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 INTERSERVE, INC. dba TECHCRUNCH
 8 and CRUNCHPAD, INC.

9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**

Winston & Strawn LLP
 101 California Street
 San Francisco, CA 94111-5802

11 INTERSERVE, INC. dba TECHCRUNCH, a)
 Delaware corporation, and CRUNCHPAD,)
 12 INC., a Delaware corporation,)
 13 Plaintiffs,)
 14 vs.)
 15 FUSION GARAGE PTE. LTD., a Singapore)
 company,)
 16 Defendant.)

Case No. CV-09-5812 RS (PVT)
PLAINTIFFS' NOTICE OF MOTION AND
MOTION TO COMPEL DE-
DESIGNATION OF DOCUMENTS

Date: June 22, 2010.
 Time: 10:00 a.m.
 Place: Courtroom 5, 4th Floor.

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Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

1 **NOTICE OF MOTION**

2 PLEASE TAKE NOTICE that on June 22, 2010, at 10:00 a.m., or as soon thereafter as
3 counsel may be heard by the above-entitled court, located at 280 First Street, San Jose, California,
4 Courtroom 5, 4th Floor, Plaintiffs Interserve, Inc. d/b/a TechCrunch and CrunchPad Inc. will move,
5 pursuant to Federal Rules of Civil Procedure 26(c) and 37 and Paragraph 6 of the Stipulated
6 Protective Order in this case, for an order compelling Fusion Garage to remove "CONFIDENTIAL"
7 designation from certain documents and emails it produced during discovery.

8 This motion is based on this Notice of Motion, the attached Memorandum of Points and
9 Authorities, the Declaration of Nicholas Short ("Short Decl."), all pleadings and papers on file
10 herein, and upon such further oral and documentary evidence as may be presented at or before the
11 hearing on this Motion.

12 This motion follows conferences of counsel by telephone, pursuant to the Stipulated
13 Protective Order and L.R.37-1, which took place on May 7, 2010. (Short Decl. ¶ 2-3.)

14
15 Dated: May 13, 2010.

WINSTON & STRAWN LLP

16
17 By: /s/ David S. Bloch
18 Andrew P. Bridges
19 David S. Bloch
20 Matthew A. Scherb
21 Nicholas Short
22 Attorneys for Plaintiffs
23 INTERSERVE, INC. dba TECHCRUNCH
24 and CRUNCHPAD, INC.
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1 **STATEMENT OF ISSUES**

2 Whether the Court should compel de-designation of documents which Defendant has designated as
3 “Confidential” under the Stipulated Protective Order between the parties, and unseal those
4 documents which Plaintiff has previously filed with the Court.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. INTRODUCTION**

7 For more than a year, Fusion Garage collaborated with Interserve and CrunchPad
8 (collectively, “TechCrunch”) to develop the “CrunchPad” tablet computer. Halfway through this
9 collaboration, Fusion Garage started secretly scheming to steal the CrunchPad project for itself.
10 Fusion Garage’s scheme is revealed by documents that, however, have been marked “Confidential”
11 by plaintiff’s counsel.¹ Fusion Garage’s documents do not satisfy the definition of “Confidential”
12 under the Stipulated Protective Order. *See* Stipulated Protective Order, Dkt. No. 35, at 2. They are
13 not sensitive business documents; they do not reveal future strategies; they do not embody trade
14 secrets. *See* Fed. R. Civ. P. 26 (c)(1)(G). The public’s interest in open access to Court records, the
15 plaintiff’s interest in full disclosure, and the Court’s own interest in efficiently managing its docket
16 all converge: The Court should de-designate these documents at once. *Phillips ex rel. Estates of*
17 *Byrd v. General Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002) (“Not only can the public
18 generally gain access to unprotected information produced during discovery, but it also has a federal
19 common law right of access to all information filed with the court. This common law right of access
20 to inspect various judicial documents is well settled in the law of the Supreme Court and this
21 circuit”).

22 ¹ Specifically, TechCrunch seeks a Court order de-designating FG00000243-46; FG00001160-61,
23 FG00001308-09, and FG00001319-20; FG00007391-92; FG00008409-12; FG00013268-69;
24 FG00013302-07; FG00013395-99; FG00029680; FG00029728-32; FG00029927-33; FG00029940-
25 44; FG00029960-68; FG00030010-11; FG00030068-73; FG00030270-74; FG00032834; and
26 FG00032911. TechCrunch filed all but one of these documents under seal in support of various
27 motions. Decl. Of Andrew Bridges In Support of Reply In Support Motion for Preliminary
28 Injunction, Dkt. No. 109-2, Exhibits A, C-E, L, N-T, and V; Decl. Of Matthew Scherb In Opposition
to Fusion Garage’s Motion to Dismiss the Complaint, Dkt. No. 81-1, Ex. J; Decl. of Matthew Scherb
In Support of Plaintiffs’ Motion To Enforce Subpoena, Dkt. No. 83-1, Ex. H. The one exception—
an immigration document Bates-numbered FG00001160-61—is extremely similar to two other
documents TechCrunch previously filed under seal (FG00001308-09 and FG00001319-20).
Documents FG00007391-92, FG00029680, FG00032834, and FG00032911 were produced as
“Highly Confidential – Attorneys’ Eyes Only,” but were down-designated during the meet and
confer process.

1 **II. ARGUMENT**

2 Under the Protective Order, a document deserves the “Confidential” designation only if the
3 information in it qualifies “for protection under standards developed under F.R.Civ.P. 26(c).”
4 Stipulated Protective Order, Dkt. No. 35, ¶ 2.3. The burden of persuasion in a motion to de-
5 designate “shall be on the Designating Party.” *Id.* ¶ 6.3; see *Pansy v. Borough of Stroudsburg*, 23
6 F.3d 772, 787-88 (3d Cir. 1994) (“The burden of justifying the confidentiality of each and every
7 document sought to be covered by a protective order remains on the party seeking the order”).

8 Fusion Garage therefore must show “good cause” to keep these documents under seal. Fed.
9 R. Civ. P. 26(c). “A showing of Rule 26(c) good cause requires a balancing of the interests of the
10 parties competing to open or close the civil discovery process to the public,” and access is
11 “particularly appropriate” when there is “especial public interest.” *Welsh v. City and County of San*
12 *Francisco*, 887 F. Supp. 1293, 1297 (N.D. Cal. 1995) (Jensen, J.). Fusion Garage can prove good
13 cause only if the documents at issue are “truly confidential” and disclosure would create a “clearly
14 defined and very serious injury” evidenced by specifics and not “stereotyped or conclusory
15 statements.” *Id.*; *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 40 (N.D. Cal. 1990) (Vukasin, J.).

16 Fusion Garage justifies its “Confidential” designations by saying that the documents in
17 question pertain to “communications with Defendant’s public relations firm reflecting business and
18 media strategy,” “confidential communications with its PR firm,” “confidential communications
19 with investors,” and so on. Short Decl. ¶ 4. But a party cannot withhold documents from public
20 scrutiny based on these types of boilerplate and conclusory statements. *Welsh*, 887 F. Supp. at 1297.
21 “Including the qualifiers ‘private’, ‘confidential’, or ‘proprietary’ adds nothing. Characterizing the
22 records as those the disclosure of which could invade privacy rights of non-parties and injure the
23 defendant’s business is merely conclusory.” *Pierson v. Indianapolis Power & Light Co.*, 205 F.R.D.
24 646, 647 (S.D. Ind. 2002). Here is a list of the categories of documents in question:

25 ***Communications between Fusion Garage and McGrath Power.*** Emails between Fusion
26 Garage and PR agency McGrath Power make up the majority of the documents in dispute. Fusion
27 Garage claims that these documents reflect business or media strategy. Short Decl. ¶ 4. That may
28 be so, but it is not sufficient justification to keep the documents out of the public record. And in any

1 event Fusion Garage and McGrath Power already have engineered the launch of the JooJoo
2 (formerly the CrunchPad). Their scheming with regard to a launch that already has happened cannot
3 reveal confidential information. Addressing the documents in turn:

- 4 • FG00007391 is a September 29, 2009, email between Jonathan Bloom of McGrath Power
5 and Keith Hughes of Marina Maher Communications. [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED] but even
9 that is not confidential. Disclosing this information is unlikely to cause concrete injury.

