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13

14 UNITED STATES DISTRICT COURT
15 SOUTHERN DISTRICT OF CALIFORNIA

16 FUHU, INC. and FUHU HOLDINGS, INC.,

17 Plaintiffs,

18 vs.

19 TOYS "R" US, INC. and TOYS "R" US-
20 DELAWARE, INC.,

21 Defendants.
22

CASE NO. 3:12-CV-02308 WQH-WVG

Hon. William Q. Hayes

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' APPLICATION FOR
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE FOR
ISSUANCE OF PRELIMINARY
INJUNCTION**

Date: October 17, 2012

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<i>Filipino Yellow Pages v. Asian Journal Publ'n</i> , 198 F.3d 1143 (9th Cir. 1999)	21

1 *Flemming v. Ronson Corp.*,
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2 *Inspection Management Systems, Inc v. Open Door Inspections, Inc.*,
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19 *Norm Thompson Outfitters, Inc. v. GM Corp.*,
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20 *Oakland Tribune, Inc. v. Chronicle Publishing Co., Inc.*,
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23 *Rachel v. Banana Republic, Inc.*,
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18 *Winter v. Natural Resources Defense Council, Inc.*
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1 **I. INTRODUCTION**

2 This Court should reject outright the ploy by Fuhu, Inc. and Fuhu Holdings, Inc.
 3 (collectively, “Plaintiffs” or “Fuhu”) to gain a competitive advantage during the critical, upcoming
 4 holiday shopping season by removing one of its competitors, Toys “R” Us, Inc. and Toys “R” US-
 5 Delaware, Inc. (collectively, “Defendants” or “TRU”), from the marketplace. As discussed below
 6 and in the Declarations accompanying this Opposition, there is no basis for any of the relief sought
 7 by Plaintiffs and their application for a TRO should be denied.

8 Fuhu is a software development company that had the idea of selling a kid-centric computer
 9 tablet or, as Fuhu’s CEO, James Mitchell put it, “an iPad for kids,” called the NABI. In its press
 10 release introducing the NABI, Fuhu’s Founder and President, Robb Fujioka, explained that the
 11 company had taken its expertise at software and combined it with the best features *already available*
 12 *on tablets* – touch-screen, WiFi, app store, gaming, movies, books – to give kids an engaging tablet.¹
 13 At the time Fuhu made these statements, there were already at least 5 other tablets in the market
 14 aimed at or customized for children.

15 Fuhu, however, had never manufactured or marketed a single tangible product and did not
 16 have the background, expertise, or experience needed to bring a children’s product to a national
 17 market. As a result, in October 2011, Fuhu entered into an agreement with TRU pursuant to which
 18 TRU would exclusively sell and distribute the NABI at its stores. TRU, the world’s leading
 19 dedicated toy and juvenile products retailer, has vast, unparalleled experience marketing TRU-
 20 branded and third-party toys and other products to children, including electronics. At the time it
 21 entered into an agreement with Fuhu, TRU had already begun exploring the development of its own
 22 children’s tablet, but it agreed to and did use its considerable expertise to market and sell the NABI
 23 as one piece of its overall tablet strategy.

24 Fuhu chose to end the exclusive relationship with TRU in February 2012 because Fuhu
 25 wanted to sell the NABI through other retailers. Fuhu hoped that doing so would result in the sale of

26 _____
 27 ¹ Messrs. Mitchell’s and Fujioka’s descriptions of the NABI are in the November 21, 2011, Fuhu Press
 28 Release, a true and correct copy of which is attached as Exhibit (“Ex.”) B to the Declaration of Troy
 Peterson (“Peterson Decl.”) filed concurrently herewith.

1 more tablets than TRU was required to purchase under the parties' agreement. TRU, meanwhile, had
 2 continued its efforts to develop its own children's tablet and, last month, in time for the upcoming
 3 holiday season, TRU announced that it would begin selling its own branded tablet, the TABEO. In
 4 response, Fuhu filed the instant action and sought a TRO.

5 Fuhu's basis for seeking a TRO is styled as a violation of its trade secrets (of which there are
 6 none), common law trademark and the trade dress of the NABI, but it basically boils down to one
 7 grievance – that the removable bumper on the TABEO resembles the bumper on the NABI, a shape
 8 which Fuhu says is unique to the NABI.² Fuhu does not claim that TRU's tablet or its content
 9 infringes Fuhu's trademarks or trade dress – it only takes issue with the bumper, a form of which is
 10 found on almost every other children's tablet on the market and is widely available from third-party
 11 suppliers. Even if Fuhu were right, which it is not, Fuhu suggests no reason it would not be fully
 12 compensated by money damages were it ultimately to show it has been harmed. Nonetheless, Fuhu
 13 seeks to bar TRU from taking orders or selling not only the bumper, but the TABEO tablet itself.
 14 Fuhu has no likelihood of prevailing on its claims and will not suffer irreparable injury if TRU
 15 continues to sell the TABEO. The balance of hardships, including the public interest, weighs heavily
 16 in favor of keeping the TABEO on the market and denying the relief sought by Fuhu.

17 **II. FACTUAL BACKGROUND**

18 **A. The Children's Computer Tablet Market**

19 Computer tablets have been a huge hit with children and schools since Apple's iPad was first
 20 released on March 12, 2010. The market for kid-friendly portable electronic devices resembling
 21 computers was already widespread and had sparked increasing competition for years, beginning with
 22 LeapFrog's release of the first LeapPad model in 1999. *See* Declaration of Philip G. Baker ("Baker
 23 Decl."), ¶ 18. The popularity of the LeapPad – it was awarded Toy of the Year in 2001 – generated
 24 notable competition in the industry with other companies like Mattel (with the Fisher-Price Power
 25 Touch Learning System) and Publications International, Inc. (with the ActivePoint, Magic Wand,
 26 and My First Story Reader) launching similar products shortly thereafter. *Id.* The iPad, with a world

27
 28 ² Fuhu also alleges that TRU stole its business plan, but fails to address what plan it is talking about. In any event, for the reasons discussed below, there is no support for this specious allegation.

1 of applications for children and inviting interactivity, took the children’s portable electronic market
2 to another level.

3 The market for computerized learning tablets developed expressly for children has grown
4 with rapid advancements in software and technology. LeapFrog—a pioneer in this industry—has
5 stayed ahead of the curve with technological upgrades to its products and, on or about August 25,
6 2011, released the LeapPad Explorer tablet, followed this year by the LeapPad 2 Explorer in August
7 2012. Baker Decl., ¶ 18. With its release in or around February 10, 2011, VTech’s InnoTab
8 Interactive Learning Tablet emerged as one of LeapPad’s strongest competitors. *Id.* The first
9 generation InnoTab, like LeapPad, was marketed to consumers as being an iPad-*inspired* tablet,
10 designed specifically for children, with pre-loaded learning and entertainment apps like an e-Reader,
11 various games, an art studio, and a multimedia player, as well as the ability to sync to any PC or Mac
12 computer to download additional content. Baker Decl., ¶ 21; *see also* Peterson Decl., ¶ 32.

13 Google’s release of the Android 2.3 (Gingerbread) operating system on or about December 6,
14 2010 – which is an open and customizable operating system that can be used on other electronic
15 devices – meant that it was only a matter of time before existing portable electronic devices for
16 children would be elevated to more full-functioning kid-friendly computer tablets for children.
17 Baker Decl., ¶ 22. With the iPad itself adaptable for children but at a high price point, a so-called
18 “iPad for children” at a lower price point was the next logical step in the consumer electronics
19 industry. *Id.*

20 When Fuhu issued its press release on November 21, 2011, it acknowledged that the NABI
21 was not a novel concept. Peterson Decl., Ex. B, ¶ 32. Indeed, it was not even the first Android-
22 based tablet made especially for children – that honor goes either to the KINEO from Brainchild
23 available in March of 2011, Baker Decl., ¶ 24, or to the original VINCI tablet first available on July
24 29, 2011, complete with a red rubber protective case surrounding a 7-inch display and touch screen,
25 Android 2.3 operating system, 3-megapixel camera, pre-loaded games, music videos, story books,
26 and educational apps. Baker Decl., ¶ 23.

