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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

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

CASE NO. C 09-cv-5812 RS (PVT)
**FUSION GARAGE'S OPPOSITION TO
 PLAINTIFFS' MOTION TO COMPEL**
 Date: April 12, 2010
 Time: 2:00 p.m.
 Judge: Hon. Patricia Trumbull

1 *Preliminary Statement*

2 Plaintiffs' Motion to Compel makes no sense. Plaintiffs seek to compel documents that are the
3 subject of a Motion for a Protective Order that Defendant Fusion Garage PTE Ltd. ("Fusion Garage")
4 filed. That protective order motion remains under submission and Plaintiffs are seeking to subvert the
5 Court's consideration of it by filing this motion to compel. Moreover, given that the protective order
6 motion is pending, the parties "tabled" discussions regarding many of Plaintiffs' document requests
7 during meet and confer discussions. Declaration of Patrick C. Doolittle, Ex. A. Plaintiffs also contend
8 that the issues raised in Fusion Garage's protective order motion are the only objections Fusion Garage
9 has raised, but a cursory read of Fusion Garage's written responses reveal that Plaintiff's contention is
10 wrong. Fusion Garage has asserted several objections to many of the requests at issue. Plaintiffs' motion
11 to compel does not even address these objections. Plaintiffs' motion to compel is premature at best.

12 Plaintiffs also claim that Fusion Garage should immediately produce all documents that it has
13 agreed to produce, but the urgency underlying plaintiffs' position is entirely inconsistent with their
14 litigation conduct to date. Plaintiffs (i) sought discovery prior to the Rule 26(f) Conference, then turned
15 around and stonewalled Fusion Garage in discovery; (ii) already filed a motion for a preliminary
16 injunction, so apparently do not believe they need discovery for that motion; (iii) objected to the topics in
17 a 30(b)(6) deposition notice that Fusion Garage served; (iv) objected to the deposition subpoena of a
18 third-party witness, Ron Conway, and then cancelled the deposition. Plaintiffs cannot claim urgency in
19 discovery while simultaneously throwing up roadblocks in discovery.

20 Plaintiffs argue that Fusion Garage has produced only 50 pages of documents and demand
21 production "of all agreed-upon documents" by April 9, 2010. (Mot. at 3). But the assertion that Fusion
22 Garage has produced only 50 pages is no longer accurate, as Fusion Garage produced an additional 900
23 pages of documents just this week. Fusion Garage is continuing to process and produce additional
24 documents (not affected by the pending protective order motion) as quickly as possible, and there is no
25 justification for Plaintiffs' insistence that Fusion Garage produce *all* agreed-upon documents by the
26 arbitrary date of April 9, 2010.

27 Finally, Plaintiffs have filed for a preliminary injunction that seeks the extraordinary remedy of
28 impounding Fusion Garage's revenues in a Court-supervised account. Plaintiffs are, in effect, trying to

1 strangle Fusion Garage's business even though they claim to be partners with Fusion Garage. The
2 ostensible reason for Plaintiffs' request is their contention that Fusion Garage will dissipate its revenues.
3 It is untenable for Plaintiffs to claim that Fusion Garage will dissipate its revenues while engaging in
4 expensive motion practice and demanding that Fusion Garage produce documents on an expedited basis,
5 which makes discovery more expensive.

6 Plaintiffs filed this lawsuit for an improper purpose. They alleged claims that have no basis.
7 They are engaging in public relations campaign through their own web blog to tarnish Fusion Garage.
8 They have filed a PI motion to strangle Fusion Garage. They have now filed a motion to compel that
9 was unnecessary and unwarranted. The Court should not countenance Plaintiffs' strategy. It should deny
10 the motion to compel.

11 *Facts*

12 **A. Background**

13 Plaintiff Interserve, Inc. dba TechCrunch ("TechCrunch") is an Internet "blog" founded by
14 blogger Michael Arrington. Mr. Arrington formed another company, Plaintiff CrunchPad, Inc.
15 ("CP, Inc.") CP, Inc. to acquire Fusion Garage. The parties were never able to come to terms on an
16 acquisition and never signed a deal. Spurned and embarrassed that they have no product and
17 could not consummate an acquisition, TechCrunch and Mr. Arrington filed this lawsuit to disrupt
18 Fusion Garage's introduction of its product, the JooJoo, to the market. Plaintiffs have
19 simultaneously engaged in a public relations campaign through the TechCrunch blog to derail
20 Fusion Garage's business. Plaintiffs are focused on systematically publishing information about
21 this lawsuit and Fusion Garage to try to tarnish and embarrass Fusion Garage and run it out of
22 business.

