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12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN FRANCISCO DIVISION
 16

17 TECHCRUNCH, INC., ET AL.,
 18 Plaintiffs,
 19 vs.
 20 FUSION GARAGE PTE. LTD.,
 21 Defendant.

CASE NO. C 09-cv-05812-RS (PSG)

**DEFENDANT FUSION GARAGE'S
 REPLY IN SUPPORT OF ITS MOTION
 TO COMPEL**

Date: January 3, 2012
 Time: 10:00 a.m.
 Judge: Hon Paul Singh Grewal
 Place: San Jose, Courtroom 5, 4th Floor

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1 **INTRODUCTION**

2 The issues in this case are not complex: were the parties co-owners of a joint venture for
3 profit or were they instead involved in protracted arms-length merger negotiations that were never
4 consummated? Plaintiffs will be called upon to explain why these companies did not reduce the
5 terms of their purported joint venture to a writing if, indeed, Plaintiffs believed they were
6 collaborators working in earnest on a common joint venture. Fusion Garage intends to show the
7 jury that Plaintiffs did not intend to enter a joint venture with Fusion Garage on a web tablet and
8 assume the significant financial risks associated therefore. Fusion Garage’s discovery requests
9 related to the Calacanis litigation and his business relationship with TechCrunch bare directly on
10 the Plaintiffs’ and Fusion Garage’s relative conduct towards each other, their expectations, their
11 actions, and their words—both stated and unstated—because Plaintiffs’ former principle Michael
12 Arrington avoided written agreements to extract unfair advantages in his business relationships.
13 Arrington’s pattern and practice of avoiding written agreements allows him to have it both ways—
14 to deny a business relationship if things turn sour, or to claim a relationship and appropriate for
15 himself the fruits of someone else’s labor if he wished. Plaintiffs do not deny that such documents
16 exist. Rather, Plaintiffs’ opposition is primarily a relevance objection, which at this stage of
17 *discovery* would operate as an *in limine* motion if the Court denies Fusion Garage’s motion to
18 compel. That result would plainly be premature.

19 Plaintiffs’ opposition concerning the AOL related document requests is also unpersuasive.
20 Despite Plaintiffs’ pleas of burden, they have not provided the necessary evidentiary support why
21 they believe production of the AOL documents would be difficult or burdensome, or how long it
22 would take to collect the information requested by Fusion Garage. Indeed, the relevant time
23 period for these documents is approximately three months at the most, and the actual, final
24 agreement(s) themselves cannot be hard to produce. The AOL related document requests are
25 reasonably calculated to lead to the discovery of admissible evidence concerning damages because
26 they may show the relative value of the purported joint venture between Plaintiffs and Fusion
27 Garage. Finally, it took this motion to compel for Plaintiffs to acknowledge a subsequent
28 document production will be forthcoming.

1 Accordingly, Fusion respectfully requests that the Court grant its motion to compel in full.

2 **ARGUMENT**

3 **I. THE JASON CALACANIS DOCUMENT REQUESTS ARE REASONABLY**
4 **CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE**
5 **SHOWING NO JOINT VENTURE WAS EVER FORMED**

6 Plaintiffs' sole objection to the discovery of their dealings with Jason Calacanis is
7 relevance. "[D]iscovery should ordinarily be allowed under the concept of relevancy unless it is
8 clear that the information sought can have no possible bearing upon the subject matter of the
9 action." *Thomas v. Cate*, 715 F. Supp. 2d 1012, 1031 (E.D. Cal. 2010). This is a generous
10 standard, distinct from the admissibility of evidence. *See Kerr v. U.S. Dist. Court for N. Dist. of*
11 *Cal.*, 511 F.2d 192, 196 (9th Cir. 1975). Plaintiffs do not deny they possess evidence related to
12 the TechCrunch / Calacanis relationship and resulting litigation. This information exists and
13 Fusion Garage is entitled to discover it.

