

Westlaw.

The New York Times

3/16/04 NYT B1

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(Cite as: 2005 WL 929089, \*12 (E.P.A.))

more than 35,000 people have signed up in cities all over the world.

Postings are moderated by volunteers in local groups, who have mulled over the ethics of posting Playboys, puppies and pistols. They have had to deal with suspicions that perhaps the people who were posting too many "wanted" listings in one Arizona city were taking goods south of the border to sell in Mexico. ("We figured we were working for a good cause by keeping things out of the landfill," Mr. Beal said. "That was the main thing, and beyond that let the gifter beware." ) And they have pondered what to do with people who occasionally forget to stop by to pick up the couch left on the porch for them.

Mr. Beal recalls a favorite post, with the heading, "OFFER: black hair dye, tonight only." It continued, "Clairol Balsam permanent hair dye in black, already mixed up and ready to go. My hair is short, so the bottle is still mostly full. But it needs to be used really soon, so if anyone has an urge to go darker, tonight is the night!"

Mr. Beal said: "Every once in a while someone will try to **freecycle** themselves -- "OFFER: nice guy to good home" or "WANTED: cure for a lonely heart."

But others don't see the humor in it. "I think personally, in this day and age, it would probably be too frightening to post things online to have strangers to come to your home," said Ivy Lester, who is from Dallas but was visiting New York City, where she grew up.

Although she could see **freecycling** for a good cause, the idea of a stranger coming by to pick up an item, even from a doorstep, did not appeal to her. "The Internet is so impersonal, and you have to be so careful nowadays," she said. But mostly, members of the New York City **freecycling** group have been pleased with the cross-country skis they received just before a snowstorm, or happy to have met the need of the guy who refurbishes computer systems for use in day care centers.

That man, Cornell D. Green, posted, "If you're looking at that old 486 in the basement and can't stop laughing, please contact me." Nancy Schubiger, one of the six people who responded to his request, delivered a vanload of computer components to him at a park-and-ride lot in New Jersey on a recent Friday, then wrote to him, "Glad that they won't be dust-gathering paperweights!"

The New York City **freecycling** group has about 300 members, but the Portland, Ore., group has 10 times as many.

"I'm not sure it has a limit," said Christina Salvi, 28, who estimated she has spent half an hour a night moderating the New York group, making sure the postings were marked as Wanted or Offered, and keeping spam, politics and crankiness out of the discourse.

Of course, there are other ways to find free or cheap things in the city, like walking down the street in many neighborhoods the night before trash day. Thrift stores provide bargains. Also online is Craigslist.org, which includes a section of free items, and New York WasteMatch, sponsored by the Department of Sanitation, which matches valuable

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commercial waste and surplus goods with organizations that need them. The city also runs Material for the Arts, which collects reusable items and distributes them to nonprofit arts groups.

Robin Nagle, who teaches a graduate anthropology class on garbage at New York University, said that the curb has been the destination of choice for unwanted items only since the end of World War II.

"You never simply got rid of something because you didn't like it anymore," she said. "You'd turn it into something else." Old adult clothes, for instance, would be re sewn into children's clothes, then made into cushions or dolls or rags, then sold as "shoddy" to peddlers, who used old fabric to make paper. Scavengers would travel the city in rented carts in search of useful items.

Mr. Beal hopes to incorporate freecycle.org as a nonprofit group and raise money for its own Web page independent of Yahoo.com's group mail function, which it currently uses. He hopes the new site can help **freecyclers** meet international needs -- for instance, to send computers to Iran after an earthquake.

"We get it drilled into us on television ads: 'Consume, consume, consume. You want more, you need more,' and do we really?" Mr. Beal asked. "I think what's coming out with **freecycling** is, 'Gee, it's kind of fun not to be into all this.'"

As for the wanted old socks, they were destined to be made into puppets in a class for adults with developmental disabilities. The telephone pole, at last inquiry, was still available, in Oregon. So were the rocks and lemons, together, in San Francisco.

Photos (Photos by Left, Associated Press; Above: Jim Cummins for The New York Times)

---- INDEX REFERENCES ----

INDUSTRY: (Regional Web Presences (1RE47); Internet (1IN27))

REGION: (USA (1US73); Americas (1AM92); North America (1NO39); New York (1NE72); Oregon (1OR01))

Language: EN

OTHER INDEXING: (Kelley, Tina; Beal, Deron) (BEAL; CUMMINS; DEPARTMENT OF SANITATION; INTERNET; JIM; NEW YORK UNIVERSITY) (Beal; Christina Salvi; Clairol Balsam; Consume; Cornell D. Green; Deron Beal; Dusty; Gee; Glad; Ivy Lester; Legal; Nancy Schubiger; Offered; Robin Nagle; Scavengers; Thrift; Web) (Computers and the Internet; Philanthropy; Barter; Prices (Fares, Fees and Rates))

EDITION: Late Edition - Final

Word Count: 1347

Westlaw.

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END OF DOCUMENT

**Exhibit 5**

## Digits

The Wall Street Journal, 941 words

May 6, 2004

### Document Text

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[Gambits & Gadgets in the World of Technology]

#### Octopus Opulence

Microsoft Corp. co-founder Paul Allen typically likes to keep a low profile, but he made a big splash at this week's convention of the National Cable and Telecommunications Association in New Orleans by hosting several lavish parties aboard his new 413-foot yacht, Octopus.

