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 14 and CRUNCHPAD, INC.

15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA

17 Winston & Strawn LLP
 18 101 California Street
 19 San Francisco, CA 94111-5894

20 **INTERSERVE, INC., dba TECHCRUNCH,)**
 21 **a Delaware corporation, and CRUNCHPAD,)**
 22 **INC., a Delaware corporation,)**
 23 **)**
 24 Plaintiffs, **)**
 25 **)**
 26 vs. **)**
 27 **)**
 28 **FUSION GARAGE PTE. LTD., a Singapore)**
 29 **company,)**
 30 **)**
 31 Defendant. **)**
 32 **)**
 33 **)**

34 **Case No. CV-09-5812 RS (PVT)**

35 **PLAINTIFFS' MOTION (1) TO COMPEL**
 36 **DEFENDANT'S PRODUCTION AND (2)**
 37 **TO ENFORCE SUBPOENA TO**
 38 **MCGRATH POWER**

39 Date: May 11, 2010
 40 Time: 10:00 A.M.
 41 Place: Courtroom 5, 4th Floor, San Jose
 42 (motion to shorten time pending)

1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 Plaintiffs will present *Plaintiffs' Motion to Compel Defendant's Production and Enforce*
4 *Subpoena to McGrath Power* on May 11, 2010 at 10:00 A.M., or on April 7, 2010 or other date and
5 time this week convenient to the Court (as requested in Plaintiffs' concurrently-filed cross-motion to
6 shorten time before the Honorable Patricia V. Trumbull, presiding in Courtroom 5, 4th Floor, of the
7 above-named court located at 280 South First Street, San Jose, California 95113.

8 To support their motion, Plaintiffs rely on the following Memorandum of Points and
9 Authorities, the declaration of David S. Bloch, Proposed Order, and other pleadings and papers filed
10 in the case, the proceedings at oral argument, and any other matter that the Court deems appropriate.

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1 **STATEMENT OF THE ISSUES**

- 2 1. Whether the Court should compel Defendant to produce documents given the pending
3 preliminary injunction motion, upcoming deposition of Defendant’s principal, its failure to
4 produce more than 50 pages to date, and given Plaintiffs’ own production and planned
5 productions.
6 2. Whether the Court should compel McGrath Power to produce documents responsive to
7 TechCrunch’s subpoena.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 In this case, TechCrunch and Defendant Fusion Garage collaborated for more than a year to
10 produce a cheap tablet computer, the CrunchPad. In November 2009, Fusion Garage aborted the
11 partnership and usurped the project to manufacture, market, and sell the CrunchPad, using the name
12 “JooJoo.” TechCrunch filed suit in early December (Dkt. No. 1) and promptly moved for expedited
13 discovery to support a contemplated preliminary injunction motion to impound Fusion Garage’s
14 revenues from the CrunchPad/JooJoo device. (Dkt. No. 11.) The Court granted TechCrunch’s
15 motion on January 7, 2010, noting that “[e]xpedited discovery will allow plaintiff to determine
16 whether to seek an early injunction.” (Dkt. No. 19 at 4.) *Fusion Garage has stonewalled ever since,*
17 *and Plaintiffs have received virtually no documents.*

18 While Fusion Garage may have been first to file its motion to compel (Dkt. No. 47), it is
19 Fusion Garage’s own failure to produce documents that requires Court intervention. Despite the
20 Court’s order granting expedited discovery, Fusion Garage has produced a grand total of 50 pages of
21 documents to date.¹ (Declaration of David Bloch in Support of Motion to Compel (“Bloch Decl.”) ¶
22 2.) Further, third-party PR agency McGrath Power--also represented by Fusion Garage’s counsel--
23 has failed to produce *any* documents despite TechCrunch’s service of a Rule 45 subpoena for
24 documents on January 7, 2010, almost three months ago, and despite an express promise to produce
25 document once a protective order was entered. *Id.* ¶ 3 & Exh. C (“McGrath will be making a
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27 ¹ For its part, TechCrunch already has produced nearly 400 pages of highly-relevant documents, will
28 be producing the rest of Mr. Arrington’s documents (several thousand pages) on Tuesday, April 6,
and expects to process the remaining production in rolling fashion on a custodian-by-custodian basis.

1 production. But we should meet and confer about the objections. Among other things, it doesn't
2 want to produce anything without a protective order.”). The Court entered the stipulated protective
3 order on March 11, Dkt. No. 35, *yet McGrath Power still has produced nothing*.

4 TechCrunch asks the Court to order production, by Friday, April 9, 2010 of all agreed-upon
5 documents in the possession, custody, or control of the company; its principal, Chandrasekar
6 Rathakrishnan; and McGrath Power.

7 TechCrunch urgently needs these documents. Because Fusion Garage is now collecting
8 revenues flowing from its breach of fiduciary duty and other violations, and is in a position to
9 dissipate its illegal gains, the need for an order imposing a constructive trust is compelling.
10 TechCrunch was forced to file its motion for a preliminary injunction without benefit of Fusion
11 Garage’s documents. (Dkt. No. 26.) In support of that motion (and also to oppose Fusion Garage’s
12 motion to dismiss, (Dkt. No. 20), TechCrunch has noticed the deposition of Mr. Rathakrishnan for
13 April 14, 2010. (Bloch. Decl. ¶ 4.) Fusion Garage is in sole possession of the documents showing
14 why, how and with whose cooperation Fusion Garage decided to hijack the CrunchPad venture for
15 itself. What it did behind TechCrunch’s back to cheat TechCrunch and deceive the public is
16 available only in discovery from Fusion Garage, which makes TechCrunch’s need for documents
17 even more pressing than Defendant’s.

