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 8

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

Winston & Strawn LLP
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 San Francisco, CA 94111-5802

12 TECHCRUNCH, INC., a Delaware corporation,)
 and CRUNCHPAD, INC., a Delaware)
 13 corporation,)
)
 14 Plaintiffs,)
)
 15 vs.)
)
 16 FUSION GARAGE PTE. LTD., a Singapore)
 company,)
 17)
 Defendant.)
 18)
 19 _____)

Case No. C 09-cv-5812 RS (PVT)

**PLAINTIFFS' REPLY IN SUPPORT OF
 THEIR MOTION TO COMPEL
 PRODUCTION OF WITHHELD
 INFORMATION AND DOCUMENTS**

Date: October 12, 2010
 Time: 10:00 a.m.
 Place: Courtroom 5, 4th Floor, San Jose

Hon. Patricia V. Trumbull

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1 **I. INTRODUCTION**

2 Although Fusion Garage’s opposition to Plaintiffs’ motion to compel (Dkt. No. 164)
3 discusses the same source code and other allegedly proprietary information at issue in its “trade
4 secret” protective order motion (Dkt. No. 93), it ignores the fact that the “business ideas” claim that
5 formed the basis of Fusion Garage’s earlier motion is no longer in the case. Nor has Fusion Garage
6 produced any evidence with its opposition to support the claim that its source code or other
7 proprietary information is itself a trade secret. In fact, it now appears that Fusion Garage’s source
8 code should be in the public domain, and should have been disclosed months ago, given the code’s
9 derivation from code subject to the GNU General Public License (the “GPL license”) and its open-
10 source status.

11 Essentially conceding that its protective order motion is moot, Fusion Garage has quietly
12 shifted its focus. It now argues, without basis, that the information Plaintiffs seek is irrelevant. It
13 also argues that Fusion Garage has already produced enough materials during discovery for
14 TechCrunch and CrunchPad to prove their case. It does not follow, however, that Fusion Garage
15 therefore should produce nothing more. Fusion Garage is withholding documents that (for example)
16 mention the JooJoo and TechCrunch or CrunchPad (RFP 40), or mention the JooJoo and date from
17 before the parties’ breakup (RFP 53). Plaintiffs’ requests are wholly appropriate under the Federal
18 Rules.

19 Plaintiffs have sought full discovery for months in the face of two successive protective order
20 motions from Fusion Garage. There is no longer a misappropriation of business ideas claim, Fusion
21 Garage has conceded that its latest protective order motion is moot, and yet it still resists making a
22 full production of relevant and responsive documents.

23 There is no basis for continued delay. The Court should deny the outstanding protective
24 order motion and grant Plaintiffs’ motion to compel.

25 //

26 //

27 //

28 //

1 **II. ARGUMENT**

2 **A. Fusion Garage Concedes that its Pending Protective Order Motion is Moot and**
3 **Offers No Evidence that Its Source Code or Other “Proprietary” or “Technical”**
4 **Information is a Trade Secret Worthy of Court Protection.**

5 Fusion Garage does not argue that its protective order motion is still viable now that the
6 Court has dismissed Plaintiffs’ claim for misappropriation of business ideas.

7 Moreover, Fusion Garage has failed to articulate, as it must, what its trade secrets are and
8 why they` deserve this Court’s special protection against *any* form of disclosure, even under an
9 “Attorneys Eyes Only” restriction. (*See* Dkt. No. 35 (stipulated protective order).) True, Fusion
10 Garage points to its source code. But it does not clearly articulate any other trade secrets. And now,
11 it appears that even Fusion Garage’s source code *cannot be* a trade secret. Fusion Garage’s
12 allegedly proprietary source code is in fact based on code authored under the GPL license. The GPL
13 license (*see* Declaration of Matthew Scherb in Support of Plaintiffs’ Reply (“Scherb Reply Decl.”)
14 Ex. A) requires that any source code released under the GPL be publicly disclosed. Fusion Garage
15 has acknowledged enough, promising a computer code writer and open-source advocate who asked
16 to see Fusion Garage’s code: “We will make the source release available once we feel we are ready
17 to do so and also having the resources to get this sorted out and organized for publication.” (Scherb
18 Reply Decl. Ex. B.) This is utterly inconsistent with claiming source code as a trade secret.