Mr. Allen docked it on the Mississippi River behind the convention center and hosted receptions for several of his companies that serve the cable industry, including Digeo Inc. and Oxygen Media Inc. Mr. Allen's security force kept a watchful eye to make sure the media stayed onshore. But guests reported that the boat was over the top -- even by billionaire-yacht standards. Details include: teak floors, a theater and basketball court, two helicopter pads and a sound-mixing studio large enough, guests were told, to produce a major motion picture. For times when Mr. Allen feels like roughing it, the yacht ports a 60-foot yacht and eventually will boast a 10-person submarine that will run on fuel cells so it can stay under water for as long as two weeks.

The opulence of Octopus -- estimates of its price started at \$200 million -- may have stirred a bit of yacht-envy on the part of some of the other moguls at the gathering. Take the exchange that happened at one session that featured Mr. Allen, Comcast Corp. Chief Executive Brian Roberts and Time Warner Inc. Chief Executive Richard Parsons. Asked whether Time Warner would bid for Adelphia Communications Corp., Mr. Parsons stopped in the middle of confirming his interest and said: "I've changed my mind. We're going for a boat."

"I can help you on that," chimed in Mr. Allen, who also owns at least one other yacht.

#### Mothers Online

As any busy mother will tell you, the Internet can be a huge time saver when it comes to tasks like getting homework help and paying bills.

A new survey shows women are turning to the Web for more than that: Forty-eight percent of those who responded to a survey by Opinion Research Corp. for America Online Inc. said they stay in touch with loved ones by sending photos online. Fully 75% use the Web to plan trips. Seventy-one percent get news, 63% look for recipes, 55% click for coupons and discounts, and 42% pay their taxes online.

Nearly 55% of the 1,653 women who opted to respond to the survey play games online, most frequently with their children. Thirty-nine percent use the Web to help with homework, and 38% to shop.

That doesn't surprise Lynne Builta, who four years ago launched an online site Mommyshop.com. Ms. Builta is projecting sales of \$1 million this year, up from \$27,000 in 2000. She says many new mothers find they need lots of new gear. They can go online and have the products delivered to their doorstep. Once she had her second child, Ms. Builta said, "I shopped online for everything."

#### Spring Sweep

With the dreaded spring-cleaning season under way, there is a new, Internet-based alternative for getting rid of all that clutter in the basement and garage.

Known as "freecycling," the approach creates Web-based communities in cities across the country that allow members to post by e-mail a listing of items they are looking to unload. The catch? Everything must be given away free.

The freecycle movement has gained a modest measure of success since it was launched in May 2003 by Deron Beal of Rise Inc., a nonprofit organization in Tucson, Ariz. that promotes recycling initiatives. There are now

freecycling groups in 412 cities with 61,000 members. The largest, in Portland, Ore., has 4,723 members.

There are few limits on the kinds of items given away or sought. Typical items offered up include unused exercise equipment and storage boxes. Other items are more obscure. Recent listings in the Tucson area included someone looking for a reptile enclosure for their sick water dragon; another person offering up left-handed garden gloves and someone looking to unload a hot tub.

Membership is free and is organized through Yahoo groups. Information about freecycling is available at [www.freecycle.org](http://www.freecycle.org).

#### Big Blue Fights Back

International Business Machines Corp.'s investor-relations Web site featured something new on Monday -- an attack on a Wall Street analyst's view of its future. The message: "We believe [investors] should question the report's conclusions."

IBM didn't identify the analyst, but competitors quickly realized it was Toni Sacconaghi of Sanford C. Bernstein & Co., a research house. Mr. Sacconaghi has been saying for months that IBM's long-term growth of per-share earnings will be 7% to 9% annually, significantly lower than the "double digit" growth that IBM publicly targets. Barron's magazine cited Mr. Sacconaghi's forecast over the weekend, and that apparently triggered IBM's uncharacteristic outburst. Other Wall Street analysts who generally are more bullish on IBM said they couldn't recall a similar published refutation of an analyst's work. IBM's statement said the Bernstein report was based on historical analysis that doesn't consider the "increased competitiveness of IBM's products."

Mr. Sacconaghi says IBM hadn't contacted him and he was surprised to learn of the Web-site message. He noted that he has been saying for more than a year that IBM's long-term growth in sales will be around 5% and per-share earnings will be less than 10%. He added: "It's unclear why it elicited an unprecedented response."

An IBM spokesman said "it's good governance to keep investors informed." He added that the "statement speaks for itself" and said Herve Parks, IBM's veteran investor-relations chief, wouldn't be available to comment.

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Digits was compiled by Ann Grimes, with contributions from Peter Grant, David Armstrong and William Bulkeley.

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**Exhibit 6**

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5/10/04 People Wkly. 195

2004 WLNR 17905742

## PEOPLE

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May 10, 2004

Volume 61

Section: TrendsNo. 18 Special Double Issue/The 50

Most Beautiful People

## Free For All

Got a used hot tub to unload? Or a stuffed armadillo? Givers find takers on Deron Beal's "freecycling" Web site

Richard Jerome Strawberry Saroyan In Los Angeles

In November 2002 Deron Beal hired on as a manager for RISE, a non-profit that provides a recycling service for local businesses in Tucson. It didn't take long to realize he had a problem. "The businesses started giving us all this stuff that's not recyclable but that they don't want to throw away," he says. "Computers, desks. I didn't know what to do with it, but I couldn't bear to say no."

