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11
 12 **UNITED STATES DISTRICT COURT**
 13 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

14
 15 WAGNER AERONAUTICAL, INC.;
 16 MAMMOTH FREIGHTERS LLC;
 17 WILLIAM WAGNER; and WILLIAM
 TARPLEY,

18 Plaintiffs,

19 v.

20
 21 DAVID DOTZENROTH; SEQUOIA
 22 AIRCRAFT CONVERSIONS, LLC;
 23 CAI CONSULTING LTD.; CHARLES
 WILEY DOTZENROTH; ANDREW
 24 MANSELL; and STEVEN WELO,

25 Defendants.

Case No.: 21CV0994 L AGS

**EX PARTE APPLICATION FOR
 LEAVE TO EXCEED PAGE LIMIT
 ON MOTION FOR SUMMARY
 JUDGMENT OR, IN THE
 ALTERNATIVE, PARTIAL
 SUMMARY JUDGMENT, BY
 DEFENDANTS DAVID
 DOTZENROTH, SEQUOIA
 AIRCRAFT CONVERSIONS, LLC,
 CAI CONSULTING LTD., AND
 CHARLES WILEY DOTZENROTH**

Dist. Judge: Hon. M. James Lorenz

NO ORAL ARGUMENT PURSUANT
 TO LOCAL RULES

1 Pursuant to Local Civil Rule 7.1(h), Defendants David Dotzenroth, Sequoia
2 Aircraft Conversions, LLC, CAI Consulting Ltd., and Charles Wiley Dotzenroth
3 (“Defendants”) respectfully apply *ex parte* for leave to file a Memorandum of
4 Points and Authorities in excess of 25 pages in support of Defendants’ Motion for
5 Summary Judgment.

6 Good cause exists for the this request:

7 1. Pursuant to Local Civil Rule 7.1(h), memoranda in support of a
8 motion by a party may not exceed 25 pages without leave of court to exceed the
9 page limit.

10 2. Defendants attempted in good faith to comply with the 25-page limit
11 in their motion for summary judgment, but could not fully address the factual and
12 legal issues within that limit. The Complaint in this action is 31 pages long, with
13 six claims for relief, and defendants needed five additional pages in their brief to
14 fully address all of plaintiffs’ allegations and claims. The brief that defendants
15 wish to file is attached here to as Exhibit A.

16 3. Defendants’ motion is 30 pages, which is 5 pages beyond the Rule
17 7.1(h)’s page limit. It was not possible to fully present all of the factual and legal
18 arguments in support of the motion for summary judgment motion –within the 25
19 page limit.


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1 4. Defendants would obviously stipulate to plaintiffs receiving the
2 same accommodation of five additional pages in their opposition brief, should
3 this request be granted.

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Dated: June 21, 2021

Respectfully Submitted,

By: 
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CERTIFICATE OF SERVICE

I certify that today I am causing to be served the foregoing document by CM/ECF notice of electronic filing upon the parties and counsel registered as CM/ECF Users. I further certify that, to the extent they are not registered CM/ECF Users, I am causing the foregoing document to be served by other means.

Dated: June 21, 2021



Kenneth M. Fitzgerald, Esq.

INDEX OF EXHIBITS TO *EX PARTE* APPLICATION FOR LEAVE TO EXCEED PAGE LIMIT ON MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT, BY DEFENDANTS DAVID DOTZENROTH, SEQUOIA AIRCRAFT CONVERSIONS, LLC, CAI CONSULTING LTD., AND CHARLES WILEY DOTZENROTH

Exhibit No.	Description	Page No.
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EXHIBIT A

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 23 WILEY DOTZENROTH; ANDREW
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25 Defendants.

Case No.: 21CV0994 L AGS

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION FOR SUMMARY
 JUDGMENT OR, IN THE
 ALTERNATIVE, PARTIAL
 SUMMARY JUDGMENT, BY
 DEFENDANTS DAVID
 DOTZENROTH, SEQUOIA
 AIRCRAFT CONVERSIONS, LLC,
 CAI CONSULTING LTD., AND
 CHARLES WILEY DOTZENROTH**

Date: July 26, 2021
 Dist. Judge: Hon. M. James Lorenz

**NO ORAL ARGUMENT PURSUANT
 TO LOCAL RULES**

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1 **I. INTRODUCTION**

2 This is a trade secret case where the alleged trade secrets were not kept
3 secret. Plaintiffs admit throughout their Complaint that they shared documents,
4 details, and strategies with defendant David Dotzenroth, in the hopes of entering a
5 business relationship with him. Dotzenroth, however, never signed an NDA or
6 confidentiality agreement with plaintiffs before his alleged misappropriation of
7 the information that plaintiffs shared. Nor did his son Wiley Dotzenroth, to whom
8 plaintiffs also sent supposedly secret information. Plaintiffs allege they put
9 “PROPRIETARY” markings on their business plan and design information, but
10 extensive documentary evidence shows this allegation to be untrue. And as
11 plaintiffs’ own allegations demonstrate, the Dotzenroths never entered a
12 partnership or other fiduciary relationship with plaintiffs, much less formed a
13 business. Moreover, plaintiffs made no effort to “claw back” or otherwise protect
14 the documents they now claim as trade secrets when the parties’ preliminary
15 discussions broke off.

16 By their own admission, plaintiffs learned the Dotzenroths were using the
17 purported trade secrets as early as 2019, and by no later than February 2020.
18 Despite knowing their purported trade secrets were being used and shared with
19 others, plaintiffs did nothing about it. They finally got around to suing for trade
20 secret misappropriation in late May 2021, after realizing that they were failing in
21 the market, and long after they disclosed and permitted the use and dissemination
22 of their purportedly confidential information. Because plaintiffs disclosed
23 documents and information to those who had no duty to keep them secret, and
24 because plaintiffs took no action to protect the information now claimed as trade
25 secrets even after knowing it was being used by defendants in a competing
26 venture, plaintiffs lost whatever rights they may have had to claim trade secret
27 protection.

28 Trade secret cases can be complex, but this one is easily disposed of. It is a

1 fundamental prerequisite to claiming trade secret protection that a party claiming
2 to own the trade secrets take meaningful *action* to keep them secret. A party
3 cannot claim trade secret protection in information that was shared with a
4 potential business partner – even if the sharing party *expected* it to be kept
5 confidential – if the potential partner never signed an NDA or confidentiality
6 agreement, or if the potential partner had no legal duty of secrecy. No such duty
7 existed here. The parties never agreed on the essential terms of a joint venture,
8 never entered a partnership agreement or formed a company to pursue the aircraft
9 conversion business together, and therefore had no fiduciary relationship or
10 accompanying duty of secrecy. Even if plaintiffs’ documents and information
11 could be considered valuable – which is highly doubtful at best – plaintiffs cannot
12 invoke trade secret law under the undisputed facts here. As a result, summary
13 judgment on plaintiffs’ trade secret misappropriation claims should be granted.

14 Plaintiffs’ other claims are largely predicated on the purported trade secret
15 theft alleged against defendants. Because the trade secret claims fail, so too do the
16 claims dependent on them. The undisputed facts also show that plaintiffs cannot
17 succeed on those claims for additional reasons discussed below. Summary
18 judgment on all of plaintiffs’ claims is therefore warranted.

19 II. UNDISPUTED FACTS

20 Plaintiffs’ lengthy allegations are easily summarized. Plaintiffs tried to
21 form a passenger-to-freighter aircraft conversion business for Boeing 777’s with
22 defendant David Dotzenroth. The parties never agreed on the essential business
23 terms for that relationship, however. Doc. 1 (Complaint) ¶¶ 7, 51, 53, 55.
24 Throughout the course of their discussions about a *potential* business
25 arrangement, plaintiffs shared documents and information with Dotzenroth. *Id.* ¶
26 40 (“Dotzenroth received emails containing drafts of the business plan,
27 information used for the roadmap, and other important documents and
28 communications . . .”). Plaintiffs now contend the documents and information

1 shared with Dotzenroth are confidential trade secrets – including a business plan,
2 budget, and schedule roadmap. *Id.* ¶ 83.