- 10 • FG00013268 is an October 6, 2009, letter between Mr. Bloom and Fusion Garage's
11 Chandrasekar Rathakrishnan. In it, Mr. Bloom indicates that [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 [REDACTED] So even if the McGrath Power communications contained strategic information
17 related to the JooJoo, it is now obsolete.

- 18 • FG00013302 is an October 12, 2009, document exchanged between Messrs. Bloom and
19 Rathakrishnan, reflecting their ideas about [REDACTED]

20 [REDACTED]
21 [REDACTED]. Public
22 disclosure of Mr. Rathakrishnan's brainstorm for a product launch which took place six
23 months ago will not cause a concrete injury to Fusion Garage.

- 24 • FG00013395 is an October 19, 2009, email between Mr. Bloom and Mr. Rathakrishnan,
25 copying third party Bill Trumpfheller of Nuffer Tucker Smith Public Relations. The email
26 contains Mr. Bloom's thoughts, [REDACTED]

27 [REDACTED]
28 [REDACTED]

1 [REDACTED] address a situation that now has come to pass. The email contains
2 no sensitive strategic information likely to cause any clearly defined or serious injury to
3 Fusion Garage if publicly disclosed.

4 • FG00029728 is a [REDACTED]
5 [REDACTED]
6 [REDACTED], and this draft does not contain confidential information likely to cause
7 clearly defined and serious injury.

8 • FG00029927 is a November 15-16, 2009, email string among Mr. Bloom, Mr.
9 Rathakrishnan, and Ursula Herrick of McGrath Power. It describes [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 [REDACTED] While these statements are a
14 cause for shame, there is no legitimate reason to keep them under seal.

15 • FG00029940, FG00029960, FG00030010, FG00030068, and FG00030270 are all emails
16 concerning [REDACTED]
17 [REDACTED] Mr. Rathakrishnan
18 sent the final version of this document to TechCrunch. *Compare* Short Decl. Ex. B
19 [FG0030162] with Ex. C [TC00000619]. The added gloss in the first three emails
20 (FG00029940, FG00029960, FG00030010) contains Mr. Bloom's, Ms. Walker's, and Ms.
21 Herrick's thoughts about [REDACTED]

22 [REDACTED] The last two (FG00030068, and
23 FG00030270) show Mr. Bloom's and Mr. Rathakrishnan's correspondence after Mr.
24 Arrington replied to Mr. Rathakrishnan on November 18, 2009 and threatened legal action if
25 Mr. Rathakrishnan took the JooJoo/CrunchPad to market alone. Again, this scheming does
26 not affect Fusion Garage's future business strategies and cannot be placed outside the public
27 record merely because Fusion Garage would rather not expose its misconduct.

28

1 The public's interest in a full and complete record of this case far outweighs Fusion Garage's
2 desire to bury embarrassing documents under a "Confidential" label. "Although the information ...
3 may be embarrassing and incriminating, this alone is insufficient to bar public disclosure." *Culinary*
4 *Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 301 (N.D. Ill. 1993).

