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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TECHCRUNCH, INC., et al. Plaintiffs, vs. FUSION GARAGE PTE. LTD., Defendant.	**Case No. C 09-cv-05812-RS (PSG)** **PLAINTIFFS' APPLICATION FOR DEFAULT JUDGMENT AGAINST DEFENDANT FUSION GARAGE PTE, LTD.** **Date:** April 19, 2012 **Time:** 1:30 p.m. **Judge:** Hon. Richard Seeborg **Location:** Courtroom 3, 17th Floor

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NOTICE OF APPLICATION FOR DEFAULT JUDGMENT

TO FUSION GARAGE PTE, LTD.:

PLEASE TAKE NOTICE that on April 19, 2012, at 1:30 p.m., or as soon as possible thereafter as the matter may be heard, plaintiffs TechCrunch, Inc. and CrunchPad, Inc. will and hereby do apply to this Court, pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, for an order entering a default judgment against defendant Fusion Garage PTE, Ltd., awarding Plaintiffs monetary damages and pre-judgment interest in the amount $10,157,000, transferring title in two of Fusion Garage's domain names to Plaintiffs, and identifying those owners, investor, and known domestic assets against which the judgment may be enforced.

The Application is based on this Notice, the accompanying Memorandum of Points and Authorities, the Declarations of Gregory Regan and Nicholas Short filed concurrently herewith, the complete files and records in this action, as well as the oral argument of counsel and other evidence introduced at the hearing on the Application, and any other matter the Court may deem appropriate.

Fusion Garage has received this Notice by service (via ECF/PACER and electronic mail) on its former counsel, pursuant to Northern District of California Civil Local Rule 11-5(b). *See also* Dkt. No. 236 ("Pursuant to Civil Local Rule 11-5(b), until new counsel has entered an appearance, any papers to be served on Fusion Garage may be served on Quinn Emmanuel for forwarding purposes"). As a courtesy, Plaintiffs also will send (via Federal Express and fax) a copy of the Notice and Memorandum, and all supporting declarations and documents to Fusion Garage's liquidators in Singapore.

Dated: March 23, 2012

WINSTON & STRAWN LLP

By: _____
David S. Bloch
Nicholas W. Short

Attorneys for Plaintiffs TechCrunch, Inc., and CrunchPad Inc.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Just as Fusion Garage abandoned its joint venture with TechCrunch and CrunchPad on November 17, 2009, giving rise to this lawsuit in the first instance, Fusion Garage has now abandoned its legal defense of its misconduct. The Court has stricken Fusion Garage's answer and the clerk has entered its default. Pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, Plaintiffs now apply for an order entering a default judgment against Fusion Garage in the amount of $10,157,000—the value of their interest in the joint venture as of November 16, 2009 ($7.8 million) plus the amount of direct costs TechCrunch incurred in establishing the joint venture and the CrunchPad product ($357,000), together with pre-judgment interest on those two amounts ($2,000,000). Decl. of Gregory J. Regan, Ex. A ("Regan Report") § I.D.

II. FACTUAL BACKGROUND

As the Court is aware,[1] TechCrunch operates the leading technology blog in Silicon Valley. From 2008 to 2009 TechCrunch and its subsidiary CrunchPad participated in a joint venture with Fusion Garage to develop the CrunchPad, a web tablet device with an open-source software platform to promote user-generated innovation and debugging, which they would sell at a bargain-basement price of $200 or less. Dkt. 167 (First Amended Complaint) ¶ 15. The parties began discussing this "possible collaboration" on September 18, 2008. *Id.* ¶ 19. Roughly nine months later, after significant collaboration on product development, marketing, and investor relations, they agreed to the material terms of a merger in which CrunchPad would acquire Fusion Garage, with Fusion Garage holding 35 percent of the merged company's stock and CrunchPad holding the remaining 65 percent. *Id.* ¶¶ 37-41 and Ex. 13.