14 Plaintiffs mistakenly assert that all evidence of Arrington's conduct must be direct
15 evidence when stating: "The unlikely idea that Mr. Arrington would have reduced to writing his
16 reluctance to reduce things to writing cannot justify a wholesale review and production of a mass
17 of documents concerning a relationship entirely unrelated to the one at issue in this case." Opp. 4.

18 Whether or not this particular document may or may not exist is insufficient reason to deny
19 discovery where Fusion Garage's defense of no joint venture is made up of several bases of
20 circumstantial evidence, including (1) the "no-shop" provision in Plaintiffs' Letter of Intent to
21 acquire Fusion Garage (Stake Decl., Ex. B); (2) the requirement that funding must take place
22 before a merger (Stake Decl., Ex. C); (3) Arrington's blog post that Fusion Garage deserved all the
23 credit for the device it built (Stake Decl., Ex. E); (4) Arrington's statements that the CrunchPad
24 was dead (Stake Decl., Exs. F and G); (5) the October 2008 pitch to potential investors stating
25 TechCrunch planned to either acquire Fusion Garage or hire away Fusion Garage's employees
26 (Stake Decl., Ex. H); (6) Arrington's statement to TechCrunch CEO Heather Harde about how
27 they could threaten to work with other software companies if Fusion Garage did not agree to
28 Plaintiffs' proposed merger terms (Stake Decl., Ex. I); and (7) Plaintiffs' contractor Nik

1 Cubrilovic’s proposal to poach Fusion Garage’s employees and letting Fusion Garage “die” as
2 viable business strategies for Plaintiffs (Stake Decl., Ex. J).

3 Arrington’s tendency to avoid written contracts to maximize his flexibility and extract
4 these types of advantages over purported business “partners” like Fusion Garage and Jason
5 Calacanis directly supports Fusion Garage’s defense that no joint venture ever existed between the
6 parties. *Leff v. Gunter*, 33 Cal.3d 508, 514 (1983) (“Partners are trustees for each other, and in all
7 proceedings connected with the conduct of the partnership every partner is bound to act in the
8 highest good faith to his copartner and may not obtain any advantage over him in the partnership
9 affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.”
10 (quoting *Page v. Page*, 55 Cal.2d 192, 197 (1961))). Fusion Garage’s Request for Production Nos.
11 97, 98, 99, 100, 102 and 103 seeking documents about the Calacanis / TechCrunch agreements
12 and resulting litigation are narrowly tailored to these issues.

13 Plaintiffs’ reliance on *D.R. Horton L.A. Holding Co., Inc. v. Am. Safety Indem. Co.*, 2011
14 WL 4403974 (S.D. Cal. 2011), *Samuels v. Adams*, 2011 WL 4565772 (E.D. Cal. 2011) and *Cano*
15 *v. Naku*, 2009 WL 1582851 (E.D. Cal. 2009) is mistaken. In *D.R. Horton L.A.*, the defendant
16 insurance company requested “all” documents about the “timing of construction performed in
17 connection with the project,” despite the fact that certain construction (*i.e.*, plumbing, electric, and
18 flooring) was not at issue in the underlying litigations that lead the plaintiff contractor to initiate
19 the denial of coverage action against its insurer. Notably, the court found that the plaintiff *had*
20 responded appropriately to defendant’s request for production by producing a subset of documents
21 that were specifically relevant to the issues in suit. *D.R. Horton L.A.*, 2011 WL 4403974 at * 4.
22 Here, on the other hand, Fusion Garage’s requests are narrowly focused on documents about the
23 TechCrunch / Calacanis agreement(s) and resulting litigation, and Plaintiffs refused to produce
24 any documents responsive to the requests.

25 The requests at issue in *Samuels* and *Cano* were similarly overbroad because they were not
26 reasonably tailored to the specific matters at issue in those cases. In contrast, Fusion Garage cited
27 *Turley v. State Farm Mut. Auto Ins. Co.*, 944 F.3d 669 (10th Cir. 1991), which is more closely
28 aligned to the facts in this case where the trial court there was found to have erred by not allowing

1 evidence—as opposed to the limited *discovery* requested here—of prior instances of the plaintiff’s
2 potential insurance fraud to support the defendant’s theory of the case.