19 The burden is on Fusion Garage, as the party resisting discovery, to show that the
20 information at issue “is a ‘trade secret or other confidential research, development, or commercial
21 information’ under Rule 26, and that its disclosure would be harmful to the party's interest in the
22 property.” *Nat'l Acad. of Recording Arts & Scis., Inc. v. On Point Events, LP*, 256 F.R.D. 678, 681
23 (C.D. Cal. 2009). Fusion Garage “has not presented any declarations from its officers or employees
24 supporting its claim that the information sought in the remaining interrogatories and document
25 requests is a ‘trade secret’” or that it “has taken reasonable steps to assure the confidentiality of this
26 information and to prevent its disclosure to third parties,” as required. *Id.* at 683. Conclusory
27 arguments are insufficient to establish that requested documents merit protection. *Creative Gifts,*
28 *Inc. v. UFO*, 183 F.R.D. 568, 571 (D.N.M. 1998). It further has failed to explain why it would suffer
harm from disclosure of its alleged trade secrets under the stringent “Attorneys’ Eyes Only”

1 protective order in this case.

2 **B. Fusion Garage’s Source Code is Relevant and Not a Trade Secret, and the Court**
3 **Should Order Its Production.**

4 The only information that Fusion Garage specifically identifies as its proprietary trade secret
5 information, and the only information it specifically argues lacks relevance to this case, is its source
6 code. The source code, however, is not a trade secret and is relevant to Plaintiffs’ claims.

7 To start with, Fusion Garage has not shown that its source code is a trade secret. To the
8 contrary, it appears Fusion Garage’s source code is based on code authored under the GPL (GNU
9 General Public Library) license. The GPL license (*see* Scherb Reply Decl. Ex. A) requires that all
10 code based upon code released under the GPL be made public. Recent news stories show that
11 Fusion Garage’s code is based on GPL code and should be publicly disclosed. Fusion Garage
12 conceded as much in a publicly posted message to an open source advocate:

13 Dear Sir,

14 we are still actively making changes to the joojoo software. We will make
15 the source release available once we feel we are ready to do so and also
16 having the resources to get this sorted out and organized for publication.
17 We seek your kind understanding on our position and appreciate your
18 patience on this. Thank you.

19 Best Regards
20 joojoo Support Team

21 (Scherb Reply Decl. Ex. B.) The position Fusion Garage took in this message is utterly inconsistent
22 with maintaining its source code as a trade secret. Fusion Garage has failed to disclose this
23 significant and extremely relevant fact to the Court.

24 Meanwhile, Fusion Garage’s source code, and changes to it, will show the parties’ joint
25 development of the CrunchPad and the transformation of the CrunchPad into the JooJoo, once
26 Fusion Garage chose to abandon the joint venture. It will contain comments or elements that may
27 reveal use of the term “JooJoo” in mid-2009 or earlier, corroborating Plaintiffs’ account of Fusion
28 Garage’s betrayal. It will also contain comments that may reveal that a feature or tweak originated
with Mr. Monier or other of Plaintiffs’ personnel, corroborating their account of their contributions
to the CrunchPad software. Mr. Monier’s technical documents, which Plaintiffs already have

1 produced, show that Mr. Monier contributed substantial technical expertise to the development of
2 the CrunchPad software.

3 Further, changes to the source code may be important to damages discovery, and there is no
4 reason to postpone damages discovery, particularly in light of the Court’s ruling on the preliminary
5 injunction motion that Plaintiffs are likely to establish Fusion Garage’s breach of fiduciary duty.
6 Dkt. No. 162; *see Charles O. Bradley Trust v. Zenith Capital LLC*, No. 04-2239, 2005 WL 1030218,
7 at *3 (N.D. Cal. May 3, 2005) (ordering the production of financial/damages documents “under a
8 strict protective order”) (Chen, M.J.). If Fusion Garage continues to contend that “there is currently
9 no new version of the JooJoo being offered for sale” and thus concedes that Plaintiffs could claim
10 profits related to all JooJoo versions, then perhaps this particular basis for discovery would be less
11 strong. But Fusion Garage’s “current” contentions are subject to change and, as discussed, there are
12 several other valid bases for source code discovery.