The parties continued to collaborate through the summer and fall of 2009 to prepare the CrunchPad for launch at TechCrunch's CrunchUp conference on November 20, 2009. *Id.* ¶¶ 42-50. Unbeknownst to Plaintiffs, however, Fusion Garage developed a secret plan to unilaterally abandon the joint venture and take the CrunchPad to market on its own as "the joojoo." *Id.* ¶¶ 50-55, 58-90.

[1] The Court has extensively examined and summarized the factual contentions in this case, having already adjudicated two separate motions to dismiss. See Dkt. Nos. 162, 194. Only the most relevant allegations are repeated here.

Fusion Garage never disclosed its plan to usurp the CrunchPad business (*id.* ¶ 50), and as late as November 10, 2009—10 days before the scheduled product launch—Fusion Garage's CEO, Chandrasekhar Rathakrishnan, emailed his counterpart at TechCrunch, Michael Arrington, to say that "we are almost there" and "ready to go live on stage." *Id.* ¶ 53. On November 17, 2009, Fusion Garage terminated the joint venture "out of the blue," and converted the joint venture's yearlong effort to its own private benefit. *Id.* ¶¶ 55, 58, 88.

As a joint venturer, Fusion Garage had a fiduciary duty to deal with Plaintiffs at all times with the highest loyalty and the utmost good faith. Fusion Garage breached these fiduciary duties (*id.* ¶¶ 112-113) and Plaintiffs have suffered injury as a result, including "loss of Plaintiffs' substantial investment of money and services for the CrunchPad's development and marketing" and "loss of Plaintiffs' rightful share in the value of the joint venture." *Id.* ¶ 115. At the time of dissolution, the "but-for" fair value of TechCrunch's interest in the CrunchPad joint venture was $7.8 million. Regan Report § I.D (summary), § III.A (analysis supports a valuation of CrunchPad, Inc. equity in the range of $12 to 15 million, with TechCrunch/CrunchPad receiving a 65% share), § III.B (alternative approach supports a valuation of approximately $15 million, again with TechCrunch/CrunchPad entitled to a 65% share). TechCrunch also incurred approximately $357,000 in direct costs related to establishing CrunchPad, Inc. and the CrunchPad product. Regan Report § I.D (summary), § IV (out of pocket losses). The prejudgment interest on those two amounts, calculated on a simple basis at a 10 percent interest rate assuming a judgment date of April 30, 2012, is $2,000,000. Regan Report § I.D (summary), §V (pre-judgment interest).

III. PROCEDURAL BACKGROUND

Plaintiffs filed their initial complaint in this matter on December 10, 2009 (Dkt. No. 1) and personally served the summons and complaint on Fusion Garage on December 18. Dkt. No. 7. In response to the initial complaint, Fusion Garage moved to dismiss, to strike, and for a more definite statement. Dkt. No. 20. The Court denied the motion with respect to Plaintiffs' claim for breach of fiduciary duty. Dkt. No. 162 (Aug. 24, 2010 Order) at 12:6-8 ("For the same reasons that TechCrunch has made a credible showing as to the existence of a joint venture, it has adequately pleaded its claim for breach of fiduciary duty"). But the Court granted the motion, with leave to

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amend, with respect to Plaintiffs' claims for fraud and unfair competition. *Id.* at 15:1-2 and 16:9.

Plaintiffs then filed an amended complaint on September 13, 2010. Dkt. No. 167. Fusion Garage again moved to dismiss Plaintiffs fraud and unfair competition claims. Dkt. No. 181. The Court denied the motion with respect to both claims. Dkt. 194 (Feb. 9, 2011 Order) at 5:12-13 ("The allegations [as to fraud], though, are sufficient to state a claim and the motion must be denied"), 6:2-4 ("In light of the conclusion above that the Amended Complaint states a claim for fraud with sufficient particularity, the motion must be denied as to the unfair competition claim as well"). Fusion Garage answered the amended complaint on March 1, 2011 (Dkt. No. 195), and amended its answer on April 14, 2011. Dkt. No. 207.