3 However, during the time these materials were shared with Dotzenroth –
4 before May-June 2019 (when plaintiffs say they parted ways with Dotzenroth) –
5 plaintiffs never had Dotzenroth sign an NDA or any confidentiality agreement.
6 Dozenroth Dec. ¶ 2. Plaintiffs fail to allege that such a written agreement exists,
7 and they are not suing for breach of contract. Rather than alleging that Dotzenroth
8 signed any NDA or confidentiality agreement, plaintiffs allege that they shared
9 their supposedly secret information “*with the understanding* shared by
10 Dotzenroth” that the information was confidential. Doc. 1 ¶ 5 (emphasis added).
11 Elsewhere, plaintiffs vaguely allege the existence of some unspecified, unwritten
12 and indeterminate confidentiality agreement. *Id.* ¶ 33 (alleging the parties met to
13 discuss their plans and “emphasized the need to keep their business plan and
14 engineering strategy confidential, and all agreed to do so”).

15 According to plaintiffs, they protected their purported trade secrets by
16 placing “PROPRIETARY” legends on the materials containing them. *Id.* ¶ 44.
17 The purportedly protected information included a conversion program schedule,
18 and design drawings showing placement of a cargo door. *Id.* ¶¶ 46, 60, 64.
19 Plaintiffs also allege that Wagner Aeronautical completed preliminary design
20 work, including a “main deck cargo layout, a weight analysis, and other analyses .
21 . . .” *Id.* at 11:7-11. Plaintiffs allege this information was “confidential,
22 proprietary, and highly valuable.” *Id.* Plaintiffs therefore allege that Tarpley and
23 Wagner “took individual actions to ensure” their “data and work-product
24 remained confidential, including placing “‘PROPRIETARY’ legends on the
25 material” (*id.* at 13:4-6) “[g]iven the extraordinary value of their confidential and
26 proprietary information.” *Id.* at 12:23-24.

27 The evidence shows these allegations to be false. In truth, Tarpley emailed
28 work product to Dotzenroth that included the conversion program development

1 schedule, Wagner design drawings showing placement of the cargo door (a
2 supposedly secret design feature), the main deck cargo layout, and a weight
3 analysis – all with no “PROPRIETARY” or other confidentiality markings on
4 them. Dotzenroth Dec. ¶¶ 4-5, Exhs. 1-3. Indeed, Tarpley received this design
5 work from Wagner, who sent it to Tarpley without any “proprietary” or
6 “confidential” designations. Dotzenroth Dec., Exh. 2. Tarpley forwarded it to
7 Dotzenroth, also without any such designations. *Id.*

8 Tarpley also emailed at least seven iterations of the draft business plan to
9 Dotzenroth, starting with the very first version on January 19, 2019. Dotzenroth
10 Dec. ¶ 7, Exh. 4. The draft business plan had no “proprietary” or “confidential”
11 markings on it. *Id.* Tarpley’s email transmitting it had no “proprietary” or
12 “confidential” designation on it. *Id.* Tarpley sent additional iterations of the
13 business plan by email, again with no “proprietary” or “confidential”
14 designations. Dotzenroth Dec. ¶ 7, Exhs. 4-10. These drafts included *all* of the
15 information plaintiffs claim as confidential in their Complaint, including design
16 features, costs, marketing strategy, and the like. *Ibid.*, Dotzenroth Dec. ¶ 8, Exh.
17 10. Tarpley had also sent a different industry player’s 777 conversion
18 presentation from 2014, showing placement of the cargo door in the location that
19 plaintiffs now allege was their unique and secret design feature. Dotzenroth Dec.
20 ¶ 9, Exh. 11 at 229-230.

21 The circumstances surrounding plaintiffs’ disclosures did not involve a
22 partnership or other relationship of trust and confidence. Indeed, plaintiffs not
23 only fail to allege that Dotzenroth was a trusted business partner; they go out of
24 their way to characterize him as a neophyte and nobody, who had no insight and
25 who contributed nothing. *See, e.g., id.* at 2:28-3:1 (Dotzenroth had “little or no
26 aircraft conversion experience or project management experience”); *id.* at 3:23-24
27 (Dotzenroth failed to “contribute in any meaningful way to the conversion
28 program”); *id.* at 14:23-27 (“there were few roles he could fill”); *id.* at 15:12-14

1 (Dotzenroth “was unwilling to accept significant responsibility and made only
2 minor contributions, if any, at all”). And yet, plaintiffs would have us believe
3 they shared all their most treasured trade secrets with him.

4 Plaintiffs allege that they found out years ago that Dotzenroth took their
5 supposed trade secrets and used them to pursue a conversion program of his own.
6 Doc. 1 ¶ 57 (alleging that Dotzenroth organized a meeting with NIAR in Kansas
7 in November 2019 to which plaintiff Wagner was invited, where the Dotzenroths
8 “were simply presenting the conversion program that Wagner and Tarpley had
9 developed”); *id.* ¶¶ 59-60 (alleging that Dotzenroth attempted to enlist plaintiff
10 Tarpley’s assistance in February 2020, and Tarpley “*immediately recognized* that
11 Dotzenroth was using the information and business plan that Tarpley had
12 prepared with Wagner,” and that Dotzenroth’s plan “contained a conversion
13 program schedule and design features from Wagner and Tarpley’s conversion
14 program and discussed in the materials Dotzenroth stole”) (emphasis added); *id.*
15 ¶¶ 63-64 (alleging that a conversion program sent to plaintiff Wagner by NIAR
16 on March 3, 2020 “like the Dotzenroths’ November 2019 presentation in Wichita
17 – bore striking similarities to Wagner and Tarpley’s own conversion program –
18 not least of which was the placement of the cargo door on the aircraft.”); *id.* ¶ 65
19 (alleging that in April 2020, defendant Wiley Dotzenroth sent a PowerPoint
20 presentation containing references to intellectual property that “Sequoia did not
21 own As both David Dotzenroth and Wiley Dotzenroth well knew, the Jumbo
22 Jet conversion program and been developed by Wagner, Tarpley, and Wagner
23 Aeronautical”); *id.* ¶ 66 (alleging that Dotzenroth and Sequoia publicly launched
24 their own Jumbo Jet conversion program in September 2020 – in partnership with
25 NIAR – to compete directly with Wagner and Tarpley”). Yet until this lawsuit
26 was filed on May 25, 2021, plaintiffs did nothing to claim or protect the
27 information they now claim they vigilantly safeguarded. Dotzenroth Dec. ¶ 13.
28

1 Defendants did not misappropriate any intellectual property belonging to
 2 plaintiffs. They pursued a different business model – involving a consortium of
 3 industry players with whom plaintiffs never interacted, and that consortium is
 4 developing its own engineering data to convert the 777 aircraft that plaintiffs
 5 identify and procure. The evidence undermines plaintiffs’ allegations that they
 6 developed and own the information they now claim as trade secret. *See*
 7 Dotzenroth Dec. ¶ 3; Wiley Dotzenroth Dec. ¶ 6. Plaintiffs have not specifically
 8 identified their trade secrets with particularity as the law requires, and defendants
 9 do not believe they can. Discovery and litigation over the sufficiency of plaintiffs’
 10 trade secret identification would undoubtedly reveal that plaintiffs’ alleged trade
 11 secrets are not actually trade secrets, but publicly available information and/or
 12 information provided to plaintiffs, rather than developed by them.

13 But regardless of whether plaintiffs actually own the trade secrets they
 14 claim to, the undisputed facts show they did not take reasonable measures to
 15 protect them, which is enough to warrant summary judgment.

16 III. ARGUMENT

17 A. The Undisputed Facts Defeat Plaintiffs’ Trade Secret Claims, as a 18 Matter of Law

19 Claims under the federal Defend Trade Secrets Act (“DTSA”) and
 20 California’s Uniform Trade Secrets Act (“CUTSA”) “may be analyzed together
 21 because the elements are substantially similar.” *Spice Jazz LLC v. Youngevity*
 22 *Int’l, Inc.*, No. 19-CV-0583-BAS-DEB, 2020 WL 6484640, at *3 (S.D. Cal. Nov.
 23 4, 2020) (quotation marks and citation omitted). Under both, a plaintiff must
 24 plead and prove: “(1) that the plaintiff possessed a trade secret, (2) that the
 25 defendant misappropriated the trade secret[,] and (3) that the misappropriation
 26 caused or threatened damage to the plaintiff.” *Id.*

27 To satisfy their obligation to show that they possessed a trade secret at all,
 28 plaintiffs must demonstrate, among other things, that they took “reasonable

1 measures to keep [the] information secret.” 18 U.S.C.A. § 1839(3)(A); *see also*
2 Cal. Civ. Code § 3426.1(d)(2) (same). And to satisfy their obligation to show that
3 defendants misappropriated, plaintiffs must demonstrate that defendants either (1)
4 came into possession of the information at issue while having “reason to know
5 that the trade secret was acquired by improper means”; or (2) did not have
6 “express or implied consent” to disclose or use the information, *and* either “used
7 improper means to acquire knowledge of the trade secret” or had “a duty to
8 maintain the secrecy of the trade secret or limit the use of the trade secret.” 18
9 U.S.C. § 1839(5)(B)(i)-(ii); *see also* Cal. Civ. Code § 3426.1(b)(2)(A)-(B)
10 (same).

11 Here, plaintiffs cannot raise a triable issue of fact as to whether their
12 claimed trade secrets qualify for trade secret protection. That is because plaintiffs
13 indisputably failed to take reasonable steps to keep the information secret.
14 Moreover, defendants neither used improper means to acquire the information nor
15 had a duty to keep it secret.

16 Plaintiffs’ allegations are full of sound and fury, but as far as trade secret
17 law goes, they signify nothing. Plaintiffs fail to allege, nor can they allege, that
18 defendants ever signed an NDA or confidentiality agreement during the time that
19 plaintiffs shared their supposedly secret information. Plaintiffs fail to allege, nor
20 can they allege, that defendants entered a partnership agreement or formed an
21 LLC, which would have bound them to a duty of secrecy. What plaintiffs do
22 allege is that they had preliminary discussions about a potential business
23 relationship with defendant David Dotzenroth, and that during those discussions,
24 plaintiffs freely shared their allegedly trade secret information. But the parties
25 never got close to partnering up or agreeing on any essential terms for a
26 partnership, LLC, or other confidential relationship. Because plaintiffs shared
27 their information and documents without any NDA or other confidentiality
28 obligations in place, plaintiffs lost any right to now claim trade secret protection

1 in the information and documents they chose to disclose.

2 **1. Plaintiffs Failed to Take Reasonable Measures to Keep the**
3 **Information at Issue Secret From the Start**

4 “The test for trade secrets is whether the matter sought to be protected is
5 information (1) which is valuable because it is unknown to others and (2) which
6 the owner has attempted to keep secret.” *Whyte v. Schlage Lock Co.*, 101 Cal.
7 App. 4th 1443, 1454 (2002). “If an individual discloses his trade secret to others
8 who are under no obligation to protect the confidentiality of the information, or
9 otherwise publicly discloses the secret, his property right is extinguished.”
10 *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (quoted in *In re*
11 *Providian Credit Card Cases*, 96 Cal. App. 4th 292, 304 (2002)). The undisputed
12 facts show that is what happened here.

13 In general, the disclosure of alleged trade secrets to others who are not
14 bound by an NDA destroys any trade secret protection. *Whyte*, 101 Cal. App. 4th
15 at 1454-5 (finding no trade secret protection in documents shared with customer
16 not bound by secrecy agreement); *Cinebase Software, Inc. v. Media Guar. Tr.,*
17 *Inc.*, No. C98-1100 FMS, 1998 WL 661465, at *10-11 (N.D. Cal. Sept. 22, 1998)
18 (failing to secure nondisclosure agreements constituted unreasonable efforts to
19 maintain secrecy despite securing the information with passwords, limiting access
20 to a “need-to-know” basis, and marking documents confidential); *Southwest*
21 *Stainless, L.P. et al. v. Sappington et al.*, 582 F.3d 1176, 1189-90 (10th Cir. 2009)
22 (no trade secret protection in pricing information disclosed to customer with no
23 restriction on customer’s right to share it).

24 “Trade secrets are a peculiar kind of property. Their only value consists in
25 their being kept private. Thus, the right to exclude others is central to the very
26 definition of the property interest. Once the data that constitute a trade secret are
27 disclosed to others, or others are allowed to use those data, the holder of the trade
28 secret has lost his property interest in the data.” *DVD Copy Control Assn., Inc. v.*

1 *Bunner*, 31 Cal. 4th 864, 881 (2003). The undisputed facts show plaintiffs shared
2 their purported trade secrets with no NDAs in place, and without even marking
3 them as “proprietary” or confidential in many instances. As a result, they “lost
4 [their] property interest in the data.” *Id.* at 881.

5 Dotzenroth never signed an NDA with plaintiffs during the time they were
6 sharing supposedly trade secret information with him. Dotzenroth Dec. ¶ 2. In
7 fact, he was never asked to. *Id.* Moreover, *Tarpley emailed Dotzenroth the*
8 *specific conversion schedule and design information now claimed as trade*
9 *secrets in emails and documents without any “proprietary” or “confidentiality”*
10 *markings on them.* Dotzenroth Dec. ¶ 4, Exhs. 1-2. Specifically, Tarpley sent
11 Dotzenroth the B777 conversion “program development schedule” in a May 31,
12 2018 email with no proprietary designation. Dotzenroth Dec. ¶ 4, Exh. 1. *Cf.*
13 Doc. 1 at 2:9-10 (alleging the “misappropriated information” includes “a schedule
14 roadmap”); *id.* at 10:18-20 (alleging plaintiffs’ trade secret business plan
15 “outlined a customized development schedule”). Tarpley also sent Dotzenroth
16 multiple drawings with no proprietary designations which showed the placement
17 of the cargo door, in a May 31, 2018 email with no proprietary designation.
18 Dotzenroth Dec. ¶ 4, Exh. 2 at 10-15. *Cf.* Doc. 1 at 17:4-8 (alleging that
19 Dotzenroth “was using design features from Wagner’s and Tarpley’s program
20 including the door placement on the aircraft that was unique to Wagner and
21 Tarpley’s conversion program and discussed in the materials Dotzenroth stole”).
22 In fact, Tarpley emailed a competitor’s 777 conversion presentation which
23 showed the cargo door placement in the same position that plaintiffs falsely allege
24 was “unique to Wagner and Tarpley’s conversion program.” Doc. 1 at 17:4-8.
25 Dotzenroth Dec. 9, Exh. 11.

26 Tarpley also emailed Dotzenroth design documents with no proprietary
27 designations that had been forwarded by Wagner with no proprietary
28 designations, which included a main deck cargo pallet layout and weight analysis.

1 Dotzenroth Dec. ¶ 4, Exhs. 2, 3. *Cf.* Doc. 1 at 11:7-11 (alleging that Wagner’s
2 preliminary design work included a “main deck cargo pallet layout, a weight
3 analysis, and other analyses,” and that this design information was “confidential,
4 proprietary and highly valuable”).

5 Plaintiffs repeatedly tout their business plan as containing the crown jewels
6 of their trade secrets. Doc. 1 ¶¶ 1, 4, 5, 8, 33, 35, 36, 37, 38, 39, 40, 41, 42, 44,
7 45, 46, 47, 48, 53, 67, 74, 75, 76, 77, 78, 81, 83, 85, 90, 92, 103, 105. But Tarpley
8 actually emailed the first version of the draft business plan to Dotzenroth with no
9 “proprietary” markings on it, or in the email transmitting it. Dotzenroth Dec. ¶ 7,
10 Exh. 4. He repeatedly emailed successive iterations of it with no “proprietary” or
11 “confidential” markings, in emails that had no confidentiality notices. *Id.*, Exhs.
12 4-10. Those many versions of the business plan included *all* of the purportedly
13 proprietary information that plaintiffs describe in paragraph 37 of their
14 Complaint, including a development schedule, a plan for achieving FAA
15 certification, design features, cost estimates, projected returns, and a business and
16 marketing strategy. Dotzenroth Dec. ¶ 8, Exhs. 4-10. **None of it is marked**
17 **“proprietary.”** *Ibid.*

18 The emails and documents sent by Tarpley show the disturbing falsity of
19 plaintiffs’ core allegation that Tarpley and Wagner “took individual actions to
20 ensure” their data and work product remained confidential, “including placing
21 “PROPRIETARY” legends on the material.” Doc. 1 at 13:4-6. The truth is that
22 they frequently and repeatedly sent such information to the Dotzenroths with no
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1 “PROPRIETARY” legends, and with no NDA in place. As a matter of law, that
2 destroyed any trade secret protection that might have protected it.¹

3 Trying to manufacture a basis for trade secret protection, plaintiffs allege
4 that Dotzenroth and the parties entered NDAs with outside parties like potential
5 investors, but this proves nothing. Absent a binding agreement under which the
6 *defendants* agreed to maintain plaintiffs’ information in confidence, plaintiffs
7 have no trade secret claims against Dotzenroth, or the parties who allegedly
8 received information from him. *See Southwest Stainless*, 582 F.3d at 1189-90 (no
9 trade secret protection for pricing information disclosed to customer without
10 restriction on customer’s right to share it, rejecting argument that employee
11 confidentiality agreements, password protections and confidentiality reminders
12 within company established trade secret status, since “*general* measures to keep
13 its company information private” did not prohibit customer to whom pricing was
14 disclosed from sharing such information with outside parties) (emphasis in
15 original); *Metro Sales, Inc. v. Core Consulting Grp., LLC*, No. CV 15-3233

16 _____
17 ¹ Plaintiffs repeatedly allege that they protected their trade secrets by “marking trade
18 secret documents with a ‘PROPRIETARY’ legend.” Doc. 1 at 23:25-27; 25:12-14.
19 Beyond the falsity of these essential allegations, plaintiffs apparently misunderstand
20 what trade secret law protects, as evidenced by their effort to seal their innocuous
21 factual allegations from public view. In the apparent hope of making their Complaint
22 look like it contains secret information, plaintiffs filed a redacted pleading that blacks
23 out generalized, bland material that could not possibly be considered secret, protectable
24 under intellectual property law, or even sensitive. *See, e.g.*, Doc. 1 at 4:23-25 (“They
25 received it during a 2019 meeting – arranged by Dotzenroth – as potential investors in
26 Wagner and Tarpley’s conversion program”); *id.* at 15:1-2 (“In May 2019, Dotzenroth
27 arranged for a meeting between himself, Tarpley, Andrew Mansell, and Steven Welo.”);
28 *id.* at 17:11-16 (“About a week later, Dotzenroth called Tarpley and again inquired
whether he could operate a conversion program without Wagner. Tarpley again told
Dotzenroth he would need Wagner’s expertise. During this call, Dotzenroth also
suggested that he might have a job for Tarpley to work on the conversion program.
Tarpley turned him down. Tarpley did not believe that Dotzenroth would actually enter
the P2F market with his own conversion program. At that point, Dotzenroth had no
funding or engineering resources.”). These are just a few examples of the allegations
plaintiffs seek to seal, but which do not warrant such confidential treatment.

1 (DWF/JSM), 2016 WL 11526757, at *5 (D. Minn. Feb. 26, 2016) (rejecting a
2 proposed amendment to a trade secrets counterclaim as futile, explaining: “[T]he
3 proposed amended claim is silent as to any steps Core Consulting took to alert
4 MSI to the fact that the work it provided was ‘secret’ and that MSI must not
5 disseminate it. The proposed amended claim described Core Consulting’s alleged
6 efforts to not disclose the information to others, but that is only one half of the
7 equation. MSI cannot be charged with ‘misappropriation of a trade secret’ if no
8 facts are alleged to show that it was put on notice that Core Consulting considered
9 its ESOP Components to be ‘trade secrets’ or confidential or, at a minimum,
10 directed MSI not to share the information with anyone else.”) (emphasis in
11 original); *see also McIntyre v. BP Expl. & Prod., Inc.*, No. 3:13-CV-149 RRB,
12 2015 WL 999092, at *4 (D. Alaska Mar. 5, 2015), *aff’d*, 697 F. App’x 546 (9th
13 Cir. 2017) (dismissing trade secrets claim, finding that plaintiff did not “put
14 Defendants on notice” that information was intended to be confidential, and
15 explaining that “the proprietor of an alleged trade secret” may not “unilaterally
16 create a confidential relationship without the knowledge or consent of the party to
17 whom the secret is disclosed”).

18 There was no secrecy agreement with Dotzenroth, or with any of the
19 defendants. Indeed, tellingly, plaintiffs fail to allege any claim for breach of an
20 NDA or breach of any express or implied contract. That is because they have no
21 NDA or confidentiality agreement to enforce. The absence of such an agreement
22 – with parties who plaintiffs allege had nothing meaningful to contribute to their
23 venture – is fatal to plaintiffs’ trade secret claims.

24 It is customary in business transactions generally, and in the aviation
25 industry in particular, for parties to enter an NDA before disclosing trade
26 secrets as part of discussions about potential transactions. *See, e.g., Ashford v.*
27 *Aeroframe Servs., L.L.C.*, 907 F.3d 385, 389 (5th Cir. 2018) (“Aeroframe entered
28 into a non-disclosure agreement (‘NDA’) with Aviation Technical Services

1 ('ATS') for the purpose of discussing partnership."); *Airbus S.A.S. v. Aviation*
2 *Partners, Inc.*, No. A-11-CA-1030-LY, 2012 WL 2515414, at *1 (W.D. Tex.
3 June 29, 2012) ("Before Aviation Partners disclosed any confidential information
4 to Airbus, the two companies entered into a nondisclosure agreement"); *Lockheed*
5 *Martin Corp. v. L-3 Commc'ns Corp.*, No. CIVA 105-CV-902-CAP, 2008 WL
6 4791804, at *1 (N.D. Ga. Sept. 30, 2008) (describing how contractors were
7 required to sign NDAs to be allowed access to confidential data regarding P-3
8 aircraft).

9 It would be particularly important to enter NDAs when dealing with
10 unproven parties who are not sharing their own confidential information. But
11 plaintiffs here allege that Dotzenroth was just such a nobody, who offered no
12 valuable information of his own. *See* Doc. 1 at 2:28-3:1 (alleging Dotzenroth
13 "had little or no aircraft conversion engineering expertise or project management
14 experience"); *id.* at 3:13-14 (Dotzenroth "is not an engineer and []lacked the
15 technical know-how to develop a conversion program"); *id.* at 3:23-24
16 (Dotzenroth "failed to secure funding for the conversion program or contribute in
17 any meaningful way to the conversion program itself"); *id.* at 3:26 (Dotzenroth
18 made "meager contributions"); *id.* at 10:10-11 (Dotzenroth "lacked expertise and
19 experience with conversion programs"); *id.* at 12:3-8 ("[H]is contributions to the
20 development of the business plan, the budget and schedule roadmap, and the
21 conversion program were minimal. Dotzenroth lacked any engineering and
22 technical expertise and was not capable of contributing meaningfully on that
23 front. Dotzenroth tried to offer comments on the PowerPoint slide deck and
24 spreadsheets but did so with obsolete versions rather than the most current drafts
25 that Tarpley and Wagner were editing, revising, and updating"); *id.* at 14:23-27
26 ("Tarpley, however, struggled to find a role for Dotzenroth that would justify the
27 one-third ownership interest in the LLC that Dotzenroth had requested. Because
28 Dotzenroth lacked P2F conversion experience and expertise, there were few roles

1 he could fill. And, when Tarpley would suggest certain roles for Dotzenroth,
2 Dotzenroth would express hesitancy or reluctance to accept the full scope of
3 responsibilities that Tarpley had proposed.”); *id.* at 15:12-14 (“Dotzenroth was
4 unwilling to accept significant responsibility and had made only minor
5 contributions – if any, at all – to the development of the business plan and budget
6 and schedule roadmap.”); *id.* at 15:21-22 (“Dotzenroth’s failure – yet again – to
7 secure funding”); *id.* at 15:23 (“Dotzenroth’s contributions – if any – were
8 small”); *id.* at 15:24-25 (“Dotzenroth’s inability and unwillingness to contribute
9 meaningfully to their conversion program”); *id.* at 19:22 (“the inexperienced and
10 uninformed Dotzenroth”); *id.* at 20:6-7 (Dotzenroth “lacked the know-how and
11 expertise to develop and operate a conversion program”).

12 Dotzenroth naturally disagrees with these disparaging statements, which
13 are untrue. They are laced throughout the Complaint in an obvious effort to
14 damage his reputation and derail his conversion program. But regardless, these
15 allegations reinforce the conclusion that plaintiffs failed to take reasonable
16 measures to protect the secrecy of their information. It is plainly unreasonable to
17 entrust trade secrets having “extraordinary value” (*id.* ¶ 43) to a person not bound
18 by an NDA, where that person is believed to be unreliable, unpossessed of any
19 valuable information of his own, and unworthy of inclusion in a venture so
20 heavily dependent on intellectual property for its success, as plaintiffs allege
21 theirs was.

22 Plaintiffs also belittle defendant Wiley Dotzenroth (David’s son). Doc. 1 at
23 16:10-11 (“Wiley Dotzenroth, at that time, was a 24-year-old recent college
24 graduate. He did not have the experience, expertise, and know-how of Wagner
25 and Tarpley.”). Wiley Dotzenroth never signed an NDA with plaintiffs, and was
26 never asked to. Wiley Dotzenroth Dec. ¶¶ 3-4. Nevertheless, and contrary to their
27 representations to the court about protecting the business plan with
28 “PROPRIETARY” markings, Tarpley sent the business plan to young Wiley with

1 no such markings, in an email with no such markings. *Id.* ¶ 5, Exh.1. The business
 2 plan is alleged by plaintiffs to be “absolutely critical to a successful conversion
 3 program – and, for that reason, highly valuable.” *Id.* at 11:11-13. By sending it to
 4 Wiley, *who is not even alleged to have been part of the discussions about a*
 5 *potential business with Tarpley and Wagner*, plaintiffs lost any right to claim
 6 trade secret protection in any information in that document.²

7 **2. Plaintiffs Continually Failed to Protect the Secrecy of Their**
 8 **Purported Trade Secrets**

9 Plaintiffs not only failed to protect their information with an NDA or
 10 secrecy agreement; they also failed to protect that information once they parted
 11 ways with David Dotzenroth, *even after* coming to believe that he was using it in
 12 a competing venture. According to plaintiffs, talks broke off in June 2019. Doc. 1
 13 ¶ 55. Yet plaintiffs made no efforts to “claw back,” retrieve, or otherwise restrict
 14 Dotzenroth from using the information they had disclosed to him at that time, or
 15 at any time thereafter. Dotzenroth Dec. ¶¶ 13-14.

16 Plaintiffs found out by no later than February 2020 that the Dotzenroths
 17 were using plaintiffs’ supposed trade secrets in their own conversion program.
 18 Doc. 1 ¶¶ 59-60 (alleging that Dotzenroth attempted to enlist plaintiff Tarpley’s
 19 assistance in February 2020, and that Tarpley “*immediately recognized that*
 20 *Dotzenroth was using the information and business plan that Tarpley had*
 21 *prepared with Wagner,*” and that Dotzenroth’s plan “contained a conversion
 22 program schedule and design features from Wagner and Tarpley’s conversion
 23 _____

24 ² Tarpley sent his first draft of the business plan on January 18, 2019, with an email
 25 saying, “I have just been pounding on the keys as the thoughts come.” Dotzenroth Dec.,
 26 Exh. 4. Just over three weeks later, on February 12, 2019, Tarpley sent a revised version
 27 of the business plan (Version 12), which was 38 pages long and replete with all the
 28 information described by plaintiffs in their Complaint. *Id.*, Exh. 10. Plaintiffs wildly
 exaggerate what went into this business plan. *See, e.g.*, Doc. 1 at 19:10-12 (describing
 “the business plan and roadmap that Wagner and Tarpley had created after more than a
 year of non-stop laboring, thousands of engineering hours, and millions of dollars”).

1 program and discussed in the materials Dotzenroth stole”) (emphasis added); *id.*
2 ¶¶ 63-64 (alleging that a conversion program sent to plaintiff Wagner by NIAR
3 on March 3, 2020 “like the Dotzenroths’ November 2019 presentation in Wichita
4 – bore striking similarities to Wagner and Tarpley’s own conversion program –
5 not least of which was the placement of the cargo door on the aircraft.”). Yet until
6 this lawsuit was filed on May 25, 2021 – fifteen months after learning their “trade
7 secrets” were being used – plaintiffs did nothing to claim or protect the
8 information they now claim to have acted vigilantly to protect. Dotzenroth Dec.
9 ¶¶ 13-14.

10 This also defeats plaintiffs’ long-after-the-fact attempt to claim secrecy in
11 information they knew was no longer secret. *See Rockwell Graphic Sys., Inc. v.*
12 *DEV Indus., Inc.*, 925 F.2d 174, 179 (7th Cir. 1991) (analogizing the requirement
13 that a “plaintiff to show that he took reasonable precautions” to maintain the
14 secrecy of a trade secret to “the duty of the holder of a trademark to take
15 reasonable efforts to police infringements of his mark”); *Compuware Corp. v.*
16 *Health Care Serv. Corp.*, 203 F. Supp. 2d 952, 957-58 (N.D. Ill. 2002) (granting
17 summary judgment on a trade secrets claim where the plaintiff knew that its trade
18 secret was being used by an unlicensed third party and “did not do anything about
19 it until it discovered that [the third party] was using it for a purpose of which [the
20 plaintiff] disapproved,” explaining that “[a]s a matter of law doing nothing to
21 enforce a confidentiality agreement is not a reasonable effort in the circumstances
22 to maintain a trade secret”), opinion withdrawn sub nom. *Compuware Corp. v.*
23 *Health Care Service Corp.*, No. 01 C 0873, 2002 WL 31598839 (N.D. Ill. Oct.
24 31, 2002) (opinion withdraw due to settlement); *Bolt Assocs., Inc. v. Trustees of*
25 *Columbia Univ. in City of New York*, 249 F. Supp. 612, 618 (S.D.N.Y. 1966)
26 (denying a preliminary injunction where a trade-secret plaintiff “was shown
27 drawings” of the allegedly infringing product and the alleged infringers
28

1 “published an article” about their work, yet the plaintiff “made no claim that his
2 rights were violated”).

3 Plaintiffs obviously did not believe they owned trade secrets that had been
4 misappropriated, because they did nothing after coming to believe that
5 Dotzenroth was using their information in his own conversion program. No
6 cease-and-desist letter; no notification to Dotzenroth; no lawsuit; nothing. It was
7 only when Dotzenroth *succeeded* in moving his conversion program forward, and
8 only when plaintiffs realized they were losing the competition for conversion
9 partners and customers, that they finally filed this lawsuit, for a transparently anti-
10 competitive purpose. *See* Doc. 1 at 21:18-19 (“Plaintiffs have lost and will
11 continue to lose their competitive advantage in the P2F aircraft conversion
12 market”); *id.* at 23:7-9 (“NIAR’s partnership with Sequoia essentially rendered
13 NIAR unavailable for partnership with Mammoth Freighters. Plaintiffs stand to
14 lose similar opportunities and partners in the future.”). This opportunistic misuse
15 of trade secret litigation to counter competitive losses – in a case where plaintiffs
16 did not keep their purported secrets secret – is not permissible. A party may not
17 openly disclose information to those who are not bound to keep it secret, then
18 belatedly claim it was a trade secret all along after losing in the market.

19 A party can only claim trade secret information if it consistently and
20 effectively kept its information secret at all times. *See SortiumUSA LLC v.*
21 *Hunger*, No. 3:11-CV-1656-M, 2013 WL 11730655, at *11-12 (N.D. Tex. March
22 31, 2013) (granting motion to dismiss based on plaintiff’s failure to mark the
23 information as confidential, require the defendant to execute a confidentiality
24 agreement, and “its failure to plead any other steps to protect the
25 secrecy”); *Orthofix Inc. v. Hunter*, 55 F. Supp. 3d 1005, 1013 (N.D. Ohio 2014),
26 *rev'd on other grounds and remanded*, 630 F. App'x 566 (6th Cir. 2015) (holding
27 that there were no reasonable efforts to monitor allegedly protected information
28 because “when [defendant] left the company, [plaintiff] did not engage in

1 meaningful efforts to seek the return of any trade secret information defendant
2 might possess.”); *OTR Wheel Engineering Inc. v. West Worldwide Services Inc.*,
3 No. CV-14-085-LRS, 2015 WL 11117430, at * 2, (E.D. Wash. Nov. 30, 2015)
4 (granting summary judgment where there was "no 'Confidential' designation on
5 the single document produced by Plaintiffs"); *Convolve Inc. v. Compaq Computer*
6 *Corp.*, 527 F. App'x 910, 921-3 (Fed. Cir. 2013) (finding that the information lost
7 any “trade secret status” when it was disclosed without markings required under
8 NDA); *GTAT Corp. v. Fero*, No. 17-55-M-DWM, 2017 WL 2303973, at *4-5 (D.
9 Mont. May 25, 2017) (failure to consistently enforce protective measures resulted
10 in denial of request for preliminary injunction).