13 Fusion Garage does not deny that its source code would reveal the information that Plaintiffs
14 seek. In fact, it concedes that source code comments can disclose “who created the source code *and*
15 *when.*” (Opp. at 14; emphasis added.) Instead, Fusion Garage argues that this is not a case about
16 source code ownership and that, after a point in 2009, Plaintiffs did not write source code for the
17 CrunchPad. Fusion Garage misses the point entirely. This is a case of breach of fiduciary duty and
18 fraud. Evidence of Fusion Garage’s two-timing TechCrunch and CrunchPad, of its use in the JooJoo
19 of code developed in the course of the joint venture – *even code Fusion Garage itself wrote during*
20 *the joint venture*, and of its concealed intentions and false statements, is all very relevant to the case.
21 The JooJoo source code may contain evidence, or information that will lead to discoverable
22 evidence, on those and other important points. Fusion Garage fails to cite any case holding that a
23 court should deny discovery of source code for these purposes.

24 Instead, Fusion Garage tries to distinguish the cases that Plaintiffs used to illustrate how
25 source code and comments can contain relevant, discoverable information. Fusion Garage argues
26 that none of those cases specifically ordered source code production, but this distinction does not
27 matter, as discussed below.

28 In *Philip M. Adams & Assoc., LLC v. Winbond Elecs. Corp.*, No. 05-64, 2010 WL 2977228

1 (D. Utah July 21, 2010), the court considered sanctions against the defendant because the defendant
2 failed to retain the source code. *Id.* at *1. The court found that the defendant should have had the
3 original code, noted that comments in the original code would have been relevant, and allowed the
4 jury to draw inferences from the loss. *Id.* at *2. Though *Adams* did not order production, *it did*
5 *impose sanctions, a harsher result.*

6 The Ninth Circuit's decision in *JustMed, Inc. v. Byce*, 600 F.3d 1118 (9th Cir. 2010) may not
7 have ordered production, but a state court's temporary restraining order before the case was removed
8 to federal court did just that. *Id.* at 1123. Also, contrary to Fusion Garage's assertions, the dispute
9 was not over who wrote the code and when, but rather whether the writer was legally an employee of
10 JustMed. *Id.* at 1120, 1125 fn.4.

11 Finally, in *i4i Limited Partnership v. Microsoft Corp.*, 670 F. Supp. 2d 568, 586 (E.D. Tex.
12 2009), there was no need for the court to order production of source code as the expert had already
13 examined the code and testified about it at trial. *i4i* stands for the proposition that source code itself
14 (not only source code comments, as Fusion Garage suggests in its footnote on page 14 of its
15 opposition brief) can show the dates when the code was modified. *Id.*

16 The only other case that Fusion Garage cites concerning source code is *Viacom Int'l Inc. v.*
17 *YouTube Inc.*, 253 F.R.D. 256 (S.D.N.Y. 2008). *Viacom* declined to order production of source code
18 because Viacom's basis to obtain it was wholly speculative. Viacom claimed that the source code
19 would show that YouTube purposefully designed its search tool to distinguish between infringing
20 and noninfringing material. *Id.* at 259. YouTube submitted an affidavit that this was false, and that
21 such a design was not even possible without the active participation of rights-holders. *Id.* The court
22 required a plausible showing by Viacom that YouTube was lying. *Id.* at 260. Viacom also
23 speculated that the source code might be *adapted in the future* to filter out infringing content. The
24 court, however, noted that while whether such a feature could exist might be relevant, the idea that
25 Viacom needed YouTube's code, which did not contain such a filtering program, in order to show
26 that it could have been done some other way was too speculative. *Id.* at 260-61.

