

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

DMITRIY SHIROKOV, on behalf of himself	)	
and all others similarly situated,	)	
	)	
Plaintiff,	)	<b>CLASS ACTION</b>
	)	
v.	)	<b>JURY TRIAL DEMANDED</b>
	)	
DUNLAP, GRUBB & WEAVER PLLC; US	)	Civ. A. No. 1:10-cv-12043-GAO
COPYRIGHT GROUP; THOMAS DUNLAP;	)	
NICHOLAS KURTZ; GUARDALEY, LIMITED;	)	
and ACHTE/NEUNTE Boll Kino	)	
Beteiligungs Gmbh & Co KG,	)	
	)	
Defendants.	)	
	)	

**PLAINTIFF’S RESPONSE IN OPPOSITION TO DEFENDANT  
GUARDALEY LIMITED’S MOTION TO STRIKE**

Plaintiff Dmitriy Shirokov (“Plaintiff”) hereby submits this response in opposition to Defendant Guardaley Limited’s (“Guardaley”) Motion to Strike (the “Motion to Strike”; Dkt. No. 58). For the reasons given in the following memorandum, the Motion to Strike cites the wrong legal standard, fails under the correct standard, and should be denied.

**INTRODUCTION**

Plaintiff filed his operative Second Amended Class Action Complaint and Jury Demand (“SAC”; Dkt. No. 26) on March 18, 2011. On May 18, 2011, Guardaley filed a motion to dismiss the SAC (Dkt. No. 42) “pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction; pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim; and pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.” *Id.* p. 1. In a memorandum of law purporting to support that motion to dismiss (Dkt. No. 44; “Motion to Dismiss”), Guardaley raised a variety of unproven factual arguments and characterizations to justify dismissal, ranging from claims that

Guardaley's role in the Copyright Scheme alleged in the Complaint was too limited to warrant liability (*id.* pp. 16 & 19) to assertions regarding the reliability of the data it provided to other Defendants that served as a cornerstone of the Scheme (*id.* pp. 9 and 16). Plaintiff filed a response to the Motion to Dismiss (Dkt. No. 56; "Opposition") on June 14, 2011, in part to counter Guardaley's unfounded characterizations through an extensive "Statement of Facts Specific to Guardaley" (*id.* pp. 5-9) and supporting exhibits.<sup>1</sup> By the Motion to Strike, Guardaley seeks to remove from the record the Opposition's facts section, exhibits, and related arguments, and exclude that material from the Court's consideration when ruling on the Motion to Dismiss. Guardaley filed its Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6), but its Motion to Strike (which relies on that Motion to Dismiss) cites only to Rule 12(b)(6) and the standard of review applicable to such motions. Oppositions to motions for dismissal under Rules 12(b)(1) and 12(b)(2) are proper sites for the Court's review of facts and evidence as presented by Plaintiff.

## **LEGAL STANDARD FOR REVIEW OF DOCUMENTS OUTSIDE THE COMPLAINT**

### **I. Motion to Dismiss for Lack of Subject Matter Jurisdiction Under Rule 12(b)(1)**

"In ruling on a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the district court must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff." *Aversa v. United States*, 99 F.3d 1200, 1209-10 (1st Cir. 1996). "Should the pleader allege facts from which jurisdiction may be inferred, the motion to dismiss must be denied." *Casey v. Lifespan Corp.*, 62 F. Supp. 2d

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<sup>1</sup> See, e.g., Opposition at p. 23:

Guardaley contends that Plaintiff "cannot assert any plausible theory of liability against Guardaley." MTD p. 16. Guardaley spoke too soon. As outlined in the Statement of Facts, above, Guardaley is directly implicated as a participant in the fraud and conspiracy alleged in the complaint, and has committed independent tortious misrepresentations above and beyond those described in the SAC. These independent acts of fraud constitute the underlying tort necessary to support a conspiracy claim. ...