Beal tried giving the items to charity but after hours of calls scarcely made a dent. Then, last May, an epiphany: Why not set up a Web group where people can unload trash that might be someone else's treasure? A kind of cyber curbside. "I thought, 'If I give this a nifty name,'" says Beal, 36, "'who knows?'"

One year later Beal's site ([www.freecycle.org](http://www.freecycle.org)) has become an Internet phenomenon with 53,000 members in 360 cities--including London, Tokyo, Sao Paulo and Melbourne. And just how does one **freecycle**? For starters, the network is broken down into local groups, each with its own volunteer moderator (collectively known as the "mod squad"). If there's an object, or even a service, you want to give or receive, you post an e-mail, leave a contact and, if someone bites, arrange for a pickup. The rules are simple: no politics or spam, and everything must be free. Some popular goods offered up: exercise equipment, moving boxes and anything related to gardening.

But the site attracts some decidedly uncommon offers and requests. There was the offer of a "'63-'64 schoolbus motorhome...NO Brakes." And a plea for wings, feathers and a stuffed armadillo for "extreme art purposes." One woman offered a mixed bottle of partially used hair dye: "It needs to be used really soon, so if anyone has an urge to go darker, tonight is the night." An Austin, Texas, **freecycler** who asked to be identified only by his user name "dancestoblue" offered fishing tackle-but only to someone who once had tackle stolen. "As a kid 34 years ago, give or take, I stole a tackle box," he explains. "There's no way



I can find the person and make it right, so I'm trying to do the next best thing."

In many cases local **freecycling** groups have developed into Web-based communities where members help each other out. Oregonians Livia Vande and Larry Thompson scored not only a free photo album for their April 24 wedding, but free photography from a fellow **freecycler**. But they also gave back. "We helped a refugee family at Christmastime," says Vande. "We inherited a lot of stuff from Larry's grandmother and tried to give them as much as we could to start a little household."

Beal is thrilled by the response. "It's inspiring," he says, "to see someone driving off with something of yours that they really need." Born in Lancaster, Ohio, he arrived at a career in recycling via a circuitous route. After earning a degree in foreign service at Georgetown University in Washington, D.C., and later an M.B.A., he worked as a finance manager for Procter & Gamble and studied literature in Germany. He considered teaching, then switched to environmentalism and settled in Tucson in 1999. An admitted "computer illiterate," he started his **freecycling** venture with an e-mail to just 30 or 40 friends. When he set up the site in Tucson, the group snowballed, and he got some tech help. At the bungalow home he shares with his wife of nine months, pastry chef Jennifer Columbus, 37, Beal tries to live the **freecycling** life--with mixed results. Sure, Columbus would like him to clear out the shed. "But there's a difference between a weird pack rat and Deron," she says. "He has everything splayed out, but it's not, like, gross." Though he makes no income from **freecycling**, Beal has reaped rewards. "We got this great kitchen table," Columbus says, "and a neat old 1930s couch." It has given him some big ideas too, such as rallying his tens of thousands of members for good causes. "It has to grow up by itself," he says. "I'm just helping it along."

By Richard Jerome. Strawberry Saroyan in Los Angeles

NEED A PLUMBER? A SHRINK? A SATURDAY NIGHT DATE? MILLIONS ARE  
FINDING IT ON CRAIGSLIST

"I need a wife," begins one candid personal ad. Others troll for jobs and apartments. One guy wants a stooge to take the CPA ethics test for him. Welcome to the eclectic world of the daddy of online community bulletin boards: craigslist--Irreverent cyber-classifieds that attract millions of viewers in 35 cities. "Craig" is Craig Newmark, 51, a self-styled computer nerd who one day in 1995 innocently sent out e-mails about upcoming events in San Francisco to a bunch of friends. "People started sending me more stuff to put on the list, and more people asked to be added to it," he says. Newmark charges only job posters in the Bay Area to make a living and pay his staff of 14. The rest post for free. "Everyone else can make as much as they want," he says. "But nerd values suggest you live comfortably--then try to change the world."

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COLOR PHOTO: COMPOSITE PHOTO "There's something radical about getting something for nothing," says Beal (at his recycling job in Tucson, with items posted on his site).

TWO COLOR PHOTOS: PHOTOGRAPHS BY WERNER SEGARRA

COLOR PHOTO: PHOTOGRAPH BY DAVID PAUL MORRIS Craig Newmark (in San Francisco) added a barter section to his site.

