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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

TECHCRUNCH, INC. (f/k/a INTERSERVE,  
INC.), and CRUNCHPAD, INC.,

Plaintiffs,

vs.

FUSION GARAGE PTE. LTD., a Singapore  
Company,

Defendant.

**Case No. C 09-cv-05812 RS (PSG)**

**DECLARATION OF MATTHEW SCHERB  
IN SUPPORT OF PLAINTIFFS' MOTION  
TO STRIKE FUSION GARAGE'S  
AMENDED ANSWER**

Date: June 9, 2011  
Time: 1:30 P.M.  
Place: Courtroom 3, 17th Floor

Hon. Richard Seeborg

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I, Matthew Scherb, declare under penalty of perjury that the following is true and correct:

1. I am an attorney at the law firm of Winston & Strawn LLP, which is counsel of record for Plaintiffs in this action.

2. Exhibit A is a “redline” showing the changes between Defendant’s March 1, 2011 answer and counterclaim and April 14, 2011 amended answer. The redline compares only the text of the pleadings, not the exhibits. I supervised creation of the redline and believe it is accurate. As the “Legend” on the final page indicates, text deleted from the March 1, 2011 answer is in red strike-out, inserted text is blue and underlined, and moved text is in green (strike-out shows where the text was on March 1 and underlined shows where the text moved to on April 14).

Executed on April 29, 2011.

/s/ - Matthew Scherb  
Matthew Scherb

# EXHIBIT A

~~Defendant Fusion Garage PTE Ltd. ("Fusion Garage"), answering the Amended Complaint of Plaintiffs TechCrunch, Inc. ("TechCrunch") and CrunchPad, Inc., pleads and avers as follows. PREFATORY STATEMENT~~

~~This lawsuit arises out of a failed merger and the attempt by two Michael Arrington-controlled entities—one of which, CrunchPad, Inc., is a shell that has never done business, has no assets and no capitalization—to salvage Arrington's reputation after he found out that he was never going to be able to deliver on his promise of a "dead simple web tablet for \$200." Arrington is using the façade of his alter-egos and this lawsuit to appropriate for himself the fruit of the time, innovation, creativity, know-how and boldness that Fusion Garage and its personnel have shown and put into its web tablet when Plaintiffs themselves did not want to take the risk.~~

~~Plaintiffs' 24-page Amended Complaint is a rant of misstatements that offers a false account of the parties' dealings with each other. Below, Fusion Garage explains the actual course of dealings between the parties and the evolution of Fusion Garage's own web tablet device. Fusion Garage denies all the material allegations in Plaintiffs' Amended Complaint, including the allegation that "Fusion Garage and Plaintiffs were joint venturers" and the allegation that "Fusion Garage led Plaintiffs to believe that they were collaborators working earnestly on a common joint venture."~~

~~The Parties: Defendant Fusion Garage, a Singapore-based start-up company, was formed in February 2008 with a goal of building a browser-based operating system for mobile devices. In July 2008, Fusion Garage became aware of a very public blog post purported to have been authored by Arrington, TechCrunch's founder, in which Arrington expressed his desire to build a "dead simple web tablet for \$200." Arrington made a public offer and challenge, and invited public response. He never suggested that anyone who responded would become his partner or a joint venturer with him or his TechCrunch alter-ego. Intrigued by the possible synergies between its own browser-based operating system and Arrington's web tablet idea, Fusion Garage CEO Chandrasekar Rathakrishnan traveled to San Francisco for a technology trade show that TechCrunch was hosting. At this trade show, Rathakrishnan met Arrington, who was likewise intrigued by the possible synergies between his web tablet idea and Rathakrishnan's operating system. However, as Arrington has already been forced to admit in this case under oath, both men recognized from the outset that the only possible way~~

~~TechCrunch and Fusion Garage could work together would be through a merger of their corporate entities. (Ex. A at 85:1-6) ("The first meeting I had with Chandra was, I believe, in—I believe in October . . . *At that meeting, we, Chandra and I, agreed that the only way to work together was a merger of the entities.*") (emphasis added).~~

~~The Early Merger Negotiations: Plaintiffs began negotiating to acquire Fusion Garage in late 2008. On December 18, 2008, TechCrunch CEO Heather Harde sent Rathakrishnan a "Letter of Intent" to acquire Fusion Garage for a lump sum of cash plus 8 percent stock in CrunchPad, Inc., a new shell company that TechCrunch set up to commercialize their web tablet idea. (Ex. B.) Notably, the Letter of Intent was unsigned, and included a limited "no-shop" provision, under which Fusion Garage could shop itself to other corporate suitors if no merger was ~~struck within 60 days~~. This no-shop provision shows that TechCrunch did not consider Fusion Garage to be a "joint venturer" who was bound by duties of loyalty to TechCrunch. Rather, Fusion Garage was simply a potential acquisition target *who could walk away and/or merge with other companies if it did not merge with CrunchPad, Inc. within this 60-day window*.~~

~~Arrington and TechCrunch are not in a position to claim that they did not understand the legal significance of this writing. Arrington is a lawyer, who practiced for three years with two large corporate law firms. Although he abandoned the law as a profession relatively early on, Arrington knew enough to know that the Letter of Intent was, in fact, a clear expression that there would be no legal relationship between the parties unless they entered into a formal, written agreement to do so. In fact, Arrington, Harde, and TechCrunch contractor Louis Monier explained to Fusion Garage in no uncertain terms that Arrington could not "formalize something with [Fusion Garage] (as in signed papers) until [Plaintiffs] close the round of funding" and that the funding and merger must "happen in the right order." (Ex. C.)~~

~~Fusion Garage's Early Involvement with Plaintiffs' Web Tablet Efforts: Ultimately, the parties did not agree to the merger terms set forth in Harde's December 18 Letter of Intent (there was no other letter of intent presented by Arrington, Harde or TechCrunch) and the funding never came—ever. In fact, the merger talks virtually ceased in early 2009. In large part, this was due to the fact that Arrington took a sabbatical from work during this period—burned out from his work schedule and upset~~

about a recent incident in which he had been spat upon by a heckler in Germany.

Nonetheless, in an effort to show its bona fides as a potential acquisition target, and for no consideration whatsoever, Fusion Garage supplied a version of its browser software to TechCrunch in January 2009 for use in "Prototype B" of the "CrunchPad"—the then-current web tablet prototype that TechCrunch had developed.<sup>4</sup> Fusion Garage offered this technology to Arrington and his alter ego under the mistaken belief—based on representations by Arrington—that Arrington and his alter ego were so well-connected to the venture capital community that he would actually be able to arrange for an acquisition of Fusion Garage. This and similar representations by Arrington and TechCrunch were false: Arrington and TechCrunch were at all relevant times venture capital wannabes.

The Death of Plaintiffs' Web Tablets Efforts—And Birth of Fusion Garage's Device: By March 2009, it became clear that Arrington's or TechCrunch's desire to fund a company that could actually build a web tablet was fading and that his ability to attract venture capital was illusory. Louis Monier—the consultant that Plaintiffs allegedly hired to spearhead their web tablet efforts—remarked to Rathakrishnan around this time that Plaintiffs' web tablet project "had no legs," that there was insufficient funding available, and that Fusion Garage should figure out what to do on its own should it wish to pursue a web tablet. (Ex. D at 259:12-17.)

