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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISCO DIVISION**

TECHCRUNCH, INC. (f/k/a INTERSERVE, INC.), and CRUNCHPAD, INC.,

Plaintiffs,

vs.

FUSION GARAGE PTE. LTD., a Singapore Company,

Defendant.

**Case No. C 09-cv-05812 RS (PSG)**

**PLAINTIFFS' MOTION TO STRIKE FUSION GARAGE'S AMENDED ANSWER**

**Fed. R. Civ. P. 12(f)**

Date: June 9, 2011
Time: 1:30 P.M.
Place: Courtroom 3, 17th Floor

Hon. Richard Seeborg

Winston & Strawn LLP
101 California Street
San Francisco, CA 94111-5802

**NOTICE OF MOTION**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Plaintiffs will present this Motion to Strike Fusion Garage's Amended Answer before the Honorable Richard Seeborg on June 9, 2011 at 1:30 P.M., or at any other date and time thereafter convenient to the Court, in Courtroom 3, 17th Floor, of this Court located at 450 Golden Gate Avenue, San Francisco, CA 94102.

Plaintiffs rely on the following Memorandum of Points and Authorities, the included Proposed Order, other pleadings and papers filed in the case, the proceedings at oral argument, and any other matter that the Court deems appropriate.

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. BACKGROUND

On March 1, 2011, Defendant filed an answer and counterclaim to Plaintiffs' amended complaint. Plaintiffs moved to strike "colorful" language from the answer's 11-page "prefatory statement" and moved to dismiss the counterclaim. On March 28, 2011, the Court, on its own motion, struck the entire prefatory statement from the answer. The Court did not grant leave to replead the answer or to amend it. (Dkt. #204.) At the March 31, 2011 case management conference, Defendant asked if the Court would alter its ruling to allow Defendant to keep some portions of its stricken prefatory statement, but the Court declined. The Court's March 28, 2011 ruling offered Defendant a choice of either filing a short opposition to the motion to dismiss the counterclaim, if Defendant could oppose in good faith, or "dismiss[ing] the counterclaim without prejudice." *Id.* Defendant did not oppose the motion and instead, on April 14, 2011, filed an amended answer that omitted the counterclaim and the stricken prefatory statement. (Dkt. #207.) Defendant did not seek leave of court to file the amended answer.

The amended answer contains numerous changes to the "answer" portion of the document apart from dropping the prefatory statement and counterclaim. Most notably, Defendant copied chunks of text from its previously struck "prefatory statement" directly into revised responses to Plaintiffs' numbered allegations of the amended complaint. (*See, e.g.*, Declaration of Matthew Scherb, Exh. A (a redline showing the changes in the amended complaint) ¶¶ 20, 22, 27, 42, 44, 63.)

Plaintiffs move to strike Defendant's amended answer on the basis that it is both untimely and improper.

## II. STATEMENT OF THE ISSUE

Defendant's amended answer is both untimely and improper and should be struck.

## III. LEGAL ARGUMENT

The Court may strike, under Rule 12(f), pleadings that are untimely. *Great Socialist People's Libyan Arab Jamahiriya v. Miski*, 683 F. Supp. 2d 1, 6 (D.D.C. 2010) (striking an amended answer that was not timely under Rule 15, which enumerates the proper ways and times for filing amended pleadings). Further, the Court may strike "from any pleading any insufficient defense or any

redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f); *Metropolitan Life Ins. Co. v. Przybil*, No. 02-C-1940, 2002 WL 31641591, at*1-2 (N.D. Ill. Nov. 21, 2002) (striking additional allegations that do not admit or deny allegations). The Court may strike a pleading on its own or upon a party's motion. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005); *Pigford v. Veneman*, 225 F.R.D. 54, 58 (D.D.C. 2005).

Rule 15 allows a party to amend its pleading as a matter of course within "21 days after serving it." Fed. R. Civ. P. 15(a)(1)(A). If a pleading requires a responsive pleading, a different rule applies. *Id.* R. 15(A)(1)(B). An answer, however, requires no response and falls squarely within the 21-day rule. *Miski*, 683 F. Supp. 2d at 6. This is true even if the answer, as here, initially contained a counterclaim. Courts treat the answer and counterclaim separately when determining whether an amendment to one or the other is timely and proper. *Yale University v. Konowaloff,* No. 09-466, 2010 WL 3925262, at *1 (D.Conn. Sep. 29, 2010) ("The addition of a counterclaim to the scenario does not change the analysis."). To hold otherwise would "create the anomalous result that parties without a counterclaim would waive their defenses by failing to amend their answers in 20 days, while parties with a counterclaim could freely preserve defenses that they have not pursued for months" while the parties and court sort out Rule 12 motions related to the counterclaim. *Id.*

Here, Defendant served its answer on March 1, 2011 and waited until April 14, 2011, well beyond the 21-day limit, to amend its answer. Defendant did not seek leave of the Court. Moreover, the Defendant through its untimely amendments has sought to make an end-run around the Court's earlier ruling by reinserting language the Court had struck. The Court had already refused to reconsider its ruling despite an entreaty by Defendant's counsel at the status conference.

For these reasons, Plaintiffs ask the Court to strike Defendant's untimely and improper amended answer.

Dated: April 29, 2011

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