27 Here, discovery has already produced evidence that Fusion Garage likely breached its
28 fiduciary duty to Plaintiffs by working on development of the JooJoo tablet while it was in a joint

1 venture with Plaintiffs to develop the CrunchPad. This Court has already found likely success of the
2 claim for breach of fiduciary duty. (Dkt. No. 162.) Information in the source code bearing on the
3 dates when Fusion Garage was working on the JooJoo, whether Fusion Garage used in the JooJoo
4 any code that was developed during the CrunchPad joint venture, and what other features or
5 functions the JooJoo owed to the CrunchPad joint venture is clearly relevant to when and the extent
6 to which Fusion Garage breached its fiduciary duty.

7 Because Fusion Garage’s source code is not a trade secret and because it is relevant, the court
8 should order its production.

9 **C. Fusion Garage Cannot Avoid Producing Relevant Technical Documents Simply**
10 **Because It Thinks Plaintiffs Already Have Enough Evidence to Prove Their**
11 **Case.**

12 Not only should the Court order production of source code, it should order production of the
13 other technical documents Fusion Garage continues to withhold. Plaintiffs posed many of the
14 discovery requests that seek these documents through Court-ordered expedited discovery in January
15 of this year. Plaintiffs posed the other requests at issue in June. Fusion Garage has produced *some*
16 documents in response to *some* of those requests. It is time for Fusion Garage to produce *all*
17 responsive documents to *all* requests, regardless of whether they contain proprietary information.

18 Fusion Garage offers two arguments against producing technical documents. *First*, Fusion
19 Garage argues that technical documents lack relevance because, it claims, Plaintiffs played no role in
20 the technical development of the CrunchPad. *Second*, Fusion Garage asserts that Plaintiffs can
21 already prove their case without these documents and so may not seek them, or presumably any
22 other documents, in discovery. Fusion Garage claims that TechCrunch and CrunchPad could not
23 argue that “they would be unable to prove their case without discovery into Fusion Garage’s
24 proprietary information.” (Opp. at 11.) Both of Fusion Garage’s arguments fail. Even if Fusion
25 Garage stipulates to liability for its breach of fiduciary duty, which Plaintiffs invite Fusion Garage to
26 do, the documents are relevant to damages calculations.

27 **1. Plaintiffs Seek Relevant, Discoverable Information.**

28 Evidence of the development of both the parties’ jointly developed but unfinished CrunchPad
product and Fusion Garage’s separately announced and marketed JooJoo product is central to

1 understanding the relationship of the JooJoo to the parties’ joint venture, as well as Fusion Garage’s
2 fraudulent representations that everything was “on track” until days before it pulled the plug on the
3 CrunchPad collaboration and announced the JooJoo as its solo effort. Fusion Garage disputes the
4 relevance of technical information pertaining to the JooJoo. It argues, based on its own cherry-
5 picked evidence, that Plaintiffs contributed nothing to the technical development of the CrunchPad
6 and concludes that therefore the technical documents they seek must be irrelevant. This argument
7 entirely misses the point. What matters is the relationship between the JooJoo and the CrunchPad
8 joint venture, *including the work that Fusion Garage had done within the joint venture* that Fusion
9 Garage usurped to its own benefit. “[W]here one partner excludes the other, repudiates the very
10 existence of the partnership and converts all of the partnership assets, the victim may sue for
11 damages.” *Gherman v. Colburn*, 72 Cal. App. 3d 554, 557 (1977). It does not matter that the
12 parties’ contributions were different in kind; indeed, it is very common that venturers contribute
13 different things to their joint enterprise. *See, e.g., Drdlik v. Ulrich*, 203 Cal. App. 2d 360 (1962)
14 (contribution of money versus services; collecting cases); *Wilson v. Brown*, 96 Cal. App. 140 (1929)
15 (in a real estate venture, defendant contributed financing while plaintiff worked to sell the
16 subdivided plots; defendant cut out plaintiff, and plaintiff successfully recovered both cash from the
17 proceeds of sales and also some of the unsold plots).

18 Not only is Fusion Garage’s argument on that point a red herring, it is also factually wrong.
19 Fusion Garage itself admits that Plaintiffs made technical contributions to the CrunchPad project that
20 Fusion Garage has now repudiated. On February 4, 2009, Fusion Garage wrote on its blog:

21 The collaboration with the Crunchpad project happened as a result of meetings we had with
22 Mike Arrington and co, subsequent to TC50. ***We worked closely with Louis Monier in***
23 ***getting the software in shape for the hardware prototype B.*** We continue to work with them
24 in getting the software in shape to make crunchpad a easy to use device. This is where we
25 stand as of prototype-B: (Details over at TechCrunch’s update)
26 (Scherb Reply Decl. Ex. C (emphasis added).) Several documents corroborate that Mr. Monier did
27 in fact work with Fusion Garage to “get[] the software in shape.” For example, Mr. Monier prepared
28 a detailed, 10-page “Software plan for version 1” that outlines features and discusses methodology
and resource time and personnel requirements. *Id.* Ex. D. Also, Mr. Monier sent Mr. Rathakrishnan
a lengthy “product draft” for the “software side” – a compilation of Mr. Monier’s thoughts about

1 how the web tablet software should look, feel, and operate. *Id.* Ex. E.

2 Mr. Rathakrishnan understands that the software on his company’s JooJoo, the one-time
3 CrunchPad, derives from Plaintiffs’ contributions. He remarked in May 2009 that Prototype C was
4 part of “the evolution of the collaboration with techcrunch . . . prototype b then prototype c.”
5 (Scherb Reply Decl. Ex. F.) Further, Mr. Rathakrishnan, back in April 2009, explained to a friend
6 that Fusion Garage was only “kind of” responsible for product design on that prototype. *Id.* Ex. G.
7 The software in Prototype C then led to the software now included with the JooJoo. Fusion Garage’s
8 insistence now that Plaintiffs offered no technical design advice does not square with its previous
9 public statements.

10 Fusion Garage also fails to mention Mr. Cubrilovic, whom Plaintiffs tasked with software
11 development in August 2009. Instead, Fusion Garage misdirects the spotlight to Ms. Harde, Mr.
12 Arrington, and Mr. Kindle. It cites deposition testimony and complains each failed to provide
13 detailed technical direction (Opp. at 9-10), but its complaints have no bite. Ms. Harde is
14 TechCrunch’s CEO and CrunchPad’s acting CFO. Her primary role was executive and financial,
15 and Plaintiffs have never argued that she was providing detailed technical direction. Mr. Arrington
16 is the founder and Co-Editor of TechCrunch and CrunchPad’s CEO. He envisioned the CrunchPad
17 and devised its features, and was involved in decisions concerning the CrunchPad’s hardware and
18 software, but he has never claimed to be a code writer or a hardware engineer. (*See* Arrington Dep.
19 Tr. at 139:1-7 (Scherb Reply Decl. Ex. H).) Mr. Kindle, as distinguished from Mr. Cubrilovic, did
20 not work with software, but was, with Mr. Rathakrishnan’s approval, in charge of hardware design
21 and manufacturing. (Kindle Dep. Tr. at 17:17 to 18:3; 71:22 to 72:4 (Scherb Reply Decl. Ex. I).)
22 Mr. Kindle provided detailed technical guidance, for example, on “thermals” related to the
23 CrunchPad. (Scherb Reply Decl. Ex. J.) He also provided the high level management that Fusion
24 Garage and Plaintiffs asked him to provide. *Id.* Ex. K.

25 Plaintiffs made detailed technical contributions. But even if they had not, TechCrunch and
26 CrunchPad still are entitled to obtain technical and proprietary information from Fusion Garage
27 during discovery for a variety of important purposes in the litigation. For example, the documents
28 may show when and how Fusion Garage worked with secret partners, such as its manufacturer

1 Gigabyte, against the interests of the parties’ joint venture. Fusion Garage was working with
2 Gigabyte well ahead of the breakup with Plaintiffs, and Plaintiffs therefore are entitled to all
3 communications with Gigabyte, regardless of whether those communications contain proprietary
4 information. (*See* Mot. Appendix A, RFPs 54-55 (seeking various communications with Gigabyte).)
5 As another example, proprietary technical documents that mention both the JooJoo and TechCrunch
6 or CrunchPad (RFP 40) are highly relevant and Fusion Garage must produce them, regardless of
7 whether they contain alleged “trade secrets.”

