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14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN FRANCISCO DIVISION
 17

18 TECHCRUNCH, INC., a Delaware
 corporation, and CRUNCHPAD, INC., a
 19 Delaware corporation,

20 Plaintiffs,

21 vs.

22 FUSION GARAGE PTE LTD., a Singapore
 company,

23 Defendant.
 24

CASE NO. C 09-cv-5812 RS (PVT)

**FUSION GARAGE'S OPPOSITION TO
 PLAINTIFFS' MOTION TO COMPEL
 PRODUCTION OF WITHHELD
 INFORMATION AND DOCUMENTS**

Date: October 12, 2010
 Time: 10:00 a.m.
 Judge: Hon. Patricia Trumbull

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1 **I. INTRODUCTION**

2 Discovery taken since the time the parties were previously before this Court on Defendant
3 Fusion Garage’s renewed motion for a protective order has made even clearer what Fusion Garage
4 has been arguing all along: Plaintiffs had nothing to do with the technical development of the web
5 tablet that is at the center of this dispute. This is not a technical or source code case. Plaintiffs
6 have filed an original and an amended complaint, answered interrogatories, served a purported list
7 of “business ideas” they claim they contributed, and sat for depositions. In none of these areas
8 have Plaintiffs articulated an alleged contribution that would justify the need for technical
9 documents or source code. Nonetheless, Plaintiffs’ Motion to Compel Production of Withheld
10 Information and Documents (“Motion”) seeks production of Fusion Garage’s highly proprietary
11 technical information and source code – the crown jewels of Fusion Garage’s business. This
12 detailed technical information is irrelevant to Plaintiffs’ breach of fiduciary duty, fraud and deceit,
13 and unfair competition claims, and Plaintiffs’ motion should be denied.

14 **II. BACKGROUND**

15 **The Parties.** Plaintiff TechCrunch is an Internet “blog” founded by blogger Michael
16 Arrington. (See Amended Complaint, Dkt. 167 at ¶ 7.) Plaintiff CrunchPad, Inc. was allegedly
17 formed as a subsidiary of TechCrunch to be a vehicle for TechCrunch’s commercialization of the
18 CrunchPad. (See *id.*) CrunchPad Inc. was also the entity that would either acquire or merge with
19 Defendant Fusion Garage Pte. Ltd. (“Fusion Garage”) had their merger negotiations been
20 successful. However, the parties were never able to come to terms on a merger or acquisition and
21 never signed a deal—largely because of Plaintiffs’ failure to secure any venture funding for the
22 project. Spurned and embarrassed that they have no product and could not consummate a merger
23 or acquisition, Plaintiffs filed this lawsuit to disrupt Fusion Garage’s business.

24 **Plaintiffs’ Complaint and Request for a Preliminary Injunction.** Plaintiffs initially
25 filed suit in December 2009, alleging claims for Violation of the Lanham Act, Breach of Fiduciary
26 Duty, Misappropriation of Business Ideas, Fraud and Deceit, and Unfair Competition. (See Dkt. 1
27 (hereinafter “Complaint”).) Plaintiffs’ Complaint contained broad and superficial allegations that
28 Defendant Fusion Garage had stolen their ideas and breached an alleged partnership agreement

1 after Fusion Garage released a web tablet that the parties allegedly spent over a year jointly
2 developing.

3 Specifically, Plaintiffs’ alleged that it developed a web tablet, Prototype A, by August 20,
4 2008. (*See id.* at ¶ 12.) The Complaint also alleged that Plaintiffs and Mr. Rathakrishnan of
5 Fusion Garage meet around the time of Plaintiffs’ TechCrunch 50 conference in San Francisco in
6 September 2008, and struck up a relationship to collaborate on Plaintiffs’ so-called CrunchPad
7 project. (*See id.* at ¶ 14 and *passim.*) By January 19, 2009, Prototype B was alleged to have been
8 constructed. (*See id.* at ¶ 18.) What Plaintiffs call Prototype C was ready by April 2009, but even
9 Plaintiffs acknowledged in their Complaint that Fusion Garage should get all the credit for the new
10 web tablet. (*See id.* at ¶ 22.) Between the parties’ first meeting in September 2008 and November
11 2009, the parties continuously negotiated the terms of a potential merger. (*See e.g., id.* at ¶¶ 15,
12 26, 27, 28, 29, 38, 41.) The funding Plaintiffs needed never came, and they filed suit shortly after
13 Fusion Garage launched its web tablet in December 2009. (*See id.* at 44 and *passim.*)

14 Even without the benefit of a full record or exchange of discovery between the parties,
15 Judge Seeborg saw through many of Plaintiffs’ allegations and dismissed the bulk of their claims
16 in his Order Denying Plaintiffs’ Motion for Preliminary Injunction and Granting in Part and
17 Denying in Part Defendant’s Motion to Dismiss, dated August 24, 2010 (hereinafter “August 24,
18 2010 Order”). (*See* Dkt. 162.)

