

1 Andrew P. Bridges (SBN: 122761)  
 ABridges@winston.com  
 2 David S. Bloch (SBN: 184530)  
 DBloch@winston.com  
 3 Matthew A. Scherb (SBN: 237461)  
 MScherb@winston.com  
 4 WINSTON & STRAWN LLP  
 101 California Street  
 5 San Francisco, CA 94111-5802  
 Telephone: (415) 591-1000  
 6 Facsimile: (415) 591-1400

7 Attorneys for Plaintiffs  
 INTERSERVE, INC. dba TECHCRUNCH  
 8 and CRUNCHPAD, INC.

9 **UNITED STATES DISTRICT COURT**  
 10 **NORTHERN DISTRICT OF CALIFORNIA**  
 11 **SAN FRANCISCO DIVISION**

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

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

**Case No. CV-09-5812 RS (PVT)**  
**DECLARATION OF MATTHEW SCHERB**  
**IN SUPPORT OF PLAINTIFFS' MOTION**  
**TO COMPEL PRODUCTION OF**  
**WITHHELD INFORMATION AND**  
**DOCUMENTS**  
**Date: Tuesday, October 12, 2010**  
**Time: 10:00 A.M.**  
**Place: Courtroom 5, 4<sup>th</sup> Floor, San Jose**  
**Hon. Patricia V. Trumbull**

1 I, Matthew Scherb, declare pursuant to 28 U.S.C. § 1746 under penalty of perjury that the  
2 following is true and correct:

3 1. I am counsel of record for Plaintiffs and an associate with the law firm of Winston &  
4 Strawn LLP.

5 2. On August 25, 2010, in light of Judge Seeborg's August 24, 2010 order dismissing  
6 Plaintiffs claim for misappropriation of business ideas, Plaintiffs asked Fusion Garage to concede  
7 that its motion for a renewed protective order had become moot and to withdraw that motion. It  
8 declined. A true and correct copy of the email exchange of counsel is Exhibit A to this declaration.

9 3. After Fusion Garage declined to concede mootness and to withdraw its motion,  
10 Plaintiffs sought a telephonic conference to identify the materials Fusion Garage was continuing to  
11 withhold (in order to determine the scope of the current discovery dispute) and to learn whether  
12 Fusion Garage would continue to refuse to produce source code and highly proprietary information  
13 even after a denial of the protective order motion. During the call on September 2, 2010, Fusion  
14 Garage was unable to give a final position, but asked counsel for Plaintiffs to put Plaintiffs' position  
15 in writing so that Fusion Garage could more effectively provide a response. Plaintiffs' counsel did  
16 so and asked for a response. Fusion Garage made no response.

17 4. Exhibit B to this declaration is a true and correct copy of the May 18, 2009 slip  
18 opinion in *Echostar Satellite LLC v. Freetech, Inc.*, No. 07-6124 (N.D. Cal.). The opinion is not  
19 available through Westlaw or Lexis.

20 Executed September 7, 2010.

21  
22 /s/  
Matthew A. Scherb

# EXHIBIT A

## **Scherb, Matthew A.**

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**From:** Scherb, Matthew A.  
**Sent:** Thursday, September 02, 2010 4:24 PM  
**To:** 'Evette Pennypacker'; Bridges, Andrew P.  
**Cc:** Bloch, David S.; Claude M. Stern; Thomas Watson  
**Subject:** RE: TechCrunch/Fusion Garage

Evette,

Thanks for speaking with me this afternoon. During our call, and based on our recent correspondence, I asked whether Fusion Garage would continue to object to production of source code and other highly technical or trade secret information if the Court denies Fusion Garage's pending protective order motion. You advanced some arguments for why Fusion Garage ought not produce those materials. In response, I offered these arguments for why Plaintiffs believe production is necessary:

1. Arguments presented at the June 30 protective order hearing, including that source code comments are reasonably likely to contain references to the term "JooJoo," or "CrunchPad," or "TechCrunch," or various personnel affiliated with Plaintiffs (such as Mr. Monier) and these comments, especially if paired with dates, would shed light on the collaboration of the parties and any planned "divorce."
2. Given the recent *Bratz* decision, we anticipate Fusion Garage arguing that at some point a new version of its product will turn a corner and be substantially based upon source code and/or hardware that was not in use or selected during the parties' collaboration. We anticipate Fusion Garage arguing that Plaintiffs should not obtain profits from sales of the new version as part of a damages award. We would challenge this argument if Fusion Garage makes it, and challenging the argument's factual basis might well require source code comparison. It would be inequitable for Fusion Garage to assert it had created a second-generation product without revealing how its product had changed

Also, with respect to the non-source code technical documents and email communications, the timing and identities of the communicating parties are likely to shed light on the collaboration and its health, on the honesty of Fusion Garage's communications, and on Fusion Garage's intent.

The "trade secret" issue has been before the Court in one way or another for about nine months. As I mentioned during the call, our client needs us to move the ball forward on this issue so we can secure complete production as depositions continue, and we therefore plan to file a motion to compel production of still-outstanding materials on Tuesday if we cannot reach an agreement. An agreement would need to be in the form of a Court-approved stipulation stating that if the Court denies the pending protective order motion, Fusion Garage will produce the outstanding materials within 10 days.

For the sake of clarity, based on our understanding these are the discovery requests for which Fusion Garage may still be, in whole or part, withholding documents because the requests allegedly call for "trade secrets":

- RFPs 4, 5 (re work on a tablet pre-collaboration or separately)
- RFPs 12, 13, 14, 15 (re design, development, or writing of software for the CrunchPad and JooJoo)
- RFPs 17, 18 (user experience testing of the CrunchPad and JooJoo)

RFPs 19, 20 (documents re user documentation for CrunchPad and JooJoo)  
RFPs 23, 24 (documents concerning plans for development and design, manufacturing, marketing, advertising, and promotion of CrunchPad and JooJoo)  
RFPs 32, 33 (documents evidencing or concerning communications re IP in CrunchPad and JooJoo)  
RFPs 37, 38 (all versions of source code, object code, executables)  
RFP40 (mentions of the JooJoo and one of CrunchPad, TechCrunch, or Mr. Arrington)  
RFPs 43, 44 (communications with vendors, contractors or suppliers, re JooJoo or CrunchPad)  
RFPs 45, 46 (design documents, BOMs, technical materials re CrunchPad and JooJoo)  
RFP49 (documents re government approvals or certifications re CrunchPad and JooJoo)  
RFP53 (documents with the term JooJoo)  
RFPs 54-57, 59 (certain communications with Gigabyte, CSL, or MPayments)  
RFPs 60, 61 (documents re Project Fuse, or Plan B)  
RFP 67 (re work on CrunchPad or JooJoo projects)  
RFP 76 (documents sufficient to identify Fusion Garage's other products)  
RFP s 78-81 (re design, development, and manufacture of CrunchPad prototypes)  
Interrogatories 1 and 2

These requests would be the focus of a motion to compel.

Please let me know Fusion Garage's position at your earliest convenience, and in any event, no later than 6pm on Monday.

Best,  
Matt

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**From:** Evette Pennypacker [mailto:evettepennypacker@quinnemanuel.com]  
**Sent:** Wednesday, September 01, 2010 11:02 PM  
**To:** Scherb, Matthew A.; Bridges, Andrew P.  
**Cc:** Bloch, David S.; Claude M. Stern; Thomas Watson; Evette Pennypacker  
**Subject:** RE: TechCrunch/Fusion Garage

Matthew:

Not sure what there is to discuss, but I think I can be available at about 3 tomorrow. Feel free to give me a call in the office.