11 “It is axiomatic that without secrecy, no trade secret can exist. . . . ‘The
12 inquiry simply boils down to the question: was this information truly a secret?’”
13 *Penalty Kick Mgmt., Ltd. v. The Coca-Cola Co.*, 164 F. Supp. 2d 1376, 1380–81
14 (N.D.Ga.2001).” *BDT Productions, Inc. v. Lexmark Int’l, Inc.*, 274 F. Supp. 2d
15 880, 891* (E.D. Ky. 2003).

16
17 A failure to require a third party to enter a confidentiality agreement
18 to protect alleged trade secrets is one clear way to waive any trade
19 secret protection that might exist.” *Id. See, e.g., Auto Channel, Inc. v.*
20 *Speedvision Network, LLC*, 144 F.Supp.2d 784, 795 (W.D.Ky.2001)
21 (plaintiffs waived any possible trade secret protection when they sent
22 alleged trade secret television pilot concepts as unsolicited
23 promotional materials to cable networks, with no requirement of
24 secrecy); *BioCore, Inc. v. Khosrowshahi*, 96 F.Supp.2d 1221, 1232
(D.Kan.2000)(no protection where Plaintiffs' marketing materials,
provided without confidentiality requirements, included results of
efficacy studies claimed as trade secret).

25 *BDT Products*, 274 F. Supp. 2d at 891. Undisputed evidence shows that plaintiffs
26 sent many versions of their draft business plan, Wagner’s weight analysis, design
27 documents (including pictures of the cargo door placement), and other
28 purportedly confidential documents containing the alleged trade secrets to

1 Dotzenroth -- with no “proprietary” or “confidential” markings. Dotzenroth Dec.,
2 Exhs. 1-10. They also sent the draft business plan to Wiley Dotzenroth – with no
3 “proprietary” or “confidential” markings. Wiley Dotzenroth Dec., Exh. 1. Neither
4 Dotzenroth was bound by any NDA when plaintiffs sent them their supposed
5 trade secrets. Plaintiffs made no effort to retrieve or protect them after breaking
6 off talks, and they did nothing for well over a year after coming to believe that
7 Dotzenroth was using them. Put simply, plaintiffs’ claimed trade secrets were not
8 kept secret. As a result of these undisputed facts, plaintiffs’ trade secret claims
9 fail. And along with them, plaintiffs’ other claims fail as well.

10 **B. Plaintiffs’ False Advertising Claim (Count Three) Fails as a Matter of**
11 **Law**

12 Plaintiffs’ false advertising claim is partly dependent on the contention that
13 plaintiffs exclusively own intellectual property, i.e., their claimed trade secrets, in
14 their conversion program; and on their contention that defendants
15 misappropriated that intellectual property. Doc. 1 at 26:19-20 (alleging
16 defendants falsely represented that “Sequoia owns the intellectual property
17 underpinning the conversion program”). But since plaintiffs have no protectable
18 trade secrets, there could be no actionably false statements concerning
19 defendants’ intellectual property rights as plaintiffs allege.

20 Moreover, it is well-settled that there can be no liability under the Lanham
21 Act for making statements regarding the ownership of intellectual property. In
22 prohibiting false statements about the “origin” of goods, neither Section
23 43(a)(1)(A) nor Section 43(a)(1)(B) of the Act refer to the ownership of
24 intellectual property. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539
25 U.S. 23, 38 (2003) (holding that there can be no liability under 43(a)(1)(A) of the
26 Lanham Act for merely claiming ownership of a work); *Romero v. Buhimschi*,
27 396 F. App’x 224, 232 (6th Cir. 2010) (affirming dismissal of Lanham Act claim,
28 holding that neither 43(a)(1)(A) nor 43(a)(1)(B) prohibit “false designation[s] of

1 authorship”); *Akzo Nobel Surface Chemistry LLC v. Stern*, No. 2:13-CV-00826,
2 2014 WL 6982674, at *4 (S.D. Ohio Dec. 9, 2014) (granting motion for judgment
3 on the pleadings, where plaintiff claimed defendant falsely represented ownership
4 of intellectual property in a patent application). Statements about intellectual
5 property ownership where such ownership is contested are obviously legal
6 contentions, rather than statements of fact. They are opinions that cannot be
7 proven factually false since they necessarily depend on the outcome of the IP
8 dispute. The Lanham Act only applies to a “false or misleading description of
9 fact, or false or misleading representation of fact.” 15 U.S.C. § 1125(a). The
10 challenged statements therefore cannot constitute false advertising.

11 Plaintiffs also cannot establish Lanham Act liability for the alleged
12 statements that “Dotzenroth possesses the competence, experience, and expertise
13 to develop and operate Sequoia’s conversion program.” Doc. 1 at 26:20-21.
14 Generalized statements touting quality, performance, a party’s abilities, or
15 predicting success are not actionable as false advertising—they are opinions, or,
16 at best, “puffery.” *See Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1121 (9th
17 Cir. 2021) (explaining that “[s]tatements of opinion and puffery . . . are not
18 actionable,” and holding that statements of opinions about the quality of a
19 nutritional supplement were not actionable); *Appliance Recycling Centers of
20 America, Inc. v. JACO Environmental, Inc.*, 378 Fed. Appx. 652, 654 (9th Cir.
21 2010) (“The statement that Defendants’ method for recycling appliances is a
22 ‘unique’ system with ‘unprecedented’ results is non-actionable puffery because it
23 is a ‘general, subjective claim,’ rather than a statement about ‘specific or absolute
24 characteristics.’”); *Edmundson v. Procter & Gamble Co.*, 537 Fed. Appx. 708,
25 709 (9th Cir. 2013) (“Specific, quantifiable ‘statements of fact’ that refer to a
26 product’s absolute characteristics may constitute false advertising, while general,
27 subjective, unverifiable claims are ‘mere puffery’ that cannot.”); *Pizza Hut, Inc.
28 v. Papa John’s Int’l, Inc.*, 227 F.3d 489, 496 (5th Cir. 2000) (explaining that “a

1 general claim of superiority . . . that is so vague, it would be understood as a mere
2 expression of opinion” is not actionable); *Davis v. Avvo, Inc.*, 345 F. Supp. 3d
3 534, 542 (S.D.N.Y. 2018) (holding that statements “conveying that an attorney is
4 especially experienced or skilled . . . [were] mere puffery,” because they
5 “constitute[d] a broad commendation relaying a view of an attorney’s level of
6 experience or skill that can only be subjective”); *Notification Techs., Inc. v.*
7 *Parlant Tech., Inc.*, No. 05CV0089 J (JMA), 2005 WL 8173034, at *2 (S.D. Cal.
8 Jan. 27, 2005) (“To be actionable, a statement must be about a specific fact; ‘mere
9 puffery’ is not actionable. Mere puffery involves vague or highly subjective
10 statements.”); *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1140 (C.D.
11 Cal. 2005) (finding the description of a product as “quality” or “high
12 performance” was mere puffery); *see also Hamilton Exhibition, LLC v. Imagine*
13 *Exhibitions, Inc.*, No. 19 CIV. 1470 (LLS), 2019 WL 2590639, at *3 (S.D.N.Y.
14 June 11, 2019) (holding, in the context of a claim for fraud, that “[d]efendants’
15 general statements that they are experts at producing exhibitions and can ‘take
16 broad concepts and translate them into concrete realities’ are non-actionable
17 statements of puffery and opinion about their expertise”); *Barilli v. Sky Solar*
18 *Holdings, Ltd.*, 389 F. Supp. 3d 232, 252 (S.D.N.Y. 2019) (holding, in the context
19 of a misrepresentation claim, that “[t]he general positive statements about
20 [defendant’s] professional history and management abilities, such as statements
21 that he was a ‘successful businessman,’ are at most non-actionable puffery”).

22 Finally, plaintiffs’ attempt to invoke the Lanham Act fails for the simple
23 reason that defendants never “advertised” the allegedly false information
24 attributed to them. To sustain a claim for false advertising in federal court, a
25 plaintiff must plead and prove the use of a false or misleading statement in
26 “commercial advertising or promotion.” 15 U.S.C. § 1125(a)(1)(B); *Porous*
27 *Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999) (“commercial
28 speech” is “a threshold requirement for Lanham Act liability”). Although the

1 representations need not be made in a “classic advertising campaign,” they must
2 be “disseminated sufficiently to the relevant purchasing public to constitute
3 ‘advertising’ or ‘promotion’ within that industry.” *Coastal Abstract Serv. v. First*
4 *Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999). A communication made to
5 only one or just a few people does not constitute a communication disseminated
6 sufficiently to the relevant purchasing public such that it constitutes “advertising”
7 or “promotion.” *eMove Inc. v. SMD Software Inc.*, 2012 WL 1379063, *11 (D.
8 Ariz. Apr. 20, 2012) (“[T]he evidence shows that the statements have been
9 disseminated to a tiny fraction of the market. The instant dispute is readily
10 distinguishable from cases where a similar number of representations were found
11 to be commercial promotion because the market was significantly smaller.”);
12 *Professional Sound Services, Inc. v. Guzzi*, 349 F. Supp. 2d 722, 728 (S.D.N.Y.
13 2004) (allegedly disparaging oral statement made to only one of plaintiff’s 36
14 customers did not constitute “advertising or promotion”); *Medical Graphics*
15 *Corp. v. SensorMedics Corp.*, 872 F. Supp. 643, 650 (D. Minn. 1994) (denying
16 preliminary injunction because statements made by a sales rep to an individual
17 customer are not actionable as “commercial advertising or promotion”).

18 Here, there is no allegation that defendants advertised falsely to the public.
19 And they did not. Dotzenroth Dec. ¶ 15. Indeed, plaintiffs only allege that
20 defendants made false statements at one face-to-face meeting in Kansas in
21 November 2019. Doc. 1 ¶¶ 57-58. The meeting attendees included “executives
22 from NIAR and several Kansas state officials,” which were potential business
23 partners. *Id.* Alleged false statements made orally at a private business meeting to
24 potential business partners do not rise to the level of “commercial advertising or
25 promotion.” Plaintiffs also allege that defendants falsely represented to one
26 manufacturer that Sequoia was the intellectual property owner. *Id.* ¶ 65. Plaintiffs
27 allege on information and belief that this representation was repeated during one
28 other meeting with an air cargo operator. *Id.* A statement made to one

1 manufacturer and one potential customer (the air cargo operator) in two discrete
 2 meetings does not constitute “commercial advertising or promotion.” Thus, there
 3 can be no Lanham Act liability, even if the alleged statements are actionable
 4 (which they are not). Summary judgment on the Lanham Act claim is therefore
 5 warranted.

6 **C. Plaintiffs’ Unfair Competition Claim (Count Four) Fails as a Matter of**
 7 **Law**

8 If plaintiffs’ UCL claim were legally permissible, it would fail for the same
 9 reasons as their trade secret and false advertising claims. However, this claim
 10 fails for a more fundamental reason. The Uniform Trade Secret Act displaces (or
 11 preempts) any state law cause of action predicated on the alleged theft of
 12 confidential information. *Silvaco Data Sys. v. Intel Corp.*, 84 Cal. App. 4th 210,
 13 236 (2010); *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171
 14 Cal. App. 4th 939, 958 (2009). “CUTSA provides the exclusive civil remedy for
 15 conduct falling within its terms, so as to supersede other civil remedies ‘based
 16 upon misappropriation of a trade secret.’” *Silvaco Data*, 184 Cal. App. 4th at 236.
 17 Thus, causes of action that are based on the same nucleus of facts as a trade secret
 18 misappropriation claim are displaced by CUTSA. *Id.* at 241 (finding a UCL
 19 claims that “depended on the misappropriation of a trade secret” superseded by
 20 CUTSA). As the *Silvaco* and *K.C. Multimedia* courts explained, one cannot
 21 pursue a UCL claim based on the theft of purportedly confidential information, as
 22 plaintiffs attempt to do here.

23 CUTSA displaces state law claims based on misappropriation of
 24 information because such claims would confer unwarranted restrictions on
 25 information, the lifeblood of a competitive economy. *See Silvaco*, 184 Cal. App.
 26 4th at 239 n.22 (“information that does not fit” CUTSA’s definition of a trade
 27 secret “and is not otherwise made property by some provision of positive law,
 28 belongs to no one, and cannot be converted or stolen”). As the court explained in

1 *Silvaco*, allowing state law claims for misappropriated information would create
2 “a new category of intellectual property far beyond the contemplation of
3 [CUTSA], subsuming its definition of ‘trade secret’ and effectively obliterating
4 the uniform system it seeks to generate.” *Id.* If parties could avoid CUTSA’s
5 stringent burden of establishing the protectability of their claimed trade secrets,
6 they could use state law claims to monopolize information that does not rise to
7 the level of protectable intellectual property. As the *Silvaco* court explained,
8 “‘information’ cannot be ‘stolen’ unless it constitutes *property*. And information
9 is not property unless some law makes it so. If the plaintiff identifies no property
10 right outside of trade secrets law, then he has no remedy outside that law.” *Id.* at
11 239 (emphasis in original).

12 Plaintiffs’ overbroad and anti-competitive UCL allegations here illustrate
13 the *Silvaco* court’s point. According to plaintiffs, defendants violated the UCL
14 because they “knew Plaintiffs’ playbook and how Plaintiffs planned to conduct
15 their business.” A “playbook” and “how one plans to conduct business” are not
16 trade secrets, or protectable IP. Plaintiffs also allege defendants violated the UCL
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1 because they “sought deals with the same customers and partners as Plaintiffs.”
 2 Doc. 1 at 28:1-2. *Defendants competed*, in other words.³

3 Competition is lawful, but plaintiffs effectively allege that it is not.
 4 Competition using information that is not legally protected as IP is lawful.
 5 Information not patented, copyrighted, or protected by some other law can only
 6 be legally protected as intellectual property if it is *secret* and has independent
 7 economic value *because it is secret*. *DVD Copy Control Assn.*, 31 Cal. 4th at 881
 8 (“Once the data that constitute a trade secret are disclosed to others, or others are
 9 allowed to use those data, the holder of the trade secret has lost his property
 10 interest in the data”).

11 Plaintiffs’ UCL claim is based on the same nucleus of facts supporting their
 12 trade secret claims. *See, e.g.*, Doc. 1 ¶104 (“After misappropriating Plaintiffs’
 13 confidential and proprietary information, and after learning the details of
 14 Plaintiffs’ engineering and marketing strategy, Defendants started a conversion
 15 program to compete directly with Plaintiffs’ conversion program.”). A UCL claim
 16 based on defendants’ alleged misappropriation of information would be “a
 17 transparent attempt to evade the strictures of CUTSA by restating a trade secrets
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19 ³ Customer lists can be trade secrets, but only where substantial time and effort is
 20 required to identify a group of customers out of a large universe of prospects. *ABBA*
 21 *Rubber Co. v. Seaquist*, 235 Cal. App. 3d 1, 18-21 (1991). Plaintiffs here do not allege
 22 that the identities of customers and partners for jumbo jet conversions constitute trade
 23 secrets, nor can they, because as plaintiffs admit, there are only a few of each. Doc. 1 ¶
 24 80 (“Losing a single customer in the P2F conversion industry can be devastating. First,
 25 only a limited number of potential customers exist. The number of aircraft available for
 26 conversion is limited, and the vast majority of those are owned by a few large players,
 27 in particular a large air cargo operator and two leading express delivery services. Those
 28 customers typically purchase all of their converted aircraft from a single supplier, and
 they enter into long term contracts with the supplier because the conversion and
 delivery process can take several years.”). Nevertheless, they breathlessly allege
 wrongdoing because defendants “sought deals with the same customers” *Id.* at
 28:1-2. *See also id.* ¶ 12 (“Dotzenroth and Sequoia have competed against plaintiffs for
 deals with potential business partners.”).

1 claim as something else.” *Silvaco*, 184 Cal. App. 4th at 240. The law prohibits
 2 plaintiffs from doing so here. In sum, plaintiffs’ UCL claim is legally
 3 impermissible, because it is displaced by CUTSA and because defendants cannot
 4 be liable for trade secret misappropriation. This claim must therefore be
 5 dismissed.

6 **D. Plaintiffs’ Breach of Fiduciary Duty Claim (Count Five) Fails as a**
 7 **Matter of Law**

8 Plaintiffs’ claim for breach of fiduciary duty is based on the conclusory
 9 allegation that “Dotzenroth was a joint venturer with Wagner and Tarpley while
 10 working with them to develop Plaintiffs’ conversion program.” Doc. 1 ¶ 108.
 11 The undisputed facts, however (including plaintiffs’ own more specific factual
 12 allegations), show that no joint venture relationship was ever formed.

13 “A joint venture is defined as an undertaking by two or more persons, or
 14 entities, jointly to carry out a single business enterprise for profit. . . . It requires
 15 *an agreement* under which the parties have (1) a joint interest in a common
 16 business, (2) an understanding that profits and losses will be shared, and (3) a
 17 right to joint control.” *Ramirez v. Long Beach Unified Sch. Dist.*, 105 Cal. App.
 18 4th 182, 193 (2002) (emphasis added). More specifically, the parties must have
 19 “an understanding as to the sharing of profits and losses” (*Connor v. Great W.*
 20 *Sav. Loan Ass’n*, 69 Cal. 2d 850, 863 (1968)), i.e., an agreement as to how those
 21 profits and losses will be shared. “A legally binding agreement, however, is not
 22 formed where essential elements are reserved for future agreement.” *Goodworth*
 23 *Holdings Inc. v. Suh*, 239 F. Supp. 2d 947, 956 (N.D. Cal. 2002) (citing *Louis*
 24 *Lesser Enterprises, Ltd. v. Roeder*, 209 Cal. App. 2d 401, 408 (1962)). Where, as
 25 here, the parties did not agree on “how we were going to structure the deal”
 26 (*Goodworth*, 239 F. Supp. 2d at 957), no binding agreement existed. *See id.*
 27 (where parties’ term sheet indicated that the division of profits and parties’ roles
 28 were not determined, such unresolved terms were “dispositive,” resulting in

1 summary judgment on plaintiff’s claim for breach of joint venture agreement).
2 “At most, it appears that [the parties] created an agreement to agree, whereby they
3 each expressed interest in developing an opportunity Under California law,
4 however, such an agreement does not create a binding contract.” *Id.*

5 Here, plaintiffs’ own admissions in their Complaint prove that no joint
6 venture agreement was ever reached. They allege they never agreed with
7 Dotzenroth on the most essential terms of any joint venture agreement – roles and
8 shares in the enterprise. Doc. 1 at 14:23 (“Tarpley, however, struggled to find a
9 role for Dotzenroth that would justify the one-third ownership interest in the LLC
10 that Dotzenroth had requested.”); *id.* at 15:10 (“Dotzenroth and his wife
11 questioned Tarpley about the ownership stake that Dotzenroth would be given in
12 the conversion program. They demanded a full one-third of the ownership, even
13 though Dotzenroth was unwilling to accept significant responsibility and had
14 made only minor contributions – if any, at all – to the development of the
15 business plan and budget and schedule roadmap”); *id.* ¶ 55 (alleging that Tarpley
16 and Wagner decided to part ways with Dotzenroth after failing to agree on his
17 ownership share or his role). The parties never did agree on the necessary terms
18 for a joint venture agreement. Dotzenroth Dec. ¶¶ 10-12, Exhs. 12-13. In fact,
19 Dotzenroth warned Tarpley that no money should be spent because they had no
20 such agreement. *Id.* ¶ 11, Exh. 12. And the draft operating agreement sent by
21 Tarpley neither specified the purpose of the proposed LLC, nor the percentages to
22 be owned by each member. *Id.*, Exh. 13.

23 The undisputed facts – including plaintiffs’ own admission about how the
24 parties could not agree on Dotzenroth’s ownership share or role – prove there was
25 no joint venture agreement. Summary judgment on plaintiffs’ claim for breach of
26 fiduciary duty is therefore warranted.

1 **E. Plaintiffs Can't Have It Both Ways**

2 Plaintiffs may argue that Dotzenroth had a duty of secrecy, even though
3 they never asked him to sign an NDA when sharing their purported trade secrets
4 with him, and even though he never signed such an NDA. Parties in a relationship
5 of trust and confidence have a fiduciary duty of loyalty, which prohibits them
6 from using information from their trustee for their own benefit or gain. Plaintiffs
7 undoubtedly hope to establish such a duty by alleging the existence of a joint
8 venture agreement, even though the parties did not enter such an agreement.
9 Because they were not joint venturers (or partners), they did not have fiduciary
10 duties to each other.

11 But if they did have such duties, then plaintiffs are not permitted to proceed
12 with their claims. If the parties were partners in a joint venture with fiduciary
13 duties, then *none of them* was permitted to use partnership property or
14 information shared in confidence to benefit themselves, without sharing such
15 benefits with the others. *See* Cal. Corp. Code § 16404(b)(1) (“A partner's duty of
16 loyalty to the partnership and the other partners includes . . . account[ing] to the
17 partnership and hold[ing] as trustee for it any property, profit, or benefit . . .
18 derived from a use by the partner of partnership property or
19 information[.]”); *Pellegrini v. Weiss*, 165 Cal. App. 4th 515, 524 (2008) (“The
20 rights and liabilities of joint adventurers, as between themselves, are governed by
21 the same rules which apply to partnerships. . . . [J]oint venturers have a fiduciary
22 duty to act with the highest good faith towards each other regarding affairs of the
23 partnership or joint venture.”) (quotation marks and citations omitted).

24 Plaintiffs claim that Dotzenroth was not permitted to use purportedly
25 confidential information for his own conversion program because he was in a
26 joint venture with plaintiffs. If that is so, then plaintiffs were not permitted to use
27 that information for their own program either. They would not own the trade
28 secrets; only the joint venture would.

1 Plaintiffs' very act of suing to enforce *their* purported intellectual property
2 rights demonstrates that the parties were not in a joint venture, were not partners,
3 and therefore had no duties of secrecy. Because plaintiffs would be breaching
4 such duties to Dotzenroth by proceeding as they have.

5 The simple truth is that the parties had preliminary discussions about doing
6 business together, freely shared information with no NDAs or secrecy obligations
7 between them, and they each went their separate ways after failing to agree on
8 terms. They were all free to use the information they had developed and shared in
9 pursuing their own separate ventures, as plaintiffs obviously recognized by doing
10 just that, and by doing nothing when they found out that Dotzenroth was also
11 doing just that.

12 **F. Plaintiffs' Civil Conspiracy Claim (Count Six) Fails as a Matter of**
13 **Law**

14 In the parlance of the young, civil conspiracy is not a thing. Civil
15 conspiracy is not an independent cause of action. *City of Indus. v. City of*
16 *Fillmore*, 198 Cal. App. 4th 191, 211-12 (2011) (quoting *Applied Equipment*
17 *Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-511 (1994)). The only
18 effect of pleading civil conspiracy is to make the alleged conspirators liable for
19 underlying torts as aiders and abettors. *Id.* Moreover, like plaintiffs' UCL claim,
20 their civil conspiracy claim is displaced by CUTSA, since it alleges the same
21 allegedly wrongful conduct in misappropriating purportedly confidential
22 information. *See* Doc. 1 at 29:10-13 ("After gaining access to Plaintiffs' trade
23 secrets and learning Plaintiffs' engineering and marketing strategy, [defendants]
24 conspired to unlawfully misappropriate Plaintiffs' proprietary and confidential
25 business information and trade secrets"). Under *Silvaco* and *K.C. Multimedia*, this
26 claim must be dismissed, because CUTSA displaces it.

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1 To the extent plaintiffs also allege civil conspiracy based on defendants'
2 alleged false advertising (Doc. 1 at 29:14), the claim also fails because the false
3 advertising claim fails.

4 **IV. CONCLUSION**

5 For the reasons stated above, defendants respectfully request that the Court
6 grant summary judgment, and dismiss plaintiff's Complaint with prejudice. In the
7 alternative, defendants request partial summary judgment as to one or more of
8 plaintiffs' claims.

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10 Dated: June 21, 2021

FITZGERALD KNAIER LLP

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By: 

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Dated: June 21, 2021



Kenneth M. Fitzgerald, Esq.