19 **Plaintiffs’ Discovery Requests and Fusion Garage’s Motion for a Protective Order.**

20 Between the time Plaintiffs filed their Complaint and Judge Seeborg’s August 24, 2010 Order,
21 Plaintiffs propounded interrogatories and several sets of requests for production seeking discovery
22 of Fusion Garage’s confidential technical information and source code, including the discovery at
23 issue in this motion. Concerned that Plaintiffs’ Misappropriation of Business Ideas claim was a
24 stalking horse for a trade secrets claim, Fusion Garage filed a Motion for Protective Order on
25 February 5, 2010 to protect its source code and highly proprietary information from being
26 disclosed until Plaintiffs complied with Cal. Code Civ. P. § 2019.210 and disclosed precisely what
27 Fusion Garage allegedly misappropriated. (*See* Dkt. 23.) The Court granted this motion on April
28

1 9, 2010, ruling that Fusion Garage need not disclose its “source code and other highly proprietary
2 information” until Plaintiffs “identify the ideas that have been misappropriated.” (Dkt. 62 at 7.)

3 On April 23, 2010, Plaintiffs provided a Statement of Misappropriated Business Ideas
4 (further discussed *infra*). However, this Statement was so broad and non-specific that, in Fusion
5 Garage’s view, it did not adequately identify the allegedly misappropriated business ideas.
6 Accordingly, Fusion Garage filed a Renewed Motion for Protective Order on April 30, 2010 that
7 sought to shield its proprietary information until Plaintiffs submitted a legally sufficient Statement
8 of Misappropriated Business Ideas. (*See* Dkt. 93.) This motion was submitted for decision on
9 June 30, 2010 and remains pending.

10 Since filing the Renewed Motion for Protective Order, however, Fusion Garage has had an
11 opportunity to take depositions and insist on supplemental responses to its interrogatories to learn
12 what, exactly, Plaintiffs “contributed” to Fusion Garage’s web tablet *under oath*. Plaintiffs’
13 responses reveal what Fusion Garage has been asserting all along: that Plaintiffs have had *no*
14 involvement in the actual technical and source code development of Fusion Garage’s web tablet.
15 (*See* Sohn Decl., Exs. A, B, C, D and H, discussed *infra*.)

16 **Plaintiffs’ Statement of Misappropriated Business Ideas.** On April 23, 2010, Plaintiffs
17 served a Statement of Misappropriated Business Ideas (“Statement”). (*See* Sohn Decl., Ex. A.)
18 The Statement, however, lacks any indication that Plaintiff had any involvement in the actual
19 development of Fusion Garage’s web tablet. With respect to hardware development, the
20 Statement asserts only that Plaintiffs “created CrunchPad Prototype A,” “CrunchPad Prototype B,”
21 and their respective hardware configurations. (*See id.* at 2.) However, CrunchPad Prototype A
22 predated Fusion Garage, and Prototype B simply ran Fusion Garage’s software and bears no
23 relation to Fusion Garage’s web tablet on either a specific hardware or source code level. (*See*
24 Sohn Decl., Ex. K at ¶40 [Declaration of Chandra Rathakrishnan In Support of Opposition to
25 Plaintiffs’ Motion for Preliminary Injunction (Dkt. 75)]) (disclosing that the prototype Fusion
26 Garage unveiled in April 2009, Prototype C, was fundamentally different from the prior Prototype
27 A and Prototype B.) Plaintiffs’ remaining alleged “contributions” to hardware development
28 consisted of “indicat[ing],” “suggest[ing],” “direct[ing],” and “dictat[ing]” various aspects to the

1 web tablet related to the keyboard, an integrated camera, peripheral ports, viewing angle, and a
2 single button. (See Sohn Decl., Ex. A at 2-3.) Conspicuously absent is any statement that
3 Plaintiffs actually performed *any* of the actual hardware development. More importantly, each of
4 Plaintiffs’ alleged “contributions” are plainly visible by simply looking at the device.

5 Similarly with respect to software, other than stating they provided source code for
6 Prototype A and a “product draft” for source code for Prototype B (whatever that means),
7 Plaintiffs’ alleged contributions to the source code for Fusion Garage’s product is nothing more
8 than superficial “suggest[ions],” “idea[s],” and “instructions,” as well as the the “identifi[cation]”
9 of “specific hang-up problems with the Linux source code and instruct[ing] Fusion Garage to
10 troubleshoot and repair them.” (See *id.* at 3-4.) Plaintiffs make no affirmative representations that
11 they actually performed the coding for Fusion Garage’s web tablet.