471, 474 (D.R.I. 1999). When deciding whether to dismiss under Rule 12(b)(1), “[t]he Court is not restricted [] to examining only the pleadings but may review any evidence, including affidavits, to determine any disputed facts upon which the motion or the opposition to it is predicated.” *Id.*; *see also Aversa*, 99 F.3d at 1210 (“the court may consider whatever evidence has been submitted, such as the depositions and exhibits submitted in this case”); *Torres Vazquez v. Comm’l Union Ins. Co.*, 417 F. Supp. 2d 227, 236 (D.P.R. 2006) (“courts are not limited in their review to the mere allegations in the complaint”); *Halstead v. Motorcycle Safety Found., Inc.*, 71 F. Supp. 2d 464, 468 (E.D. Pa. 1999) (“any evidence may be reviewed”). Applying this broad power to review submitted materials does not call for conversion to a summary judgment motion. *Id.* “As the court is permitted to look beyond the pleadings on a Rule 12(b)(1) motion, the formality of converting the motion to dismiss to one for summary judgment need not be observed.” *Kolancian v. Snowden*, 532 F. Supp. 2d 260, 261-62 (D. Mass. 2008); *see also Espinosa v. DeVasto*, 818 F. Supp. 438, 440 (D. Mass. 1993); *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001) (distinguishing motions under Rules 12(b)(1) and 56); *Int’l Cement Aggregates, Inc. v. Antilles Cement Corp.*, 62 F. Supp. 2d 412 (D.P.R. 1999) (“the court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits ... This supplementation does not convert the motion into a Rule 56 summary judgment motion”) (quotations omitted). This is true even where defendant moves to dismiss under both 12(b)(1) and 12(b)(6):

As a general matter, trial courts should give Rule 12(b)(1) motions precedence.... The conversion principle does not apply in regard to such motions—and for good reason. The court, without conversion, may consider extrinsic materials and, to the extent it engages in jurisdictional factfinding, is free to test the truthfulness of the plaintiff’s allegations.

*Dynamic Image Techs., Inc. v. United States*, 221 F.3d 34, 37 (1st Cir. 2000) (citing *Northeast Erectors Ass'n of the BTEA v. Sec'y of Labor*, 62 F.3d 37, 39 (1st Cir. 1995)); accord *Deniz v. Mun. of Guayanabo*, 285 F.3d 142, 149-50 (1st Cir. 2002).

## II. Motion to Dismiss for Lack of Personal Jurisdiction Under Rule 12(b)(2)

Likewise, “consideration of materials outside the complaint is appropriate in ruling on a motion to dismiss for lack of personal jurisdiction” under Fed. R. Civ. P. 12(b)(2). *Callahan v. Harvest Bd. Int'l, Inc.*, 138 F. Supp. 2d 147, 152-53 (D. Mass. 2001). Courts reviewing such motions under the *prima facie* approach<sup>2</sup> “draw the facts from the pleadings and the parties’ supplementary filings, including affidavits, taking facts affirmatively alleged by plaintiff as true and construing disputed facts in the light most hospitable to plaintiff.” *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 203 (1st Cir. 1994). “Under this [*prima facie*] standard, the court will look to the facts alleged in the pleadings and the parties’ supplemental filings, including affidavits.” *W. Marine Products, Inc. v. Dolphinite, Inc.*, 2005 U.S. Dist. LEXIS 7489, \*4-5 (D. Mass. Mar. 23, 2005). “When it employs the *prima facie* standard, a district court does not act as a factfinder; to the contrary, it ascertains only whether the facts duly proffered, fully credited, support the exercise of personal jurisdiction.” *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 84 (1st Cir. 1997). See *Rosenthal v. MPC Computers, LLC*, 493 F. Supp. 2d 182, 186 (D. Mass. 2007) (reviewing motion to dismiss under 12(b)(2) and 12(b)(6), the court took facts “from the complaint and, for personal jurisdiction purposes, several other documents, including an affidavit”); *Val Leasing, Inc. v. Hutson*, 674 F. Supp. 53, 55 (D. Mass. 1987) (“when personal jurisdiction is challenged, a plaintiff must establish a ‘threshold’ showing of jurisdiction but no more. That is, through affidavits and other competent evidence, a plaintiff must make out a *prima facie* case for the existence of personal jurisdiction”) (citing *N. Am. Video Corp. v. Leon*, 480 F.