<sup>4</sup>As this name implies, "Prototype B" was TechCrunch's second web tablet prototype. The first prototype, "Prototype A," was an August 2008 device that TechCrunch created before they had ever met Fusion Garage. By Arrington's own admission, Prototype A was a "humble and messy" device that "barely booted."

Faced with the reality that Arrington and his alter egos were more form than substance, Fusion Garage was forced to develop both the hardware and the software for its own web tablet without any acquisition by TechCrunch or Arrington's new alter ego, CrunchPad, Inc. During March and April 2009, Fusion Garage developed its own hardware platform, further refined its operating system, and built an entirely new web tablet prototype from scratch. Arrington contributed no technology of any kind to this development effort.

Fusion Garage showed the device to Arrington in April 2009 in an effort to jump-start or invigorate the lagging merger negotiations. Arrington, always the publicity whore, rushed to blog about

~~this new device, publishing a lengthy piece about it on April 10, 2009 (Ex. E), but again failed to secure any venture capital that would support an acquisition of Fusion Garage.~~

~~Notably, Arrington's April 10 post makes indisputably clear that this new device was created solely by Fusion Garage, on both the hardware and software fronts. Specifically, Arrington wrote that "this time the ID and hardware work was driven by Fusion Garage.. *the credit for what we saw today goes entirely to the Fusion Garage team.*" (Ex. E) (emphasis added). As Arrington's post pointed out, this new Fusion Garage device was vastly dissimilar from the previous "Prototype B," which had contained Fusion Garage software but third party hardware. (Ex. E.) Indeed, a cursory comparison between "Prototype B" and Fusion Garage's April 2009 device shows the vast differences between the two devices:~~

~~Prototype B ————— Fusion Garage's Web Tablet~~

~~**Plaintiffs' Inability to Raise Money Stalls the Merger Negotiations:** Fusion Garage's unveiling of its new device did inspire Arrington and his alter ego to make noises about an intent to continue merger negotiations. Soon, however, an uncomfortable reality—Arrington's utter inability to raise money—caused the negotiations to fail.~~

~~Arrington had earlier expressed his desire that CrunchPad, Inc. acquire Fusion Garage. Fusion Garage knew, however, that if Fusion Garage was to lose its independence and merely become a shareholder in CrunchPad, Inc., it needed assurances that Plaintiffs could raise sufficient capital to launch the device. Arrington and his alter ego also wanted the security of a round of financing before merging with Fusion Garage. Despite Arrington's self-proclaimed "esteemed position in the technology world," however, he and his alter egos proved surprisingly inept at raising capital.~~

~~As Arrington testified, he knew that Plaintiffs needed to raise roughly \$2 million to launch a web tablet under the CrunchPad name. (Ex. A at 316:9-11) ("\$2 million seemed to be roughly the amount needed to get to the point where we could start producing CrunchPads.") During the middle~~

part of 2009, Plaintiffs repeatedly sought to raise this \$2 million from Silicon Valley venture capitalists and technology companies—but they failed to even approach this \$2 million figure. Indeed, they only received one term sheet for an amount that was an order of magnitude less than this figure. ~~Arrington and his alter egos were all turned down by no less than 16 different venture capital funding sources.~~ Notably, this rejection was not based on anything that Fusion Garage had done or said: Arrington was simply unable to establish any meaningful credibility with any of the venture capital sources he contacted about his "web tablet" idea.

Fusion Garage was concerned about the inability of Arrington or his alter egos to raise the necessary capital. At the same time, it began to dawn upon Arrington that, without necessary venture capital, ~~any merger with Fusion Garage was doomed, as were the prospects of Arrington or his alter egos' participating in the development of a web tablet.~~ Arrington has been forced to admit in this case that, at this time in 2009, ~~he told Fusion Garage and third parties that the "CrunchPad" was dead. (Exs. F, G.)~~

**Fusion Garage's Continued Work on its Web Tablet During Summer '09:** Plaintiffs' fundraising failures may have stalled the merger talks, but they did not stall Fusion Garage's continued development of its device during the Summer of 2009. Fusion Garage personnel worked virtually non-stop during this period to refine the device's hardware and software.

Attempting to take credit for Fusion Garage's own efforts on the hardware front, Plaintiffs' Complaint alleges that "in July 2009, Plaintiffs and Fusion Garage brought in [Plaintiffs' contractor] Brian Kindle to oversee hardware development for the CrunchPad." (Amended Complaint 42.) This is false and known by both Arrington and TechCrunch to be false. In this case, Mr. Kindle conceded he could not claim *any* credit for the development of Fusion Garage's hardware. ~~Mr. Kindle was so unfamiliar with Fusion Garage's development efforts and the relevant technology that he conceded he had no knowledge about how the CrunchPad's prototypes evolved after he was hired in July 2009, and he could not identify something as basic as whether the final product's form factor would be plastic or metal. In fact, Mr. Kindle was so detached from any development process that he could not even identify photographs of any version of the Fusions Garage prototype. Mr. Kindle's utter ignorance of the~~



device's evolution during his tenure on the alleged CrunchPad project reflects that he made no significant contribution to the hardware of Fusion Garage's device.<sup>2</sup>

**Arrington and His Alter Egos as the Worst Sort of "Partner" or "Joint Venturer":**

Contrary to Plaintiffs' allegations that they were in a "joint venture" with Fusion Garage in which the parties owed each other fiduciary duties, Plaintiffs' conduct and statements throughout the entire 2008-09 period make clear that they were simply in arms-length merger negotiations with Fusion Garage and did not believe that they owed Fusion Garage any fiduciary duties whatsoever. Moreover, Plaintiffs' own statements and actions during this time period reveal their belief that any party could unilaterally walk away at any moment.

<sup>2</sup>Nor can Plaintiffs or their representatives claim any credit for the software in Fusion Garage's device. Indeed, Mr. Arrington admitted in deposition that Fusion Garage did all the software coding dating back to the launch of "Prototype B" in January 2009. (Ex. A at 338:23-339:2.)

For instance, in an October 2008 pitch to potential investors, TechCrunch wrote that it planned to either acquire Fusion Garage *or hire away Fusion Garage's employees*. (Ex. H at TC00004114) ("we're working with a Singapore startup that has developed a kick-ass working prototype . . . We will either acquire the startup *(or hire the team)*." ) (emphasis added). Two months later, Arrington brainstormed with TechCrunch CEO Heather Harde about how they could threaten to work with other software companies if Fusion Garage did not agree to Plaintiffs' proposed merger terms. (Ex. I) ("Tariq pitched me on using [his operating system] for the tablet. It doesn't work for what we're doing, but it's a cool UI *and if FG gives us any crap about terms we should suggest they are our alternative.*" ) (emphasis added). Even as late as August 2009, Plaintiffs' contractor Nik Cubrilovic, proposed "poaching" Fusion Garage's employees and letting Fusion Garage "die" as viable business strategies for Plaintiffs. (Ex. J) ("option 2 is we kill the project and fusion garage also dies . . . option 3 is we just poach his guys, run it ourselves.") This behavior is inconsistent with the behavior of someone who truly believes they are in a joint venture with someone to whom they owe fiduciary duties.

But Arrington's willingness to poach Fusion Garage's employees was just the tip of the iceberg when it comes to conduct evincing the absence of any fiduciary duties to Fusion Garage.