3 Finally, Plaintiffs’ arguments with respect to the impeachment value of the Jason Calacanis
4 documents misses the mark. Fusion Garage does not believe there was no written agreement
5 between Plaintiffs and Fusion Garage because Arrington preferred verbal agreements. Opp. 5.
6 Rather, Fusion Garage intends to show that there was no written agreement and no verbal
7 agreement because there was no joint venture. Arrington’s pattern and practice of avoiding
8 written agreements so he could avoid liability or take a free ride on someone else’s coattails,
9 which ever best suited his interest, is highly relevant to this case and is strong impeachment
10 evidence. Fed. R. Evid. 404(b) (other acts admissible to show a common plan, scheme, or design).

11 Plaintiffs’ reliance on *Freeman v. Witco Corp*, 1999 WL 389892 (E.D. La. 1999) does not
12 require a different result. In that case, there was an actual writing defining the parties’ relationship
13 that the court found to be the best evidence of the parties’ agreement. Here, on the other hand,
14 Fusion Garage intends to show that there was no written or oral agreement between it and
15 Plaintiffs because there was no joint venture. The only writings exchanged between the parties in
16 this case attempting to define their business relationship were in the context of acquisition
17 negotiations. Plaintiffs have not provided any evidence to the contrary.

18 **II. THE AOL DOCUMENT REQUESTS ARE REASONABLY CALCULATED TO**
19 **LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE CONCERNING THE**
20 **PURPORTED JOINT VENTURE AND DAMAGES**

21 Plaintiffs’ objections to Fusion Garage’s requests for the TechCrunch / AOL acquisition
22 documents and related communications are threefold: (1) relevance, (2) burden, and (3) privilege.
23 Fusion Garage will take on these objections in turn.

24 Relevance. Plaintiffs’ now appear to state that certain AOL communications evidencing
25 the “expected future earnings from Fusion Garage’s sale of the JooJoo” and “the premium or
26 discount applied because of the instant litigation” will be produced. Opp. 7:3-7. Yet these
27 documents have not been produced, and Plaintiffs provide no time that Fusion Garage can expect
28 their production. Fusion Garage requests that the Court compel as part of this production the final
AOL / TechCrunch acquisition agreement(s) and any documents referenced in the acquisition

1 agreement(s). Although Fusion Garage may or may not be specifically referenced, this litigation
2 is presumptively built into TechCrunch’s purchase price.

3 Documents responsive to the broader Request No. 93 are also reasonably calculated to lead
4 to the discovery of admissible evidence. Responsive documents may show the relative value of
5 the purported joint venture with Fusion Garage in the acquisition price compared to other factors
6 AOL and TechCrunch considered for the acquisition. These other factors AOL and TechCrunch
7 considered—such as writing staff, readership, advertising revenue, page views, etc.—will be
8 discussed in documents responsive to Request No. 93 but may not be covered by the narrower
9 Request No. 94.

10 Burden. Plaintiffs’ burden objection also fails. “It is well-established that the burden is
11 on the objecting party to show grounds for failing to provide the requested discovery.” *Big*
12 *Baboon Corp. v. Dell, Inc.*, 723 F. Supp. 2d 1224, 1229 (C.D. Cal. 2010) (citing *Burton Mech.*
13 *Contractors, Inc. v. Foreman*, 148 F.R.D. 230, 233 (N.D. Ind. 1992) (“An objecting party must
14 specifically establish the nature of any alleged burden, usually by affidavit or other reliable
15 evidence.”)). Plaintiffs cannot simply invoke generalized objections; rather, with respect to
16 Fusion Garage’s discovery requests, Plaintiffs “must state specifically how, despite the broad and
17 liberal construction of federal discovery rules, each [request] is overly broad, unduly burdensome,
18 or oppressive by submitting affidavits or offering evidence revealing the nature of the burden.”
19 *Thomas v. Hickman*, 2007 WL 4302974, at *6 (E.D. Cal. 2007) (citations omitted). For a
20 burdensomeness argument to be sufficiently specific to prevail, it must be based on declarations or
21 other evidence. *Big Baboon Corp.*, 723 F. Supp. 2d 1229.