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<sup>2</sup> As Plaintiff has noted, “[t]he *prima facie* approach is appropriate, and Guardaley does not contend otherwise.” Opposition p. 11 (citing Motion to Dismiss p. 5).

Supp. 213, 215-16 (D. Mass. 1979)). When opposing a 12(b)(2) motion, “a plaintiff’s reliance on the bare allegations of the Complaint is not enough. ... The ‘plaintiff must go beyond the pleadings and make affirmative proof.’” *Noonan v. Winston Co.*, 902 F. Supp. 2d 298, 302 (D. Mass. 1995) (quoting *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992)). “The Court may consider pleadings, affidavits, and other evidentiary materials without converting the [12(b)(2)] motion to dismiss to a motion for summary judgment.” *Lex Computer & Mgmt. Corp. v. Eslinger & Pelton, PC*, 676 F. Supp. 399, 402 (D.N.H. 1987).<sup>3</sup> See also *Sigros v. Walt Disney World Co.*, 129 F. Supp. 2d 56, 70 (D. Mass. 2001) (not considering Rule 12(b)(6) motion to dismiss under a summary judgment standard but rather treating motion as seeking dismissal under Rule 12(b)(2), though defendants had submitted affidavits, where motion’s thrust was that the Court lacked personal jurisdiction).

### **III. Motion to Dismiss for Failure to State A Claim Under Rule 12(b)(6)**

Ordinarily, on a motion to dismiss for failure to state a claim under Rule 12(b)(6), “any consideration of documents not attached to the complaint, or not expressly incorporated therein, is forbidden, unless the proceeding is properly converted into one for summary judgment under Rule 56.” *Watterson v. Page*, 987 F.2d 1, 4 (1st Cir. 1993). “A Rule 12(b)(6) motion is decided solely on the pleadings while a Rule 56 motion may rely on additional outside evidence.” *Whiting v. Maiolini*, 921 F.2d 5, 6 (1st Cir. 1990).

“However, courts have made narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs’ claim; or for documents sufficiently referred to in the complaint.” *Watterson*, 987 F.2d at 4; see also *Alternative Energy, Inc. v. St. Paul Fire and Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001) (quoting *Watterson*). “[O]n a motion to dismiss a court may properly look beyond the complaint

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<sup>3</sup> *Accord Telford Aviation, Inc. v. Raycom Nat’l, Inc.*, 122 F. Supp. 2d 44, 45 n.1 (D. Me. 2000); *Rodriguez v. Dixie S. Indus., Inc.*, 113 F. Supp. 2d 242, 247 n.1 (D.P.R. 2000); *N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale*, 536 F. Supp. 2d 181, 186 (D.R.I. 2008).