~~By late August 2009, the only party that had done anything about actually contacting and working with a manufacturer for the web tablet was Fusion Garage. Arrington's efforts at raising capital to finance an acquisition of Fusion Garage had all but failed as of mid- or late August 2009. It was during this period that Fusion Garage introduced Arrington and his alter ego TechCrunch to Pegatron Corporation, the original design and manufacturing company that Fusion Garage had contacted to discuss building the tablet. Pegatron apparently insisted that it be paid a one-time \$700,000 Non-Recurring Engineering (NRE) fee before they would begin manufacturing.~~

~~Arrington knew that he had no financing for the acquisition of Fusion Garage. He also knew that he had no funding to pay a \$700,000 NRE fee to Pegatron. Keenly aware of the fact that he was unable to finance either the development of the web tablet or the acquisition of Fusion~~

~~Garage, Arrington outright threatened Pegatron that, if it did not drop the demand for a \$700,000 NRE fee, TechCrunch would abandon any interest in developing the CrunchPad and Pegatron would instead have to manufacture the web tablet for Fusion Garage without TechCrunch's involvement. Or, as Pegatron confirmed a conversation it had with Arrington's hired contractor, Brian Kindle:~~

~~[Pegatron understands from Kindle that] if Pegatron is not willing to change current agreement and MOU (\$700K NRE / 1200K life-cycle), TechCrunch will drop out of this business and stop merging Fusion Garage. Fusion Garage will not get any supporting [sic] from TechCrunch or certain famous business units. ***But, Fusion Garage may keep doing business with Pegatron by itself.***~~

~~(Ex. K) (emphasis added.)~~

~~Put simply, by the end of August 2009, Arrington and TechCrunch clearly believed that they owed no fiduciary duties to Fusion Garage and that Fusion Garage owed none to Arrington or TechCrunch, and that Fusion Garage had the option of going it alone in developing its own web tablet.~~

~~Critically, Arrington and TechCrunch concealed this email string, along with hundreds of other documents, when they applied for a preliminary injunction in this case.~~

~~Fusion Garage's Mounting Doubts That Arrington Could Ever Raise the Requisite~~

~~**Funding:** By the Fall of 2009, with Plaintiffs *still* incapable of raising anywhere near the \$2-million it believed was required to manufacture and sell the devices, Fusion Garage began to realize that the prospects of a merger with CrunchPad, Inc. were remote. Arrington and his alter-egos had failed to come up with any meaningful capital to warrant acquisition of Fusion Garage. Fusion Garage had also performed all the work to develop its web tablet on its own, with no meaningful assistance from Arrington or his alter-egos.~~

~~While Fusion Garage continued to negotiate with Plaintiffs and hold out hope that their fundraising efforts would improve, it also began laying the groundwork to sell the device on its own should the prospective merger with CrunchPad, Inc. fail or never materialize. For instance, Fusion Garage internally decided that they would call their device the "JooJoo" if Arrington could~~

~~not raise the money or develop the capital to acquire Fusion Garage. Fusion Garage registered the web address [www.thejoojoo.com](http://www.thejoojoo.com) to prepare for this contingency, and also retained McGrath/Power Public Relations to drive advertising and PR for its device should the merger negotiations fall apart.~~

~~Arrington and his alter-egos make much of the fact that Fusion Garage did not disclose this contingency plan to Arrington or TechCrunch. Of course, Arrington and his alter-ego also never disclosed to Fusion Garage their intention to poach Fusion Garage employees. They never disclosed to Fusion Garage the full extent of their complete and utter failure to raise venture capital for any acquisition of Fusion Garage. In fact, Arrington seemed to go out of his way not to cc anyone from Fusion Garage on emails or correspondence with venture capitalists who were rejecting Arrington right and left as a financial target.~~

~~Moreover, Fusion Garage was concerned that Arrington might use the TechCrunch blog to unfairly smear Fusion Garage if he knew that Fusion Garage was considering breaking off merger negotiations and launching the device on their own. After all, during their months of negotiations, Fusion Garage had significant contact with Arrington and had witnessed first hand his mercurial temper—a temper repeatedly confirmed by Arrington's own colleagues. (Ex. L at 334:17-335:3.)~~

~~Arrington has an unfortunate, disturbing, and almost pathological tendency to use the TechCrunch blog as a weapon against those whom he dislikes or those who disagree with him. For~~

~~instance, when faced with a balky screen vendor for one of his early CrunchPad prototypes, Arrington had expressed his frustration to his colleagues as follows: "fuck that, bulldoze around this problem. find out who their investors are ... *i may just trash them on techerunch*. dicks." (Ex. M) (emphasis added). When Pegatron refused to budge on the NRE charge, Arrington had Kindle tell Pegatron that he would drop a "hail storm of negative press" on Pegatron and otherwise use the bad press against Pegatron as "negative guns"—and to put them in his "crosshairs"—if it did not capitulate to his desires. (Ex. N.) Fusion Garage had no desire to be likewise "trashed" on the widely read TechCrunch blog simply for voicing its growing doubts that the merger would go through or that Arrington's fundraising efforts would improve.~~

~~**The End of the Merger Negotiations and Fusion Garage's Launch of the JooJoo:** By mid-November 2009, it became clear to Fusion Garage that the merger was not going to go forward. The fundraising efforts of Arrington and TechCrunch had failed miserably and repeatedly, and they no longer wanted to take the great financial risk associated with bringing the web tablet to market. Fusion Garage realized that its web tablet would never see the light of day if Fusion Garage continued to wait to be merged with CrunchPad, Inc. It was time for Fusion Garage to break off negotiations and launch its device on its own.~~

~~In an effort to soften the blow and avoid confrontation, Mr. Rathakrishnan wrote to Mr. Arrington on November 17 that Fusion Garage's investors were unwilling to go through with the merger and that he had no choice but to follow their directives. In fact, Fusion Garage and its investors were on the same page by this point, and any attempt by Plaintiffs to distort this fact is grossly misinformed and is utterly ignorant of their own history of "trashing" and causing a "hail storm of negative press" to fall upon anyone who Plaintiffs believed to have crossed them. Fusion Garage formally launched its device under the "JooJoo" brand two weeks later, on December 7, 2009.~~

~~**The Filing of This Lawsuit and Arrington's Smear Campaign Against Fusion Garage:** Plaintiffs responded to the launch of the JooJoo by filing this lawsuit on December 10, 2009. Given the failure of TechCrunch and Arrington to develop a web tablet or raise money to buy a company that~~

~~could develop a web tablet, Fusion Garage's decision to launch the JooJoo was the luckiest thing that could have ever have happened to them. Fusion Garage did all the work, took on all the risk, and launched a product that Arrington and TechCrunch had long lost interest in. Plaintiffs' lawsuit enables them to seek Fusion Garage's profits without having to take on any of the risks associated with having to run a web tablet business.~~

~~Even better for Arrington, this lawsuit permits him to engage in a systematic smear campaign against Fusion Garage to save face after he found out that it could not deliver on his promise of a web tablet. He now has someone to blame.~~ **INTRODUCTORY STATEMENT**

1. Fusion Garage denies the allegations in Paragraph ~~1~~, 1,
2. Fusion Garage denies the allegations in Paragraph 2.
3. Fusion Garage denies the allegations in Paragraph 3.
4. Fusion Garage denies that it was ever involved in a joint venture with Plaintiffs. Fusion

Garage responds that the statements ~~cherry-picked by Plaintiffs~~ in Paragraph 4 have been taken ~~completely~~ out of context, considering Fusion Garage's ~~very real~~ fear about being the subject of Plaintiffs' history of threatening to use the TechCrunch blog to "trash" and cause a "hail storm of negative press" to fall upon anyone who they believe to have crossed them— however unfounded. ~~Fusion Garage denies that it was ever involved in a joint venture with Plaintiffs.~~ (Exs. A, B, C at 334-335.) Fusion Garage ~~further~~ denies the remaining allegations of Paragraph 4.