----- INDEX REFERENCES -----

COMPANY: PROCTER AND GAMBLE CO (THE)

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); Arizona (1AR13); North America (1NO39); California (1CA98))

Language: EN

OTHER INDEXING: (CPA; GEORGETOWN UNIVERSITY; OREGONIANS LIVIA VANDE; PLUMBER; PROCTER GAMBLE; SHRINK; VANDE) (Beal; Born; Craig; Craig Newmark; DAVID PAUL; Deron; Larry; Larr Thompson; Newmark; Richard Jerome; Strawberry Saroyan; WERNER SEGARRA)

KEYWORDS: (Trend); (Internet)

Word Count: 1029

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END OF DOCUMENT

**Exhibit 7**

Authentication-Results: mta329.mail.scd.yahoo.com  
 from=freecycle.org; domainkeys=neutral (no sig)  
 X-YahooFilteredBulk: 209.68.5.9  
 X-pair-Authenticated: 67.52.36.178  
 From: "Freecycle Database Admin" <database@freecycle.org>  
 To: <freecyclesunnyvale-owner@yahooogroups.com>  
 Subject: [Bulk] [spam] 1st request freecyclesunnyvale  
 Date: Tue, 1 Nov 2005 09:48:17 -0600  
 Organization: Freecycle.org  
 X-eGroups-Moderators: freecyclesunnyvale

-----  
 Yahoo! Groups SpamGuard has detected that the attached message to the owner of the Yahoo! Group freecyclesunnyvale is likely to be spam. For more information about SpamGuard, please visit our help pages: <http://groups.yahoo.com/local/spamguard.html>  
 -----

Received: (qmail 96375 invoked from network); 1 Nov 2005 15:49:14 -0000  
 Received: from unknown (66.218.66.218)  
 by m31.grp.scd.yahoo.com with QMQP; 1 Nov 2005 15:49:14 -0000  
 Received: from unknown (HELO relay.pair.com) (209.68.5.9)  
 by mta3.grp.scd.yahoo.com with SMTP; 1 Nov 2005 15:49:13 -0000  
 Received: (qmail 95981 invoked from network); 1 Nov 2005 15:48:55 -0000  
 Received: from unknown (HELO WP1) (unknown)  
 by unknown with SMTP; 1 Nov 2005 15:48:55 -0000  
 X-pair-Authenticated: 67.52.36.178  
 Message-ID: <00d101c5defb5c71c10b0\$4501a8c0@WP1>  
 Reply-To: "Freecycle Database Admin" <database@freecycle.org>  
 From: "Freecycle Database Admin" <database@freecycle.org>  
 To: <freecyclesunnyvale-owner@yahooogroups.com>  
 Subject: 1st request freecyclesunnyvale  
 Date: Tue, 1 Nov 2005 09:48:17 -0600  
 Organization: Freecycle.org  
 MIME-Version: 1.0  
 Content-Type: multipart/alternative;  
 boundary="-----\_NextPart\_000\_00C5\_01C5DEC9.62C3A970"  
 X-Priority: 3  
 X-MSMail-Priority: Normal  
 X-Mailer: Microsoft Outlook Express 6.00.2900.2180  
 X-MimeOLE: Produced By Microsoft MimeOLE V6.00.2900.2180  
 X-eGroups-Remote-IP: 209.68.5.9

Dear Owner of the Yahoo group "freecyclesunnyvale",

I am writing on behalf of The Freecycle Network(TM) to notify you that your link has been removed from [www.freecycle.org](http://www.freecycle.org). This was done at the request of the Group Outreach and Assistance Coordinator for your region because your group is not currently set up in accordance with the basic requirements for all approved Freecycle(TM) groups which include, but are not limited to:

- items posted must be free, legal, and appropriate for all ages
- the group must not be set to full moderation.

We have invested considerable time and resources in insuring that our organization is associated with only appropriately moderated, legal, and totally free services that have a common source of origin from The Freecycle Network(TM). This is why we only allow approved groups to associate with us in each community--to avoid any confusion among the public as who they are dealing with when the Freecycle name is used. Accordingly, please consider this your official notice to stop using the trademark-protected Freecycle name and logo, as well as any and all copyrighted texts, graphics, rules, guidelines, title, or its URL (Yahoo group name).

Please understand that our intent is not to stop your or your group from gifting or exchanging unwanted items with fellow users. Should you wish to remain independent of our organization, you are, of course, free to start your own gifting-based site under a name that is not confusingly similar to Freecycle. However, if there is another group listed on [www.freecycle.org](http://www.freecycle.org) that covers the area that your group hoped to serve, please consider offering your help to that group as a co-moderator. We can all use the help!

For those of your members who are looking to join a local Freecycle group, you may simply refer them to [www.freecycle.org](http://www.freecycle.org) where they can find all approved Freecycle groups.

Please let me know when either the group has been deleted or the above-listed Freecycle materials have been completely removed from your group. We appreciate your commitment to furthering the overall mission of promoting the local gift community in your area while keeping good stuff out of landfills.

Sincerely,

Database Admin  
Freecycle.org  
[database@freecycle.org](mailto:database@freecycle.org)

**Exhibit 8**

Authentication-Results: mta222.mail.mud.yahoo.com  
from=post.harvard.edu; domainkeys=neutral (no sig)  
Date: Sat, 5 Nov 2005 23:00:41 -0800  
To: copyright@yahoo-inc.com  
From: Tim Oey <oey@post.harvard.edu>  
Subject: IMPORTANT: freecyclesunnyvale group request  
Cc: freecyclesunnyvale-owner@yahoogroups.com  
X-eGroups-Moderators: freecyclesunnyvale

Dear copyright@yahoo-inc.com,

It has come to our attention that The Freecycle Network (TFN) may ask that the group:  
<http://groups.yahoo.com/group/freecyclesunnyvale/>  
be deleted.