8 Finally, Fusion Garage’s reliance on *Autotech Tech. Ltd. P’ship v. Automationdirect.com,*
9 *Inc.*, 249 F.R.D. 530 (N.D. Ill. 2008), undermines rather than supports its position. In *Autotech*, the
10 court found that documents related to distribution of the defendant’s competing product *were*
11 relevant to a breach of contract claim related to “best efforts” to distribute the plaintiff’s product. *Id.*
12 at 534. The court ordered production of documents related to the *distribution* of defendant’s
13 touchscreen and not documents related to *development* of defendant’s touchscreen because the
14 contract terms *specifically applied only to distribution*. *Id.* In this case, the breach of fiduciary
15 claim, which is not tied to a written contract, relates to the development by Fusion Garage of a
16 competing product during the time it was supposedly developing the parties’ joint product. The
17 extent to which Fusion Garage converted that joint venture to its own exclusive benefit, and the
18 extent that Fusion Garage lied about its intentions and its activities, is at the core of the case.

19 **2. Fusion Garage Cannot Limit Discovery by Claiming that Plaintiffs Can**
20 **Already Sufficiently Prove Their Case: Plaintiffs are Entitled to Prove**
21 **Both Liability and Damages with All Appropriately Discoverable**
22 **Evidence.**

23 Aside from its straw-man relevance argument, Fusion Garage’s only other bulwark against
24 production of its technical documents and information is that Plaintiffs already have enough
25 materials to “prove their case without discovery into Fusion Garage’s proprietary information” (Opp.
26 at 11).¹ Plaintiffs are gratified that Fusion Garage effectively concedes liability with that argument,
27 but even that concession cannot avoid complete discovery.

28 ¹ Fusion Garage has not argued, for instance, that producing responsive documents, including the
source code, would be unduly burdensome. On the contrary, Fusion Garage’s attorneys have already
collected the requested documents. All that remains is production.

1 Fusion Garage offers no support for its view that a defendant still vigorously litigating its
2 defense of liability and damages may impose unilateral restrictions on discovery upon suggesting
3 that the plaintiff has enough evidence to prove its case. Such a standard would turn discovery on its
4 head.

5 Discovery under the Federal Rules is “accorded a broad and liberal treatment.” *Hickman v.*
6 *Taylor*, 329 U.S. 495, 507 (1947). Rule 26 provides that “[p]arties may obtain discovery regarding
7 any matter, not privileged, that is relevant to the claim or defense of any party. ... Relevant
8 information need not be admissible at the trial if the discovery appears reasonably calculated to lead
9 to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). Further, discovery of relevant
10 trade secrets information is commonplace, especially when the parties protect against potential
11 disclosures with a protective order. *Urbina v. Goodyear Tire & Rubber Co.*, No. 07-3705, 2009 WL
12 481655, at *5 (C.D. Cal. Feb. 23, 2009).

13 It is not for Fusion Garage to decide what theories of the case Plaintiffs choose to pursue, nor
14 can defendants limit the scope of discovery because there is already some evidence of their
15 wrongdoing. See *Humphreys v. Regents of University of Cal.*, No. 04-38 08, 2006 WL 870963, at *2
16 (N.D. Cal. Apr. 3, 2006) (Illston, J.) (“defendants are not allowed to limit discovery based merely
17 upon their theory of the case”).

18 Moreover, Fusion Garage, while stating that it has agreed to produce some documents
19 responsive to seven of the contested requests, also states that it has withheld an unknown number of
20 responsive but otherwise uncharacterized documents. (Opp. at 12) Thus, Fusion Garage appears to
21 be withholding documents, for example, that mention both the JooJoo and TechCrunch or
22 CrunchPad (RFP 40), communications with Pegatron (the parties’ chosen manufacturer) (RFP 43),
23 and even documents created before the November 17, 2009, breakup that contains the word
24 “JooJoo.” (RFP 53). There is no basis for withholding *any* document responsive to these requests.