12 **Plaintiffs’ Responses to Interrogatories.** Plaintiffs’ responses to interrogatories seeking
13 their contributions to the Fusion Garage web tablet largely incorporate by reference Plaintiffs’
14 Statement discussed immediately above, and also includes the following high-level “ideas”:

- 15 • the “overall conception, blueprint, guidance, and senior level support of the
16 project”;
- 17 • a large-screen touch-screen;
- 18 • booting extremely rapidly and straight to a borrower;
- 19 • the lack of a desktop;
- 20 • no hard drive other than for the software footprint;
- 21 • use of a white instead of a black background;
- 22 • use of large icons on the web tablet home screen so that users can quickly navigate
to their favorite web pages;
- 23 • the use of proxying video display to the device so that video can be played without
the use of a flash player;
- 24 • the application programming interface with the browser for custom applications;
25 and
- 26 • the idea and knowhow for empowering the device to play video output to a
27 resolution of 1080p.

1 (See Sohn Decl., Ex. B at 5 and 9 [Plaintiffs’ Second Supplemental Response to Fusion Garage’s
2 Interrogatories, Nos. 1 and 4].) However, such “contributions” and “ideas,” even if they were
3 provided by Plaintiffs for the purposes of this motion, would be readily apparent by simply
4 looking at Fusion Garage’s web tablet without ever having to look at Fusion Garage’s proprietary
5 technical documentation and source code.

6 **Depositions of Plaintiffs’ Witnesses Further Clarify Plaintiffs’ Lack of Involvement in**
7 **the Development of Fusion Garage’s Web Tablet.** Depositions of Plaintiffs and their related
8 witnesses over the past several months have only confirmed that Plaintiffs did *not* make any
9 technical contributions to Fusion Garage’s web tablet. For instance, Mr. Arrington, Plaintiffs’
10 30(b)(6) witness, testified at deposition that the software coding for the web tablet was performed
11 by Fusion Garage: “I believe with prototype B where Louis was involved as well, that’s when we
12 moved to mostly Fusion Garage software. At that point they were taking over. The actual coding
13 was done by Fusion Garage employees.” (See Sohn Decl., Ex. D at 338:23-339:2.) He also could
14 not name any specific contributions that representatives of TechCrunch or CrunchPad, Inc. made
15 to the CrunchPad. (See Sohn Decl., Ex. D at 337:5-338:5.)

16 Brian Kindle, the person Plaintiffs claim to have hired to run the hardware side of the
17 business, did not start until mid-July 2009 (relatively late in the web tablet’s development), could
18 not testify about *any* differences in web tablet prototypes after he started, and could not identify
19 any of the tablet’s specifications, including whether the final form factor of the device was plastic
20 or metal. (See Sohn Decl., Ex. C at 74:8-12, 118:20-25, 128:8-132:18, and 130:1-5.) Needless to
21 say, Kindle’s complete ignorance of the device’s evolution proves that he was not “leading”
22 hardware development as Plaintiffs claim. Further, Kindle admitted that he flew to Singapore—
23 where Fusion Garage was developing its web tablet—to “understand the details of the hardware
24 development” shortly after he was hired in July 2009, but spent only *two days* there. (See Sohn
25 Decl., Ex. C at 208:21-209:6 and 213:8-15.)

26 Finally, Heather Harde, TechCrunch’s CEO and CrunchPad, Inc.’s CFO, testified that she
27 knew nothing about the source code for any of the devices at issue. She also testified that she had
28 only “limited” involvement with any of the CrunchPad prototypes and had never even *held* Fusion

1 Garage’s JooJoo product until August 2010 – nearly a year after the parties’ alleged collaboration
2 ceased. (*See* Sohn Decl., Ex. H at 89:20-24; 89:25-90:2; 106:18-20.)

3 **Plaintiffs’ Amended Complaint.** On September 13, 2010, Plaintiffs filed their Amended
4 Complaint for Breach of Fiduciary Duty, Fraud and Deceit, and Unfair Competition. (*See* Dkt.
5 167.) The Amended Complaint, filed six days after Plaintiffs brought this motion, defines the
6 scope of their claims (and by extension, discovery) against Fusion Garage by stating that
7 Plaintiffs’ purported contributions to the development of the CrunchPad project were, again,
8 simply “high-level direction” related to “the overall conception, blueprint, guidance, and senior
9 level support.” (*See id.* at ¶ 56.) The Amended Complaint does not allege that Plaintiffs were
10 responsible for creating any web tablet prototypes other than the first two prototypes of the
11 CrunchPad – an initial prototype (Prototype A) which predated Fusion Garage’s interactions with
12 Plaintiffs, and a second prototype (Prototype B) that bears little relation to Fusion Garage’s JooJoo
13 and whose only connection to Fusion Garage was that it ran Fusion Garage’s software. (*See*
14 Amended Complaint ¶¶ 16, 24, 56(b); Sohn Decl., Ex. K at ¶ 40.)