22 Plaintiffs failed to offer any evidence in support of their burdensomeness objection
23 concerning the AOL acquisition documents and related communications. Further, any purported
24 burden on Plaintiffs will likely be minimal considering the privilege logs AOL submitted
25 reflecting its communications with Plaintiff TechCrunch only span a period of approximately
26 three months, from mid-September 2010 to mid-December 2010. *See* Stake Decl., Exs. U and V,
27 *passim*. Moreover, the final AOL / TechCrunch acquisition agreement(s) are presumably in a
28 binder or dealbook sitting on an office shelf and easily retrievable.

1 Privilege. The “common interest” or “joint defense”¹ privilege is simply an extension of
2 the attorney-client privilege that Plaintiffs’ are unable to invoked here. *See United States v.*
3 *Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). To invoke the privilege, Plaintiffs must first show
4 that the communications *were designed to show a joint legal as opposed to commercial interest.*
5 *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 579 (N.D. Cal. 2007). Even the *Elector*
6 *Scientific Indus., Inc. v. Gen. Scanning, Inc.* 175 F.R.D. 539, 543 (N.D. Cal. 1997) case cited by
7 Plaintiffs confirms this: “[A] sophisticated party who intentionally discloses the most significant
8 part of an otherwise privileged communication, in an act calculated to advance that party’s
9 commercial interests, cannot establish ... that the party reasonably believed that it would be able
10 to preserve the confidentiality of the other parts of that communication.”

11 Plaintiffs’ opposition argues, without evidentiary support or a declaration of counsel, that
12 its communications with AOL “embody[] legal advice and strategy concerning this litigation.”
13 Opp. 7. This statement is directly contradicted by entries in AOL’s supplemental privilege logs
14 attached to the Stake declaration at Exhibits U and V. For example, AOL’s supplemental
15 privilege logs explicitly admit that an overwhelming majority of the relevant documents are
16 “[c]ommunication[s] reflecting request for and receipt of legal advice of counsel *re*
17 *AOL/TechCrunch acquisition.*”² (emphasis added) The remainder of the withheld documents are
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19

20 ¹ Fusion Garage used the term “joint defense” in its moving papers as opposed to “common
21 interest.” These terms are interchangeable. *See In re Megan-Racine Associates, Inc.*, 189 B.R.
22 562, 570 n.4 (Bankr. N.D.N.Y. 1995) (“Courts and commentators use the terms ‘joint defense
23 privilege,’ and ‘common interest privilege’ and ‘pooled information situation’ interchangeably.”).
Thus, Plaintiffs’ are not correct to suggest Fusion Garage “fail[ed] to mention the common-
interest doctrine at all.” Opp. 8.

24 ² *See* Stake Decl., Ex. U (AOL’s Revised Initial Privilege Log identifying communications at
25 3.2, 3.3, 5.3, 5.4, 44.1, 46.3, 47.3, 47.4, 49.4, 50.4, 50.5, 120.4, 234.6, 234.7, 235.7, 235.8, 236.5,
26 236.8, 243.7, 244.7, 244.8, 246.9, 246.10, 249.8, 249.9) and Ex. V (AOL’s Revised Supplemental
27 Privilege Log identifying communications at 9.3, 9.4, 35.2, 35.3, 63.5, 63.6, 66.1, 66.2, 71.3,
28 71.4, 74.2, 74.3, 77.1, 77.2, 80.2, 87.5, 87.6, 88.5, 88.6, 89.1, 89.2, 96.1, 96.2, 123.5, 123.6, 271.1,
271.2, 276.1, 279.2, 279.3, 288.2, 288.3, 296.2, 296.3, 307.1, 307.2, 319.1, 331.3, 331.4, 334.2,
337.1, 337.2, 348.2, 354.2, 357.1, 365.5, 366.5, 366.6, 367.5, 367.6, 368.4, 368.5, 370.2, 370.3,
375.1, 418.1, 421.2, 423.2, 423.3, 424.4, 431.2, 434.2, 442.3, 449.4, 449.5, 450.2, 450.3, 452.3,
(footnote continued)