to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment.” *Mack v. S. Bay Beer Distrib., Inc.*, 789 F.2d 1279, 1282 (9th Cir. 1986) (quoted by *Watterson*, 987 F.2d at 4). The Court may also consider any “other matters susceptible to judicial notice” without requiring conversion. *Giragosian v. Ryan*, 547 F.3d 59, 65 (1st Cir. 2008). The Court need not convert a 12(b)(6) motion to a summary judgment motion, though “matters outside the complaint are considered by the Court ... [where] *only the Plaintiffs have submitted additional materials.*” *Heinrich v. Sweet*, 49 F. Supp. 2d 27, 32 n. 5 (D. Mass. 1999) (emphasis added). Moreover, even when both parties have submitted materials beyond the complaint, it is premature to convert the 12(b)(6) motion when the record is not sufficiently developed. See *Dantone v. Bhaddi*, 570 F. Supp. 2d 167, 170 (D. Mass. July 15, 2008) (declining to treat motion to dismiss as one for summary judgment when discovery had barely begun, neither party had responded to the others’ materials nor filed a statement of undisputed facts, and defendant had not submitted, nor had plaintiff responded to, a detailed affidavit). The First Circuit has “disfavored conversion when (1) the motion comes quickly after the complaint was filed, (2) discovery is in its infancy and the nonmovant is limited in obtaining and submitting evidence to counter the motion, or (3) the nonmovant does not have reasonable notice that a conversion might occur.” *Rubert-Torres v. Hospital San Pablo, Inc.*, 205 F.3d 472, 475 (1st Cir. 2000) (comparing Rule 12(c)’s identical conversion provisions) (citing *Whiting*, 921 F.2d at 6).

#### **IV. Judicial Notice Under Fed. R. Evid. 201(b)**

Under Federal Rule of Evidence 201(b), the Court is entitled to take judicial notice of facts that are not subject to reasonable dispute in that they are “(1) generally known within the territorial jurisdiction of the district court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” A court may take judicial notice, whether requested or not, at any stage of the proceeding. Fed. R. Evid. 201(c); (f). “It is well-accepted that federal courts may take judicial notice of proceedings in other courts if those

proceedings have relevance to the matters at hand.” *Kowalski v. Gagne*, 914 F.2d 299, 305 (1st Cir. 1990) (quoting 5 J. Weinstein & M. Berger, *Weinstein’s Evidence* ¶ 902(4)[01], at 902-28 to 902-29 (1989) (“In many instances where full compliance with certification procedure is not shown, judicial notice may be taken, particularly of court documents.”)).

## ARGUMENT

### **I. The Motion to Strike Ignores the Legal Standards that Allow for the Court’s Review of Material Outside the Complaint on an Opposition to a Motion to Dismiss.**

Guardaley claimed both jurisdictional and substantive grounds for dismissal in its Motion to Dismiss.<sup>4</sup> However, Guardaley’s Motion to Strike treats Rule 12(b)(6) as if it alone dictates the review of documents that go beyond the pleading, failing to distinguish the standards for review applicable to motions for lack of jurisdiction under Rules 12(b)(1) and 12(b)(2). The Motion to Strike mentions neither those two Rules nor any case law pertinent to a motion to strike materials presented under those Rules.<sup>5</sup> Only with this blinkered outlook could Guardaley claim it to be a “fact” that the materials and argument Plaintiff presented are “entirely outside the scope of acceptable motion practice under Rule 12.” Motion to Strike p. 5.

Consideration of materials outside the complaint is appropriate in ruling on a motion under Rule 12(b)(1), *Aversa*, 99 F.3d at 1210 (“the court may consider whatever evidence has been submitted”) and under Rule 12(b)(2), *Callahan*, 138 F. Supp. 2d at 152-53. Indeed, a Rule 12(b)(2) motion *requires* the plaintiff to go beyond the pleadings. *Boit*, 967 F.2d at 675. The Court may also, when ruling on a Rule 12(b)(6) motion, review outside materials introduced by the plaintiff. “In this instance, only the Plaintiffs have submitted additional materials.

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<sup>4</sup> See *Espinosa*, 818 F. Supp. at 440 (distinguishing between motions that “attack the merits of plaintiff’s claims” from one that “raises a jurisdictional issue unrelated to the merits of the case”) (internal citations omitted).

<sup>5</sup> Guardaley cites only three relevant cases, each of which addresses only the standard of review on a Rule 12(b)(6) motion: *Alternative Energy, Inc. v. St. Paul Fire and Marine Ins. Co.*, 267 F.3d 30, 33-34 (1st Cir. 2001); *Gaglardi v. Sullivan*, 513 F.3d 301, 306 (1st Cir. 2008); and *Watterson v. Page*, 987 F.2d 1 (1st Cir. 1993). See Motion to Strike p. 3.