5. Fusion Garage admits that Plaintiffs purport to bring this suit to seek redress for the purported misconduct alleged in the Amended Complaint, but denies the remaining allegations in Paragraph 5.

#### **PARTIES**

6. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 6, and therefore denies them.

7. ~~6.~~ Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 6, ~~and therefore denies them.~~ 7, and therefore denies them.

~~7. Fusion Garage lacks knowledge or information sufficient to form a belief as to the~~

~~truth or falsity of the allegations in Paragraph 7, and therefore denies them.~~

8. Fusion Garage admits that it is a Singapore company with its principle place of business in Singapore. The second sentence of Paragraph 8 states a legal conclusion to which no response is required. Fusion Garage admits that Chandrasekhar Rathakrishnan is a Singapore national and is the chief executive of Fusion Garage. Fusion Garage further denies the remaining allegations of Paragraph 8.

### JURISDICTION

9. Fusion Garage admits that this Court has original jurisdiction over the action under 28 U.S.C. § 1332.

### VENUE

10. For purposes of this action, Fusion Garage does not contest venue in the United States District Court for the Northern District of California. Fusion Garage denies the substance of the remaining allegations in Paragraph 10.

### INTRADISTRICT ASSIGNMENT

11. Fusion Garage admits that Plaintiffs initially brought claims under the Lanham Act, for which this action was not subject to intradistrict assignment. Plaintiffs' Lanham Act claims were dismissed in an Order by Judge Seeborg dated August 24, 2010.

### FACTS COMMON TO ALL CAUSES OF ACTION

~~12.— Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 12, and therefore denies them.~~

12. ~~13.~~ Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph ~~13,~~12, and therefore denies them.

13. ~~14.~~ Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph ~~14, and therefore denies them.~~13, and therefore denies them.

14. Fusion Garage lacks knowledge or information sufficient to form a belief as to the

truth or falsity of the allegations in Paragraph 14, and therefore denies them.

15. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the in Paragraph 15, and therefore denies them. Fusion Garage states that Exhibit 1 and the quoted language speak for themselves.

16. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 16, and therefore denies them. Fusion Garage states that Exhibit 2 and the quoted language speak for themselves.

17. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 17, and therefore denies them.

18. Fusion Garage lacks knowledge or information sufficient<sup>r</sup> to form a belief as to the truth or falsity of the allegations in the first sentence of Paragraph 18, and therefore denies them. Fusion Garage admits that Mr. Rathakrishnan ~~meet~~ met Michael Arrington while at TechCrunch 50. ~~Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in the second sentence of Paragraph 18, and therefore denies them.~~

Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in the second sentence of Paragraph 18, and therefore denies them.

19. Fusion Garage states that Exhibit 3 and the quoted language speak for themselves<sub>2</sub>. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage further denies the remaining allegations of Paragraph 19.

20. Fusion Garage admits that Mr. Arrington, ~~Ms.~~ TechCrunch CEO Heather Harde, and Mr. Rathakrishnan ~~meet~~ met on September 23, 2008, but lacks knowledge or information sufficient to belief as to the truth or falsity of the allegations of the remainder of the first sentence of Paragraph 20, and therefore denies them. Fusion Garage states that Exhibit 4 and the quoted language speak for themselves. Fusion Garage denies the remaining allegations in Paragraph 20. Fusion Garage further avers that Mr. Arrington even admitted that from the outset the only way TechCrunch and Fusion Garage could work together would be through a merger of their

corporate entities. (Ex. D at 85:1-6) ("The first meeting I had with Chandra was, I believe, in — I believe in October . . . *At that meeting, we, Chandra and I, agreed that the only way to work together was a merger of the entities.*") (emphasis added).

21. Fusion Garage states that Exhibit 5 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. ~~Fusion Garage denies the remaining allegations in Paragraph 21.~~

22. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the first two sentences of Paragraph 22, and therefore denies them. Fusion Garage admits that CrunchPad, Inc. would have been the entity to merge with Fusion Garage had the parties' merger talks succeeded. Fusion Garage denies that the parties ever collaborated on a web tablet in parallel with their merger talks. Fusion Garage ~~denies the remaining allegations of Paragraph 22.~~ further avers that the parties never consummated this merger. On December 18, 2008, Ms. Harde sent Rathakrishnan a "Letter of Intent" to acquire Fusion Garage for a lump-sum of cash plus 8 percent stock in CrunchPad, Inc., a new shell company that TechCrunch set up to commercialize their web tablet idea. (Ex. E.) Notably, the Letter of Intent was unsigned, and included a limited "no-shop" provision, under which Fusion Garage could shop itself to other corporate suitors if no merger was

struck within 60 days. (Id. at FG00001047.) This no-shop provision shows that TechCrunch did not consider Fusion Garage to be a "joint venturer" who was bound by duties of loyalty to TechCrunch. (See also Ex. F ("Tariq pitched me on using [his operating system] for the tablet. It doesn't work for what we're doing, but it's a cool UI and *if FG gives us any crap about terms we should suggest they are our alternative.*" (emphasis added).) Rather, Fusion Garage was simply a potential acquisition target who could walk away and/or merge with other companies if it did not merge with CrunchPad, Inc. within this 60-day window. TechCrunch knew that the Letter of Intent was, in fact, a clear expression that there would be no legal relationship between the parties unless they entered into a formal, written agreement to do so. Mr. Arrington, Ms. Harde, and TechCrunch contractor Louis Monier explained to Fusion Garage in no uncertain terms that Arrington could not "formalize something with [Fusion Garage] (as in



signed papers) until [Plaintiffs] close the round of funding" and that the funding and merger must "happen in the right order." (Ex. G.)

23. Fusion Garage admits that a prototype known as "Prototype B" was constructed as of January 19, 2009 and that Fusion Garage provided the source code for "Prototype B." Fusion Garage avers that it offered this technology to TechCrunch under the mistaken belief—based on representations by Mr. Arrington—that Mr. Arrington and TechCrunch were well-connected in the venture capital community and would be able to arrange for an acquisition of Fusion Garage. Mr. Arrington and TechCrunch failed to arrange this acquisition and failed to secure any funding for Fusion Garage. Indeed, Mr. Arrington and TechCrunch were turned down by no less than 16 different venture capital funding sources. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remainder of the allegations in Paragraph 23, and therefore denies them.

24. Fusion Garage states that Exhibit 6 and the quoted language speak for themselves. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 24, and therefore denies them.

25. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the first sentence of Paragraph 25, and therefore denies them. Fusion Garage denies the remaining allegations of Paragraph 25.

26. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 26, and therefore denies them. Fusion Garage states that Exhibit 7 and the quoted language speak for themselves.

27. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 27, and therefore denies them. Fusion Garage avers that Louis Monier—the consultant that Plaintiffs allegedly hired to spearhead their web tablet efforts—remarked to Mr. Rathakrishnan around this time that Plaintiffs' web tablet project "had no legs," that there was insufficient funding available, and that Fusion Garage should figure out what to do on its own should it wish to pursue a web tablet. (Ex. H at 259:12-17.)

28. Fusion Garage denies the allegations in Paragraph 28.

29. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 29, and therefore denies them.

30. Fusion Garage admits that it drove the industrial design and hardware work for ~~the~~ its own web tablet out of Singapore, and that it should get the credit for developing ~~its own web~~the tablet. (Ex. I) Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 30, and therefore denies them. Fusion Garage states that Exhibit 8 and the quoted language speak for themselves.

31. Fusion Garage denies the allegations in Paragraph 31.

32. Fusion Garage states that Exhibit 9 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 32.

33. Fusion Garage states that Exhibit 10 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 33.

34. Fusion Garage denies the allegations in Paragraph 34.

35. Fusion Garage denies the allegations in the first sentence of Paragraph 35. Fusion Garage avers that Mr. Arrington recognized around this time that any merger with Fusion Garage was doomed without further venture capital funding. Fusion Garage states that Exhibit 11 and the quoted language speak for themselves. By August 2009, Mr. Arrington had told Fusion Garage and third parties that the "CrunchPad" was "dead." (Exs. J, K.) Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 35, and therefore denies them.

36. Fusion Garage states that Exhibit 12 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 36.

37. ~~37,~~ Fusion Garage denies the allegations in Paragraph 37.

38. Fusion Garage states that Exhibit 13 and the quoted language speak for themselves.

Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 38.

39. Fusion Garage states that Exhibit 13 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 39, and therefore denies them.

40. Fusion Garage states that Exhibit 13 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 40.

41. Fusion Garage denies that the parties engaged in any ongoing collaboration separate and apart from their merger talks. Fusion Garage states that Exhibit 14 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 41. Indeed, Mr. Arrington and Mr. Rathakrishnan agreed from the outset that the *only way* TechCrunch and Fusion Garage could work together would be through a merger of their corporate entities. (Ex. D at 85:1-6)

42. Fusion Garage admits that Mr. Rathakrishnan met Mr. Kindle at TechCrunch's offices in July 2009. Fusion Garage avers that Mr. Kindle—as he has conceded under oath—made no significant contribution to the hardware or software developed by Fusion Garage. Mr. Kindle was so unfamiliar with Fusion Garage's development efforts and the relevant technology that he conceded he had no knowledge about how the CrunchPad's prototypes evolved after he was hired in July 2009, and he could not identify something as basic as whether the final product's form factor would be plastic or metal. In fact, Mr. Kindle was so detached from any development process that he could not even identify photographs of any version of the Fusions Garage prototype. Fusion Garage denies the remaining allegations in Paragraph ~~42~~42.

43. Fusion Garage denies the allegations in Paragraph 43.

44. Fusion Garage states that Exhibit 15 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage

lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 44, and therefore denies them. Fusion Garage further avers that around this same time TechCrunch threatened Pegatron that, if it did not drop the demand for a \$700,000 Non-Recurring Engineering fee to manufacture the web tablet, that TechCrunch would abandon any interest in developing the CrunchPad and Pegatron would instead have to, manufacture the web tablet for Fusion Garage without TechCrunch's involvement. Or, as Pegatron recounted a conversation that it had with TechCrunch's contractor, Brian Kindle:

[Pegatron understands from Kindle that] if Pegatron is not willing to change current agreement and MOU (\$700K NRE / 1200K life cycle), TechCrunch will drop out of this business and stop merging Fusion Garage. Fusion Garage will not get any supporting [sic] from TechCrunch or certain famous business units. **But, Fusion Garage may keep doing business with Pegatron by itself.**

(Ex. I) (emphasis added.) Accordingly, Mr. Arrington and TechCrunch clearly believed that they owed no fiduciary duties to Fusion Garage and that Fusion Garage owed none to Arrington or

TechCrunch, and that Fusion Garage had the option of going-it-alone in developing its own web tablet.

45. Fusion Garage states that Exhibit 15 speaks for itself. Fusion Garage denies Plaintiffs' characterization and interpretation of Exhibit 15. Fusion Garage denies the remaining allegations in Paragraph 45.

46. Fusion Garage states that Exhibit 16 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 46, and therefore denies them.

~~Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 46, and therefore denies them.~~

47. Fusion Garage denies the allegations in Paragraph 47.

48. Fusion Garage states that the photos in Paragraph 48 speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of the photos. Fusion Garage denies the remaining allegations in Paragraph 48.

49. Fusion Garage denies the allegations in Paragraph 49.

50. Fusion Garage denies the allegations in Paragraph 50.

51. Fusion Garage states that Exhibit 17 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 51.

52. Fusion Garage admits that Fusion Garage conducted a demonstration of its web tablet at TechCrunch's offices on or about October 27, 2009, in furtherance of the still-pending merger negotiations. Fusion Garage states that Exhibit 18 speaks for itself. Fusion Garage denies the remaining allegations in Paragraph 52.

53. Fusion Garage states that Exhibit 19 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 53.

54. Fusion Garage states that Exhibit 20 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 54.

55. Fusion Garage states that Paragraph 55 contains a legal conclusion to which no response is required. Fusion Garage otherwise denies the allegations in Paragraph 55.

56. Fusion Garage denies the allegations in Paragraph 56, including subparagraphs (a)-(i), as well as the implication that TechCrunch had anything to do with the development of Fusion Garage's web tablet.

57. Fusion Garage admits that it rightfully claims ownership of the product that it developed on its own. Fusion Garage denies the remaining allegations in Paragraph 57.

58. Fusion Garage denies the allegations in Paragraph 58, including the implication

that the parties were ever in a joint venture.

59. Fusion Garage states that the email reproduced in this paragraph speaks for itself. Fusion Garage denies Plaintiffs' characterization and interpretation of the email. Fusion Garage denies the remaining allegations in Paragraph 59.

60. Fusion Garage states that Exhibit 21 speaks for itself and that no further response is required. Fusion Garage further denies the remaining allegations of Paragraph 21.

61. Fusion Garage denies the allegations in Paragraph 61. Fusion Garage avers that Plaintiffs and their founder, Michael Arrington, have a long history of threatening to "trash" people and companies in their TechCrunch blog. Fusion Garage's fear of Plaintiffs doing the same to Fusion Garage was justified, especially considering how Plaintiffs have simultaneously with this lawsuit publicly harassed, ~~embarrassed, and defamed~~ Fusion Garage in numerous blog posts.

62. Fusion Garage denies the allegations in Paragraph 62.

63. Fusion Garage admits~~states~~ that Plaintiffs' ~~contractor Nik Cubrilovic~~ wanted to poach Fusion Garage's personnel. ~~Fusion Garage denies the remaining allegations in Paragraph 63.~~ (Ex. M ("option 2 is we kill the project and fusion garage also dies . . . option 3 is *we just poach his guys, run it ourselves.*"); Ex. N at TC00004114 ("we're working with a Singapore startup that

has developed a kick ass working prototype ... We will either acquire the startup (*or hire the team.*)" (emphases added).) Fusion Garage denies the remaining allegations in Paragraph 63.