5 ***Correspondence between Mr. Rathakrishnan and Mr. Lee.*** Fusion Garage also seeks to
6 shield two emails (FG00008409 and FG00032834) between Mr. Rathakrishnan and his investor,
7 Bruce Lee, because they embody "confidential communications with an investor." Fusion Garage's
8 boilerplate objection does not satisfy Rule 26 (c). Moreover, neither email contains confidential
9 information. The first (FG00008409)—dated more than a year ago—reflects Mr. Lee's general and
10 abstract thought that [REDACTED]

11 [REDACTED] The second
12 (FG00032834) is the earliest written indication that Fusion Garage was planning to break with
13 TechCrunch, but it does not contain confidential financial or other information—and the fact of the
14 "divorce" is now a matter of public record. Again, the notion "that this information will incriminate
15 or embarrass defendants ... is not a basis for documents to be held to be 'confidential' under Rule
16 26." *Ideal Steel Supply Corp. v. Anza*, 2005 WL 1213848 * 3 (S.D. N.Y. May 23, 2005). These
17 emails do not contain any confidential information likely to cause injury if made public.

18 ***Vendor discussions.*** Fusion Garage asserts that all of its communications with vendors are
19 confidential. But the identity of Fusion Garage's Original Design Manufacturer, Gigabyte, is not
20 confidential: multiple public documents and FCC filings identify Gigabyte as the manufacturer of
21 the "RTL8191SE" mini-card used in the JooJoo. Short Decl., ¶ 8, Ex. D. The documents
22 themselves do not reveal any secrets. FG00000243 shows that [REDACTED]

23 [REDACTED]
24 [REDACTED] FG00032911 contains routine business
25 correspondence with a vendor and investor [REDACTED] whose identity is, again, a matter of public
26 record. A third document, FG00029680, reflects [REDACTED]

27 [REDACTED] That is now many months in the past. To shield these documents,
28 Fusion Garage must prove "with some specificity that the embarrassment resulting from

1 dissemination would cause a significant harm to its competitive and financial position.” *Cippollone*
2 *v. Liggett Group*, 785 F.2d 1108, 1121 (3d Cir. 1986). In meet-and-confer exchanges, it has failed to
3 do so. These documents, too, should be in the public record.

4 ***Immigration documents originating from a party are not confidential under the federal***
5 ***Freedom of Information Act.*** Finally, Fusion Garage claims that its visa-related correspondence
6 (FG00001160,² FG00001308, and FG00001319) is exempt from disclosure under 8 U.S.C. § 1202
7 (f) and the Freedom of Information Act (FOIA), and therefore should be treated as “Confidential.”
8 In fact, Section 1202 (f) protects documents “pertaining to the issuance or refusal of visas or permits
9 to enter the United States”—*i.e.*, the State Department’s work product in determining whether to
10 accept or reject an application—but not the letter or application itself. *Medina-Hincapie v. Dept. of*
11 *State*, 700 F.2d 737, 742 n. 20 (D.C. Cir. 1983). Fusion Garage offers no reason why its efforts to
12 obtain U.S. visas should be shielded from the public.

13 III. CONCLUSION

14 The Court should de-designate FG00000243-46; FG00001160-61, FG00001308-09, and
15 FG00001319-20; FG00007391-92; FG00008409-12; FG00013268-69; FG00013302-07;
16 FG00013395-99; FG00029680; FG00029728-32; FG00029927-33; FG00029940-44; FG00029960-
17 68; FG00030010-11; FG00030068-73; FG00030270-74; FG00032834; and FG00032911. It should
18 unseal the Declaration Of Andrew Bridges In Support of Reply In Support Motion for Preliminary
19 Injunction, Dkt. No. 109-2, Exhibits A, C-E, L, N-T, and V; the Declaration Of Matthew Scherb In
20 Opposition to Fusion Garage’s Motion to Dismiss the Complaint, Dkt. No. 81-1, Exhibit J; and the
21 Declaration of Matthew Scherb In Support of Plaintiffs’ Motion To Enforce Subpoena, Dkt. No. 83-
22 1, Exhibit H.

23 Dated: May 13, 2010.

WINSTON & STRAWN LLP

24
25 By: /s/ David S. Bloch
26 Andrew P. Bridges
27 David S. Bloch
Attorneys for Plaintiffs

28 ² FG00001160-1161 is the one document TechCrunch has not filed in connection with its motion
practice in this case, but it is substantially similar to FG00001308 and FG00001319.