Consequently, the Court will not convert the motion.” *Heinrich*, 49 F. Supp. 2d at 32 n.6. “The primary reason for not considering documents outside the complaint is to protect *the plaintiff* from unfair surprise, ... and therefore *the need for the rule is greatly reduced when it is the plaintiff (and not the defendant) who seeks to introduce additional documents.*” *MHI Shipbuilding, LLC v. Nat’l Fire Ins. Co. of Hartford*, 286 B.R. 16, 21 (D. Mass. 2002) (emphasis added) (citing *Watterson* at 4) (internal citation omitted); accord *Airframe Systems, Inc. v. Raytheon Co.*, 520 F. Supp. 2d 258, 263 (D. Mass. 2007). Because Plaintiff introduced the exhibits about which Guardaley complains, the Federal Rules allow for their consideration without treating Guardaley’s motion as one for summary judgment.

**II. The Opposition Properly Presents Factual Information, Exhibits, and Argument that Counter Guardaley’s Motion to Dismiss on the Basis of Personal Jurisdiction.**

Guardaley moved to dismiss the SAC for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2). The Opposition appropriately went beyond the pleadings in presenting materials to counter that motion.

As the Opposition and its Exhibits show, Guardaley’s contacts with the United States have been continuous and systematic. Guardaley has operated a sales division in Los Angeles, California since at least early 2010, headed by Barbara Mudge, to directly solicit client business. SAC ¶ 38; Opposition p. 7; Opposition Exs. A & I p. 3. Ms. Mudge is also a board member of the Independent Film & Television Alliance (IFTA), also located in Los Angeles. Opposition Exs. A & D. IFTA members include Boll AG, producer of *Far Cry*, as well as several other current USCG clients, including Nu Image, Inc., Voltage Pictures, and Worldwide Film Entertainment, LLC (whose CEO is Barbara Mudge). *Id.* Exs. A, D & E. In addition to being a Guardaley employee and USCG client, Ms. Mudge has traveled to Delaware for a least one speaking engagement with Dunlap. *Id.* pp. 7-8 & Ex. G.



Guardaley tracked alleged infringers of *Far Cry* including the IP addresses of Massachusetts residents. *Id.* pp. 13-14 & Ex. L. It could have readily determined at any time that it was tracking IP addresses within the Commonwealth by using freely available online searches, as the Declaration of Erin Fitzgerald illustrates. *Opp.* pp. 16-17 & Ex. L.

Defendant does not dispute the content of any of the documents or that they establish personal jurisdiction. Instead, relying on rhetoric alone, Guardaley proceeds to question the authenticity of these publicly available documents.

### **III. The Opposition Properly Presents Factual Information, Exhibits, and Argument that Counter Guardaley's Motion to Dismiss on the Basis of Subject Matter Jurisdiction.**

Guardaley also moved to dismiss the SAC for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), and the Opposition also presented materials to counter that motion. Specifically, Guardaley contested whether Plaintiff suffered “legally compensable damage[s].” *Motion to Dismiss* p. 28.

The Copyright Scheme had the appearance of legitimacy, which the Defendants knew to be fraudulent. Guardaley's knowledge of and active role in a fraud upon Plaintiff and thousands of others, through the Scheme outlined in the SAC, is further documented in the Opposition and its exhibits.<sup>6</sup> This false appearance of meritorious claims caused damages to Plaintiff and those similarly situated. Guardaley's data mining and submission of declarations in the *Achte* action regarding the same were essential building blocks for the Copyright Scheme. Like its *Motion to Dismiss*, Guardaley's declarations erroneously maintain the accuracy of its data about alleged