On December 13, 2011, Fusion Garage's attorneys moved for leave to withdraw as counsel. Dkt. No. 230. In granting the motion, the Court ordered Fusion Garage to retain new counsel by February 1, 2012, or "appear and show cause on February 9, 2012 at 1:30 p.m., why its answer should not be stricken and its default entered." Dkt. No. 236. Fusion Garage did not retain new counsel by the February 1 deadline and did not appear at the February 9, 2012 hearing. Dkt. 239-1 ¶ 2. As a result, the Court struck Fusion Garage's answer (Dkt. No. 238) and, upon Plaintiffs' request, the clerk entered default against Fusion Garage pursuant to Rule 55(a) of the Federal Rules of Civil Procedure. Dkt. No. 241.

IV. LEGAL STANDARD

After entry of default, the Court may enter a default judgment pursuant to Federal Rule of Civil Procedure Rule 55(b) upon application by the plaintiff. Fed. R. Civ. P. 55(b); *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977); *Coach, Inc. v. Diva Shoes & Accessories*, No. 10-5151, 2011 WL 1483436, *2 (N.D. Cal. April 19, 2011) (Conti, J). As an initial matter, the Court must determine that service of process on the defaulting party was adequate. *Coach, Inc.*, 2011 WL 1483436, at *2. The Court then considers several factors in evaluating the application:

> (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claims, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

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Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986); *Penpower Tech., LTD. v. S.P.C. Tech.*, 627 F. Supp. 2d 1083, 1088 (N.D. Cal. 2008) (Conti, J.). While the Court assesses the allegations in the complaint to determine if they are legally sufficient, the Court must accept the allegations—except those relating to the amount of damages—as true. *Geddes*, 559 F.2d at 557. The Court may conduct an evidentiary hearing in order to determine the amount of damages. Fed R. Civ. P. 55(b)(2).

V. ARGUMENT

A. Plaintiffs Have Perfected Service.

Plaintiffs personally served summons and the initial complaint in this matter on Fusion Garage on December 18, 2009 in compliance with the standard for service upon corporations, associations, or partnerships set forth in Federal Rule of Civil Procedure 4(h).[2] Dkt. No. 7. Plaintiffs have therefore perfected service.

B. Plaintiffs Will be Prejudiced Absent Entry of Default Judgment.

Plaintiffs will be prejudiced if the Court does not enter default judgment against Fusion Garage, because Plaintiffs have no other "recourse or recovery" for the wrongs alleged in their Amended Complaint. *Penpower Tech., LTD.*, 627 F. Supp. 2d at 1089. Plaintiffs, in this instance, are especially vulnerable because Fusion Garage is a foreign (Singaporean) company, has ostensibly declared bankruptcy in Singapore, and has expressed its intent to destroy the company's records in connection with the apparent distribution of its assets. *See* Dkt. No. 237 2:25-3:13, Tabs A-D. Important evidence supporting Plaintiffs' claims and damages may soon be destroyed, making it virtually impossible for Plaintiffs to further investigate or prosecute their claims in this or any other forum. Plaintiffs have incurred significant expense in litigating their claims for over two years, only to have Fusion Garage disappear without warning. If the Court does not enter default, Plaintiffs will suffer significant prejudice and be without a remedy for their claims.

C. Plaintiffs Have Stated Claims Upon Which They May Recover.

Plaintiffs have stated legally sufficient claims. The Court generally considers (1) the merits of Plaintiffs' substantive claim and (2) the sufficiency of the complaint in order to determine

[2] Fusion Garage subsequently appeared and defended itself in response to the summons and complaint, and has waived any right to object to the sufficiency of service of process.

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whether a plaintiff's allegations "state a claim upon which the [plaintiff] may recover." *Kloepping v. Fireman's Fund*, No. C 94-2684, 1996 WL 75314, at *2 (N.D. Cal. 1996) (quoting *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)) (Henderson, J.). However, this is not a case where the defendant has simply failed to appear. On the contrary, Fusion Garage appeared and filed two separate motions to dismiss (Dkt. Nos. 20, 181), and the Court has already determined that Plaintiffs have stated valid, legally sufficient claims for breach of fiduciary duty, fraud, and unfair competition in response to those motions. Dkt. Nos. 162, 194. Plaintiffs have therefore stated legally sufficient claims and are entitled to a default judgment.