64. Fusion Garage denies the allegations in Paragraph 64.

65. Fusion Garage states that Exhibit 22 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 65.

66. Fusion Garage states that Exhibit 23 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 66.

67. Fusion Garage states that Exhibit 23 and the quoted language speak for themselves.

Fusion Garage denies Plaintiffs' characterization and interpretation of this language, as well as its attribution to Plaintiffs. Fusion Garage denies the remaining allegations in Paragraph 67.

68. Fusion Garage states that Exhibit 25 and the quoted language speaks for themselves. Fusion Garage admits that it contracted with McGrath Power to assist in the launch of its web tablet. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 68, and therefore denies them.

69. Fusion Garage states that Exhibit 26 speaks for itself. Fusion Garage denies Plaintiffs' characterization and interpretation of Exhibit 26. Fusion Garage denies the allegation that it "secretly" planned to do anything that it was not entitled to do. Plaintiffs failed to find financing and developed cold feet with respect to the merger. Fusion Garage denies the remaining allegations in Paragraph 69.

70. Fusion Garage states that Exhibit 27, the quoted language, and the McGrath Power website speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations relating to the purported McGrath Power website, and therefore denies them. Fusion Garage further denies the remaining allegations of Paragraph 70.

71. Fusion Garage states that Exhibits 28 and 29 and the quoted language speak for themselves, and denies Plaintiffs' characterizations and interpretations. Fusion Garage also denies that it had any obligation to inform Plaintiffs of these facts alleged in Paragraph 71. Fusion Garage denies the remaining allegations in Paragraph 71.

72. Fusion Garage states that it was under no obligation to inform Plaintiffs that "[joojoo.com](http://joojoo.com)" was registered. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 72, and therefore denies them.

73. Fusion Garage states that Exhibit 30 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation because they are taken out of the context of Plaintiffs' history of threatening to use the [TechCrunch.com](http://TechCrunch.com) blog to "trash" and

cause a "hail storm of negative press" to fall upon anyone who does not acquiesce to their demands. Fusion Garage denies the remaining allegations of Paragraph 73.

74. Fusion Garage states that Exhibit 31 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 74.

75. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 75, and therefore denies them. Fusion Garage states that Exhibit 32 speaks for itself. Fusion Garage denies Plaintiffs' characterization and interpretation of the exhibit.

76 ~~76~~-Fusion Garage states that Exhibit 32 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 76.

77 ~~77~~-Fusion Garage denies the allegations in Paragraph 77.

78 ~~78~~-Fusion Garage states that Exhibit 33 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language as it is taken

out of context and is misinformed. Fusion Garage denies the remaining allegations in Paragraph 78.

79. Fusion Garage states that Exhibits 33 and 34, and the quoted language, speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language as it is taken out of context and is misinformed. Fusion Garage denies the remaining allegations in Paragraph 79.

80. Fusion Garage states that Exhibit 21 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 80.

81. Fusion Garage states that Exhibit 21 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage



denies the remaining allegations in Paragraph 81.

82. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 82, and therefore denies them. Fusion Garage denies the implication that its web tablet was created as a result of a joint venture.

83. Fusion Garage states that Exhibit 36 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language as it is taken out of context and is misinformed. Fusion Garage denies the remaining allegations in Paragraph 83.

84. Fusion Garage states that Paragraph 84 makes legal conclusions to which no responsive pleading is required. Fusion Garage denies the implication that the parties were ever in a joint venture.

85. Fusion Garage states that Exhibit 37 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language as it is taken out of context and is misinformed. Fusion Garage admits, however, its very real and justifiable fear of Plaintiffs' and Mr. Arrington's ~~propensity to "go all nuclear" on people and companies they believe to have crossed~~temper toward those who they perceive cross them.

TechCrunch CEO Heather Harde has testified to Mr. Arrington's temper. (Exs. A, B, C.) Fusion Garage denies the remaining allegations in Paragraph 85.

86. Fusion Garage states that Exhibit 35 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language.

87. Fusion Garage admits that it announced the launch of its web tablet, the JooJoo, at a December 7, 2009 press conference in San Francisco. Fusion Garage denies the remaining allegations in Paragraph 87.

88. This paragraph states a legal conclusion to which no responsive pleading is required. Fusion Garage denies the implication that the parties were ever in a joint venture.

89. Fusion Garage denies the allegations in Paragraph 89.

90. Fusion Garage lacks knowledge or information sufficient to form a belief as to the

truth or falsity of the allegations in Paragraph 90, and therefore denies them.

91. Fusion Garage denies the allegations in the first sentence of Paragraph 91. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in Paragraph 91, and therefore denies them.

92. Fusion Garage denies the allegations in Paragraph 92.

93. Fusion Garage denies the allegations in Paragraph 93.

94. Fusion Garage denies the first sentence in Paragraph 94. Fusion Garage states that Mr. Rathakrishanan's deposition testimony speaks for itself.

95. Fusion Garage states that Exhibit 22 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language.

96. Fusion Garage denies the allegations in Paragraph 96.

97. Fusion Garage denies the allegations in Paragraph 97.

98. Fusion Garage states that Exhibits 23, 16, 25, 38, 28, 18, 29, 20, 30, and 21 and the quoted language speak for themselves. Fusion Garage denies Plaintiffs' characterization and interpretation of this language. Fusion Garage denies the remaining allegations in Paragraph 98.

99. Fusion Garage denies the allegations in Paragraph 99.

100. Fusion Garage denies the allegations in Paragraph 100.

101. Fusion Garage denies the allegations in Paragraph 101. **FIRST**

**CAUSE OF ACTION: BREACH OF FIDUCIARY DUTY**

102. Fusion Garage incorporates its responses to each and every paragraph above with the same force and effect as if fully set forth herein.

103. Fusion Garage denies the allegations in Paragraph 103.

104. Fusion Garage denies the allegations in Paragraph 104.

105. Fusion Garage denies the allegations in Paragraph 105.

106. Fusion Garage denies the allegations in Paragraph 106.

107. Fusion Garage denies the allegations in Paragraph 107.

108. Fusion Garage denies the allegations in Paragraph 108.

109. Fusion Garage denies the allegations in Paragraph 109.

110. Fusion Garage responds that this paragraph states a legal conclusion to which no response is required.

111. Fusion Garage denies the allegations in Paragraph 111.

112. Fusion Garage responds that this paragraph states legal conclusions to which no responsive pleading is required. Fusion Garage denies the implication that the parties were in a joint venture.

113. Fusion Garage denies the allegations in Paragraph 113.

114. Fusion Garage lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 114, and therefore denies them. Fusion Garage denies the implication that it needed Plaintiffs' "informed" consent to "act" in any manner.

115. Fusion Garage denies the allegations in Paragraph 115.

116. Fusion Garage denies the allegations in Paragraph 116.

117. Fusion Garage denies the allegations in Paragraph 117. ~~SECOND CAUSE OF ACTION: FRAUD AND DECEIT~~

**SECOND CAUSE OF ACTION: FRAUD AND DECEIT**

118. Fusion Garage incorporates its responses to each and every paragraph above with the same force and effect as if fully set forth herein.