1 “[c]ommunication[s] reflecting request for and receipt of legal advice of counsel *re*
2 *AOL/TechCrunch acquisition and analysis* regarding CrunchPad litigation.”³ (emphasis added)
3 There is absolutely no indication that the documents share, discuss, coordinate, or attempt to
4 formulate a common legal strategy. Nor is there any indication that they were prepared in
5 anticipation of litigation or trial.

6 To the extent there are a limited number of documents that were actually prepared for
7 purposes of joint litigation against Fusion Garage as Plaintiffs claim, Fusion Garage is entitled to
8 redacted versions of those documents.

9 The parties in the *Hewlett-Packard* and *Depomed* cases cited by Plaintiffs made the
10 requisite showing that the communications were designed to further a joint legal, as opposed to
11 commercial, interest. *See Hewlett-Packard*, 115 F.R.D. 308 (N.D. Cal. 1987); *Depomed, Inc. v.*
12 *IVAX Corp.*, 2007 WL 1792324, at *1 (N.D. Cal. 2007).⁴ And in *Electro Scientific Indus., Inc. v.*
13 *Gen. Scanning, Inc.*, 175 F.R.D. 539, 542 (N.D. Cal. 1997), the court ruled that the limited
14 disclosure of otherwise privileged information “*probably* would support a finding that the
15 ‘community of interest’ doctrine applied,” because the party claiming privilege showed that the
16 disclosures “were made under circumstances (including steps taken to maintain
17 confidentiality)...” (emphasis added) Here, on the other hand, no such showing has been made.

18 The attorney-client privilege must be strictly construed because it impedes the search for
19 the truth. *See United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) (“Because it impedes full

20 _____
21 452.4, 456.4, 456.5, 578.3, 578.4, 581.2, 581.3, 582.2, 583.3, 585.1, 582.3, 585.1, 585.2, 596.2,
22 599.2611.3, 614.2, 617.2, 620., 643.5, 646.6, 644.5644.6, 645.5645.6654.3, and 654.4).

23 ³ *See* Stake Decl., Ex. U (AOL’s Revised Initial Privilege Log identifying communications at
24 69.4, 69.5, 70.5, 70.6, 71.5, 71.6, 72.5, 90.4, 90.5, 91.5, 91.6, 92.5, 92.6, 245, 247.10, 247.11,
255.4, 255.5, 256.5, 256.6, 257.5, 257.6, 258.5, 258.6).

24 ⁴ The court in *Depomed* may have also misapplied the law to the extent the case is read to
25 imply that simply having a “common interest” in a commercial endeavor, without a corresponding
26 common joint legal interest, is sufficient to invoke the common interest privilege. *See Nidec*, 249
27 F.R.D. at 579 (“*Hewlett-Packard* did not hold there was a common legal interest between
28 defendant and the third party merely because the third party was a prospective purchaser of one of
defendant’s divisions. Rather, the court found there was a common legal interest because of
anticipated joint litigation.”).

1 and free discovery of the truth, the attorney-client privilege is strictly construed. [citations]”);
2 *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1423 (3d Cir. 1991) (noting that a
3 narrow interpretation of the attorney-client privilege is necessary because the privilege hinders
4 “the truth-finding process”); *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) (explaining
5 that the attorney-client privilege obstructs the quest for truth). Plaintiffs’ requested extension of
6 the attorney-client privilege to communications made to further a commercial transaction between
7 two adverse parties should not be permitted.

8 Accordingly, Fusion Garage respectfully requests that the Court compel production of
9 documents responsive to Request for Production Nos. 93 and 94.

10 ***Conclusion***

11 For the reasons stated in Fusion Garage’s opening brief and this reply, Fusion Garage
12 respectfully request that the Court grant its motion to compel.

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14
15 DATED: December 9, 2011

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