Best,

Evette

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**From:** Scherb, Matthew A. [mailto:MScherb@winston.com]  
**Sent:** Wednesday, September 01, 2010 4:15 PM  
**To:** Evette Pennypacker; Bridges, Andrew P.  
**Cc:** Bloch, David S.; Claude M. Stern; Thomas Watson  
**Subject:** RE: TechCrunch/Fusion Garage

Hi Evette,

We disagree over the scope of Fusion Garage's motion. Despite some discussion at the hearing about source code as an example of a Fusion Garage trade secret, Fusion Garage's motion is aimed only at ensuring the adequacy of the Plaintiffs' statement of business ideas

before allowing full discovery of source code and other claimed trade secrets, not preventing discovery of those material for all time (or for reasons unrelated to the material sought being a trade secret).

In any event, we need to understand what specific materials besides source code – what “other detailed technical documentation,” “highly proprietary information,” or other “trade secret” materials –Defendants are withholding based on the trade secret objection (or other objections, if any).

Let's discuss these issues. I am available Thursday afternoon after 2:30pm and anytime on Friday. Please let me know when you are available during those times.

Best,  
Matt

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**From:** Evette Pennypacker [mailto:evettepennypacker@quinnemanuel.com]  
**Sent:** Sunday, August 29, 2010 10:33 PM  
**To:** Bridges, Andrew P.  
**Cc:** Bloch, David S.; Scherb, Matthew A.; Evette Pennypacker; Claude M. Stern; Thomas Watson  
**Subject:** RE: TechCrunch/Fusion Garage

Dear Andrew:

We have consulted with our client, and we do not intend to withdraw this motion. We made clear in our motion practice and during the substantial hearing on this motion that the business ideas claim was not the only claim Magistrate Judge Trumball's order applies to. Discovery taken thus far has only further confirmed that TechCrunch has no basis for seeking source code or other detailed technical documentation in this case. Please let us know if you'd like to discuss further.

Best,

Evette

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**From:** Bridges, Andrew P. [mailto:ABridges@winston.com]  
**Sent:** Wednesday, August 25, 2010 5:04 PM  
**To:** Claude M. Stern; Evette Pennypacker; Thomas Watson  
**Cc:** Bloch, David S.; Scherb, Matthew A.; Bridges, Andrew P.  
**Subject:** TechCrunch/Fusion Garage

Dear Claude,

With Judge Seeborg's ruling now officially knocking the misappropriation of business ideas claim out without leave to amend, and with no trade secret claim asserted by Plaintiffs, will Fusion Garage now withdraw its motion for protective order as moot and furnish the previously withheld documents? Please let us know right away. Thanks.

Andrew

**Andrew P. Bridges**  
Partner  
Winston & Strawn LLP

101 California Street  
San Francisco, CA 94111-5802  
D: +1 (415) 591-1482  
F: +1 (415) 591-1400  
Bio | VCard | Email | [www.winston.com](http://www.winston.com)

WINSTON  
& STRAWN  
LLP

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# EXHIBIT B

United States District Court  
For the Northern District of California

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\*E-Filed 5/18/09\*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ECHOSTAR SATELLITE LLC, et al.

NO. C 07-6124 JW (RS)

Plaintiffs,

**ORDER GRANTING IN PART  
AND DENYING IN PART  
MOTIONS TO COMPEL**

v.

FREETECH, INC., et al.,

Defendants.

I. INTRODUCTION

Three motions to compel are at issue in this order. Pursuant to Rules 37 and 45 of the Federal Rules of Civil Procedure, in its first motion, defendant Freetech, Inc. ("Freetech") moves to enforce a subpoena to non-party The Carmel Group ("TCG") based on its Nagrastar FTA Piracy Report (the "piracy report"). In its second motion, Freetech moves to compel documents from plaintiffs Echostar Satellite LLC, Echostar Technologies Corporation, and Nagrastar LLC (collectively "Echostar"). In the third motion, Echostar moves to compel documents from Freetech. The parties oppose the respective motions filed against them. For the reasons stated below, all three motions will be granted in part and denied in part.