25 While Fusion Garage makes some representation about these seven requests and claims that
26 it has “produced documents responsive to nearly half of the requests at issue here,” Fusion Garage is
27 silent on 29 of the 37 document requests, as well as the two interrogatories, at issue. (The requests it
28 lists on the bottom of page 12 of its opposition are *not* at issue in this motion.)

1 For example, Fusion Garage does not call attention to discovery requests that seek
2 communications with its secret manufacturer, Gigabyte (RFPs 54-55); communications with its
3 partner and investor, CSL (RFPs 56-57); or communications with its payment processor, MPayments
4 (RFP 59). Nor does it highlight RFP 78, which seeks “[a]ll documents that refer or relate to the
5 design, development and/or manufacture of the tablet computer referred to as ‘Prototype B.’” As
6 discussed above, Fusion Garage credited Plaintiffs with working on Prototype B and it does not
7 make sense for Fusion Garage to withhold documents about that prototype because they contain
8 trade secrets unless it is conceding that it intended to abandon the parties’ joint venture at that early
9 date. While Fusion Garage has produced some apparently non-proprietary documents that fall into
10 these categories, it is impossible to know what is missing. Meanwhile, Fusion Garage has made no
11 substantive response to Interrogatory No. 2, which seeks the identities of “all persons who
12 participate, or have participated in, the design of, or the supply of components for, the JooJoo.”
13 These persons may be basic witnesses in the case and Fusion Garage must disclose their identities.

14 As discussed in Plaintiffs’ opening brief, the requests in dispute seek relevant, discoverable
15 information. Whether Fusion Garage believes Plaintiffs need that information to pursue their case is
16 not the issue.

17 **D. The Protective Order is Sufficient to Address Defendant’s Concerns of**
18 **Disclosure.**

19 Fusion Garage offers no reason why the Stipulated Protective Order in this case, which
20 provides for “Attorneys’ Eyes Only” designations, cannot protect Fusion Garage’s alleged trade
21 secrets. (*See* Dkt. No. 35.)

22 The Supreme Court has noted that “orders forbidding any disclosure of trade secrets or
23 confidential commercial information are rare. More commonly, the trial court will enter a protective
24 order restricting disclosure to counsel.” *Fed Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443
25 U.S. 340, 363 n. 24 (1979). This is precisely what this Court did in *Echostar Satellite LLC v.*
26 *Freetech, Inc.*, No. 07-6124, slip. op. at 3-4 (N.D. Cal. May 18, 2009) (Seeborg, M.J.) (Scherb Decl.
27 ISO Mot. to Compel Ex. B), a case Fusion Garage does not address. The Court ordered disclosure of
28 source code under a standard protective order, which it viewed as entirely adequate.

1 Fusion Garage misreads Mr. Arrington’s extrajudicial comments about this case. His off-the-
2 cuff remark on Twitter was titillating but irrelevant: he later posted a detailed commentary on the
3 amended complaint and its wealth of *non-confidential* documents, many of which had been
4 declassified from Confidential or Attorneys’ Eyes Only status based on the Court’s strong
5 encouragement to curb confidentiality designations. The facts of the matter are that (a) Mr.
6 Arrington *has not* violated the protective order and (b) he will not have an opportunity to gain access
7 to genuinely proprietary materials designated by Fusion Garage as “Attorney’s Eyes Only.”

8 **III. CONCLUSION**

9 Plaintiffs’ requests seek relevant information that is the appropriate subject of discovery and
10 necessary for them to present their case. Fusion Garage has failed to show it has trade secrets so
11 exotic that the existing “Attorneys’ Eyes Only” designation under the Stipulated Protective Order is
12 somehow insufficient. Fusion Garage has delayed discovery long enough. The Court should deny
13 Fusion Garage’s outstanding protective order motion, grant this motion to compel, and order full and
14 immediate production.

15 Dated: September 30, 2010

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