****E-filed 5/2/11***

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

INTERSERVE, INC., et al.,

Plaintiffs,

v.

FUSION GARAGE PTE. LTD,

Defendant.

_____/

No. C 09-5812 RS

ORDER DENYING MOTION TO STRIKE AMENDED ANSWER

Defendant previously filed an answer and declaratory relief counterclaim that began with a ten page "prefatory statement" describing the circumstances that led to this litigation from defendant's point of view. Plaintiff filed a noticed motion to strike portions of the prefatory statement and to dismiss the counterclaim. Without waiting for opposition, on March 28, 2011, the Court issued an order striking the prefatory statement in its entirety on its own motion, both because such a statement is not authorized by the Federal Rules of Civil Procedure and because it included unnecessarily inflammatory language. The March 28th order also gave defendant the option of either opposing the motion to dismiss the counterclaim or dismissing it without prejudice. The order specifically noted that it was issued in an effort, "[t]o minimize the degree to which party and court resources are further expended on matters collateral to resolution of the actual disputes between them."

In response, defendant filed an amended answer that omits the prefatory statement and the counterclaim, but which makes certain changes to the text of the answer, including incorporating limited portions of the material that originally appeared in the prefatory statement. Plaintiff now moves to strike the amended answer on grounds that defendant was not granted leave to amend, and has included material that was ordered stricken. Pursuant to Civil Local Rule 7-1(b), this motion is suitable for disposition without oral argument, and the hearing set for June 9, 2011 is vacated.[1]

In preparing its amended answer, defendant went beyond the letter of the March 28th order to make efforts to comply with its spirit as well. For example, although the order only expressly mentioned "colorful language" in the prefatory language as objectionable and did not strike any portion of the body of the answer, defendant made several edits to the answer that appear to have been designed to delete inflammatory wording or replace it with more neutral allegations, and otherwise to present a more measured tone. See e.g. ¶ 4 (deleting the modifiers "cherry-picked," "completely," and "very real"); ¶ 81 (substituting the word "temper" for the phrase, "propensity to 'go all nuclear'"). While room for disagreement may still exist as to whether defendant has eliminated all extraneous rhetoric, these modifications demonstrate a responsiveness to the concerns identified in the March 28 order that is commendable.

Plaintiff's objection that the amendments to the answer include material from the prefatory statement that was ordered stricken is not well taken. As noted, the basis of the order to strike was both that some of the language in the prefatory statement was intemperate, and that the rules do not provide for inclusion of such a statement, regardless of its language. Defendant did not retain the intemperate language, and indeed removed or minimized other verbiage in the answer that was subject to similar criticism. It may be true that the rules also do not contemplate affirmative allegations like those made by defendant even within the body of an answer, but as amended, the answer's use of that device is not so egregious as to warrant a motion to strike. Furthermore, while plaintiff may be technically correct that defendant was not expressly given leave to amend its answer, it was not a wholly-unreasonable decision for defendant to choose that vehicle for

[1] In light of the disposition of this order, and the interest in preserving resources, it is also appropriate to decide the motion without waiting for opposition to be filed.

exercising its option under the March 28 order to dismiss the counterclaim, and the amendments are not otherwise objectionable.

More fundamentally, plaintiff has failed to appreciate the additional message of the March 28 order that it serves no legitimate purpose to expend client resources and the taxpayer-funded resources of the court engaging in disputes over technical or collateral matters that cannot possibly facilitate the eventual resolution of this litigation or any portion of it. The motion to strike is denied.

IT IS SO ORDERED.

Dated: 5/2/11

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE