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11
 12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN FRANCISCO DIVISION
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16 INTERSERVE, INC. dba TECHCRUNCH, a
 Delaware corporation, and CRUNCHPAD,
 17 INC., a Delaware corporation,

18 Plaintiffs,

19 vs.

20 FUSION GARAGE PTE LTD., a Singapore
 company,

21 Defendant.
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CASE NO. 09-cv-5812 RS (PVT)

**REPLY BRIEF IN SUPPORT OF FUSION
 GARAGE'S RENEWED MOTION FOR
 PROTECTIVE ORDER**

Date: June 8, 2010
 Time: 10:00 a.m.
 Judge: Hon. Patricia Trumbull

1 This Court has already ruled that Plaintiffs may not discover Fusion Garage’s highly
2 proprietary information until they provide a Statement of Misappropriated Business Ideas
3 (“Statement”) that satisfies California Code of Civil Procedure Section 2019.210. Plaintiffs
4 provided a Statement, but that Statement fails to specify or delineate the business ideas Plaintiffs
5 allege Fusion Garage misappropriated in a manner sufficient to satisfy Section 2019.210. Rather,
6 the Statement lists broad, omnibus ideas such as the “hardware configuration,” “source code,” and
7 “user interface” for the various CrunchPad prototypes. The broad categories Plaintiffs list in their
8 Statement cover every possible element of the CrunchPad and do not provide Fusion Garage with
9 any real notice as to the specific business ideas that Fusion Garage allegedly misappropriated.
10 Accordingly, the Statement fails to pass muster under Section 2019.210.

11 Rather than address the obvious inadequacies in its Statement, Plaintiffs point to other
12 claims and information Fusion Garage has allegedly refused to produce. However, this motion is
13 about Plaintiffs’ failure to comply with Section 2019.210 – that failure justifies Fusion Garage’s
14 efforts to protect its highly confidential information from production. Fusion Garage’s motion
15 should be granted.

16 **I. Plaintiffs’ Statement Does Not Satisfy Section 2019.210**

17 California Code of Civil Procedure 2019.210 requires Plaintiffs to “identify the trade secret
18 with reasonable particularity” before discovery may commence. Cal. Code Civ. Proc. 2019.210.
19 The purpose of this statute is to avoid costly, intrusive, and needless discovery. Thus, in this
20 context, the plaintiff “should describe the subject matter of the trade secret with sufficient
21 particularity to separate it from matters of general knowledge in the trade or of special knowledge
22 of those persons who are skilled in the trade, and to permit the defendant to ascertain at least the
23 boundaries within which the secret lies.” *Diodes, Inc. v. Franzen*, 260 Cal. App. 2d 244, 251-251
24 (1968). Plaintiffs’ Statement in this case fails to meet this standard.

25 Plaintiff’s Statement lists the “hardware configuration,” “source code,” and “user
26 interface” of CrunchPad Prototypes A and B in their Statement of Misappropriated Business
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1 Ideas.¹ Collectively, these three categories include every possible element of the CrunchPad, since
2 the CrunchPad (like any personal computer) is simply a piece of hardware running computer code
3 that a user may interface with. In other words, Plaintiffs’ Statement is equivalent to listing “all the
4 elements of the CrunchPad” as their business idea.

5 Plaintiffs cannot satisfy the “reasonable particularity” requirement by making generic
6 reference to the CrunchPad’s “hardware configuration,” “source code,” and “user interface.”
7 Ironically, the main case cited by Plaintiffs – *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443
8 (2002) – illustrates this point. The plaintiff in *Whyte* claimed “information about Schlage’s new
9 products” as a trade secret, but the court struck this disclosure as too broad under Section 2019.
10 *Id.* at 1454. It reasoned that “[a]lthough information about a company's new products certainly
11 can be trade secret, ‘information about Schlage's new products’ is too broad to enforce because it
12 does not differentiate between truly secret information (such as formulas and product design) and
13 new product information which has been publicly disclosed.” *Id.*

14 Such is the case here. Plaintiffs’ omnibus attempt to claim the CrunchPad’s “hardware,”
15 “source code,” and “user interface” – *i.e.*, every element of the CrunchPad – as their business ideas
16 does not delineate which specific elements of the hardware, source code, or UI are protectable
17 ideas and which elements are not. Accordingly, Plaintiffs’ Statement is overbroad under Section
18 2019.

19 It makes no difference whether Plaintiffs were more specific in other paragraphs of their
20 Statement. Plaintiffs’ inclusion of broad “catch-all” ideas like the CrunchPad’s hardware, source
21 code, and user interface renders the Statement as a whole fatally overbroad. Plaintiffs are trying to
22 keep their Statement so open-ended that they may later claim ownership over *any* product
23 information that Fusion Garage might disclose during discovery, since any product information
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25 ¹ Specifically, Paragraph 3 of the Statement claims “the CrunchPad Prototype A and its
26 hardware configuration” as a business idea; Paragraph 4 claims “the CrunchPad Prototype B and
27 its hardware configuration; Paragraph 13 claims “CrunchPad Prototype A’s source code,”
28 Paragraph 14 claims “CrunchPad Prototype B’s source code,” Paragraph 23 claims “CrunchPad
Prototype A’s user interface,” and Paragraph 24 claims “CrunchPad Prototype B’s user interface.”

1 Fusion Garage might disclose would necessarily fall within the broad categories of “hardware,”
2 “source code,” or “user interface.” This tactic is precisely what Section 2019.210 was designed to
3 avoid. *See Perlan Therapeutics, Inc. v. Superior Court*, 178 Cal. App. 4th 1333, 1350 (2009)
4 (“Perlan is not entitled to include broad, ‘catch-all’ language as a tactic to preserve an unrestricted,
5 unilateral right to subsequently amend its trade secret statement”); *Neothermia Corp. v. Rubicor*
6 *Med., Inc.*, 345 F.Supp. 2d 1042, 1045 (N.D. Cal. 2004) (noting that Section 2019 is designed to
7 prevent the “shifting sands approach” to trade secret allegations and discovery).

8 The overbreadth of Plaintiffs’ Statement is particularly prejudicial to Fusion Garage given
9 that Plaintiffs have refused to specify or delineate their allegedly misappropriated business ideas in
10 any *other* forum. At the May 13 hearing, for instance, Judge Seeborg asked Plaintiffs’ counsel:
11 “What are the ideas that were misappropriated?” Plaintiffs’ counsel dodged the question and
12 declined to answer. (Pennypacker Decl., Ex. A (Hearing Tr.) 10:4-10). Likewise, Mr. Arrington
13 refused at his deposition to specify what it was that Fusion Garage allegedly misappropriated
14 (Pennypacker Decl., Ex. B (Arrington Tr.) 136:23-138:8) and stated at other times that every
15 aspect of the project reflected a collaborative blend of input from both TechCrunch and Fusion
16 Garage. (*Id.* at 138:21 – 139:4). Finally, when Fusion Garage served an interrogatory asking
17 Plaintiffs to identify each business idea that Fusion Garage allegedly misappropriated, Plaintiffs
18 responded by reciting a four-page, unfocused narrative of the parties’ alleged relationship with
19 each other, again failing to specify and delineate their ideas. (Pennypacker Decl., Ex. C).

20 Plaintiffs’ Statement fails to delineate the allegedly misappropriated business ideas “with
21 reasonable particularity” under Section 2019.210 as required by this Court’s order. Fusion
22 Garage’s motion should be granted.

23 **II. The Insufficiency of Plaintiffs’ Statement Bars Them from Discovering Fusion**
24 **Garage’s Highly Proprietary Information Even if This Information Is Also Relevant**
25 **to Other Claims**

26 Plaintiffs argue that the insufficiency of their Statement is irrelevant because the
27 information Plaintiffs seek through discovery might be relevant to other claims in the case. (Opp.
28 at 8). This argument ignores the very Order that required Plaintiffs to abide by Section 2019.210

1 in the first place. In that Order, the Court stated that Fusion Garage’s highly proprietary
2 information may be relevant both to Plaintiffs’ business ideas claim and to their other claims,
3 because the claims are related.² See, e.g., Order (Dkt. 62) at 6-7 (“Plaintiff’s fraud claim is based
4 on the allegation that defendant FG misappropriated their business ideas.”) Nonetheless, the Court
5 held that Plaintiffs may not discover Fusion Garage’s highly proprietary information until they
6 comply with Section 2019.210 without making any exception for information that is relevant to
7 multiple claims. Given the Court’s Order, there is no merit to Plaintiffs’ argument that they may
8 flout their Section 2019.210 obligations yet still discover Fusion Garage’s highly proprietary
9 information just because that information may also be relevant to some *other* claim. See also
10 *Advanced Modular Sputtering, Inc. v. Superior Court*, 132 Cal.App.4th 826, 834-835 (2005) (“an
11 order that bars discovery on the cause of action for misappropriation but permits it on the others
12 simply makes no sense. Where, as here, every cause of action is factually dependent on the
13 misappropriation allegation, discovery can commence only after the allegedly misappropriated
14 trade secrets have been identified with reasonable particularity, as required by section 2019.210.”)