Below is the email we recently received from one of their administrators -- database@freecycle.org.

We have inspected our group in detail and have never violated any of the requirements they list. Furthermore we are not using any materials that are under a TFN copyright. All the materials in our group were originally authored by the moderators of the Sunnyvale group and we have even placed them into the public domain. Please inspect our group to verify this.

The logo we currently have on our home page was licensed to us by TFN under the following conditions:

> On 10/9/03 11:05 AM, "Deron Beal" <dbeal@copebhs.com> wrote:  
>  
> > Yeah, Sunnyvale!  
> > You can get the neutral logo from <http://www.freecycle.org> , just don't use  
> > it for commercial purposes or you maybe Mark or Albert can help you to do  
> > your own fancy schmancy logo!  
> >  
> > Good luck  
> > Deron  
> >  
> > ----- Original Message -----  
> > From: "Lissy Abraham" <lissy\_a@earthlink.net>  
> > To: <info@freecycle.org>  
> > Sent: Tuesday, October 07, 2003 5:07 PM  
> > Subject: logo?  
> >  
> >> Hi Deron, or Mark, or whoever:  
> >>  
> >> Is it possible you could make me a Freecycling Sunnyvale logo for mysite?  
> >> Nothing unique -- just the one with the bicycle and the guitar.  
> >>  
> >> Thanks,  
> >>  
> >> Lissy

For the logo we have, we have not violated the loose term "just don't use it for commercial purposes" -- but this was the only "requirement" for using this logo. As you can see, TFN gave us a naked license for the logo and you probably know what that means.

On behalf of the general public and particularly other freecycling groups, I am personally pursuing legal action against The Freecycle Network regarding the generic term "freecycle" and their trademark claim to this term. We and thousands of other people believe this term is generic because it has been used generically in the public press, by The Freecycle Network itself, by moderators and freecyclers in freecycle groups, and by the general public for over 2 years. The term freecycle is just a relatively new word like blog or podcast.

Until this legal action is complete, please leave the freecyclesunnyvale group as is (if the only complaint is that we use the term "freecycle") or advise us of what we need to do to make the group fall within legal compliance and/or Yahoo's TOS. We are happy to make sure the group follows all TOS

and legal requirements in any way necessary.

Please note that it is perfectly legal for discussion groups to discuss trademarks as a matter of free speech. So if you take this approach, no Yahoo Group that mentions the term freecycle should be deleted solely on that basis even if their trademark claim is upheld.

Should you wish to contact me by phone, please call me at 408-536-4541 (work) or 408-749-1914 (home). I am also happy to meet with Yahoo staff in person as I drive by Yahoo's headquarters on a regular basis. If you wish to talk to my intellectual property lawyer that can be arranged as well.

The freecyclesunnyvale group has been a vibrant community for over two years -- supporting freecycling and helping freecyclers in the Sunnyvale, CA -- also home to Yahoo headquarters. It includes among its members a number of Yahoo employees. It is specifically mentioned in a number of Sunnyvale city publications including but not limited to Sunnyvale's Resource Reuses publication at: <http://sunnyvale.ca.gov/NR/rdonlyres/0FAB72E9-C2DB-49E3-83AC-5A8422D37EB0/0/Resources2005.pdf>

Your prompt attention and response in this matter is greatly appreciated.

Sincerely,  
Tim Oey  
Sunnyvale, CA

-----  
From: "Freecycle Database Admin" <database@freecycle.org>  
To: <freecyclesunnyvale-owner@yahooogroups.com>  
Subject: [Bulk] [spam] 1st request freecyclesunnyvale  
Date: Tue, 1 Nov 2005 09:48:17 -0600  
Organization: Freecycle.org

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Yahoo! Groups SpamGuard has detected that the attached message to the owner of the Yahoo! Group freecyclesunnyvale is likely to be spam. For more information about SpamGuard, please visit our help pages: <http://groups.yahoo.com/local/spamguard.html>  
-----

Dear Owner of the Yahoo group "freecyclesunnyvale",

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- items posted must be free, legal, and appropriate for all ages
- the group must not be set to full moderation.

We have invested considerable time and resources in insuring that our organization is associated with only appropriately moderated, legal, and totally free services that have a common source of origin from The Freecycle Network(TM). This is why we only allow approved groups to associate with us in each community--to avoid any confusion among the public as who they are dealing with when the Freecycle name is used. Accordingly, please consider this your official notice to stop using the trademark-protected Freecycle name and logo, as well as any and all copyrighted texts, graphics, rules, guidelines, title, or its URL (Yahoo group name).

Please understand that our intent is not to stop you or your group from gifting or exchanging unwanted items with fellow users. Should you wish to remain independent of our organization, you are, or



course, free to start your own gifting-based site under a name that is not confusingly similar to Freecycle. However, if there is another group listed on [www.freecycle.org](http://www.freecycle.org) that covers the area that your group hoped to serve, please consider offering your help to that group as a co-moderator. We can all use the help!