27 Tablet computers customized for children are a burgeoning market in which Fuhu’s NABI is,
28 and has always been, but one of several competitors striving to sell a similar product to the same

1 targeted consumer base. The following children's tablets are just a few of those currently on the
2 market that contain features similar to those found on both the NABI and TABEO, which include
3 *inter alia*, the Android operating system, a 5-to-7-inch display and touch screen, WiFi internet, a kid-
4 friendly contoured protective case with rounded corners for the tablet, brightly-colored packaging,
5 pre-loaded games, apps and multimedia content, parental controls, and an ecosystem of tablet
6 accessories: KINEO Tablet (Brainchild); Intel STUDYBOOK Tablet (Intel); MEEP! Tablet (Oregon
7 Scientific Global Dist. Ltd.); CHILDPAD Tablet (Archos Arnova); KURIO Kids Tablet (Techno
8 Source); LEXIBOOK Junior Tablet (Lexibook Ltd); KUNO Mobile Tablet (Kuno); VINCI Tab II
9 (Vinci) and iStartSmart (Hatch). Baker Decl., ¶ 41. TRU currently sells roughly 32 different tablets
10 on Toysrus.com, including 5 children's tablets in addition to the TABEO. Peterson Decl., ¶ 28.

11 **B. The Parties' Agreements**

12 Since at least January 2011 – when it first learned about the Vinci tablet at the 2011
13 Consumer Electronics Show (“CES”) in Las Vegas, Nevada – TRU had been exploring the
14 possibility of bringing its own children's tablet to market and had met with third-party manufacturers
15 and software developers to discuss launching such a product. Peterson Decl., ¶¶ 7, 25. Prior to
16 meeting with Fuhu, TRU was already in serious discussions with a company called SYN about
17 developing a children's tablet with parental controls. Peterson Decl., ¶ 42.

18 TRU was first introduced to Fuhu in September 2011, and shortly thereafter the parties began
19 discussing bringing the NABI to market. Peterson Decl., ¶ 7. On several occasions between
20 September and October 2011, TRU representatives met with Mr. Mitchell to discuss entering into a
21 relationship to sell NABI tablets. Peterson Decl., ¶¶ 7-8. At the time, Fuhu knew that TRU was
22 already selling tablets that came with pre-loaded apps, games, music, and video, including the
23 Samsung Galaxy®, Kindle Fire®, and tablets made by Sony®, among others. Peterson Decl., ¶ 10.

24 On September 28, 2011, TRU requested that Fuhu sign a Non-Disclosure Agreement
25 (“NDA”) as a precautionary measure to protect TRU's own strategic business plans and confidential
26 information – developed over decades of experience in the children's toy and product industry --
27 from being disclosed or otherwise misappropriated by Fuhu. Peterson Decl., ¶ 7.

28 On September 30, 2011, Mr. Mitchell met again with representatives of TRU, at which time

1 he gave them a NABI brochure and explained the general concept behind the tablet, which was to
2 create an “iPad for kids” that would come pre-loaded with educational and entertainment
3 applications. Peterson Decl., ¶ 8. The brochure includes a picture of the NABI, encased in a
4 **rectangular** bumper with flat sides. Peterson Decl., ¶ 9. During this meeting, Mr. Mitchell showed
5 TRU a prototype of the NABI and the parties discussed general ideas for content that could be
6 included on the tablet, such as movies, e-books, and games. Peterson Decl., ¶ 8. TRU explained to
7 Fuhu that, based on its experience with other products, the parties could significantly increase
8 revenue by developing and selling accessories for the NABI. *Id.* TRU expressed an interest in
9 entering into an exclusive relationship with Fuhu for the NABI tablet. *Id.*

10 On October 5, 2011, Mr. Mitchell again met with representatives of TRU, including Troy
11 Peterson, TRU’s Vice President and Divisional Merchandise Manager for Electronics and
12 Entertainment. During this meeting the parties again discussed entering into an exclusive
13 relationship for the sale of NABI tablets, as well as Fuhu’s vision for the tablets. *Id.*

14 On October 7, 2011, Mr. Peterson sent Mr. Mitchell a PowerPoint presentation that Mr.
15 Peterson had prepared setting forth, *inter alia*, TRU’s detailed proprietary strategy for bringing the
16 NABI to market, as well as TRU’s proposed marketing, merchandising, and production plans for the
17 2011 holiday season and 2012, plans for displays, accessories, advertisements, brand pages, social
18 media, and in-store events. *See* Peterson Decl., ¶ 9 and Ex. A to the Declaration of James Mitchell
19 (“Mitchell Decl.”). Mr. Peterson’s PowerPoint presentation includes the same picture of the NABI
20 encased in a **rectangular** bumper with flat sides which was in the brochure that Mr. Mitchell had
21 given TRU during the parties’ September 30, 2011 meeting. *Id.*

22 From these initial meetings with Mr. Mitchell, it became apparent to Mr. Peterson that Mr.
23 Mitchell had little understanding of, or appreciation for, all of the work that was needed to bring
24 NABI to a national market. Peterson Decl., ¶ 11. For example, Mr. Mitchell did not appear to be
25 familiar with the production, testing, safety, packaging, shipping, and customs requirements that go
26 into selling consumer electronics manufactured abroad. Peterson Decl., ¶ 11. Mr. Peterson realized
27 that if they were going to bring the NABI to a national market, particularly for the 2011 holiday
28 season, TRU was going to have to serve more like a consultant to Fuhu and was going to have to put

1 the company in touch with some of TRU's vendors that could assist with necessary production and
2 shipping requirements. Peterson Decl. at ¶¶ 11-13.

3 On October 29, 2011, Fuhu and TRU entered into an agreement which gave TRU the
4 exclusive right to sell and distribute NABI products between October 31, 2011 and December 31,
5 2012 (the "Exclusivity Agreement," a true and correct copy of which is attached as Ex. N to the
6 Mitchell Decl.). The Exclusivity Agreement obligated TRU to purchase 10,000 NABI units between
7 October 31, 2011 and December 31, 2011, and an additional 500,000 units between January 1, 2012
8 and December 31, 2012, staged in phases, to ensure exclusivity during the year. *Id.*

9 **C. Efforts to Bring NABI to Market.**

10 Immediately upon entering into the Exclusivity Agreement, TRU began aggressively
11 performing its obligations, which the parties had to do if they had any hope of bring NABI to market
12 in time for the 2011 holiday season. Peterson Decl., ¶ 14. There were only 24 days between the day
13 the parties signed the Exclusivity Agreement and the biggest retail sale day of the year – Black
14 Friday. *Id.* It was in TRU's best interest, and TRU did everything it could, to help Fuhu sell as
15 many NABI tablets as they could during the 2011 holiday season. *Id.* In the weeks that followed the
16 parties' execution of the Exclusivity Agreement, Mr. Peterson and other members of his team had
17 multiple daily conversations with Fuhu representatives where TRU consulted with and advised Fuhu
18 on a myriad of issues relating to the manufacturing and production of the NABI, including testing,
19 safety, packaging, and importing requirements. *Id.* TRU also developed and shared with Fuhu
20 extensive marketing plans and sales strategies and connected Fuhu with its vendors, including D&H
21 Distributing, which ultimately entered into an agreement with Fuhu for distribution of the NABI.
22 Peterson Decl., ¶¶ 11, 14. TRU also shared its packaging and marketing resources, used its expertise
23 and experience to set the price point for the NABI, and shared detailed and proprietary distribution
24 information. *Id.*; *see also* Declaration of Lisa Tarantino ("Tarantino Decl."), ¶ 5.

25 TRU was concerned that Fuhu would not be in a position to provide products by Black
26 Friday, especially when Fuhu shared that it was having sourcing problems, including difficulty in
27 obtaining bumpers from Silly Brandz, the supplier Fuhu told TRU it had chosen. Eventually, Fuhu
28 committed to delivering the NABI to TRU by December 1, 2011, and on November 10, 2011, TRU

1 began taking pre-sale orders on the NABI. Peterson Decl., ¶¶ 15-16. TRU had placed
2 advertisements and prepared in-store displays for selling the NABI over the all-important
3 Thanksgiving weekend but had to pull the ads and remove the displays from its stores when Fuhu
4 could not deliver by then. Peterson Decl., ¶ 16.

5 On November 21, 2011, Fuhu issued a press release announcing that the NABI would be
6 available exclusively at TRU stores and that pre-orders were available online. Peterson Decl., ¶ 22
7 and Ex. B. The Fuhu press release states that the NABI tablet was “customizable with a series of
8 rubberized bumpers that include interchangeable arms, legs, heads and handles in a variety of colors
9 and characters.” *Id.* There is no reference to a bumper with “concave sides that give rise to
10 exaggerated, flared corners” that Fuhu says is “reminiscent of the four wings of a butterfly” and
11 which it now claims was always a part of the NABI business plan. *Id.*

12 On November 29, 2011, TRU placed an initial order of 10,000 NABI tablets, fulfilling its
13 initial obligations under the Exclusivity Agreement. Peterson Decl., ¶ 18.

14 On December 14, 2011, representatives of TRU, including Ms. Tarantino, met with Mr.
15 Mitchell to discuss ideas and concepts for potential accessories to market with the NABI. Tarantino
16 Decl. ¶ 6. Based on the parties’ discussions at the meeting, Ms. Tarantino was left with the feeling
17 that Mr. Mitchell did not have much experience and was going to need a lot of help identifying and
18 developing potential accessories for the NABI tablet. Tarantino Decl., ¶ 5. Drawing on its
19 experience with branding and accessories, TRU gave Mr. Mitchell ideas for potential accessories like
20 branded back-packs, branded bumpers, kids’ designs for accessories, and similar designs for ear
21 phones, a car charger, headphones, and a stylus. *Id.*

22 During the December 14, 2011 meeting, Mr. Mitchell disclosed that production of the NABI
23 bumper by Silly Brandz was delayed. Tarantino Decl., ¶ 6. As a result, despite Fuhu’s commitment
24 to deliver the NABI by December 1, as of December 14, 2011 ***TRU still had not received the NABI***
25 ***tablets***. Peterson Decl., ¶ 18. Anticipating sales in 2012, TRU offered to introduce Fuhu to its
26 accessories vendors and to work with Fuhu to develop the accessories, including the bumpers, but
27 Fuhu never took TRU up on the offer. Tarantino Decl., ¶ 5.

28 When NABI tablets were finally delivered to TRU on December 18, 2011, the tablets were

1 encased with a functional bumper that had contoured edges and extra padding on the corners (the
 2 “contoured bumper”) – much like others already on the market, such as the rubber M-Edge
 3 “Supershell” for the iPad 2, which were designed to absorb shock and protect tablets against damage.
 4 Mitchell Decl., ¶ 91; Peterson Decl., ¶¶ 20-24; Tarantino Decl., ¶ 16. When the tablets finally
 5 arrived, Fuhu did not mention that the bumper was intentionally designed in the shape of a butterfly,
 6 that the design was part of an overall NABI concept, or that it considered the bumper to be
 7 protectable “Butterfly Design Trademark and Flared Corner Trade Dress,” as Fuhu now claims.
 8 Peterson Decl., ¶ 22. TRU learned those claims for the first time when it read Fuhu’s Complaint in
 9 this action. *Id.*

10 There is nothing unique about the contoured bumper that encases the NABI. Peterson Decl.,
 11 ¶ 23; Tarantino Decl., ¶ 16. The NABI bumper is an inherently functional product that operates to
 12 protect the tablet from wear-and-tear, as well as external blows as a result of being misused or
 13 dropped, and allows a child to more easily grip the tablet from the sides. Tarantino Decl., ¶ 16.

14 Notwithstanding Fuhu’s production problems and shipping delays, TRU sold 11,419 NABI
 15 tablets during the 2011 holiday season and, by December 31, 2011, had placed an order for an
 16 additional 20,000 units, of which Fuhu delivered approximately 10,000 units. Peterson Decl., ¶19.³

17 **D. Fuhu Ends the Exclusivity Agreement**

18 In January 2012, Mr. Mitchell met with representatives of TRU, including Mr. Peterson, at
 19 the CES. Peterson Decl., ¶ 29. At the meeting, TRU gave Mr. Mitchell a detailed marketing and
 20 purchasing schedule that set forth how TRU intended to meet its obligation to order an additional
 21 100,000 tablets by April 30, 2012, and 400,000 more units by December 31, 2012. *Id.* During this
 22 meeting, Mr. Mitchell told TRU that Fuhu’s board of directors was pressuring him to sell one million
 23 tablets, twice the commitment TRU had under the Exclusivity Agreement. *Id.* Mr. Mitchell told Mr.
 24 Peterson that if TRU did not agree to purchase a lot more tablets, or terminate the parties’

25 _____
 26 ³ Fuhu claims, again without support, that TRU failed to meet its marketing obligations. In fact, TRU
 27 met its marketing obligations, but was hampered by Fuhu’s repeated delays in delivering the NABI.
 28 For example, Fuhu’s delay in completing production of the NABI, due to manufacturing problems with
 the bumper, meant that the in-store display and ads that TRU had prepared for publication on Black
 Friday had to be pulled at the last minute. Peterson Decl., ¶¶ 15-16.

1 Exclusivity Agreement, Fuhu would begin marketing NABI under a different brand name to other
2 retailers, like Wal-Mart. Peterson Decl., ¶ 30.

3 After the meeting at CES, Mr. Mitchell continued his efforts to persuade TRU to buy more
4 tablets and to allow Fuhu to begin selling NABI to other retailers despite the Exclusivity Agreement.
5 Peterson Decl., ¶ 31. TRU ultimately agreed to release Fuhu from its obligations and, on or about
6 February 29, 2012, Fuhu sent TRU notice that it was formally terminating the Exclusivity
7 Agreement. *Id.* TRU continued sell the NABI tablet until April 2012. *Id.*

8 **E. TRU Develops the TABEO**

9 At no time during the parties' relationship did anyone from Fuhu ever disclose to TRU any
10 confidential, proprietary, or trade secret information. Peterson Decl. at ¶ 32; Tarantino Decl., ¶ 6.
11 All the information that Fuhu shared with TRU was either in its brochure, was publicly-available, or
12 already well known within the retail consumer electronics industry, *e.g.*, merchandising strategies for
13 personalized kid-centric accessories. Peterson Decl. at ¶¶ 9, 26, 32. The shape of the NABI bumper,
14 which Fuhu now claims is trade dress, was already in widespread use for children's tablets and
15 protective bumpers for the iPad. Tarantino Decl., ¶¶ 9, 16; Baker Decl., ¶¶ 30-37.

16 TRU began exploring the possibility of developing its own branded children's tablet long
17 before Fuhu appeared on the scene. Peterson Decl., ¶¶ 7, 42. TRU continued to talk to a number of
18 third party manufacturers throughout 2011 and into 2012, and TRU eventually decided to partner
19 with an experienced Android-based tablet manufacturer called Archos, which was itself set to release
20 a branded children's tablet, the ChildPad®, in early 2012. Peterson Decl., ¶ 43. Archos and TRU
21 ultimately entered into an agreement in which Archos agreed to manufacture a TRU-branded tablet
22 modeled after the ChildPad but with content developed by and for TRU. *Id.*

23 On March 6, 2012, after Fuhu had formally notified TRU that it no longer wished to sell
24 exclusively through TRU, TRU established a design team to discuss the design and creation of the
25 TABEO. Tarantino Decl., ¶ 8. One task for the team was to design or select a bumper for the
26 TABEO, so the design team surveyed the publicly-available tablets and electronic product bumpers,
27 including covers and bumpers for tablets, laptops, notebooks, smart phones and other consumer
28 electronics. *Id.*, ¶ 9. In addition to third-party cases like the neoprene sleeves from Built NY and

1 bumpers like the Disney Cars 2 Kid Kit for the iPad, which are separately available for purchase,
2 TRU looked at tablets which had integrated bumpers like the LeapPad and those which had
3 removable bumpers like the NABI, the ChildPad, iPad, Kindle FIRE and NOOK (Color) since each
4 of these could be adapted for children's use. *Id.* Based on its survey, TRU concluded that there are
5 four key components to a successful bumper, all of which serve important functions:

6 First, the bumper needs to be designed so that a child with small hands would have no trouble
7 holding the tablet when it is in the bumper. *Id.*, ¶ 10. TRU believes that a bumper with sides that are
8 slightly concave makes it easier for a child to hold the tablet (whether vertically or horizontally). *Id.*
9 TRU saw several examples of such bumpers marketed specifically for young children, including the
10 M-Edge SuperShell by Speck, the Disney Hybrid Case and Kit for iPad, and the Fisher-Price Laugh
11 and Learn Apptivity Case: iPad Edition. *Id.* TRU also reviewed iPad bumpers specifically marketed
12 for children by a variety of companies, which do not have concave sides, and concluded that the
13 concave design provided the greatest functionality for small hands. *Id.*

14 Second, the bumper needs to provide extra protection for the tablet. *Id.*, ¶ 11. The TABEO
15 was designed specifically for children, who are known to bump and drop things. *Id.* When a toy is
16 bumped or dropped, the corners are the first thing impacted, so TRU designed the bumper with extra
17 padding on the corners to help protect the tablet from damage. *Id.* This design is similar to designs
18 used for iPad bumpers like the SuperShell and the Disney Hybrid Case, as well as sleeves for
19 netbooks like the Neoprene Sleeve from Built NY, and was selected because it provides extra
20 protection while accommodating children's hands to hold and operate the tablet. *Id.*

21 Third, the rectangular size and intended use of the tablet dictated the overall rectangular
22 shape of the bumper. *Id.*, ¶ 12. Any bumper must provide openings for power and accessory
23 connections for, *e.g.*, headphones, microphone and camera lens. *Id.* The bumper also must
24 accommodate a docking station if one is to be used (Fuhu does not have a docking station while the
25 TABEO is designed to dock) and cannot be so thick that covered buttons like those for power or
26 volume become inoperable when the tablet is in the case. *Id.* TRU created a bumper specifically
27 designed to fit the TABEO and accessories that TRU developed for the tablet. *Id.* The bumper TRU
28 designed includes cut-outs for the camera, speakers, microphone, power cord, power button, docking

1 outlet, and is specifically shaped to fit the iHome specially developed to dock the TABEO. *Id.*

2 Fourth, the material for the bumper needs to be safe, soft, and comfortable for children to use.
3 *Id.* Because children are the primary audience, TRU was concerned that the material be hypo-
4 allergenic and particularly durable. *Id.* It was therefore restricted in the type of material it could use
5 and ultimately settled on a silicone bumper for the tablet that is both hypo-allergenic and long-
6 lasting. *Id.*

7 With these four functional aspects in mind, the design team instructed TRU's in-house
8 designer to create several proposals for the TABEO bumper based on its concepts and descriptions.
9 See Tarantino Decl., ¶ 14 and Exs. A and B. On May 8, 2012, TRU approved the final design and
10 specifications for the bumper, which were then sent out for manufacturing. *Id.*

11 The TABEO bumper and packaging were specifically designed to be unique, attractive, and
12 clearly identifiable as a tablet associated with the TRU-brand TABEO. Tarantino Decl., ¶ 15. TRU
13 wanted to make sure consumers would not confuse the TABEO tablet or its packaging with other
14 children's tablets that are available on the market. *Id.* The word "TABEOTM" is prominently
15 displayed on the upper left-hand corner of the bumper and several "e"s with circles appear along the
16 bottom right-hand corner. *Id.* The word TABEO is also prominent on the tablet's packaging, which
17 has numerous different-colored and circled "e"s on the top and sides. *Id.* and Ex. C. The final
18 design of the TABEO bumper and packaging cannot be confused with any other tablet bumper
19 currently on the market, including the NABI. *Id.* and Exs. A, B, and C.

20 On September 10, 2012, TRU announced the launch of the TABEO, with a release date set
21 for no later than October 21, 2012. Peterson Decl., ¶ 38. Mr. Peterson confirms that it was not
22 unrealistic for TRU to be able to (1) develop, manufacture, and test a product like the TABEO; (2)
23 establish vendor relationships; (3) develop and source packaging; and (4) complete a marketing plan,
24 even within a twelve-month, fifteen-month, or even shorter timeframe. Peterson Decl., ¶ 44. Since
25 its announcement, TRU has taken over 10,000 presale orders for the TABEO. *Id.*, ¶ 48. On
26 September 25, 2012, this application for a TRO was filed.⁴

27
28 ⁴ Fuhu's Complaint sets forth sixteen claims for relief, variously styled as claims for trademark, trade dress, breach of contract, and unfair competition. Perhaps recognizing that they cannot prevail on its

1 **III. ARGUMENT**

2 **A. The TRO Should Not Issue Because Plaintiffs Have No Likelihood of Success on**
 3 **the Merits.**

4 A TRO (and preliminary injunction) is an extraordinary remedy, which is rarely but only
 5 granted upon a showing that the relief requested on a temporary basis is likely to be granted on a
 6 permanent basis after a full hearing. Here, the showing must be made under New Jersey law (for that
 7 is the law Fuhu claims applies under the NDA) and trademark and trade dress common law (because
 8 Fuhu has no issued trademarks protecting these products), and Fuhu cannot make that showing.
 9 First, although Fuhu says its claims arise under the NDA, the parties only signed the NDA because
 10 they were “contemplating entering into a business transaction” Ex. M to Mitchell Decl. at 1.
 11 That transaction manifested itself when the parties later signed the Exclusivity Agreement, which
 12 contains the following integration clause:

13 This letter comprises the entire agreement of the parties with respect to
 14 the Exclusive Right granted by Fuhu to TRU hereunder, and
 15 supersedes all prior and current communications and agreements
 between the parties regarding this subject matter.

16 The Exclusivity Agreement also contains a confidentiality provision:

17 TRU will keep the pricing, quantity, and other financial terms and
 18 conditions of this letter confidential and will not disclose the terms and
 19 conditions of this letter (including its existence) without the prior
 20 written consent of Fuhu, except as otherwise expressly permitted in
 this letter (e.g., with respect to press releases and other marketing
 actions set forth in the exhibits of this letter).

21 The confidentiality provision of the Exclusivity Agreement simply does not reach the “trade
 22 secrets” described in Exhibit G to the Mitchell Declaration and provides Fuhu no legal basis for
 23 relief.⁵

24 (..continued)

25 contract and competition claims, Fuhu’s request for a TRO is based solely on the trademark and trade
 26 dress claims which, for the reasons set forth herein, are equally deficient.

27 ⁵ In *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 723 (9th Cir. 1999), the Ninth Circuit found that a
 28 nondisclosure agreement and letter of intent were superseded by a cooperation agreement, licensing
 agreement, and frame supply agreement because these later agreements contained integration clauses.
Id. at 723-24. The plaintiff tried to avoid the arbitration clauses in the later agreements by arguing that
 its claims related to conduct occurring before the parties entered into them—when only the

1 The evidence in the Declarations of Troy Peterson and Lisa Tarantino establishes that TRU
 2 did not misappropriate Fuhu's trade secrets, if ever there were any, and the TABEO, which TRU
 3 began developing before meeting Fuhu, was created without relying on any information that Fuhu
 4 shared with TRU. TRU is not using Fuhu's trademarks, and the NABI bumper is not protectable
 5 trade dress because it is purely functional. Nor has Fuhu shown that it will suffer irreparable harm,
 6 choosing instead to skirt that issue by urging that irreparable harm should be presumed on the basis
 7 of William Bleuel's opinion that Fuhu was a "first mover" in an overly narrow market and that TRU
 8 could not possibly have brought its tablet to market without using Fuhu's "knowledge." But Mr.
 9 Bleuel's opinion carries no weight because the sole article upon which he relies was discredited by
 10 its own authors, as widely-cited Professor James Boyle makes clear in his Declaration; and Bleuel's
 11 unfounded conclusion that Fuhu was first in the market is simply not true, as respected tech
 12 columnist and businessman Philip Baker confirms in his Declaration. There simply is no legal or
 13 factual basis for a TRO to issue preventing TRU from selling its TABEO.