15 Plaintiffs’ Amended Complaint does not provide any facts to support the belief that
16 Plaintiffs had any involvement in the actual hardware and software development of Fusion
17 Garage’s web tablet that would not be ascertainable by simply looking at the device.

18 **Plaintiffs Intend to Use Discovery Produced by Fusion Garage to Litigate this Case in**
19 **the Court of Public Opinion.** Simultaneously with this lawsuit, Plaintiffs have engaged in a
20 public relations campaign through the TechCrunch blog and on Twitter.com to attempt to tarnish
21 and embarrass Fusion Garage and run it out of business. Plaintiffs’ desire to litigate this case in
22 the press was on full display last week by their deft coordination of the filing of the Amended
23 Complaint with a blog post and a tweet on Twitter.com setting forth Plaintiffs’ heavily skewed
24 side of the story, including the posting of documents Plaintiffs have obtained from Fusion Garage
25 through discovery. (*See* <http://techcrunch.com/2010/09/15/status-of-crunchpad-litigation/> (*last*
26 *checked* 9/20/10); Sohn Decl., Ex. F at Tweet 74.)

27 Moreover, Mr. Arrington, TechCrunch founder and CrunchPad CEO, recently stated his
28 willingness to flout the Stipulated Protective Order in this case by posting sealed or otherwise

1 protected information on his Internet blog, stating in a recent tweet that the “really solid gold”
2 documents in this case were under seal, but that he was “probably going to just post [these
3 documents] anyway.” (Sohn Decl., Ex. E.)

4 Threatening use of Plaintiffs’ blog to shame and embarrass Plaintiffs’ opponents into
5 submission is an old tactic of Plaintiffs. Plaintiffs did the same thing to one of the potential
6 suppliers of Fusion Garage’s web tablet, Pegatron. Plaintiffs went to Pegatron in late August 2009
7 with two mutually exclusive options: either work with TechCrunch on the web tablet, or work
8 with Fusion Garage. (*See* Sohn Decl., Ex. G, *passim*.) Choosing the TechCrunch option would
9 mean that Pegatron would be showered by Plaintiffs with “great positive coverage globally” and
10 “positive communication[s].” (*See id.* at TC00000560 and TC00000557, respectively.) If
11 Pegatron chose the Fusion Garage option, on the other hand, Plaintiffs would cause a “hail storm
12 of negative press” to befall upon Pegatron. (*See id.* at TC00000558; *see also* Sohn Decl., Ex. C at
13 320:7-321:24.) Pegatron ultimately choose the Fusion Garage option, but was quick to state its
14 willingness to break-off its relationship with Fusion Garage to keep Plaintiffs’ “negative guns”
15 (i.e., negative blog posts) pointed away from Pegatron. (*See* Sohn Decl, Ex. G at TC00000557.)

16 This sort of threatening behavior makes Plaintiffs’ bare allegation that that the Court’s
17 Protective Order is sufficient to protect Fusion Garage’s proprietary information and source code
18 insufficient – particularly given how irrelevant this sensitive information is to Plaintiffs’ case.

19 **Fusion Garage Is Not Seeking to Delay Discovery.** Despite the fact the initial Complaint
20 was filed in December 2009, this case is still in its initial stages. Plaintiffs filed their Amended
21 Complaint just last week, and Fusion Garage’s response is not due until September 27, 2010.
22 There is no case schedule, discovery deadline, summary judgment deadline, or trial date. Further,
23 it should be stressed that Fusion Garage is not shielding its proprietary technical documents and
24 source code in order to stonewall discovery or deny Plaintiffs the documents that could be relevant
25 to Plaintiffs’ claims. Indeed, Fusion Garage has thus far produced roughly 35,000 pages of
26 documents – nearly double the volume of Plaintiffs’ own production – that are more than
27 sufficient to help Plaintiffs prove their case if they can, and Plaintiffs make no argument to the
28 contrary. (*See* Sohn Decl. ¶ 2.) As noted above, Mr. Arrington recently crowed in a public

1 Twitter message that some of these Fusion Garage documents are “really solid gold documents”
2 that he planned to post on the TechCrunch blog. (Sohn Decl., Ex. E) (“reason we haven't said
3 much about crunchpad litigation - the really solid gold documents are under seal. probably going
4 to just post anyway”). Mr. Arrington’s apparent delight with the contents of Fusion Garage’s
5 document production underscores how Fusion Garage has been satisfying its obligation to provide
6 relevant documents to Plaintiffs and highlights Fusion Garage’s very real concern over having its
7 proprietary information posted on the Internet for the world to see. Fusion Garage is not
8 attempting to delay production, but is instead trying to protect its proprietary technical
9 documentation and source code from production – where this information is not relevant, let alone
10 necessary, to Plaintiffs’ case.