119. Fusion Garage denies the allegations in Paragraph 119.

120. Fusion Garage denies the allegations in Paragraph 120.

121. Fusion Garage denies the allegations in Paragraph 121.

122. Fusion Garage denies the allegations in Paragraph 122.

123. Fusion Garage denies the allegations in Paragraph 123.

124. Fusion Garage denies the allegations in Paragraph 124.

125. Fusion Garage denies the allegations in Paragraph 125.

126. Fusion Garage denies the allegations in Paragraph 126.

127. Fusion Garage denies the allegations in Paragraph 127.

~~128. Fusion Garage denies the allegations in Paragraph 128.~~

128. Fusion Garage denies the allegations in Paragraph 128. **THIRD CAUSE**

**OF ACTION: UNLAWFUL BUSINESS PRACTICES  
UNDER  
CALIFORNIA LAW**

129. Fusion Garage incorporates its responses to each and every paragraph above with the same force and effect as if fully set forth herein.

130. Fusion Garage denies the allegations in Paragraph 130.

131. Fusion Garage denies the allegations in Paragraph 131.

132. Fusion Garage denies the allegations in Paragraph 132.

133. Fusion Garage denies the allegations in Paragraph 133.

**FUSION GARAGE'S AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE  
(FAILURE TO STATE A CLAIM)**

134. The Amended Complaint fails to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE  
(ESTOPPEL)**

135. Plaintiffs' claims are barred in whole or in part by application of the doctrine of estoppel.

**THIRD AFFIRMATIVE DEFENSE  
(UNCLEAN HANDS)**

~~136. Plaintiffs' claims are barred in whole or in part by application of the doctrine of unclean hands.~~

**~~FOURTH AFFIRMATIVE DEFENSE  
(WAIVER)~~**

136. ~~137.~~ Plaintiffs' claims are barred in whole or in part by application of the doctrine of

unclean hands.

**FOURTH AFFIRMATIVE DEFENSE**

**(WAIVER)**

137. Plaintiffs' claims are barred in whole or in part by application of the doctrine of

waiver.

**FIFTH AFFIRMATIVE DEFENSE**

**(ACQUIESCENCE)**

138. Plaintiffs' claims are barred by the doctrine of acquiescence.

**SIXTH AFFIRMATIVE DEFENSE**

**(NO IRREPARABLE HARM)**

139. Plaintiffs' claims for injunctive relief are barred as a matter of law because Plaintiffs have not suffered any irreparable harm as a result of the acts alleged in the Amended Complaint.

**SEVENTH AFFIRMATIVE DEFENSE**

**(FAILURE TO MITIGATE)**

140. Plaintiffs' claims are barred, in whole or in part, by Plaintiffs' failure to mitigate their alleged damages.

**EIGHTH AFFIRMATIVE DEFENSE**

**(ADEQUATE REMEDY AT LAW)**

141. Plaintiffs' claims for injunctive relief are barred as a matter of law because Plaintiffs have an adequate remedy at law for any damages resulting from the actions alleged in the Amended Complaint.

**NINTH AFFIRMATIVE DEFENSE**

**(ABUSE OF PROCESS)**

142. Plaintiffs' claims are without merit and are an attempt to harass Fusion Garage and stifle free competition, such that Plaintiffs' claims constitute an abuse of process. ~~TENTH-~~

~~AFFIRMATIVE DEFENSE~~

**TENTH AFFIRMATIVE DEFENSE**

**(NO CAUSATION)**

143. Plaintiffs' claims are barred because Plaintiffs' damages, if any, were not caused by Fusion Garage.

**ELEVENTH AFFIRMATIVE DEFENSE**

**(NO WILLFUL CONDUCT)**

144. Plaintiffs' claims for enhanced damages and an award of fees and costs against Fusion Garage have no basis in fact or law and should be denied.

**PRAYER FOR RELIEF**

WHEREFORE, Fusion Garage respectfully requests the following relief:

1. ~~I.~~ Judgment in favor of Fusion Garage and against Plaintiffs on all of Plaintiffs' claims asserted in the Amended Complaint;

2. That the Court grant Fusion Garage an award for reasonable attorneys' fees and costs of suit incurred herein; and,

~~3.~~

3. That the Court award Fusion Garage such other and further relief as the Court deems just and proper.

### COUNTERCLAIM

~~Counterclaimant Fusion Garage PTE Ltd., as and for its Counterclaims against TechCrunch, Inc. ("TechCrunch") and CrunchPad, Inc. (collectively "Counterclaim Defendants,") alleges as follows:~~

### INTRODUCTORY STATEMENT

~~1. Counterclaim Defendants have filed a lawsuit against Fusion Garage for breach of fiduciary duty, claiming that Fusion Garage breached a "joint venture" to develop and launch a web-tablet computer. Counterclaim Defendants' claim is predicated on the allegation that they and Fusion Garage jointly participated in the development of the web-tablet computer. Indeed, the Amended Complaint lists a number of "contributions" that Counterclaim Defendants allegedly made to the web-tablet's "specifications, performance characteristics . . . software architecture, hardware platform design and component sourcing, hardware forms factor and other designs, driver integration, application programming interface, [and] user interface." (Amended Complaint, 56(a)). However, these allegations are false. *Fusion Garage* was entirely responsible for developing the hardware, software, user interface, and other specifications of its web-tablet, and Counterclaim Defendants cannot claim credit for Fusion Garage's own efforts. Accordingly, Fusion Garage brings this counterclaim to protect its rights and to oppose Counterclaim Defendants' wrongful attempt to claim credit for Fusion Garage's own device.~~

### PARTIES

~~2. Counterclaimant Fusion Garage is a Singapore company with its principal place of business in Singapore.~~

~~3. Upon information and belief, Counterclaim Defendant TechCrunch is a Delaware corporation with its principal place of business in this District.~~

~~4. Upon information and belief, Counterclaim Defendant CrunchPad, Inc. is a Delaware corporation with its principal place of business in this District.~~

### JURISDICTION

~~5. The Court has original jurisdiction over this action, including Fusion Garage's~~

~~counterclaims, under 28 U.S.C. §§ 1332, 1367, and 2201.~~

~~VENUE~~

~~6. This District is a proper venue for these Counterclaims because, upon information and belief, Counterclaim Defendants maintain their principal place of business in this District.~~

~~FACTS COMMON TO ALL CAUSES OF ACTION~~

~~A. The Initial Contact Between TechCrunch and Fusion Garage~~

~~7. Fusion Garage is a Singapore-based technology start-up company. On or about about February 2008, Fusion Garage began developing an innovative browser-based operating system for mobile devices.~~

~~8. Upon information and belief, Counterclaim Defendant TechCrunch is a California-based media company that owns and operates the "TechCrunch" blog. Its founder and co-editor is Michael Arrington.~~

~~9. On July 21, 2008, Mr. Arrington purportedly posted a public message on the TechCrunch blog expressing his desire for a "dead-simple web tablet for \$200." This public message came to the attention of Fusion Garage, which was intrigued by the possible synergies between Arrington's web-tablet idea and Fusion Garage's own operating-system software. Fusion Garage's CEO, Chandrasekar Rathakrishnan, traveled to San Francisco in September 2008 and met with Mr. Arrington at the "TechCrunch 50" conference that month.~~

~~10. Upon meeting Mr. Rathakrishnan, Mr. Arrington was likewise excited about the possible synergies between his web-tablet idea and Fusion Garage's operating-system software. Accordingly, Mr. Arrington and his colleagues began merger negotiations in the Fall of 2008 to acquire Fusion Garage. Mr. Arrington also established a new shell company, "CrunchPad, Inc.," which was to be the corporation that merged with Fusion Garage and commercialized Mr. Arrington's proposed web-tablet.~~

~~11. Upon information and belief, Mr. Arrington and his colleagues created two web-tablet prototypes in furtherance of his vision. The first prototype, an August 2008 device called "Prototype~~



A," was (by Mr. Arrington's own admission) a "humble and messy" device that "barely booted." The second prototype, a January 2009 device called "Prototype B," was a 12.5" x 9.7" x 1.3" device powered by a VIA Nano processor. Fusion Garage had no involvement in Prototype A, and its involvement in Prototype B was limited to providing a version of its operating system software to demonstrate the functionality of this software and prove its bona fides as an acquisition target.

**~~B. — The Death of TechCrunch's Web Tablet Efforts and Birth of Fusion Garage's Device~~**

12. — By March 2009, it became clear to Fusion Garage that Mr. Arrington's and TechCrunch's web tablet efforts were stalling. Louis Monier — the consultant that TechCrunch allegedly hired to spearhead its web tablet efforts — remarked to Mr. Rathakrishnan around this time that the web tablet project "had no legs," that there was insufficient funding available, and that Fusion Garage should figure out what to do on its own should it wish to pursue a web tablet. (Ex. D.)

13. — Faced with the reality that Mr. Arrington and TechCrunch would be unable to build a viable web tablet to house Fusion Garage's software, Fusion Garage began developing both software and hardware for its own web tablet from scratch. Fusion Garage built successive prototypes of a web tablet between March and November 2009.

14. — Fusion Garage and Counterclaim Defendants engaged in intermittent merger negotiations throughout the March '09 — November '09 period. In furtherance of these merger negotiations, Fusion Garage also kept Mr. Arrington and his colleagues apprised about the development of its device and provided product demonstrations to Mr. Arrington and the TechCrunch team.

15. — Neither Mr. Arrington, nor any other agent of TechCrunch or CrunchPad, Inc., contributed to the hardware, software, user interface, or other specifications of Fusion Garage's device in any meaningful way. The device that Fusion Garage developed between March '09 and November '09 (including all intermediate prototypes created during this period) was entirely a product of Fusion Garage's own efforts and expertise.

16. — On or about November 17, 2009, Fusion Garage informed TechCrunch that the

~~merger talks appeared to be at an impasse and that Fusion Garage planned to launch its device without Plaintiffs' involvement. Fusion Garage formally launched its device, under the name "JooJoo," on December 7, 2009.~~

~~**A. The Amended Complaint Tries to Take Credit for Fusion Garage's Device**~~

~~16. — Counterclaim Defendants filed suit against Fusion Garage on December 10, 2009, alleging that Fusion Garage breached its fiduciary duty by launching the JooJoo without their involvement. (Dkt. 1.) Counterclaim Defendants filed an Amended Complaint on September 13, 2010 which substantially repeated these allegations. (Dkt. 167.)~~

~~17. — Specifically, the Amended Complaint attempted to support the breach of fiduciary duty claim by alleging that "Plaintiffs made numerous contributions to the joint venture with Fusion Garage." (*Id.* at 56.) It went on to allege that "Plaintiffs' contributions included [] design and oversight of the specifications, performance characteristics (including boot speed that Fusion Garage prominently features in the advertising and promotion of its JooJoo product), software architecture, hardware platform design and component sourcing, hardware forms factor and other designs, driver integration, application programming interface, [and] user interface."~~

~~(*Id.*) In short, the Amended Complaint attempts to give Counterclaim Defendants partial or full credit for the hardware, software, user interface, and other specifications of Fusion Garage's product, in order to support their claim that they were in a "joint venture" with Fusion Garage over this product.~~

~~**FIRST CAUSE OF ACTION: DECLARATORY JUDGMENT**~~

~~18. — Fusion Garage realleges and incorporates by reference the allegations in paragraphs 1 through 17 above.~~

~~19. — From March '09 through November '09, Fusion Garage built successive versions of its own web tablet computer. Counterclaim Defendants were not involved in developing the hardware, software, user interface, or other specifications for this device.~~

~~20. — Counterclaim Defendants have attempted to take credit for the hardware, software, user interface, and other specifications of Fusion Garage's device, in order to support their claim that they~~

~~were in a "joint venture" with Fusion Garage to build and launch this device.~~

~~21. — Accordingly, an actual and justiciable controversy exists over whether Counterclaim Defendants contributed to the hardware, software, user interface, or other specifications for Fusion Garage's device, as well as whether Counter Claim Defendants are entitled to claim ownership of any intellectual property associated with Fusion Garage's device, including any copyrights, patents, trademarks, trade secrets, or applications related to any copyrights, patents, or trademarks.~~

~~22. — To protect its rights over its device and defeat Counterclaim Defendants' "joint venture" allegations, Fusion Garage seeks a declaratory judgment that Counterclaim Defendants did not contribute to the hardware, software, user interface, or other specifications for Fusion Garage's device.~~

~~23. — Counter Claim Defendants also seek a declaratory judgment that Counter Claim Defendants do not own any aspect of the intellectual property related to Fusion Garage's device, including any copyrights, patents, trademarks, trade secrets, or applications related to any copyrights, patents, or trademarks.~~

~~24. — Fusion Garage is therefore entitled to relief as set forth below.~~

#### **~~PRAYER FOR RELIEF~~**

~~WHEREFORE, Fusion Garage prays that the Court enter judgment as follows:~~

~~A. — That Plaintiffs and Counter Defendants take nothing by way of their Amended Complaint;~~

~~B. — That each and every purported claim for relief by Plaintiffs and Couterdefendants be dismissed with prejudice;~~

~~C. — A declaration that Plaintiffs and Counterclaim Defendants made no contributions to the hardware, software, user interface, or other specifications for Fusion Garage's device;~~

~~D. — A declaration that Plaintiffs and Counterclaim Defendants do not own any aspect of the intellectual property related to Fusion Garage's device, including any copyrights, patents, trademarks, trade secrets, or applications related to any copyrights, patents, or trademarks.~~

~~E. — Awarding Fusion Garage its costs of suit incurred herein, including attorneys' fees and~~

expenses; and

~~F. Granting such other relief as the Court may determine just and equitable.~~

**~~DEMAND FOR JURY TRIAL~~**

~~Fusion Garage hereby demands a jury trial as to all such triable issues in this action.~~

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| Description   | March 1   |
| Document 2 ID | file://C:/Documents and Settings/btolmer/Desktop/April 14.rtf |
| Description   | April 14  |
| Rendering set | Standard  |

| Legend:                   |  |
|---------------------------|--|
| <u>Insertion</u>          |  |
| <del>Deletion</del>       |  |
| <del>Moved from</del>     |  |
| <u>Moved to</u>           |  |
| Style change              |  |
| Format change             |  |
| <del>Moved deletion</del> |  |
| Inserted cell             |  |
| Deleted cell              |  |
| Moved cell                |  |
| Split/Merged cell         |  |
| Padding cell              |  |

| Statistics:    |       |
|----------------|-------|
|                | Count |
| Insertions     | 65    |
| Deletions      | 149   |
| Moved from     | 44    |
| Moved to       | 44    |
| Style change   | 0     |
| Format changed | 0     |
| Total changes  | 302   |