14 **1. TRU Did Not Misappropriate Fuhu's Trade Secrets.⁶**

15 (..continued)

16 nondisclosure agreement and letter of intent were in force. *Id.* at 723. The Court rejected the plaintiff's
 17 position, however, finding that because the later agreements contained an integration clause, they
 18 superseded the nondisclosure agreement and letter of intent. *Id.* at 724. Accordingly, the claims were
 19 subject to arbitration. *Id.* Cf. *Marci's Fun Food, LLC v. Shearer's Foods, Inc.*, 2010 WL 3982290, at
 20 *7-8 (W.D.Pa. 2010) ("With respect to the Confidentiality Agreement, Defendants argue that it was no
 21 longer in effect because it was superseded by and integrated into the Production Agreement
 22 Defendants contend that the Production Agreement is an integrated contract and Plaintiff has not
 23 argued otherwise. Thus, Plaintiff may not rely upon the Confidentiality Agreement to state a claim.").
 24 See also *KDH Elec. Sys., Inc. v. Curtis Tech. LTD*, 826 F. Supp.2d 782, 798 (E.D.Pa. 2011) ("Curtis
 25 fails to state a claim for breach of the Confidentiality Agreement because the Teaming Agreement is a
 26 fully integrated contract that supersedes the Confidentiality Agreement"); *Medtech Prods., Inc. v.*
 27 *Ranir, LLC*, 596 F. Supp.2d 788, 793 (S.D.N.Y. 2008) ("the confidentiality provisions of the PIAs are
 28 superseded by the confidentiality provisions of the General Releases").

⁶ TRU will file a motion to dismiss the Complaint on these, and other, grounds prior to the scheduled
 hearing on Fuhu's application for a TRO, casting further doubt on Fuhu's likelihood of success on the
 merits of its claims. TRU will address Fuhu's trade secret claim, but the claim would also fail if recast
 as a misappropriation of ideas claim for confidential information that does not rise to the level of a
 trade secret. See *Duffy v. Charles Schwab & Co., Inc.*, 123 F.Supp.2d 802, 810 (D.N.J. 2000) ("[a]n
 idea will not satisfy this requirement if it is not significantly different from, or is an obvious adaptation
 or combination of, ideas in the public domain."). Moreover, even if there had been a misappropriation
 of ideas, courts do not impose preliminary injunctions for these claims. *Roman Chariot, LLC v. JMRL*
Sales & Service, Inc., No. 06-626, 2006 WL 4483165, at *5 fn. 6 (D.N.J. July 11, 2006)
 ("[c]onfidential and proprietary information that does not rise to the level of a trade secret, however, is
 not entitled to the same level of protection from disclosure as a trade secret."); *Brandport*, 2006 WL
 1737867, at *4 (misappropriation of ideas claims are "typically remediable by monetary damages.");

1 To succeed on its trade secrets claims, Fuhu must prove – among other things – the existence
 2 of a trade secret, that was communicated in confidence to TRU, and was used by TRU to Fuhu’s
 3 detriment. *Airwick Industries, Inc. v. Sterling Drug Inc.*, 720 F. Supp. 409, 416 (D.N.J. 1989). Fuhu
 4 cannot meet its burden for three reasons: (1) New Jersey law does not recognize business strategies
 5 and product ideas as trade secrets; (2) the evidence in this case establishes that it was TRU – not
 6 Fuhu – that disclosed trade secrets; and (3) all of the information that Fuhu claims were trade secrets
 7 was already widely known within the consumer electronics industry.

8 2. Fuhu’s Business Strategies and Product Ideas Are Not Trade Secrets.

9 Fuhu claims that its idea of selling a kids’ version of a tablet and creating an ecosystem of
 10 accessories around the tablet are protectable trade secrets. Memorandum in Support of TRO
 11 (“Memo”), pp. 8-10. Rather than provide the Court with the supposed “secrets,” Fuhu “summarizes”
 12 them in Exhibit G to the Mitchell Declaration, presenting in *post hoc* tabular form the things it says it
 13 discussed with TRU. In essence, the table shows that Fuhu wanted to sell the NABI to kids, to sell it
 14 with accessories, to tie it to Fuhu’s FOOZ KIDS software, and to sell in volume. Nothing in Exhibit
 15 G says anything unique, secret, or even very interesting about how Fuhu planned to market, and in
 16 new Jersey, “the definition of trade secret does not include a marketing concept or a new product
 17 idea.” *Johnson v. Benjamin Moore & Co.*, 347 N.J.Super. 71, 96, 788 A.2d 906, 922 (App. Div.
 18 2002); *Brandport*, 2006 WL 1737867, at *4 (“Under New Jersey law, the definition of a trade secret
 19 *does not include a marketing concept or a new product idea.*”) (emphasis in original).

20 Exhibit G does not contain a business plan, but Fuhu nevertheless says that its plan can
 21 qualify as a trade secret, citing three cases. Memo, p. 8. None of these cases, however, consider, let
 22 alone hold, that a business plan constitutes a trade secret.⁷ Even in jurisdictions that occasionally

23 (..continued)

24 *Flemming v. Ronson Corp.*, 107 N.J. Super. 311, 317, 258 A.2d 153 (L. Div. 1969) (the
 25 misappropriating party “must pay compensation if he actually appropriates the idea and employs it in
 connection with his own activities.”)

26 ⁷ In *Trump’s Castle Assoc. v. Tallone*, a trial court found that none of the plaintiff’s information
 27 constituted a trade secret, and the appellate court reversed and remanded because the judge failed
 to explain her findings on the record. 275 N.J.Super. 159, 163-65, 645 A.2d 1207 (App.Div.1994).
 28 *Rohm & Haas C. v. Adco Chemical Co.* involved a complicated process used to develop a paint
 vehicle with special qualities, which had nothing to do with business or marketing plans. 689 F.2d 424,
 427 (3d Cir. 1982). Fuhu’s selective quote of *Osteotech, Inc. v. Biologic, LLC* is also unavailing. The

1 treat business plans as trade secrets, Fuhu’s described plan relies on concepts that are too commonly
 2 well known within the industry to support a trade secret claim. *See Myerburg v. Medtronic, Inc.*, No.
 3 03-20616, 2004 WL 5622263, at *6 (S.D. Fla. Sep. 28, 2004) (business plan not a trade secret
 4 because it contained concepts already in marketplace); *Utah Med. Prods. V. Clinical Innovations*
 5 *Assocs.*, 79 F. Supp. 2d 1290, 1313 (D. Utah 1999) (business plan “generally known or readily
 6 ascertainable to those in the industry” not a trade secret).

7 Fuhu has to point to detailed, secret information about the development, function, or sourcing
 8 of the products to make a trade secret claim, and then show that they were used by TRU to gain a
 9 competitive advantage. Moreover, concepts in and of themselves are not trade secrets. *See e.g., Spa*
 10 *Time, Inc. v. Bally Total Fitness Corp.*, 28 Fed.Appx. 131, 133 (3d Cir. 2002) (“Bally and Musak
 11 could have misused Spa’s secret only if we interpret the trade secret to encompass the very idea of
 12 broadcasting music and advertising in health clubs”); *Turbon Int’l., Inc. v. Hewlett-Packard Co.*, 769
 13 F.Supp.2d 262, 267 (S.D.N.Y., 2011) (applying New Jersey law) (“To find that HP’s recycling
 14 program could establish use of Turbon’s secret information, the Court would have to find that the
 15 ‘very idea’ of refilling empty printer cartridges for sale is a trade secret.”)