D. The Amount at Stake is Equitable Relative to Fusion Garage's Conduct.

"The Court must also consider 'the amount of money at stake,' which requires that the court examine the amount of money involved in relation to the seriousness of the defendant's conduct." *Kloepping*, 1996 WL 75314, at *4 (N.D. Cal. 1996). The amount of money at stake in this case—supported by documentary evidence and competent expert testimony—is roughly $10.2 million, reflecting the amount of TechCrunch's interest in the joint venture and the amount of direct costs TechCrunch incurred in connection with the joint venture, both of which TechCrunch lost as a result of Fusion Garage's conduct, plus pre-judgment interest. *See* Regan Report § I.D (summary).

The amount requested by the Plaintiffs is both modest and reasonable given the nature of the venture, the market opportunity for a tablet computer with the CrunchPad's characteristics and proposed pricing, and the strategic relationships that parties had negotiated before Fusion Garage abruptly went its own way. Regan Report § II.D (CrunchPad product), esp. §II.D.4 (listing the CrunchPad's competitive advantages over the joojoo). The amount of damages also is reasonable in light of Fusion Garage's reprehensible conduct, which amounts to outright fraud and evidences an intentional scheme to appropriate the venture's singular opportunity.

E. There is No Dispute Concerning Material Facts.

In ruling on a request to enter a default judgment, the Court should consider the "possibility of a dispute concerning material facts," but upon entry of default, the Court must also accept all well-pleaded factual allegations as true. *See Geddes*, 559 F.2d at 560 (9th Cir. 1977). Where, as here, the Court has entered default, stricken the answer, and found the claims to be legally sufficient,

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then there is "little room for dispute." *Kloepping*, 1996 WL 75314 at *3; *Coach, Inc.*, 2011 WL 1483436 at *5 ("The likelihood that any genuine issue may exist is, at best, remote"); *Penpower Technology Ltd.*, 627 F. Supp. 2d at 1092 (no possibility of dispute because "[u]pon entry of default, all well-pleaded facts in the Complaint are taken as true"). Given that the Amended Complaint has already survived a motion to dismiss, its allegations are well-pleaded and should be taken as true.

F. Fusion Garage's Default Was Not Due to Excusable Neglect.

The default entered against Fusion Garage did not arise from Fusion Garage's excusable neglect. *Eitel*, 782 F.2d at 1472. It evidently stopped communicating with (and stopped paying) its attorneys, causing them to seek leave to withdraw from the case on December 13, 2011. Dkt. No. 230 (Motion for Leave to Withdraw). In granting the motion, the Court ordered Fusion Garage to retain new counsel by February 1, 2012, or "appear and show cause on February 9, 2012 at 1:30 p.m., why its answer should not be stricken and its default entered." Dkt. No. 236. The Court also ordered Fusion Garage's former counsel to "make reasonable efforts to provide Fusion Garage a copy of this order and to ensure that it understands the potential consequences of any failure to obtain new counsel by February 1, 2012." *Id.* For their part, when Plaintiffs requested that the clerk enter default, they also notified Fusion Garage's liquidators in Singapore of their request. Dkt. No. 239 at 2:7-13. Thus, Fusion Garage has had sufficient notice and the default entered in this case is not due to excusable neglect. Indeed, it is reasonable to suppose that Fusion Garage's default is a mere tactical delaying action to allow Fusion Garage's principals (particularly Mr. Rathakrishnan, the schemer behind Fusion Garage's misconduct) to abscond with Fusion Garage's remaining assets and revenues, thus to thwart Plaintiffs a final time.