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Sincerely,

Database Admin  
Freecycle.org  
[database@freecycle.org](mailto:database@freecycle.org)

**Exhibit 9**

Authentication-Results: mta103.mail.scd.yahoo.com  
from=freecycle.org; domainkeys=neutral (no sig)  
X-YahooFilteredBulk: 209.68.5.15  
X-pair-Authenticated: 67.52.36.178  
From: "Freecycle Database Admin" <database@freecycle.org>  
To: <freecyclesunnyvale-owner@yahoogroups.com>  
Subject: [Bulk] [spam] 2nd request freecyclesunnyvale  
Date: Mon, 14 Nov 2005 10:04:38 -0600  
Organization: Freecycle.org  
X-eGroups-Moderators: freecyclesunnyvale

-----  
Yahoo! Groups SpamGuard has detected that the attached message to the owner of the Yahoo! Group freecyclesunnyvale is likely to be spam. For more information about SpamGuard, please visit our help pages: <http://groups.yahoo.com/local/spamguard.html>  
-----

Received: (qmail 25659 invoked from network); 14 Nov 2005 16:06:26 -0000  
Received: from unknown (66.218.66.218)  
by m28.grp.scd.yahoo.com with QMQP; 14 Nov 2005 16:06:26 -0000  
Received: from unknown (HELO relay01.pair.com) (209.68.5.15)  
by mta3.grp.scd.yahoo.com with SMTP; 14 Nov 2005 16:06:25 -0000  
Received: (qmail 87757 invoked from network); 14 Nov 2005 16:06:02 -0000  
Received: from unknown (HELO WP1) (unknown)  
by unknown with SMTP; 14 Nov 2005 16:06:02 -0000  
X-pair-Authenticated: 67.52.36.178  
Message-ID: <015b01c5e935\$512847e0\$4501a8c0@WP1>  
Reply-To: "Freecycle Database Admin" <database@freecycle.org>  
From: "Freecycle Database Admin" <database@freecycle.org>  
To: <freecyclesunnyvale-owner@yahoogroups.com>  
Subject: 2nd request freecyclesunnyvale  
Date: Mon, 14 Nov 2005 10:04:38 -0600  
Organization: Freecycle.org  
MIME-Version: 1.0  
Content-Type: multipart/alternative;  
boundary="-----\_NextPart\_000\_0145\_01C5E902.D2A1E980"  
X-Priority: 3  
X-MSMail-Priority: Normal  
X-Mailer: Microsoft Outlook Express 6.00.2900.2180  
X-MimeOLE: Produced By Microsoft MimeOLE V6.00.2900.2180  
X-eGroups-Remote-IP: 209.68.5.15

Dear Owner of the Yahoo group "freecyclesunnyvale,"

This is your second and final notification to cease and desist using the trademark-protected Freecycle(TM) name and logo, any confusingly similar derivations thereof, and The Freecycle Network's(TM) copyrighted texts/rules/guidelines in your Yahoo group, including in the title/name of the group. Please do make the necessary changes to your group name, group URL, and applicable texts to avoid any confusion with Freecycle services or delete the group immediately.

Realize that unauthorized use of these protected materials is confusing to the public and may be damaging the Freecycle Network's reputation and goodwill. Moreover, your unauthorized use is a violation of the Yahoo Terms of Service, and a trademark and copyright infringement report will be filed with Yahoo if we cannot verify that these materials have been removed with 48 hours of the sending of this notice.

As we noted in our first letter, you are welcomed to continue the operation of a gifting or exchange-oriented site similar to that

operated by our organization. However, any Freecycle mark, logo or name, as well as any and all materials copyrighted by The Freecycle Network, must be removed before the end of the 48-hour period.

Thank you for your attention to this matter,

Database Admin  
Freecycle.org  
[database@freecycle.org](mailto:database@freecycle.org)

**Exhibit 10**

Authentication-Results: mta198.mail.re2.yahoo.com  
from=yahoo-inc.com; domainkeys=neutral (no sig)  
Date: 21 Nov 2005 13:51:38 -0800  
X-yahoo-newman-id: null  
Date: Mon, 21 Nov 2005 13:25:04 -0800 (PST)  
From: Yahoo! <yahoo-dev-null@yahoo-inc.com>  
To: tim@oey.us  
Subject: Yahoo! Administrative Notice  
X-Spam-Track: 0: 100 ; SERVER=66.218.86.246

Dear Yahoo! account holder:

By creating and using your Yahoo! account, you agree to abide by Yahoo!'s Terms of Service (TOS). Pursuant to the TOS, Yahoo! reserves the right to terminate your account or otherwise prohibit use of your account in the event that, among other things, Yahoo! believes that you have violated or acted inconsistently with the letter or spirit of the TOS.

It has come to our attention that you may have violated the TOS. Please reread the TOS and cease any use of your account that may violate the TOS.

If your use of your Yahoo! account is brought to our attention again, and we believe that such use violates the TOS, then we may terminate your account without further notice.

Please do not reply to this email. Any questions concerning Yahoo!'s Services should be submitted through the on-line form in the help area ( <http://help.yahoo.com> ).

-Yahoo!

# Tab 3

Defendant's Request for Judicial Notice

Case No. CIV 06-00173-TUC-RCC  
United States District Court  
District of Arizona

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7 Attorneys for Defendant  
The Freecycle Network, Inc.

8  
9 **UNITED STATES DISTRICT COURT**  
10  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12  
13 **OAKLAND DIVISION**

13 FREECYCLESUNNYVALE, a California  
unincorporated association,

14 Plaintiff,

15 v.