II. DISCUSSION<sup>1</sup>

A. The TCG Motion

<sup>1</sup> The relevant background for this motion to compel has been presented in the Court's previous orders. That background information is incorporated here.

1 Nagrastar commissioned TCG to write a piracy report, which Echostar produced to Freetech  
2 during discovery. Freetech subsequently served TCG with a subpoena seeking documents related to  
3 the report going back fourteen years. In particular, Freetech seeks communications with Echostar  
4 (document request number eleven), work produced or prepared for Echostar (document request  
5 number twelve), and documents referring to Echostar (document request number thirteen).<sup>2</sup>

6 Under the Federal Rules of Civil Procedure, parties may obtain discovery of any  
7 nonprivileged matter that is relevant to any party's claims or defenses, or "for good cause," discovery  
8 of any matter relevant to the subject matter involved in the action. Fed. R. Civ. P. 26(b)(1).  
9 Discovery may be limited, however, if it can be obtained from another source or the burden or  
10 expense of the proposed discovery outweighs its likely benefit. *Id.* Freetech has not shown why the  
11 materials sought, beyond those pertaining to the issue of FTA piracy that is directly in dispute in this  
12 litigation, should be produced.

13 For example, Freetech claims that it needs documents from a recent case pending in another  
14 district court ("the NDS matter") where TCG was retained as an expert by Echostar. That matter  
15 does not pertain to FTA piracy, but rather to another wholly unrelated type of piracy not at issue in  
16 this litigation. Beyond Freetech's conclusory statements that such information may relate generally  
17 to damages, the relevance of this material is not apparent. Indeed, TCG does not object to producing  
18 communications with Echostar concerning FTA or Freetech, work product prepared for Echostar  
19 concerning FTA or Freetech, or documents referring to Echostar and FTA or Freetech. TCG  
20 consequently will be ordered to do so within twenty days of the date of this order. Moreover, a  
21 search for materials going back fourteen years is overly broad, especially for a non-party. TCG need  
22 only produce documents responsive to the requests at issue going back to 2003, two years before the  
23 date of the piracy report it prepared.

24 B. Freetech's Motion to Compel

25 Freetech moves to compel: (1) information referring to FTA receivers and the FTA market or  
26 comparing such FTA related information with DISH receivers and the DISH market (document

27 \_\_\_\_\_  
28 <sup>2</sup> Freetech originally asked for documents responsive to document request numbers 1-  
7, 8-20. Only the three requests noted above remain at issue.

1 request number forty-five); (2) documents from other litigation concerning FTA, hacking, piracy, or  
2 technology measures implemented to control access to DISH Network programming (document  
3 request number sixty-four (set three)); (3) documents related to Nagrastar software that Freetech's  
4 receivers allegedly incorporate such as copies of the codes used in Echostar's current or previous  
5 access cards (document request numbers sixty-four, sixty-six, eighty-eight (set four)).<sup>3</sup>

6 1. Document Request Number 45

7 Echostar argues that this request is burdensome because there will be many documents that  
8 "refer to" FTA receivers and the DISH market. Similar to the argument regarding burden in the  
9 TCG motion, Echostar makes no showing beyond its conclusory remarks that producing this  
10 material will be a burden. That said, the amount of documents Freetech seeks without any date  
11 restriction is overly broad on its face. Similar to the date restriction above, this request also will be  
12 limited to materials going back to 2003.

13 2. Document Request Number 64 (Set Three)

14 For this document request, Echostar contends that not every previous lawsuit is relevant to  
15 the present dispute. Freetech represented at the hearing that it would refine this request, and  
16 Echostar acknowledged that it would meet and confer further with Freetech to reach a solution to  
17 this discovery dispute. Accordingly, Freetech and Echostar shall file a joint supplemental letter brief  
18 of not more than five pages detailing the outcome of their efforts within ten days of the date of this  
19 order.