18 The requests for production for which Fusion Garage has agreed to produce documents² all
19 seek highly relevant documents concerning the parties’ relationship and Fusion Garage’s
20 exploitation of the CrunchPad venture for its own gain. These issues directly relate to TechCrunch’s
21 claims.

22 ***The Parties’ Relationship.*** Requests 1-3 seek documents concerning and communications
23 with or about TechCrunch and its key personnel. Request 6-8 seek documents sufficient to identify

24 _____
25 ² Fusion Garage agreed to produce documents responsive to several requests for production in its
26 written responses that it served on February 5, 2010. (See Bloch Decl. ¶ 2 & Exh. A.) Fusion
27 Garage also agreed to supplement its written responses to agree to produce documents responsive to
28 the following requests during conferences of counsel on March 18 and March 23, 2010: RFPs 2-3, 7-
8, 21-22 (for now, public marketing materials, pending ruling on “trade secret” protective order
motion), 25 (pending ruling, documents constituting or concerning communications with Pegatron
not containing trade secrets) 26-27, 29, 30-31, 34, 36, 39, and 41. *Id.* ¶ 2.

1 Fusion Garage personnel and those people who worked on the CrunchPad or JooJoo tablet
2 computers at issue in the case. Requests 9-11 seek documents concerning Fusion Garage
3 complaints, if any, that TechCrunch was not providing sufficient resources to Fusion Garage and
4 concerning TechCrunch's promises, if any, to Fusion Garage and fulfillment of them. Requests 26-
5 27 seek documents concerning the failed merger between Fusion Garage and CrunchPad, Inc.
6 Request 41 seeks drafts and internal Fusion Garage communications leading up to the November 17,
7 2009 email that signaled the end of the joint venture.

8 ***Fusion Garage's Exploits Related to the CrunchPad and JooJoo.*** Request 29 seeks
9 documents concerning communications with Fusion Garage creditors that discuss or refer to the
10 CrunchPad, JooJoo, and similar relevant topics. Requests 30-31 seek documents concerning
11 communications with highly-involved third parties PayPal (processes payments for Fusion Garage)
12 and McGrath Power (Fusion Garage's PR firm). Request 34 seeks documents concerning contracts,
13 agreements, or understandings concerning the CrunchPad or the project to develop it. Request 36
14 seeks information about sales and order of the JooJoo. Request 39 seeks documents concerning the
15 selection of the JooJoo brand name.

16 Pending a ruling on its "trade secret" protective order motion, Fusion Garage agreed to
17 produce public marketing materials for the CrunchPad and JooJoo in response to Requests 21-22.
18 Similarly, for Request 25, Fusion Garage agreed to produce documents not containing its trade
19 secrets that were communications with manufacturer Pegatron.

20 There is no dispute over the relevance or burden of these requests. Fusion Garage has
21 already agreed to produce responsive documents. It simply refused to do so in a timely fashion.

22 Similarly, Fusion Garage's PR firm, McGrath Power, through Fusion Garage's counsel,
23 agreed to produce documents that TechCrunch sought by subpoena once the Court entered a
24 protective order. The Court has done so. The subpoena seeks just three categories of documents:
25 those concerning Fusion Garage and its personnel from late 2008 to the present, those concerning
26 TechCrunch and the CrunchPad project, and those concerning publicity, marketing, and
27 communications about Fusion Garage's tablet computer. (See Bloch Decl. ¶ 3 & Exh. B.) McGrath
28 has produced not a single document to date.

1 One, but only one, of Fusion Garage’s excuses to avoid producing any additional materials is
2 Fusion Garage’s dilatory motion for protective order – a motion in which Fusion Garage seeks to
3 avoid producing so-called “trade secret” information despite the facts that there is a comprehensive
4 stipulated protective order in place and there are no trade secret causes of action that would require a
5 staggered approach to discovery. The Court took the matter under submission on March 17. (Dkt.
6 No. 36.) Fusion Garage’s motion for protective order is dilatory, but even aside from that issue
7 Fusion Garage is withholding large number of documents that the motion does not implicate. Fusion
8 Garage has no basis whatsoever for failing to produce these documents at once.

9 In any case, the Court should order production of all documents responsive to the requests for
10 production that Fusion Garage has erroneously termed “trade secret” requests. Fusion Garage raised
11 no other objection to responding to these requests in its protective order motion other than its “trade
12 secrets” argument, and production is now proper, overdue, and necessary. These requests, Nos. 4-5,
13 12-25, 32-33, 35, 37-38, and 43-46, seek documents concerning Fusion Garage’s work on a tablet
14 computer before and after its venture with TechCrunch and key design documents for the CrunchPad
15 and JooJoo. These documents are relevant and Fusion Garage must produce them at once.

16 For the sake of the upcoming preliminary injunction motion, and TechCrunch’s reply
17 deadline of April 22, 2010, as well the April 14, 2010 deposition of Fusion Garage’s principal, the
18 Court should order Fusion Garage’s immediate production of documents and grant this motion.

19 Dated: April 5, 2010

WINSTON & STRAWN LLP

21 By: /s/
22 Andrew P. Bridges
23 David S. Bloch
24 Matthew A. Scherb

Attorneys for Plaintiffs

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