16 Fuhu alleges that it provided TRU with a list of accessories. *See* Memo, p. 10; Mitchell
 17 Decl., ¶ 82 and Ex. C. The accessories on Fuhu’s list, however, were common accessories
 18 manufactured by many others in the consumer electronics industry: headphones, speakers, screen
 19 protectors, carrying cases, HDMI cables, vehicle chargers, memory cards, and a stylus. Every new
 20 consumer product has such accessories. Baker Decl., ¶ 38. Fuhu did not share any proprietary
 21 information about the development, sourcing, or strategic value of any of these products. *See infra*,
 22 p. 10, ; Mitchell Decl., Ex. C; Peterson Decl., ¶ 32. Moreover, even if Fuhu had shared details like
 23 schematic diagrams or an explanation of its financial margins, that would not be enough. A plaintiff
 24 must also “explain these concepts, demonstrate to this Court that they are trade secrets and prove that
 25 Defendant actually disclosed the information.” *Brandport*, 2006 WL 1737867, at *7 (citing *Apollo*
 26 (..continued)

27 Court in that case was concerned, not with plaintiff’s business plan, but with its planned trademark
 28 applications. 2008 WL 686318, at *1 (D. N.J. Mar. 7, 2008) (“Plaintiff alleges that . . . Defendants
 filed trademark applications . . . that included trademarks discussed by Plaintiff as part of its business
 plans”). The court never considered whether a business plan constitutes a trade secret. *Id.* at *3 fn. 2.

1 *Techs. Corp. v. Centrosphere Indus. Corp.*, 805 F.Supp. 1157, 1202 (D.N.J.1992). Because Fuhu
2 fail to and cannot show that it communicated a trade secret to TRU, its trademark claims must fail.

3 **3. TRU Independently Developed the Product Ideas and Business Strategy**
4 **That Fuhu Now Claim as Its Own.**

5 Fuhu's claims also fail because TRU can demonstrate that the TABEO and its accessories, as
6 well as the attendant marketing and sales strategies, were independently developed. Under New
7 Jersey law, "a compelling record of independent development can indicate that a defendant did not
8 use a plaintiff's idea." *Ahlert v. Hasbro, Inc.*, 325 F. Supp.2d 509, 514-15 (D.N.J. 2004) (granting
9 summary judgment where plaintiff could not refute defendant's account of independent
10 development). As Fuhu readily concedes, TRU was exploring the possibility of developing its own
11 kids-oriented tablet with parental controls before the parties even met. Complaint, ¶ 48; *see infra*,
12 pp. 5, 10; Peterson Decl., ¶¶ 7, 42. Fuhu's admission that TRU's development plan predated the
13 parties' business relationship undermines its misappropriation claim. *See Turbon*, 769 F. Supp.2d at
14 267.

15 Before it even met Fuhu, TRU was familiar with all of the concepts that Fuhu now claims are
16 trade secrets. Peterson Decl., ¶¶ 25-41. For example, Fuhu points to the parental controls on the
17 NABI as a unique feature, but TRU had begun developing a children's tablet with parental controls
18 before the parties signed the NDA. *See Id.*, ¶ 7. The evidence, moreover, establishes that it was
19 TRU that disclosed its trade secrets to Fuhu, not the other way around. *See supra*, p. 7. Fuhu's
20 admitted expertise was in software; it had never brought a tangible product to market before the
21 NABI. *Id.*, ¶ 11 and Ex. B. It knew nothing about what it took to manufacture, design, test,
22 package, import, or market consumer electronic products. *Id.*, ¶ 11. TRU was the one with the
23 know-how, experience, and expertise which it readily shared with Fuhu in order to bring the NABI,
24 and later the TABEO, to market. *See supra*, p. 7.

25 **4. Fuhu's Alleged Business Strategies and Product Ideas Were Common**
26 **Knowledge in Fall 2011.**

27 Fuhu's alleged trade secret claims also fail because the information it now alleges constitutes
28 trade secrets was widely known within the industry. In assessing whether information amounts to a

1 trade secret, New Jersey courts consider the extent to which the information is known outside of the
 2 owner's business and the ease or difficulty by which the information can be duplicated. *Newark*
 3 *Morning Ledger Co. v. N.J. Sports & Exposition Auth.*, 423 N.J. Super. 140, 169, 31 A.3d 623, 640-
 4 41 (App. Div. 2011) (citing Restatement (First) of Torts § 757, cmt. b (1939)). Plaintiffs "must show
 5 more than that its methods and procedures were not known to the general public. It must establish
 6 that such secrets were exclusively its own and not general secrets of the trade." *Whitmyer Bros., Inc.*
 7 *v. Doyle*, 58 N.J. 25, 36, 274 A.2d 577 (N.J. 1971) (quoting *Dunfey Realty Co. v. Enwright*, 101 N.H.
 8 195, 198, 138 A.2d 80 (N.H. 1957) (internal quotation marks omitted).

9 To the extent Fuhu claims this level of secrecy, its "conclusory statements in affidavits" are
 10 "palpably insufficient" to carry the burden of proof. *Newark Morning Ledger Co. v. N.J. Sports &*
 11 *Exposition Auth.*, 423 N.J. Super. 140, 170, 31 A.3d 623, 641 (App. Div. 2011). Under New Jersey
 12 law, "information in the public domain, and information that can be garnered by reverse engineering
 13 a finished product cannot be protected as trade secrets." *Roman Chariot*, 2006 WL 4483165, at *5
 14 (citing *Sun Dial Corp. v. Rideout*, 16 N.J. 242, 257 (N.J. 1954)). Even if two products may be
 15 "somewhat similar," an injunction should be denied when "[a]ny member of the public, with access
 16 to recognized texts, could develop a [product] resembling that of plaintiffs." *Boost Co. v. Faunce*,
 17 13 N.J. Super. 63, 71, 80 A.2d 246 (Ch. Div. 1951), *aff'd*, 17 N.J. Super. 458, 86 A.2d 283 (App.Div.
 18 1952); *see also Brandport*, 2006 WL 1737867, at *5 ("many of the similarities . . . are in the public
 19 domain, such as the existence of a login, or user registration. These cannot qualify as trade secrets as
 20 these methods are employed by many websites on the Internet, such as Ebay and Amazon.")

21 Despite Fuhu's lofty rhetoric about its marketing strategy, if the alleged "trade secrets" are
 22 what appear in Exhibit G, it is not a close call. Peterson Decl., ¶¶ 35-41. Fuhu's obvious, basic
 23 industry-wide ideas, like reducing the risks associated with entering into the tablet business by
 24 building a "high quality general purpose tablet" so that you can reduce returns, or commissioning
 25 large production volumes to achieve lower prices (Memo., p. 10), are little more than Marketing 101.
 26 Peterson Decl. at ¶ 40. Fuhu did not share anything more than general business concepts and product
 27
 28

1 ideas that TRU and the rest of the industry had already implemented. Peterson Decl., ¶¶ 35-41.⁸

2 **5. TRU Is Not Using Fuhu's Trademarks and There Is No Likelihood of**
 3 **Confusion Between the Parties' Tablets.**

4 Fuhu does not have a registered trademark to protect its mark; it therefore must rely on any
 5 common law rights it may have, if any. However, Fuhu does not even specify what is likely to cause
 6 confusion, let alone that confusion is “probable, not simply a possibility.” *Murray v. Cable Natl.*
 7 *Broadcasting Co.*, 86 F.3d 858, 861 (9th Cir.1996) quoting *Rodeo Collection. Ltd. v. West Seventh*,
 8 812 F.2d 1215, 1217 (9th Cir.1987). As set forth below, Fuhu has failed to present any evidence, let
 9 alone evidence sufficient to demonstrate that a likelihood of confusion is probable.