20 3. Document Request Numbers 64, 66, 88 (Set 4)

21 As noted above, these requests seek the source code contained within Echostar's FTA  
22 receivers owned by non-party Nagravision S.A. ("Nagravision"), a company located in Switzerland  
23 and formed as a joint venture between Echostar and the Kudelski Group. To the extent any source  
24 code is in Echostar's possession or has been provided to its experts, such code must be turned over to  
25 Freetech. At this juncture, Echostar will not be required to retrieve and produce the entire code from  
26

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27 <sup>3</sup> Freetech also moves to have Echostar remove the "confidential" designation on  
28 numerous filings. At the hearing, Echostar acknowledged that it would work with Freetech to re-  
designate its filings within ten days.

1 its joint venture Swiss entity – Nagravision. Although Echostar understandably lodges concerns  
2 regarding the disclosure of this sensitive material, the stipulated protective order should address  
3 concerns regarding improper use of such information.<sup>4</sup> Protective orders in general are adequate to  
4 address proprietary issues particularly in the absence of any showing, as in this case, that the  
5 documents here go beyond the type of sensitive materials implicated in other litigation in this  
6 district.

7 C. Echostar's Motion to Compel

8 Echostar moves to compel Freetech to produce documents responsive to document request  
9 numbers 117-121, 125-128. Specifically, Echostar seeks source code and technical information for  
10 each model Coolsat receiver (document request number 117) such as the factory firmware  
11 (document request number 118), the firmware files and updates available on Freetech's website  
12 (document request number 119), memory maps and factory software (document request numbers  
13 120, 121, 127), datasheets for each chipset (document request number 125), the bootloader  
14 (document request number 126), and the security map (document request number 128).

15 Echostar argues that Freetech has possession, custody, or control of the source code.  
16 Freetech contends in response that it is only an importer of receivers manufactured by unrelated  
17 overseas companies. According to Freetech, these manufacturers have the information Echostar  
18 seeks, and Freetech does not have the right to access it. Freetech's claim of separation from those  
19 entities notwithstanding, it indisputably has access to at least portions of the information Echostar  
20 seeks for purposes of Coolsat receiver repair as apparently reflected on its website. Echostar  
21 submitted the declaration of Jeffrey Reason, a former technical manager with Freetech Canada to  
22 that effect.<sup>5</sup> In the declaration, he states that Freetech's website includes a support page with default  
23 software, and when a person returns a receiver for repair, a Freetech technician updates its software.  
24 Freetech, therefore, could not perform its service on Coolsat receivers without at least portions of the  
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26 <sup>4</sup> Echostar's elaborate proposed escrow protocol or the deletion of every tenth byte of  
27 code is not necessary to protect this proprietary information from disclosure.

28 <sup>5</sup> Freetech Canada began in 2007 as an extension of California based Freetech. The  
company ceased operations in November 2007.

1 Coolsat source code. Echostar further demonstrates that a comparison of its code and Freetech's  
2 code is relevant to determining whether the Coolsat receivers are being used to pirate Echostar's  
3 programming. As a result, just as Echostar is required to reveal the source code in its possession,  
4 Freetech similarly must do so.<sup>6</sup>

5 III. CONCLUSION

6 Accordingly, all three motions are granted in part and denied in part. The parties shall  
7 respond to the document request numbers detailed above within twenty days of the date of this  
8 order. Echostar's motions to seal beyond material revealing the identity of confidential informants is  
9 denied. Echostar is directed to file on the public docket all such documents with identifying  
10 information concerning informants redacted.

11 IT IS SO ORDERED.

12  
13 Dated: 5/18/09

14   
15 RICHARD SEEBORG  
16 United States Magistrate Judge  
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26 <sup>6</sup> Echostar argues that there is a corporate parent relationship between Freetech and the  
27 Korean manufacturer sufficient to warrant disclosure of the entire code. This corporate control is far  
28 from established at this juncture. The Court's denial of this argument is without prejudice.