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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.

CASE NO. C 09-cv-5812 RS

**MOTION TO STRIKE PLAINTIFFS’
 EXTRINSIC SPEAKING EVIDENCE
 SUBMITTED IN SUPPORT OF THEIR
 OPPOSITION TO MOTION TO DISMISS**

Date: May 13, 2010

Time: 1:30 p.m.

Judge: Hon. Richard Seeborg

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1 **MOTION TO STRIKE**

2 Fusion Garage PTE Ltd. (“Fusion Garage”) hereby objects to, and moves to strike, the
3 Scherb Declaration and Exhibits A-J thereto that plaintiffs submitted in support of their
4 Opposition Brief to Fusion Garage’s Motion to Dismiss. Fusion Garage’s Motion to Dismiss was,
5 with one exception,¹ brought under Federal Rule of Civil Procedure 12(b)(6). A court generally
6 cannot consider material outside the complaint in adjudicating a motion to dismiss under Rule
7 12(b)(6). Specifically, a court cannot consider evidence that a plaintiff attaches to its 12(b)(6)
8 opposition papers. *See Schneider v. Cal. Dep’t of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir.
9 1998) (“In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the
10 complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a defendant’s
11 motion to dismiss”) (emphasis in original); 2 Moore’s Fed. Prac. § 12.34[2] (3d. ed. 2009) (“The
12 court may not, for example, take into account additional facts asserted in a memorandum opposing
13 the motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a)”).
14 However, a court may consider exhibits attached to the complaint as well as documents alleged in
15 the complaint, whose authenticity no party questions, but which are not physically attached to the
16 pleading. *Capcom Co., Ltd. v. MKR Group, Inc.* 2008 WL 4661479 at *3 (N.D. Cal. 2008)
17 (Seebog, J.).

18 Plaintiffs here rely on a set of extrinsic evidence to save their pleading. Their submission
19 is a key admission that the claims in their complaint fail (since they apparently believe that they
20 need speaking evidence to save such claims). Nevertheless, these documents were neither
21 attached to the complaint nor referenced in it. This submission was improper and plaintiffs
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25 ¹ The one exception involves Fusion Garage’s motion to dismiss plaintiffs’ Lanham Act
26 claim for lack of standing, which was brought in part under Fed. R. Civ. P. 12(b)(1). However,
27 plaintiffs have attempted to use the Scherb Declaration and Exhibits to support arguments that are
28 far removed from standing under the Lanham Act. For instance, plaintiffs have invoked this
evidence to support their fraud claim (Opp. Br. (Dkt. 81) at 15); the *merits* of their Lanham Act
claim (*id.* at 8); and have also peppered this evidence throughout their Introduction and Statement
of Facts. (*Id.* at 1-4).

1 nowhere provide a legal basis for the Court to consider the speaking evidence. The Court should
2 strike the evidence.

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DATED: May 3, 2010

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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