10 Fuhu complains that TRU is using the NABI mark because when the word “Nabi” is typed
 11 into TRU’s website, the search engine pulls up the TABEO tablet and tablets manufactured by third
 12 parties, but not the NABI tablet. Although it does not believe its search practice was improper or
 13 novel, after the Complaint was filed, TRU modified the search function so that when the word
 14 “Nabi” is searched a “no results” page is returned.⁹ Thus, Fuhu can no longer claim, if ever it could,
 15 that TRU is improperly using the NABI Mark.¹⁰

16 Fuhu also claims that “the Court only need compare Fuhu’s NABI word mark with the mark
 17 used by TRU” in order to conclude that there is a likelihood that consumers will be confused.
 18 Memo, p. 14. It is unclear which TRU mark Fuhu is referring to as neither the marks “TABEO” and
 19

20 ⁸ Fuhu’s reliance on the New Jersey Trade Secret Act (“NJTSA”) in support of its claims is similarly
 21 unpersuasive. The NJTSA, which became effective on January 9, 2012, and is limited to
 22 misappropriation occurring after that date, does not apply to this case. 2011 NJ Sess. Law Serv. Ch.
 23 161 (ASSEMBLY 921) (WEST) (“This act shall take effect immediately, and does not apply to
 misappropriation occurring prior to the effective date. With respect to a continuing misappropriation
 that began prior to the effective date, the act also does not apply to the continuing misappropriation
 that occurs after the effective date.”)

24 ⁹ Webpage search engines are quite often designed to return results that display items other than the
 25 one being search for. For example, when the word “Nabi” is typed into the Amazon search engine,
 26 www.amazon.com displays a list of children’s tablets manufactured by Nabi, Archos Winfun,
 27 NextBook, Vinci, LeapFrog, and Kurio. This search functionality in virtual stores mirrors the
 experience in the real world where, for example, customers looking for Nike running shoes might be
 told that the store doesn’t carry Nike, but they are the Adidas running shoes that they do stock.
 Notably, Fuhu is not heard to complain that Amazon is violating its trademarks when it lists competitor
 products in response to a search for Nabi.

28 ¹⁰ TRU advised Fuhu about the modification to the search engine on September 27, 2012, but Fuhu has
 refused to remove this request for relief from its request for a TRO.

1 “NABI,” nor the parties’ packaging, look anything alike, and the parties are not using each other’s
 2 names. *See* Tarantino Decl., ¶ 15. Fuhu’s failure to identify which TRU mark purportedly violates
 3 the NABI word mark, let alone satisfy even one of the factors for assessing the likelihood of
 4 confusion, is fatal to its claims.¹¹

5 **6. Fuhu Has Not Established Any Protectable Trade Dress or Likelihood of**
 6 **Confusion.**

7 The real gravamen of Fuhu’s application for a TRO is its claim that the contoured rubber
 8 bumper that surrounds the NABI tablet is unique to Fuhu. In other words, this dispute is about a
 9 removable bumper that functions like several similar products in the market, which Fuhu has tried to
 10 stretch into a basis for injunctive relief. With no federal registration in the bumper, Fuhu can only
 11 claim that it is entitled to common law trade dress protection to keep the entire TABEO off the
 12 market.¹² It is well-established, however, that in order to be protectable, a trade dress must be non-
 13 functional. *Disc Golf Ass’n, Inc. v. Champion Discs, Inc.*, 158 F.3d 1002, 1006 (9th Cir. 1998). To
 14 determine whether a product’s trade dress is functional, the Court may “collectively” weigh four
 15 factors, none of which is dispositive: (1) whether the trade dress yields a utilitarian advantage, (2)
 16 whether alternative designs are available, (3) whether advertising touts the utilitarian advantages of
 17 the design, and (4) whether the particular design results from a comparatively simple or inexpensive
 18 method of manufacture. *Id.* Functionality is a question of fact; it is the plaintiff’s burden to prove its
 19 trade dress is non-functional. *See Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1506 (9th
 20 Cir.1987). Fuhu has not and cannot meet this burden, for several reasons.

21 First, on its website, Fuhu concedes that the NABI bumper is functional. The section on
 22 Fuhu’s website called “The Drop Test” contains several videos of drop-test comparisons between the
 23 NABI and competitor tablets the Kindle Fire, Nook and iPad. *See* [http://www.nabitablet.com/drop-](http://www.nabitablet.com/drop-test#!nabiTwo)
 24 [test#!nabiTwo](http://www.nabitablet.com/drop-test#!nabiTwo). The videos show that the NABI, when encased in the contoured rubber bumper,

25 _____
 26 ¹¹ These deficiencies in not only Fuhu’s trademark infringement claim but its entire Complaint are yet
 another ground for TRU’s planned motion to dismiss.

27 ¹² Fuhu has not clearly identified its claimed trade dress, and appears to muddy the waters with a
 28 discussion of its marketing theme of butterflies and related packaging, brochures, and advertisements.
 TRU’s motion to dismiss will address Fuhu’s failure to adequately articulate its trade dress claims.

1 suffers little or no damage, particularly as compared to the damage suffered by the other tablets.
2 This conclusively proves that Fuhu's alleged trade dress is functional. J.T. McCarthy, 1 *McCarthy*
3 *on Trademarks and Unfair Competition* (4th ed., Thomson Reuters/West 2011) § 7:74 at 7-152 ("If a
4 seller advertises the utilitarian advantages of a particular feature, this constitutes strong evidence of
5 functionality.")

6 Second, the design of the NABI contoured bumper is inherently functional. The shape of the
7 NABI bumper is derived from the shape of the tablet itself, which like almost all tablets on the
8 market are rectangular. The contours on the sides of the bumper are designed so that it can be easily
9 gripped by the small hands of a child, and the flared corners are designed to help protect the tablet
10 from damage when it is inevitably dropped by children. Tarantino Decl., ¶¶ 10-11. These utilitarian
11 functions render the design of the NABI bumper inherently functional and thus not protectable.

12 Finally, Fuhu fails to establish that its purported trade dress has acquired secondary meaning.
13 The Supreme Court has held that in an action for infringement of unregistered trade dress under §
14 43(a) of the Lanham Act, if the trade dress claim involves a product's *design*, rather than its
15 *packaging*, Plaintiff must establish that the trade dress has acquired secondary meaning. *Wal-Mart*
16 *Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 216 (2000) (emphasis added). Secondary meaning
17 exists when, "in the minds of the public, the primary significance of a [design] is to identify the
18 source of the product rather than the product itself." *Id.* at 211 (internal citation omitted). Trade
19 dress holders may establish secondary meaning through direct and circumstantial evidence. *Cont'l*
20 *Lab. Prod., Inc. v. Medax Int'l, Inc.*, 114 F.Supp.2d 992, 999 (S. D. Cal.2000). Direct evidence such
21 as consumer surveys and consumer testimony provide the strongest evidence of secondary meaning.
22 *Id.* (quoting *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1358) (9th Cir. 1985). Secondary
23 meaning may also be established through circumstantial evidence such as "exclusivity, manner, and
24 length of use, amount and manner of advertising, amount of sales and the number of customers, and
25 plaintiff's established place in the market." *Id.* (quoting *Filipino Yellow Pages v. Asian Journal*
26 *Publ'n*, 198 F.3d 1143, 1151 (9th Cir. 1999).

27 No such evidence is presented here. Fuhu has submitted absolutely no direct and little
28 circumstantial evidence to support its claim of secondary meaning. The conclusory assertions in the

1 Mitchell Declaration that NABI products “have consistently and continuously featured distinctive,
 2 non-functional trade dress” in the form of its bumper, beyond being self-serving testimony worthy of
 3 little, if any, weight, *see, e.g., Norm Thompson Outfitters, Inc. v. GM Corp.*, 448 F.2d 1293, 1297
 4 (9th Cir. 1971) (finding that the testimony of the plaintiff’s friend possessed “little value in
 5 establishing secondary meaning,” insofar as testimony from persons closely associated with the
 6 plaintiff does not adequately reflect the views of the buying public), are demonstrably false – Fuhu’s
 7 own brochures and press release show that Fuhu has not “consistently and continuously” used the
 8 “butterfly” design on the NABI. As noted above, the brochure that Fuhu originally gave TRU
 9 showed a bumper that was rectangular in shape and flat on the sides. Peterson Decl., ¶¶ 20-22;
 10 Mitchell Decl., Ex. A, p. 12. Moreover, when Fuhu issued its 2011 press release, there was no
 11 reference to exaggerated, flared corners or even a butterfly, instead it refers to a bumper with
 12 “interchangeable arms, legs, heads and handles in a variety of colors and characters.” Peterson
 13 Decl., Ex. B.