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<sup>6</sup> The Exhibits supplement the pleading, but do not vary or materially alter the factual allegations set forth in the SAC. Plaintiff need not “continuously seek leave to amend their pleadings as new or contradictory facts come to light. Neither Rule 12(f) nor the Federal Rules of Civil Procedure in general contemplate such a requirement, which would in many cases add considerably and senselessly to the expense and length of litigation.” *Archdiocese of San Salvador v. FM Int'l, LLC*, 2006 U.S. Dist. LEXIS 64156, at \*15 (D.N.H. Sept. 7, 2006) (denying motion to strike) (internal quotations omitted).

infringements.<sup>7</sup> These false representations, like many others by Defendants in the Copyright Scheme, helped cause Plaintiff and others to incur litigation expenses in defense of the claims.<sup>8</sup> In short, acts by Guardaley discussed in the Opposition support Plaintiff's broader argument for standing, and serve to expose the flaws, both technological and legal, in Guardaley's methods. As discussed below, the Opposition and its Exhibits speak directly to factual misrepresentations by Guardaley that serve as part of the Copyright Scheme's edifice.

#### **IV. The Opposition Properly Presents Factual Information, Exhibits, and Argument that Refute Misrepresentations Guardaley Introduced in its Motion to Dismiss.**

Guardaley's Motion to Dismiss is rife with factual misrepresentations addressed in Plaintiff's Opposition. For example, Guardaley chose to misinform the Court about the full scope of its role in the Copyright Scheme detailed in the SAC:

Guardaley's involvement in the purported "Copyright Scheme" is *limited to providing technical assistance* that served to identify and document undisputed acts of copyright infringement.

Guardaley's involvement in the purported "Copyright Scheme" was *limited to pre-litigation monitoring of illegal file sharing on P2P networks and identifying and documenting instances of copyright infringement.*

Motion to Dismiss, pp. 16 and 19 (emphases added). Claiming this limited involvement, "Guardaley portrays itself as a mere servant to USCG and its clients. But Guardaley has a far more significant role." (Opposition p. 6.) As Plaintiff detailed in his Opposition, Guardaley acts

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<sup>7</sup> See Declaration of Patrick Achache in Support of Plaintiff's Motion for Leave to Take Discovery Prior to Rule 26(f) Conference ¶¶ 13-14 (cited by Plaintiff in SAC ¶ 198 & n. 60) and Declaration of Benjamin Perino in Support of Plaintiff's Motion for Leave to Take Discovery Prior to Rule 26(f) Conference ¶ 10 (cited by Plaintiff in SAC ¶ 73 & n. 33). The Court may take judicial notice of these publicly available court documents from a related proceeding.

<sup>8</sup> See, e.g., *Columbia Chiropractic Grp. v. Trust Ins. Co.*, 430 Mass. 60, 63 (1999) ("Columbia's attempt to collect the amount of those inappropriate bills was an unfair act or practice. Columbia's conduct caused Trust to incur compensable litigation expenses in defense of the claim. See *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 850 (1983). If a violation of G. L. c. 93A, § 11, forces another to incur attorney's fees, those fees are a loss of money or property and may be recovered as G. L. c. 93A damages.")

as an active partner with attorneys and law firms (such as its co-defendants Dunlap, Kurtz and DGW) whom it solicits to generate copyright infringement claims. (*Id.* p. 7 & Ex. C.) Such law firms regard Guardaley as the principal, not the mere agent. (*Id.* p. 6 & Ex. B.) Indeed, Opposition Exhibits B and C show that Guardaley may be the controlling partner of USCG. Moreover, Guardaley does not passively wait to be engaged by counsel, but drums up its own business from potential clients in the film industry. (*Id.* p. 7 & Exs. A, D & E.) This raises questions of fact as to the relationships between Guardaley and its co-defendant Achte.

Guardaley's Motion to Dismiss also misrepresents the reliability of the data it provided to co-defendants that served as the basis for the Copyright Scheme.

It is the infringer's *affirmative act* of illegal downloading that causes Guardaley, from its office overseas, to identify the infringer's IP address.