16 THE FREECYCLE NETWORK, INC., an  
17 Arizona corporation,

18 Defendant.

CASE NO. C 06-00324 CW

**DEFENDANT THE FREECYCLE  
NETWORK, INC.'S MEMORANDUM  
IN SUPPORT OF MOTION TO  
DISMISS COMPLAINT UNDER RULE  
12(b)(6)**

Date: March 31, 2006

Time: 10:00 a.m.

Place: Courtroom 2 (Oakland)

Judge: Honorable Claudia Wilkin

21  
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27  
28 DEFENDANT FREECYCLE MEMORANDUM IN SUPPORT  
OF MOTION TO DISMISS COMPLAINT UNDER RULE 12(b)(6)  
CASE NO. 06-00324 CW

{60383-0001/BY060530.063}



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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The Freecycle Network, Inc. (hereinafter "The Freecycle Network") promotes the laudable goal of reusing unused equipment and supplies. Unfortunately, when The Freecycle Network sought federal trademark protection for its logo and the mark FREECYCLE to further the goals of this endeavor, Plaintiff objected to this course of action. Furthermore, Plaintiff began to disobey the rules membership in The Freecycle Network, and reluctantly The Freecycle Network eventually decided to end the relationship between itself and Plaintiff. The Freecycle Network, in order to police its trademarks, requested that Plaintiff cease using the FREECYCLE mark and logo. Plaintiff responded by creating a tempest in a second-hand teapot by filing an opposition to The Freecycle Network's trademark application with the U.S. Patent and Trademark Office, and by bringing this action in District Court (the "Complaint").

This Court should dismiss Plaintiff's claims for declaratory judgment because Plaintiff's complaint fails to state a factual basis for the existence of an actual case or controversy under the Declaratory Judgment Act. 28 U.S.C. § 2201 (hereinafter "the Act"). Plaintiff's tortious interference claim should also be dismissed because Plaintiff failed to allege facts sufficient to show that third party Yahoo! Inc. wrongfully breached a contract between itself and Plaintiff, failed to allege facts sufficient to show monetary damages, and because there is no subject matter jurisdiction over the claim.

**II. STATEMENT OF ISSUES**

1. Does Plaintiff's complaint allege a claim under the Declaratory Judgment Act?
2. Does Plaintiff's complaint allege a claim for tortious interference with business relations?

- 1 -

DEFENDANT FREECYCLE MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS COMPLAINT UNDER RULE 12(b)(6)  
CASE NO. C 06-00324 CW

### III. FACTUAL AND PROCEDURAL BACKGROUND

The Freecycle Network is an umbrella organization designed to coordinate the activities of local recycling efforts or gifting of unused equipment and supplies throughout the United States and other countries. The Freecycle Network began operation in May, 2003 to promote the formation of local gifting groups whose members could recycle functional, but unneeded, office, exercise, computer, and other items otherwise destined for landfills, by giving such items away locally for free. Complaint at ¶ 16. Apparently, Plaintiff began to promote the same goals as The Freecycle Network in the local community of Sunnyvale, California. Complaint at ¶ 17. In that regard, the instant action arises from the relationship between The Freecycle Network and Plaintiff in their mutual recycling efforts. *See Complaint* at ¶¶ 1-2.

Members of the local Sunnyvale group, as moderated by the Plaintiff as a volunteer, recycled goods and promoted reuse by giving them away in Sunnyvale, with The Freecycle Network providing support and coordinating the efforts of Plaintiff with other, similarly situated local groups throughout the country. Plaintiff set up an internet web site using free hosting services offered by Yahoo!, Inc., to promote the service in Sunnyvale. Complaint at ¶18. Plaintiff began to use the FREECYCLE mark and the distinctive FREECYCLE logo on its free Yahoo! Groups web site under specific rules which govern all member organizations of The Freecycle Network.

Plaintiff continued to use the FREECYCLE mark until it was asked to cease using the mark due to violations of the rules. On two separate occasions The Freecycle Network asked Plaintiff to cease using the mark due to the failure to abide by the rules The Freecycle Network required of all member organizations. On November 21, 2005, Yahoo! Inc. apparently suspended Plaintiff's free internet web site, citing a possible violation of Yahoo!'s Terms of Service.

1 Complaint at ¶ 34. Shortly thereafter, Plaintiff secured a new, free, web site with Yahoo! Groups  
 2 under the name "sunnyvalefree" that is in operation today. See Request for Judicial Notice, filed  
 3 herewith, Exhibit 2.

4 The Freecycle Network filed for federal trademark protection on the term FREECYCLE on  
 5 August 27, 2004. Complaint Ex. 1. Plaintiff filed an opposition to The Freecycle Network's  
 6 trademark application with the Patent and Trademark Office ("PTO") on January 18, 2006. See  
 7 Request for Judicial Notice, filed herewith, Exhibit 1. The Freecycle Network's federal trademark  
 8 application for the FREECYCLE mark, as of February 10, 2006, is on hold pending the outcome  
 9 of an opposition proceeding before the Trademark Trial and Appeal Board. ("TTAB"). Plaintiff  
 10 filed the instant action with this court on the same day as the opposition before the PTO,  
 11 requesting declaratory judgment of non-infringement on The Freecycle Network's yet-to-be issued  
 12 federal trademark, among others, and alleging tortious interference with business relations under  
 13 California state law. Complaint at ¶¶ 36-49.