11 **III. ARGUMENT**

12 Federal Rule of Civil Procedure 26(b) provides that parties may obtain discovery that is
13 relevant to any party’s claim or defense, but this ability to obtain information is subject to the
14 court’s duty to limit the frequency or extent of discovery if: (i) the discovery sought is
15 unreasonably cumulative or duplicative, (ii) the party seeking discovery has had ample
16 opportunity to obtain the information by discovery in the action, or (iii) the burden or expense of
17 the proposed discovery outweighs its likely benefit. *See* Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii); *see*
18 *also Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 439 (9th Cir. 1992) (a
19 discovery request is unnecessarily burdensome and overbroad where compelling party fails to
20 make “a specific showing that the burdens of production would be minimal and that the requested
21 documents would lead to relevant evidence”); *Epstein v. MCA, Inc.*, 54 F.3d 1422, 1424 (9th Cir.
22 1995) (holding that district court abused its discretion by granting motion to compel irrelevant
23 discovery requests). It is appropriate for the Court to limit the discovery Plaintiff seeks here.

24 In *Autotech Tech. Ltd. P’ship v. Automationdirect.com, Inc.*, 249 F.R.D. 530, 534-35 (N.D.
25 Ill. 2008), for example, the court denied a motion to compel “confidential and proprietary
26 technical information” on the ground that the information was not relevant to plaintiff’s breach of
27 contract claims over a touchscreen device. Moreover, discovery of source code has been denied
28 where a plaintiff had failed to make a “plausible showing” of relevance. *Viacom Intern. Inc. v.*

1 *Youtube Inc.*, 253 F.R.D. 256, 260 (S.D.N.Y. 2008). This Court should rule similarly here
2 because Fusion Garage’s confidential and proprietary technical information and source code are
3 not relevant to, nor are they needed to prove, Plaintiffs’ claims for breach of fiduciary duty, fraud,
4 and unfair competition.

5 A. **The Recent Depositions Confirm that Fusion Garage’s Technical Information**
6 **is Irrelevant to Plaintiffs’ Claims Because Plaintiffs Had No Involvement with**
7 **the Technical Aspects of Fusion Garage’s Product**

8 Plaintiffs’ Motion argues that the Court already “weighed in” on the relevance of Fusion
9 Garage’s proprietary information. (Mot. at 7.) While the Court’s April 9 Order (granting Fusion
10 Garage’s Motion for Protective Order over its proprietary information) did suggest that this
11 information could be relevant to Plaintiffs’ fraud and breach of fiduciary duty claims (for example,
12 the April 9 Order noted that an examination of the source code metadata might show whether
13 Plaintiffs helped write the code), the Court made this preliminary relevance determination before a
14 number of critical depositions had taken place. (Dkt. 62 at 6.)

15 By contrast, the depositions that have taken place since April 9, coupled with Plaintiffs’
16 written discovery responses, clearly show that Plaintiffs had *no* involvement with the source code
17 or technical specifications of Fusion Garage’s product. It follows that Fusion Garage’s proprietary
18 information and source code is not relevant to show the terms of the alleged “partnership” or
19 Fusion Garage’s alleged “fraud” or whether Plaintiff contributed to the source code – they admit
20 they did not. For this reason, Plaintiffs’ motion to compel such information should be denied. *See*
21 *Barcenas v. Ford Motor Co.*, No. 03-4644, 2004 WL 2827249, *2 (N.D. Cal. Dec. 9, 2004)
22 (“[s]ome threshold showing of relevance must be made before parties are required to open wide
23 the doors of discovery and to produce a variety of information which does not reasonably bear
24 upon the issues in the case.”)

25 For instance, Plaintiffs have alleged that TechCrunch consultant Brian Kindle had a major
26 role in developing the hardware for the “CrunchPad” web tablet that Fusion Garage allegedly
27 stole. (*See, e.g.*, Mot. for Preliminary Injunction (Dkt. 26) at 3.) However, Mr. Kindle admitted to
28 having no involvement with the CrunchPad before he was hired in July 2009. (Sohn Decl., Ex. C
at 74:8-12.) Mr. Kindle also had no knowledge about how the CrunchPad’s prototypes evolved

1 *after* he was hired in July 2009, and could not identify something as basic as whether the final
2 product’s form factor would be plastic or metal. (*Id.* at 118:20-25) (“Q: Can you tell me the
3 differences between the various prototypes that you saw at CrunchPad between July 2009 and the
4 time you left in December 2009? A: No.”); 130:1-5 (“Q: So you can’t recall whether the final
5 form factor was plastic or metal, is that right? A: I don’t recall.”). Clearly, Mr. Kindle did not
6 contribute to the technical specifications of the CrunchPad if he was utterly ignorant of the
7 device’s evolution during his tenure on the alleged CrunchPad project.