Guardaley's involvement in the purported "Copyright Scheme" is limited to providing technical assistance that served to identify and document *undisputed acts* of copyright infringement.

Motion to Dismiss, pp. 9 and 16 (emphases added). But Guardaley's technology produces false positives. As detailed in Opposition Exhibit I (an English translation of Exhibit H), a German law firm working with Guardaley, employing the same technology that Guardaley has used to supply all its mass copyright litigation ventures, had determined

*that the IP connection data determined by [Guardaley] on the commission of the copyright holders was not 100% accurate. That [Guardaley] had included not only so-called uploaders, i.e., those offering works, but also persons who had made download inquiries to [Guardaley]. ... that [Guardaley] did not distinguish between up- and download determinations or did not mark them appropriately. ...*

Opposition Ex. I p. 5. That is, Guardaley identifies individuals as infringers, whether or not any files are ever exchanged. More so, it does not distinguish between uploads, downloads or mere inquiries. The German law firm informed Guardaley's employee Barbara Mudge that "an unknown number of cease and desist letters about copyright infringements might have been

undertaken without a legal basis,” and that “unjustified cease and desist letters could, in certain circumstances, result in damages claims of the persons receiving such letters against the copyright holders.” *Id.* p. 6. Guardaley knew of its research data’s systemic flaws long before filing its Motion to Dismiss. Opposition Exhibit J is an analysis that was presented to Guardaley, both before and during the court proceeding, which shows that Guardaley’s research was producing false positives—identifying non-infringers as infringers. Guardaley knew of this flaw no later than January 13, 2011. Opposition Ex. I p. 11. Nonetheless, in its Motion to Dismiss filed in May, Guardaley falsely characterized its data as documenting “undisputed” acts of infringement, and has moved to strike exhibits and facts Plaintiff offered in part to refute Guardaley’s misrepresentations. A party is not “allowed to make various characterizations ... central to his [contentions] and simultaneously strike [documents, submitted in connection with a motion to dismiss, that] attempt to point out any misrepresentations therein.” *Blay v. Zipcar, Inc.*, 716 F. Supp. 2d 115, 119 (D. Mass. 2010).

Even before obtaining discovery from Defendants, Plaintiff has submitted abundant basis for refuting Guardaley’s factual contentions, including a series of documents from litigation in Germany based on Guardaley withholding information about its technology’s shortcomings. It is wholly proper for the Court to consider Plaintiff’s materials and argument in ruling on the Motion to Dismiss, and improper to grant the Motion to Strike.

**V. The Exhibits Guardaley Attacks Are Fully Admissible.**

“The requirement of authentication ... as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Fed. R. Evid. 901(a). “There is no single way, moreover, to authenticate evidence.” *United States v. Garcia*, 452 F.3d 36, 40 (1st Cir. 2006). “[T]he direct testimony of a custodian or a percipient witness is not a *sine qua non* to the authentication of a writing. Thus, a document’s appearance, contents, substance, internal patterns, or other distinctive characteristics,

taken in conjunction with circumstances, can, in cumulation, even without direct testimony, provide sufficient indicia of reliability to permit a finding that it is authentic.” *Id.* (quoting *United States v. Holmquist*, 36 F.3d 154, 167 (1st Cir. 1994) (citations and internal quotation marks omitted), *cert. denied*, 514 U.S. 1084 (1995); *United States v. Paulino*, 13 F.3d 20, 23 (1st Cir. 1994). Absent any evidence refuting what the exhibits reveal on their face, they may be admitted and reviewed in the Court’s discretion. *Id.*

