After review of the allegations, the Court finds that the
6 Complaint does not adequately allege “a false statement of fact by the defendant.” *Southland*
7 *Sod Farms*, 108 F.3d at 1139; *see also Twombly*, 550 U.S. at 555.

8 The Motion to Dismiss the twelfth claim for false advertising is granted.

9 **I. Thirteenth and Fourteenth Claims – Unfair Competition**

10 TRU moves for the dismissal of Fuhu’s thirteenth and fourteenth claims for state law
11 unfair competition. TRU contends that “these claims fail for the same reasons discussed above
12 respecting Fuhu’s Lanham Act claim [i.e., the eleventh and twelfth claims for trademark
13 infringement and false advertising under the Lanham Act].” (ECF No. 63 at 31). Because the
14 Court has denied the Motion to Dismiss the eleventh claim for trademark infringement, the
15 Motion to Dismiss the thirteenth and fourteenth claims is denied for the same reasons.

16 **J. Fifteenth and Sixteenth Claims – Unjust Enrichment and Replevin**

17 TRU moves for the dismissal of the fifteenth and sixteenth claims for unjust enrichment
18 and replevin “because they are not recognized as independent claims for relief in California.”
19 (ECF No. 63 at 32).

20 Fuhu contends that “Fuhu’s Fifteenth Claim should not be dismissed, or, at a minimum,
21 it should be deemed as sufficiently stating a claim for restitution,” and “Fuhu’s replevin claim
22 is proper.” (ECF No. 106 at 32).

23 **1. Unjust Enrichment**

24 State and federal courts are split as to whether in California a court may recognize a
25 claim for unjust enrichment as a separate cause of action. *See Nordberg v. Trilegiant Corp.*,
26 445 F. Supp. 2d 1082, 1100 (N.D. Cal. 2006) (collecting cases); *see also MB Tech., Inc. v.*
27 *Oracle Corp.*, No. C09-5988, 2010 WL 1576686, at *4 (N.D. Cal. 2010) (“California courts,
28 as well as the courts in this District, are squarely divided on this point [of whether unjust

1 enrichment is a cause of action].”) (collecting cases). This Court concludes that unjust
2 enrichment is not a separate cause of action under California law. *See MB Tech., Inc.*, 2010
3 WL 1576686, at *4 (“Of these conflicting interpretations, the better view is that unjust
4 enrichment represents a form of relief rather than an independent claim.”); *McKell v. Wash.*
5 *Mut., Inc.*, 142 Cal. App. 4th 1457, 1490 (2006) (“There is no cause of action for unjust
6 enrichment. Rather, unjust enrichment is a basis for obtaining restitution based on
7 quasi-contract or imposition of a constructive trust.”); *McBride v. Boughton*, 123 Cal. App. 4th
8 379, 387 (2004) (“Unjust enrichment is not a cause of action ... or even a remedy, but rather
9 a general principle, underlying various legal doctrines and remedies.”) (citation omitted). The
10 Court declines to “deem” the fifteenth claim for unjust enrichment “as sufficiently stating a
11 claim for restitution.” (ECF No. 106 at 32).

12 The Motion to Dismiss the fifteenth claim for unjust enrichment is granted.

13 2. Replevin

14 To the extent replevin is a cause of action under California law, courts treat causes of
15 action for conversion and replevin as the same. *See Adler v. Taylor*, No. CV 04-8472, 2005
16 WL 4658511, at *3 (C.D. Cal. Feb. 2, 2005) (“[R]eplevin is a common law remedy that
17 permits the prevailing party to recover both personal property and incidental damages from an
18 unlawful possessor.... In California, courts allow for specific recovery of personal property
19 and incidental damages (but use the term ‘claim and delivery’ rather than ‘replevin’)..... Stated
20 more simply, specific recovery is an available remedy for conversion. Because the Complaint
21 supports a conversion claim, it also supports a specific recovery remedy.”) (citations omitted),
22 *aff’d sub nom. Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007); *Shaw v. Palmer*, 65 Cal. App.
23 441, 449 (1924) (“We conclude that an action in conversion affords the proper remedy for the
24 relief sought by the plaintiff. If a party converts the personal property of another, it matters
25 not by what means the conversion is effected, the owner of the property may either proceed
26 in conversion for damages for the wrongful act or in replevin to recover the specific property
27 or damages if it cannot be restored.”). For the reasons the Court dismissed the fifth claim for
28 conversion, the Motion to Dismiss the sixteenth claim for replevin is granted.

1 **III. Conclusion**

2 IT IS HEREBY ORDERED that the Motion to Dismiss is GRANTED in part and
3 DENIED in part, as discussed above. (ECF No. 63). The following claims are DISMISSED
4 without prejudice: the second claim for breach of the implied covenant of good faith and fair
5 dealing; the third claim for fraud; the fifth claim for conversion; the twelfth claim for false
6 advertising; the fifteenth claim for unjust enrichment; and the sixteenth claim for replevin.

7 DATED: March 1, 2013

8 
9 **WILLIAM Q. HAYES**
United States District Judge

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