8 The other two Plaintiff witnesses who have been deposed thus far – Michael Arrington and
9 Heather Harde – further confirm that Plaintiffs had no involvement with the “CrunchPad’s”
10 technical specifications or source code. For instance, Ms. Harde testified that she knew nothing
11 about the source code for any of the devices at issue (Sohn Decl., Ex. H at 106:18-20), had only
12 “limited” involvement with any of the CrunchPad prototypes (*id.* at 89:25-90:2), and had never
13 even *held* Fusion Garage’s JooJoo product until last month. (*Id.* at 89:20-24.) For his part, Mr.
14 Arrington, who was testifying as Plaintiffs’ Rule 30(b)(6) designee, could not name any specific
15 contributions that representatives of TechCrunch or CrunchPad, Inc. made to the CrunchPad. (*See*
16 Sohn Decl., Ex. D at 337:5-338:5.) He admitted that the “actual coding” for the CrunchPad
17 prototypes was done by Fusion Garage since at least early 2009. (*See id.* at 338:23-339:2.) And
18 he too admitted that he had never even *held* Fusion Garage’s JooJoo product (*id.* at 107:6), and
19 thus logically cannot name any features of the JooJoo that were created by Plaintiffs. Indeed, Mr.
20 Arrington candidly admitted that “*I don’t know much about the JooJoo.*” (*Id.* at 370:5-6.)

21 Further, Plaintiffs’ responses to written discovery reveal that their purported contributions
22 are strictly limited to such superficial things such as the “overall conception, blueprint, guidance,
23 and senior level support of the project”; a large-screen touch-screen; booting extremely rapidly
24 and straight to a borrower; the lack of a desktop; no hard drive other than for the software
25 footprint; use of a white instead of a black background; use of large icons on the web tablet home
26 screen so that users can quickly navigate to their favorite web pages; the use of proxying video
27 display to the device so that video can be played without the use of a flash player; the application
28 programming interface with the browser for custom applications; and the idea and knowhow for

1 empowering the device to play video output to a resolution of 1080p. (*See* Sohn Decl., Ex. B at 5
2 and 9.)

3 Given that Plaintiffs had no involvement with the technical specifications of Fusion
4 Garage’s product, the technical information Plaintiffs seek in their motion to compel is simply not
5 relevant to Plaintiffs’ claims and need not be produced. *See Autotech*, 249 F.R.D. at 534-35
6 (denying motion to compel “proprietary technical information” where this information was not
7 relevant to plaintiff’s breach of contract claims over a touchscreen device); *Viacom*, 253 F.R.D. at
8 260 (denying motion to compel production of source code where plaintiff had failed to make a
9 “plausible showing” of relevance).

10 This is not a case about the ownership and/or piracy of source code, but whether Fusion
11 Garage breached alleged fiduciary obligations to Plaintiffs and/or committed fraud. As a result,
12 Plaintiffs’ motion should be denied.

13 **B. Plaintiffs’ Speculation About Fusion Garage’s Future Products Does Not**
14 **Justify Production of Proprietary Source Code Now**

15 Plaintiffs’ speculation about what Fusion Garage may or may not argue during the
16 damages phase regarding “a new version of the JooJoo” which “might well require a source code
17 comparison” (Mot. at 7) is irrelevant at this point because there is currently no new version of the
18 JooJoo being offered for sale. Plaintiffs have not made any showing that they have even examined
19 Fusion Garage’s JooJoo or performed any sort of analysis to justify producing source code.
20 Further, Plaintiffs have failed to make any showing, either by argument or through an expert
21 declaration, that a source code comparison would be necessary to show differences in source code
22 between the JooJoo and a hypothetical future web tablet. But again, that is all speculation at this
23 point because Fusion Garage has not released any additional web tablet besides the JooJoo.

24 **C. Plaintiffs Make No Showing That They Need Fusion Garage’s Proprietary**
25 **Documentation and Source Code**

26 Finally, Plaintiffs do not argue, nor could they, that they would be unable to prove their
27 case without discovery into Fusion Garage’s proprietary information. Indeed, Fusion Garage has
28

1 produced documents responsive to nearly half of the requests at issue here (excepting its highly
2 proprietary data), including without limitation:

3 **Request 40:** All documents that mention (a) the JooJoo and (b) the CrunchPad,
4 TechCrunch, or Michael Arrington.

5 **Request 43:** All documents concerning communications with any vendors, contractors, or
6 suppliers, including but limited to Pegatron, relating to the JooJoo.

7 **Request 44:** All documents concerning communications with any vendors, contractors, or
8 suppliers, including but not limited to Pegatron, concerning the CrunchPad or the project to
9 develop the CrunchPad.