Though contending that “the authenticity of the documents proffered by the plaintiff in the Plaintiff’s Opposition is hardly undisputed by Guardaley,” Motion to Strike p. 4, Guardaley does nothing to genuinely controvert their authenticity. The Motion to Strike recites a list of the Exhibits (*id.* p. 2) which it liberally peppers with adverse adverbs, labeling them as “irrelevant and inadmissible or otherwise incompetent” (*id.* pp. 2-3) or “not the type of document of which the Court should take judicial notice” (*id.* p. 4). But Guardaley never presents a substantive or reasonable argument against the authenticity or content of any of them. It cannot prevail on the basis of this unfocused pepper spray. See *Kling v. Fidelity Management Trust Co.*, 270 F. Supp. 2d 121 (D. Mass. 2003) (denying motion to strike documents central to plaintiff’s claim when defendant “states that he disputes the authenticity of the documents, [but] he presents no substantive argument that relies on either the content or authenticity of the documents”).

Each of the contested Opposition exhibits is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Most of them (Exhibits A through H and Exhibit J) are public documents. Indeed, half of the exhibits (Exhibits A, B, and D through G) are available online, and display their URL location and the date and time they were visited, further attesting to their veracity.

Exhibits H and J are court documents (in the original proceeding in Germany, Exhibit J was presented as an exhibit to Exhibit H), and Exhibits I and K are translated versions of the same, placing each well within the Court’s authority to review. *London-Sire Records, Inc. v. Doe*

*I*, 542 F. Supp. 2d 153, 180 n. 36 (D. Mass. 2008) (the Court may take judicial notice of related proceedings); *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 60 (1st Cir. 2000) (matters of public record ordinarily include documents from prior court adjudications). Exhibit C, a forwarded copy of an email written by Guardaley’s Patrick Achache, is also a court document: an exhibit to the notice of appeal in the same German proceeding, to which Guardaley was a party. In accordance with German civil procedure, two certified copies and two plain copies were served on Guardaley partners Patrick Achache and Benjamin Perino. Guardaley cannot reasonably contest the authenticity of such court documents about which it has direct personal knowledge. Because Guardaley “became aware of contents of these documents during the previous suit ... there is no concern that their use at this time will result in unfair surprise.” *Airframe Sys., Inc. v. Raytheon Co.*, 520 F. Supp. 2d 258, 263 (D. Mass. 2007). No unfair prejudice will result to Guardaley as a consequence of the Court’s consideration of documents as to whose existence it had notice. *Biddeford Internet Corp. v. Verizon New England Inc.*, 456 F. Supp. 2d 165, 170 (D. Me. 2006).

Exhibit L, which Guardaley deems “perhaps the most egregious” and “self-serving” of Plaintiff’s exhibits (Motion to Strike p. 3 n. 3), is a sworn affidavit attesting to an independent, fact-based analysis of the IP addresses supplied by Guardaley. The affidavit is based on a review of publicly available online resources that are identified in the affidavit, and as such are both “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,” Fed. R. Evid. 201(b), and well within Guardaley’s capacity to review, if it had any serious dispute over the accuracy or veracity of the affidavit’s analysis. Incapable of raising any such reasonable question, Guardaley offers only *ad hominem* attacks.

Because Guardaley has failed to counter the facial authenticity of documents that fall within a variety of exceptions recognized by the First Circuit and this Court, the Motion to Strike must be denied.

## CONCLUSION

For all the above reasons, Plaintiff respectfully requests that the Court deny Guardaley's Motion to Strike in its entirety.

Dated: July 28, 2011

Respectfully submitted,

Dmitriy Shirokov

/s/ Jason E. Sweet

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## CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2011, I electronically filed the foregoing Plaintiff's Response in Opposition to Defendant Guardaley Limited's Motion to Strike by using the ECF system. I hereby certify that a true copy of the aforementioned document will be served upon counsel of record for Defendants Achte/Neunte Boll Kino Beteiligungs GMBH & Co. KG; Guardaley, Limited; and Dunlap, Grubb & Weaver, PLLC, US Copyright Group, Thomas Dunlap, and Nicholas Kurtz by Notice of Electronic Filing through the ECF system.

/s/ Jason E. Sweet

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