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9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**

Winston & Strawn LLP
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 San Francisco, CA 94111-5802

11 INTERSERVE, INC. dba TECHCRUNCH, a)
 12 Delaware corporation, and CRUNCHPAD,)
 13 INC., a Delaware corporation,)
 14 Plaintiffs,)
 15 vs.)
 16 FUSION GARAGE PTE. LTD., a Singapore)
 17 company,)
 18 Defendant.)
 19)
 20)
 21)
 22)
 23)
 24)
 25)
 26)
 27)
 28)

Case No. CV-09-5812 RS (PVT)
PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO STRIKE
 Date: May 13, 2010
 Time: 1:30 p.m.
 Place: Courtroom 3, 17th Floor.

1 Rather than confront the overwhelming evidence of its fraud, Fusion Garage is seeking to
2 distract the Court from it and, if possible, exclude it. But the “extrinsic evidence” that Fusion
3 Garage criticizes is properly before the Court. Moreover, that evidence serves only to validate (and,
4 indeed, prove) rather than supplement or supplant the allegations in Interserve’s and CrunchPad’s
5 Complaint. Fusion Garage’s motion to strike “plaintiff’s extrinsic evidence” has three independent
6 and fatal flaws, and the Court should deny the motion.

7 *First*, Fusion Garage did not move to dismiss only under Federal Rule of Civil Procedure 12
8 (b)(6). It also moved to dismiss for lack of jurisdiction under Rule 12 (b)(1). In doing so, Fusion
9 Garage attacked not merely the adequacy but also the truthfulness of the allegations in the complaint.
10 This, in turn, allows the Court to consider additional evidence outside the complaint’s four corners.
11 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (“In resolving a factual attack
12 on jurisdiction, the district court may review evidence beyond the complaint without converting the
13 motion to dismiss into a motion for summary judgment”). Fusion Garage also moved for a more
14 definite statement under Rule 12 (e) and moved to strike under Rule 12 (f). These are also
15 evidentiary motions that allow the Court to consider evidence beyond the complaint itself. *See* Fed.
16 R. Civ. Proc. 12 (d) (courts should exclude additional matter outside the pleadings only in the Rule
17 12 (b)(6) or Rule 12 (c) context). Because Fusion Garage did not restrict its motion to Rule 12
18 (b)(6), Interserve and CrunchPad were well within their rights to submit evidence in support of their
19 opposition papers. The documents prove that the complaint’s allegations of fraud, false advertising,
20 unfair competition, and misappropriation of business ideas are true, thus defeating Fusion Garage’s
21 motions under Rules 12 (b)(1), 12 (e), and 12 (f). The mere fact that Fusion Garage *also* has filed a
22 motion under Rule 12 (b)(6) does not restrict evidence rebutting Fusion Garage’s arguments under
23 other portions of Rule 12. Fusion Garage apparently acknowledged this but buried its admission in a
24 footnote. *See* Motion to Strike, Dkt. No. 103, at 1 n. 1.

25 *Second*, no rule of federal evidence or procedure states that a party filing an opposition to a
26 motion—including a motion to dismiss under Rule 12(b)(6)—cannot submit evidence in support of
27 its opposition. The cases and treatise cited by Fusion Garage say only that a plaintiff cannot use its
28 opposition memorandum to allege new facts or otherwise “amend” the allegations in the complaint.

1 See *Schneider v. Cal. Dep't of Corrections*, 151 F.3d 1194, 1197, n.1 (9th Cir. 1998) (discussing “
2 ‘new’ allegations”). Interserve and CrunchPad have not sought to change the allegations or allege
3 new critical facts; their original complaint more than satisfied their notice pleading obligations.
4 Instead, they have submitted evidence—which was not manifest when they sued Fusion Garage—
5 *supporting and confirming their original allegations*. The Court is free to consider that evidence to
6 determine which inferences can reasonably be drawn from the allegations in the Complaint. But the
7 Complaint does not rise and fall on, and does not take a different turn based on, these Fusion Garage
8 materials. Thus the Court need not strike the evidence even if the Court entirely disregards it.

9 *Third*, the documents reveal the disingenuous nature of Fusion Garage’s Rule 12 motions.
10 There is no doubt that Fusion Garage understands the claims against it under Rules 8 and 9. It is
11 beyond controversy that Interserve and CrunchPad have “enough facts to state a claim for relief that
12 is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). Indeed, with these
13 documents, Fusion Garage will struggle in vain to deny the Complaint’s factual allegations. It is
14 small wonder, then, that Fusion Garage attempts, also in vain, to attack the pleadings instead.
15 Granting Fusion Garage’s motion to dismiss and for a more definite statement would be pointless,
16 given the wealth of evidence supporting Interserve’s and CrunchPad’s claims and Fusion Garage’s
17 awareness of that evidence. *See also* Reply to Opposition to Motion for Preliminary Injunction, Dkt.
18 No. 109 (describing additional evidence of Fusion Garage’s fraud and perfidy).

19 For these reasons, the Court should deny Defendant’s motion to strike the Declaration of
20 Matthew Scherb in Opposition to Fusion Garage’s Motion to Dismiss the Complaint, and its exhibits
21 A through J.

22 Respectfully submitted,

23 Dated: May 10, 2010.

WINSTON & STRAWN LLP

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28 Matthew A. Scherb
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