10 **Request 49:** All documents concerning government approvals or certifications concerning
11 the JooJoo or the CrunchPad, including but not limited to Federal Communications
12 Commission approval.

13 **Request 53:** Every document created or received before November 17, 2009 that contains
14 the term "JooJoo."

15 **Request 61:** All documents concerning the planning or implementation of what Mr.
16 Rathakrishnan termed Fusion Garage's "Plan B" on page 80 of his deposition transcript.

17 **Request 67:** Documents sufficient to show the work performed on the CrunchPad project,
18 JooJoo, or other web tablet on which either party worked by FUSION GARAGE TABLET
19 PERSONNEL.

20 (See Plaintiffs' Motion to Compel, Appendix; *see also id.*, Fusion Garage's responses to Requests
21 54, 55, 56, 57, 59, 60, 61, 79, 80, and 81.) Moreover, Fusion Garage has already produced and/or
22 agreed to produce documents responsive to numerous other requests that directly go to Plaintiffs'
23 breach of fiduciary duty and fraud claims, including:

24 **Request 1:** All documents constituting or concerning any communications with Michael
25 Arrington, Heather Harde, Louis Monier, Nik Cubrilovic, Brian Kindle, or TechCrunch.

26 **Request 7:** Documents sufficient to identify all persons who have participated in the
27 development, design, manufacturing, documentation, marketing, advertising and
28 promotion of the CrunchPad, or in the planning for any of those activities.

Request 8: Documents sufficient to identify all persons who have participated in the
development, design, manufacturing, documentation, marketing, advertising and
promotion of the JooJoo, or in the planning for any of those activities.

Request 16: Documents sufficient to identify all suppliers of any components of the
JooJoo device.

Request 22: All documents concerning marketing of the JooJoo.

Request 26: All documents concerning plans for or discussions of a merger between you
and CrunchPad, Inc.

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Request 34: All documents concerning contracts, agreements or understandings concerning the CrunchPad or the project to develop it.

Request 35: All documents concerning contracts, agreements or understandings concerning the JooJoo.

Request 36: All documents concerning sales, order, or pre-orders of the JooJoo.

Request 39: All documents concerning plans for and selection of a brand name for the JooJoo or a related domain name.

Request 41: All drafts and internal communications concerning or leading up to your November 17, 2009 email to Michael Arrington, contained within Exhibit D to the Complaint.

Request 52: Every document containing the term “CrunchPad.”

Request 62: All documents reflecting any agreement or proposal concerning, mentioning, or discussing you and Plaintiffs each profiting or deriving revenues related to developing marketing, or sale of a tablet computer.

Request 63: All documents reflecting any agreement or proposal concerning, mentioning, or discussing you and Plaintiffs each bearing their own losses or costs related to developing, marketing, or sale of a tablet computer.

Request 69: All documents referring or relating to an actual or potential merger or acquisition between you and Plaintiffs, including but not limited to agreements, letters of intent, memoranda of understanding, term sheets or any drafts of or communications comprising or regarding same.

Request 70: All communications between you and any third party reflecting an interest in collaborating, assisting, contributing or otherwise working with you to develop a web tablet.

Request 71: All documents relating to any third party’s actual or contemplated funding of or investment in the CrunchPad, JooJoo, or other web tablet on which either party worked, including communications with those third parties.

Request 74: A specimen of each prototype or version of the JooJoo, including at least....

Request 75: All documents that refer or relate to Plaintiffs advancing Fusion Garage money or paying Fusion Garage’s bills.

Request 82: All documents concerning work on presentations concerning the CrunchPad.

Request 83: All documents concerning presentations or other marketing communications you have made to promote the JooJoo outside of the United States.

(See Sohn Decl., Exs. I [Requests 1, 7, 8, 16, 22, 26, 34-36, 39, and 41] and J [Requests 52, 62-63, 69-71, 74-75, and 82-83].)

Each of these requests call for documents that Plaintiffs hope will show “what, if any, work on a tablet Fusion Garage performed outside of its collaboration with Plaintiffs” and “when

1 and how Fusion Garage began to develop and market its JooJoo apart from Plaintiffs,” which are
2 the ostensible reasons why Plaintiffs seek Fusion Garage’s technical documents and source code.
3 (Motion at 6.) Fusion Garage has also agreed to provide witnesses to testify about the
4 development of its web tablet, which the parties are currently trying to schedule for November.
5 (See Sohn Decl. ¶ 3.) Plaintiffs have failed to explain why they need more. In particular,
6 Plaintiffs have not shown they are entitled to the detailed technical documents, source code, and
7 interrogatory responses that give away the crown jewels of Fusion Garage’s product.

8 It is clear what Plaintiffs seek to do by this motion. They want to use the liberal discovery
9 rules to obtain Fusion Garage’s technical documents and source code so that they can appropriate
10 for themselves the work and effort Fusion Garage poured into its web tablet. This result would
11 not only be unfair, but it would also put at risk Fusion Garage’s most propriety information for no
12 reason at all.