G. The Policy Favoring Decisions on the Merits is Not Dispositive.

Although there is a well-grounded judicial preference for decisions on the merits, "[t]he very fact that F.R.C.P. 55(b) exists shows that this preference, standing alone, is not dispositive." *Kloepping*, 1996 WL 75314, at *3 (N.D. Cal. 1996). Under Fed. R. Civ. P. 55(a), termination of a case prior to a hearing on the merits is allowed when a defendant fails to defend an action.

Fusion Garage's failure to retain new counsel or appear at the February 9, 2012 hearing to show cause why its answer should not be stricken (Dkt. No. 236) makes a decision on the merits

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impractical, if not impossible. Accordingly, the Court is not precluded from entering default judgment against Fusion Garage.

H. The Requested Form of Judgment Is Appropriate.

As noted above, Fusion Garage has limited assets in the United States and it appears to have used the delay occasioned by its default to wind up its affairs, dissipate its assets (most likely to Mr. Rathakrishnan), and "go to ground" overseas. Plaintiffs will therefore need to enforce any money judgment the Court may enter primarily via international treaties concerning the enforcement of foreign judgments.

Discovery to date indicates that Fusion Garage has or had an account at Wells Fargo and a PayPal account for collecting money from pre-ordered products. Declaration of Nicholas Short (Short Decl.) Exs. A, B. Mr. Rathakrishnan also holds three PayPal accounts in his personal name. Short Decl. Exs. C, D, E. Plaintiffs have no way of knowing whether any assets remain in any of these accounts, but will proceed against them in the first instance. Fusion Garage also has an interest in two registered domain names: (1) www.fusiongarage.com, registered at Spot Domain LLC to Fusion Garage's principal, Mr. Rathakrishnan; and (2) www.thejoojoo.com, registered at GoDaddy LLC to Aga Reszka (apparently a web designer working at Mr. Rathakrishnan's direction). Short Decl. Exs. F, G. Plaintiffs request that the Court's default judgment specifically identify these four assets and allow Plaintiffs to enforce its judgment on any domestic property, including these domain names and any remaining balances in these two financial accounts.

Through discovery, Plaintiffs also have established that Fusion Garage's investors are Robert Tan Kah Boon, CSL Group (a Malaysian company), Dr. Bruce Lee, Raffles Technology, Stamford Technology, and Purple Ray. Short Decl. Ex. H (Supp. Response to Interr. No. 10); Ex. I (excerpts from Rathakrishnan Depo.). Mr. Rathakrishnan was Fusion Garage's only officer and / or director. Short Decl. Ex. I at 27:21-31:1. In light of Fusion Garage's apparent effort to dissipate the company's assets, Plaintiffs also request that the Court's default judgment specifically identify these individuals as owners and investors of Fusion Garage to whom the judgment may apply.

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VI. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court enter an order:

A. Granting Plaintiffs' application for a default judgment against Fusion Garage PTE Ltd.;

B. Awarding Plaintiffs money damages in the amount of $8,157,000.00, reflecting the value of Plaintiffs' share in the joint venture and the direct costs Plaintiffs incurred in connection with the joint venture, which Plaintiffs lost as a result of Fusion Garage's conduct;

C. Awarding Plaintiffs pre-judgment interest in the amount of $2,000,000.00;

D. Divesting Fusion Garage and its owners, investors, and agents of any title they hold in www.fusiongarage.com or www.thejoojoo.com and transferring title to TechCrunch;

E. Identifying Robert Tan Kah Boon, CSL Group (a Malaysian company), Dr. Bruce Lee, Raffles Technology, Stamford Technology, Purple Ray, and Chandrasekar Rathakrishnan as Fusion Garage's owners and investors, against whom this judgment may be executed;

F. Identifying Wells Fargo account number 6734089631 and PayPal account numbers 2109811128938785433, 2123709838488016036, 1750306648813649730, and 1603874742718604882 as corporate assets of Fusion Garage PTE Ltd., against which any resulting judgment may be enforced;

G. And granting such other and further relief as the Court may deem just.

Respectfully submitted,

Dated: March 23, 2012

WINSTON & STRAWN LLP

By: /s/ - Nicholas Short
David S. Bloch
Nicholas W. Short

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