14 Fuhu has also failed to submit any evidence of relevant sales, and proffers few advertising
 15 examples to support its claims. Fuhu claims, without citing any evidence, that it spent approximately
 16 \$1,000,000 on development and air time costs for television commercials (which only ran for a
 17 period of three days in the summer of 2012). Mitchell Decl., ¶ 64. It also claims that it has \$58
 18 million in sales since 2011, which is also suspect as this number is for “products bearing or
 19 incorporating the butterfly shape.” *Id.*, ¶ 65. Fuhu does not identify what portion of these sales
 20 reflect sales of the bumper, the only product at issue in this trade dress inquiry.

21 Fuhu’s trade dress claims are not only unsubstantiated, they are also incredible. While Fuhu
 22 says its bumper is “iconic,” it simply is not a Burberry® plaid pattern or Coke® bottle shape. Fuhu
 23 represents its bumper as follows:



28 However, it has used this shape for only 10 months and has not done so exclusively; there are a

1 number of companies in the consumer electronics industry that sell similar, if not identical, bumpers
 2 for tablets as original accessories and as aftermarket add-ons. Here is just a sampling:

	Disney Hybrid Case and Shell for iPad and iPad2		M-Edge Super Shell
	Kurio Tablet for Children		FisherPrice Aptivity Case for iPad
	Ballistic Tough Jacket for iPad 2-1		Hatch iStartSmart Mobile

15 The fact that Fuhu has not, and cannot, come forward with any evidence that consumers associate a
 16 bumper with flared corners with only a single source is fatal to its trade dress infringement claims.

17 **B. Fuhu Will Not Suffer Irreparable Harm.**

18 A party seeking a preliminary injunction must show that irreparable harm is *likely*, not merely
 19 possible. *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365, 375 (2008); *eBay, Inc. v.*
 20 *MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006). “Courts have consistently identified a showing of
 21 likely irreparable harm as the single most important prerequisite for the issuance of a preliminary
 22 injunction; Plaintiff must make that showing before the other requirement for the issuance of a
 23 preliminary injunction need even be considered.” *Inspection Management Systems, Inc v. Open Door*
 24 *Inspections, Inc.*, 2009 WL 805813, at *3 (E.D. Cal., Mar. 26, 2009) (citing *Dominion Video*
 25 *Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260-61 (10th Cir. 2004)). Fuhu has
 26 utterly failed to meet this burden, instead suggesting that it be relieved of this critical obligation
 27 because it was a “first mover” in the market.

28 The basis for Fuhu’s “first-mover” argument is its expert, William Bleuel, whose incredible

1 testimony TRU has moved to exclude. On the basis of an old article effectively recanted by its
 2 authors, Bleuel says that the loss of “first mover status” is “irreparable”, Bleuel Decl., ¶ 11, and
 3 therefore Fuhu asks this Court to *presume* that TRU’s planned sales of the TABEO tablet in the
 4 upcoming 2012 holiday season will cause Fuhu irreparable injury. As the evidence described above
 5 shows, however, Fuhu was not a “first-mover” in the field of children’s tablets, nor would “first-
 6 mover” status warrant the presumption of irreparable harm Fuhu seeks. *See* Declaration of Professor
 7 James Boyle (“Boyle Decl.”), filed concurrently herewith, ¶ 12. As Professor Boyle makes clear, the
 8 article on which Bleuel relies has been abandoned by everyone, including its own authors, and
 9 twenty-five years of subsequent scholarship and empirical study establishes that a “first-mover”
 10 faces as many disadvantages as advantages in a new industry. *Id.*, ¶¶ 14-15, 20. Accordingly, we
 11 cannot *presume* that Fuhu would suffer a severe and irremediable harm from TRU’s sales of the
 12 TABEO. Boyle Decl., ¶ 23. If Fuhu wants injunctive relief, it must show how it would be
 13 irreparably harmed.

14 Even if Fuhu ultimately were to prevail on its claims, monetary damages will be more than sufficient
 15 to compensate it for any harm suffered as a result of TRU’s conduct. Put another way, monetary loss
 16 in the form of lost sales simply does not constitute irreparable harm. *Aurora World, Inc. v. Ty Inc.*,
 17 719 F. Supp. 2d 1115, 1169-1170 (C.D. Cal. 2009) (quoting *Reebok Int’l Ltd. v. J. Baker, Inc.*, 32
 18 F.3d 1552, 1557 (Fed. Cir. 1994) (“Loss of sales alone will not support a finding of irreparable injury
 19 ‘because acceptance of that position would require a finding of irreparable harm to every’ plaintiff
 20 regardless of the circumstances”) and that “potential loss of market share does not constitute
 21 irreparable injury.” *Id.* (citing *Oakland Tribune, Inc. v. Chronicle Publishing Co., Inc.*, 762 F.2d
 22 1374, 1376 (9th Cir.1985)). On this basis alone, the TRO should be denied. *See Aurora World*, 719
 23 F. Supp. 2d at 1169 -1170 (finding plaintiff’s reliance on lost sales misplaced and insufficient to
 24 demonstrate a probability of irreparable harm and denying plaintiff’s request for injunctive relief);
 25 *see also, Mirina Corp. v. Marina Biotech*, 770 F.Supp.2d 1153, 1162 (W.D. Wash. 2011) (finding
 26 lost sales or business opportunities *cannot* constitute an irreparable harm) (emphasis added).

27 **C. The Balance of Hardships Weighs in TRU’s Favor**

28 In stark contrast to the lack of harm that Fuhu will suffer should the TRO be denied, the harm

1 to TRU if the TRO issues and it is barred from marketing or selling the TABEO would be
2 monumental.

3 To date, TRU has pre-sold approximately 10,000 TABEO tablets. Peterson Decl., ¶ 48.
4 TRU has already spent \$1,033,000 in advertising to promote the TABEO, and has committed
5 \$12,637,900 to manufacture the TABEO tablets for this upcoming holiday season, as well as
6 \$1,232,900 to manufacture the accessories and bumpers. *Id.*, ¶ 45. The tablets have begun to arrive
7 and are being shipped to customers. *Id.*, ¶ 48. An injunction would require TRU to recover products
8 it is shipping, refund well over \$1,490,000, and, more importantly, leave thousands of its customers
9 with a tarnished view of TRU and its practices. *Id.* In addition to the substantial hard costs to TRU,
10 the company would irreversibly lose significant goodwill with each of its customers that purchased a
11 pre-sold TABEO, with a correspondingly negative impact on the rest of TRU brands, and would lose
12 valuable credibility with the public after failing to deliver an advertised product.¹³ *Id.*, ¶ 49.

13 **D. Public Interest Does Not Favor a Temporary Restraining Order.**

14 The public interest is best served, not by reducing the choices consumers have, but by
15 expanding them. Removing the TABEO from the market will not benefit the public, especially the
16 thousands of consumers who pre-ordered the tablets. The best way to protect the public is to deny
17 the TRO and allow TRU to continue to sell its products.

18 **IV. Conclusion**

19 TRU requests that the Court DENY Fuhu’s Motion for Temporary Restraining Order.

20 Dated: October 4, 2011

Respectfully submitted,

21 **EDWARDS WILDMAN PALMER LLP**

22 By: _____

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24 Attorney for Defendants
25 TOYS “R” US, INC. and TOYS “R”
26 DELAWARE, INC.

27 ¹³ Were this Court to consider entry of any type of restraint, TRU respectfully reserves the right to
28 request that Fuhu post an immediate bond in an amount sufficient to compensate TRU were the Court
of Appeals to conclude that the restraint was improvidently granted (much as, were Fuhu ultimately to
prevail, TRU would have to compensate Fuhu in damages for any improper actions.).