15 Indeed, it would vitiate the purposes behind Section 2019.210 if Plaintiffs could submit a
16 deficient 2019.210 Statement yet still discover Fusion Garage’s highly proprietary information
17 just because that information may be relevant to some other claim. This tactic would allow
18 Plaintiffs to later claim Fusion Garage’s highly proprietary information as their own business ideas
19 – a result Section 2019.210 is designed to *prevent*. See *Perlan*, 178 Cal. App. 4th at 1343 (noting
20 that the Section 2019.210 requirement “prevents plaintiffs from using the discovery process as a
21 means to obtain the defendant’s trade secrets” and “enables defendants to form complete and well-
22 reasoned defenses, ensuring that they need not wait until the eve of trial to effectively defend
23 against charges of trade secret misappropriation.”)

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² Fusion Garage respectfully disagrees that its highly proprietary information is relevant to any non-business idea claims, but it accepts the Court’s ruling as law of the case.

1 **III. Fusion Garage’s Alleged Discovery Actions Are Irrelevant to this Motion and Proper**

2 As a final attempt to avoid providing a specific Statement, Plaintiffs focus on discovery
3 that Fusion Garage has allegedly withheld. (Opp. at 1, 10). But Plaintiffs cannot excuse their own
4 Section 2019.210 failures by pointing to Fusion Garage’s alleged actions.

5 Moreover, Fusion Garage properly invoked the Protective Order to shield the number of
6 JooJoo orders, information about the business plan for the JooJoo’s release, and the identity of
7 certain Fusion Garage investors during Mr. Rathakrishnan's deposition – all of this information is
8 highly sensitive proprietary information to Fusion Garage, a privately held startup company
9 working to launch its first major product. The Protective Order explicitly extends to Fusion
10 Garage’s “highly proprietary information.” Plaintiffs have also included “confidential
11 introductions to a variety of Silicon Valley investment luminaries” and “insights into how to best
12 market the CrunchPad” in their Statement of Misappropriated Business Ideas. (See Statement ¶¶
13 31, 32). Because Plaintiffs apparently feel that investor information and business/marketing plans
14 are within the scope of their misappropriation claim, Fusion Garage is well within its rights to
15 shield its *own* investor and business plan information until Plaintiffs adequately comply with
16 Section 2019.210.

17 Plaintiffs have also used their blog and media presence to wage a public war against
18 Fusion Garage and have publicized confidential JooJoo sales numbers and Fusion Garage investor
19 information in pursuit of this goal. For instance, after Plaintiffs subpoenaed third-party PayPal in
20 February 2010 and learned the number of JooJoo pre-orders, they paraded this confidential
21 information in a public filing (Dkt. 26 at 5), and several media outlets seized on this information to
22 suggest that the JooJoo will not succeed in the marketplace. (See Dkt. 72 at 24). Moreover,
23 Plaintiff TechCrunch has written blog posts calling Fusion Garage’s investors “borderline loan
24 sharks” and claiming that Fusion Garage is “on the edge of going out of business.” (Pennypacker
25 Decl., Ex. D). Fusion Garage should not have to produce additional highly sensitive confidential
26 information to Plaintiffs at least until Plaintiffs have complied with this Court's order to specify
27 what business ideas it alleges have been misappropriated in a way that satisfies 2019.

1 **IV. Conclusion**

2 For the foregoing reasons, Fusion Garage respectfully requests that the Court grant its
3 Renewed Motion for Protective Order. Plaintiffs' Statement of Misappropriated Business Ideas is
4 fatally overbroad, and Fusion Garage should not be forced to disclose its highly proprietary
5 information until Plaintiffs submit a revised Statement that passes muster under Section 2019.210.

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8 DATED: May 25, 2010

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By /s/ Evette D. Pennypacker
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Attorneys for Defendant Fusion Garage PTE Ltd.

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