13 **D. The Authorities Plaintiffs Cite are Distinguishable**

14 The cases that Plaintiffs cite to show the supposed “relevance” of Fusion Garage’s source
15 code are inapposite. (See Mot. at 6-7) (citing *i4i Lt. P’Ship v. Microsoft Corp.*, 670 F.Supp. 2d
16 568 (E.D. Tex. 2009); *JustMed, Inc. v. Byce*, 600 F.3d 1118 (9th Cir. 2010); and *Philip M. Adams*
17 *& Assoc., LLC v. Winbond Elecs. Corp.*, No. 05-64, 2010 WL 2977228 (D. Utah July 21, 2010)).
18 For one thing, none of these cases ordered the production of source code, and thus they certainly
19 do not compel a conclusion that Fusion Garage’s source code must be produced in this case.
20 Moreover, while the *JustMed* and *Winbond* cases *did* discuss the potential importance of source
21 code and embedded source code comments,¹ *both cases involved a dispute over the ownership*
22 *and/or alleged piracy of the source code itself* – something that is not even at issue in this case. In
23 such circumstances, it is *obviously* important to review the full, annotated source code to see who
24 created the source code and when. By contrast, in this case, *Mr. Arrington has admitted that*

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26 ¹ The third case cited by Plaintiffs, *i4i Ltd. P’ship v. Microsoft Corp.*, did not discuss source
27 code comments at all, and it is unclear why Plaintiffs even attempt to rely on this case or analogize
28 to it.

1 Fusion Garage did all of the relevant source coding since at least January 2009. Thus, there is no
2 dispute over who can claim credit for the source code of the device at issue, and Plaintiffs' motion
3 to compel such code should be denied.

4 **E. Mr. Arrington Has Admitted His Disdain for the Terms of the Stipulated**
5 **Protective Order**

6 Plaintiffs also argue that the Stipulated Protective Order in this case offers adequate
7 protection for Fusion Garage's proprietary information. (Mot. at 8.) However, Plaintiffs ignore
8 the fact that their own clients' principal officer – Mr. Arrington – has admitted his clear disdain for
9 the terms of the Stipulated Protective Order. For instance, Mr. Arrington wrote in a Twitter
10 message just last month that the “reason we haven't said much about crunchpad litigation - the
11 really solid gold documents are under seal. *probably going to just post anyway.*” (Sohn Decl., Ex.
12 E) (emphasis added).

13 The disdain likely stems from the fact that the Protective Order is preventing Plaintiffs
14 from their true desire: to litigate this case in the press in an attempt to embarrass and tarnish a
15 small start-up and run it out of business. Plaintiffs are chronicling this lawsuit, and their recent
16 coordinated the filing of their Amended Complaint with a blog post and tweet by Mr. Arrington is
17 just the latest example. (See <http://techcrunch.com/2010/09/15/status-of-crunchpad-litigation/>
18 (last checked 9/20/10); Sohn Decl., Ex. F at Tweet 74.)

19 Moreover, given the popularity and reach of Plaintiffs' TechCrunch blog, there is great
20 potential to wreak extraordinary damage to Fusion Garage's business by posting Fusion Garage's
21 proprietary information online if Plaintiffs ever follow-through with their threat. Fusion Garage
22 cannot be forced to have its proprietary technical information – the crown jewels of its business –
23 held hostage to Mr. Arrington's whim and caprice.

24 It is clear that this motion is nothing more than a veiled attempt by Plaintiffs to peer into
25 Fusion Garage's most important information to pluck and appropriate for themselves “ideas” and
26 “contributions” to Fusion Garage's web tablet that Plaintiffs had no role in developing. Thus, if
27 the Court *does* compel production of documents, Fusion Garage respectfully requests an Order
28 precluding Plaintiffs from amending their written discovery responses relating to any purported

1 “contributions” to Fusion Garage’s web tablet that Plaintiffs could not previously identify. Fusion
2 Garage also requests a stern warning to Plaintiffs that they must not disseminate Fusion Garage’s
3 proprietary information or source code over the Internet.

4 **IV. CONCLUSION**

5 Because Plaintiffs have failed to make even a threadbare showing that Fusion Garage’s
6 proprietary technical documents and source code are necessary to prove their case, and because of
7 the great risk associated with producing this information to Plaintiffs, Plaintiffs’ Motion to
8 Compel should be denied. If, on the other hand, the motion is granted, Fusion Garage respectfully
9 requests a stern warning to Plaintiffs that they must not disseminate Fusion Garage’s proprietary
10 information or source code over the Internet and must abide by the terms of the Stipulated
11 Protective Order in this matter.

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DATED: September 23, 2010

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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