23 Plaintiffs allege that Mr. Arrington posted on the Internet a "challenge to himself and the
24 world" in July 2008 to develop a web tablet. TechCrunch now claims that it owns the ethereal
25 "ideas" related to the web tablet. In fact, TechCrunch and Arrington made no contribution to
26 Fusion Garage's product. They contributed no technology to Fusion Garage's product. Moreover,
27 TechCrunch has no competing product. In discovery, TechCrunch has disavowed any intellectual
28 property infringement claim.

1 Plaintiffs allege that the parties were partners or joint venturers in connection with
2 developing a web tablet product. However, Plaintiffs do not allege the existence of any
3 partnership agreement, joint venture agreement, or any contract between the parties. In acquisition
4 discussions, Plaintiffs proposed a Letter of Intent containing a “no shop” provision, meaning that
5 Fusion Garage was free to shop itself to others if the parties did not consummate an acquisition
6 within 60 days. Such a provision is entirely inconsistent with Plaintiffs’ claim that they were
7 partners with Fusion Garage.

8 Nor have Plaintiffs explained what the terms of the supposed partnership were. Mr.
9 Arrington has filed a declaration in support of preliminary injunction motion in which he claims
10 the parties agreed to bear their own losses and expenses if the project was "not successful," but
11 would share the profits if the project was successful. Declaration of Michael Arrington in Support
12 of Motion for Preliminary Injunction (Dkt. No. 26) ¶ 31. Accordingly, Plaintiffs' position is that
13 there was a partnership if there was an upside to TechCrunch, but no partnership if there was a
14 downside to TechCrunch. Moreover, Mr. Arrington apparently claims he had the right to
15 terminate the supposed partnership at any time. The damages Plaintiffs seek are also inconsistent
16 with their partnership allegations: they claim they are entitled to Fusion Garage's profits while
17 claiming the parties are partners. There was no partnership.

18 Given the lack of any legal relationship between the parties, Plaintiffs have asserted claims
19 based on vague and non-specific allegations, including: "misappropriation of business ideas," false
20 advertising under the Lanham Act, breach of fiduciary duty, fraud, and violations of California
21 Business & Professional Code §§ 17200 and 17500. These claims are baseless and Fusion Garage
22 has moved to dismiss all of them.

23 **B. The Court’s Order on Expedited Discovery**

24 On December 28, 2009, Plaintiffs filed a motion to allow discovery before the Rule 26(f)
25 conference. (Dkt. 11). In support of this motion, Plaintiffs argued that they needed expedited
26 discovery from Fusion Garage in order to determine whether to seek a preliminary injunction
27 imposing a constructive trust on the JooJoo’s revenues. (*Id.* at 4-5). The Court granted the motion
28

1 on January 7, 2010, concluding that “[e]xpedited discovery will allow plaintiff to determine
2 whether to seek an early injunction.” (Dkt. 19 at 4).

3 **C. The Preliminary Injunction Motion**

4 Plaintiffs served requests for production on Fusion Garage in early January, 2010. Fusion
5 Garage served written objections and responses on February 5, 2010, agreeing to produce
6 documents in response to certain requests and objecting to others. On February 22, however,
7 before Fusion Garage had produced more than a handful of documents, Plaintiffs filed their
8 Motion for Preliminary Injunction (“PI Motion”). As they had previously threatened to do,
9 Plaintiffs’ PI Motion sought to impound Fusion Garage’s revenues in a Court-controlled account.
10 The PI Motion is presently set for hearing on May 6, 2010.

11 **D. Fusion Garage’s Motion for Protective Order**

12 Meanwhile, on February 5, 2010, Fusion Garage filed a motion for protective order on the
13 ground that many of Plaintiffs’ requests for production targeted Fusion Garage’s source code,
14 confidential technical documents about Fusion Garage’s product, the JooJoo, or other documents
15 seeking Fusion Garage’s trade secrets and proprietary information. (Dkt. 23). Fusion Garage
16 argued that it should not be required to produce these categories of documents until Plaintiffs
17 identify their trade secrets, given that Plaintiffs’ Complaint is simply a stalking horse for a trade
18 secrets claim. (*Id.* at 1, 8-9). The Court heard this motion on March 16, 2010 and has the motion
19 under submission.

20 *Argument*

21 **I. THE COURT SHOULD DENY PLAINTIFFS’ MOTION AS TO THE**
22 **DOCUMENTS THAT ARE SUBJECT TO FUSION GARAGE’S PENDING**
23 **MOTION FOR PROTECTIVE ORDER**

24 Plaintiffs’ Motion acknowledges that Fusion Garage has filed a motion for protective order
25 to protect its trade secrets and similar confidential technical documents from discovery until
26 Plaintiffs articulate exactly what they contend Fusion Garage misappropriated. (Mot. at 5).
27 Remarkably, however, Plaintiffs’ Motion goes on to say that Fusion Garage must immediately
28 produce these documents *even though the Court has not yet ruled on the motion for protective*
order. See id. (“In any case, the Court should order production of all documents responsive to the

1 requests for production that Fusion Garage has erroneously termed ‘trade secret’ requests. Fusion
2 Garage raised no objection to responding to these requests in its protective order motion other than
3 its ‘trade secrets’ argument, and production is now proper, overdue, and necessary.’’)

4 Plaintiffs cannot seek to evade Fusion Garage’s motion for protective order by demanding
5 production of documents covered by that still-pending motion. They also cannot ignore the other
6 objections that Fusion Garage has asserted. Accordingly, Plaintiffs’ Motion to Compel should be
7 denied as to all categories of documents that are subject to Fusion Garage’s motion for protective
8 order.

9 **II. THE COURT SHOULD DENY PLAINTIFFS’ MOTION TO COMPEL FUSION**
10 **GARAGE TO PRODUCE DOCUMENTS IMMEDIATELY**

11 Fusion Garage did agree to produce documents for certain of Plaintiffs’ Requests that did
12 not implicate Fusion Garage’s trade secrets or other confidential technical information. The
13 Motion seeks to compel production of *all* these “agreed-upon documents” by the arbitrary date of
14 April 9, 2010. Mot. at 3. The Court should deny this request.

15 There is no basis for this relief. Fusion Garage has been diligent in collecting, reviewing,
16 and producing documents, as evidenced by the fact that it produced over 900 pages of responsive
17 documents just this week. Fusion Garage’s demonstrated willingness to produce documents in
18 accordance with its discovery obligations means that there is no reason or need for the Court to
19 *compel* production.

20 Similarly, there is no logic to Plaintiffs’ demand for all agreed-upon documents by the
21 arbitrary date of April 9, 2010. After all, Plaintiffs filed their PI Motion before Fusion Garage had
22 a chance to produce more than a handful of documents, so Plaintiffs presumably felt that they
23 could prosecute and win the PI Motion without waiting for Fusion Garage’s documents. As
24 explained above, Plaintiffs’ position that Fusion Garage must produce documents immediately is
25 completely at variance with Plaintiffs’ own stonewalling in discovery. Moreover, Plaintiffs’
26 suggestion that they need Fusion Garage’s documents “to oppose Fusion Garage’s motion to
27 dismiss” (*id.* at 3) makes no sense. A motion to dismiss tests the adequacy of the complaint, and a
28 court ordinarily “may look only at the face of the complaint to decide a motion to dismiss.” *Van*

1 *Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). Thus, Plaintiffs cannot
2 use Fusion Garage's internal documents to oppose the Motion to Dismiss, for the same reason that
3 Fusion Garage could not (and did not) use Plaintiffs' internal documents to support the Motion to
4 Dismiss.¹

5 Finally, Plaintiffs argue that they have noticed Mr. Rathakrishnan's deposition for April 14
6 (Mot. at 3), as if that gave them an unconditional right to all responsive documents by April 9,
7 2010. In fact, Fusion Garage is still working out the logistics of Mr. Rathakrishnan's schedule (he
8 is not presently available then) and never agreed to produce him by April 14. In any event, there
9 is no pressing reason why Plaintiffs need to depose Mr. Rathakrishnan by April 14 (or receive all
10 responsive documents in advance of this date), given that Plaintiffs apparently felt comfortable
11 moving for a preliminary injunction without taking Mr. Rathakrishnan's deposition.

12 In short, neither the PI Motion, nor the Motion to Dismiss, nor the as-yet-unscheduled
13 Rathakrishnan deposition justifies an order requiring Fusion Garage to produce all responsive
14 documents by the arbitrary date of April 9. Plaintiffs' Motion to compel production by this date
15 should be denied.

16 ***Conclusion***

17 For the foregoing reasons, Fusion Garage respectfully requests that the Court deny
18 Plaintiffs' Motion in its entirety.

19 DATED: April 9, 2010

20 QUINN EMANUEL URQUHART &
21 SULLIVAN, LLP

22 By /s/ Patrick Doolittle
23 Patrick C. Doolittle
24 Attorneys for Defendant Fusion Garage PTE Ltd.

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26 ¹ Fusion Garage did support its Motion to Dismiss by citing a few public TechCrunch blog
27 posts and arguing that these blog posts were judicially noticeable. (Dkt. 21 (request for judicial
28 notice)). But if Plaintiffs wish to oppose the Motion to Dismiss by citing public, judicially
noticeable documents, they obviously do not need Fusion Garage's document production to do so.