#### 16 IV. ARGUMENT

##### 17 A. Plaintiff Has No Grounds for Declaratory Judgment

18 Courts perform a two-part analysis before hearing a case alleged under the Declaratory  
 19 Judgment Act, 28 U.S.C. §§ 2201(a) *et seq.* Principle Life Ins. Co. v. Robinson, 394 F.3d 665,  
 20 669 (9th Cir. 2004). First, the court must determine whether there is an actual case or controversy  
 21 within its jurisdiction, and second, the court must determine whether to exercise its jurisdiction.  
 22 See Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942); *see also* American States Ins. Co. v.  
 23 Kearns, 15 F.3d 142, 143 (9th Cir. 1994). Plaintiff's complaint in this action fails on both parts of  
 24 the test.  
 25  
 26  
 27

1           **1.       There is No Actual Case or Controversy Under the Declaratory**  
 2           **Judgment Act Because Plaintiff Failed to Plead Facts Sufficient to**  
 3           **Show a "Real and Reasonable Threat of Litigation"**

4           The test for determining the existence of an actual case or controversy under the  
 5           Declaratory Judgment Act is identical to the test for determining an actual case or controversy  
 6           under Article III of the Constitution. Kearns, 15 F.3d at 143. First, "the declaratory plaintiff must  
 7           have a real and reasonable apprehension of litigation," and second "the declaratory plaintiff must  
 8           have engaged in a course of conduct which brought it into adversarial conflict with the declaratory  
 9           defendant." Windsurfing Intern. Inc. v. AMF Inc., 828 F.2d 755, 757 (Fed. Cir. 1987). A real and  
 10          reasonable apprehension of litigation is found in the trademark context when defendant "has  
 11          charged plaintiff with infringement or has threatened plaintiff with infringement litigation, either  
 12          directly or indirectly." J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR  
 13          COMPETITION § 32:51 (4th ed.).

15          Plaintiff has not alleged facts sufficient to satisfy the "reasonable apprehension of  
 16          litigation" test laid out above. Although Plaintiff's makes a conclusory statement that The  
 17          Freecycle Network threatened litigation, the complaint fails to state how this threat was made,  
 18          whether it was implicit or explicit, when the threat was made, or any other facts sufficient to give  
 19          The Freecycle Network fair notice on this element of Plaintiff's claim. Complaint at ¶ 9. Aside  
 20          from this naked allegation of a threatened lawsuit, the only facts alleged to purportedly ground a  
 21          reasonable apprehension of litigation are two email letters sent by The Freecycle Network to  
 22          Plaintiff. Complaint at ¶¶ 29, 31. These letters include a request that Plaintiff cease using the  
 23          term FREECYCLE and the FREECYCLE logo, and state that noncompliance may result in a  
 24          Terms of Service ("TOS") violation to Yahoo!. See Complaint Exh. 7, 9. The letters did not  
 25          explicitly (or implicitly) mention litigation, and in fact invited Plaintiff to work with The  
 26          27

1 Freecycle Network in a mutually beneficial manner. *Id.* Requesting that Plaintiff cease using the  
 2 marks because it failed to abide by the rules, and extending an invitation to work together, cannot  
 3 be interpreted to give Plaintiff a reasonable apprehension of litigation.

4 Furthermore, The Freecycle Network's request to cease and desist is insufficient to be  
 5 considered a threat of a lawsuit sufficient to trigger the Act. *See Xerox Corp. v. Apple Computer*  
 6 *Inc.*, 734 F.Supp 1542, 1546 (N.D. Cal. 1990) (declaratory judgment improper in copyright case  
 7 absent threat of litigation); *see also Dunn Computer Corp v. Loudcloud, Inc.*, 133 F.Supp.2d 823,  
 8 827 (E.D. Va. 2001) (cease and desist letter that does not threaten litigation does not create a case  
 9 or controversy under the Declaratory Judgment Act). District Courts typically look for actions  
 10 beyond a cease and desist letter before determining a reasonable threat of litigation exists. *Cf.*  
 11 *Chesebrough-Pond's, Inc. v. Faberge, Inc.*, 666 F.2d 393, 396-97 (9th Cir. 1982) (actual  
 12 controversy exists where defendant's letter laid out prima facie case for infringement, threatened  
 13 litigation, threatened to file opposition before PTO, and defendant responded to complaint with  
 14 counterclaim alleging infringement). The Freecycle Network's actions, as alleged in the  
 15 complaint, fail to rise to the level of a real and reasonable apprehension of liability and, therefore,  
 16 this Court should dismiss plaintiff's motion for declaratory judgment.

17  
 18  
 19  
 20 **2. This Court Should Exercise Its Discretion to Not Entertain Plaintiff's**  
 21 **Declaratory Judgment Claim**

22 The Freecycle Network respectfully requests the Court to exercise its discretion, and not  
 23 entertain Plaintiff's declaratory judgment claim, as this case is not a case appropriate for the  
 24 Court's limited judicial resources. The Declaratory Judgment Act grants courts discretion to  
 25 dismiss a claim; under the Act courts "*may* declare the rights and other legal relations of any  
 26 interested party." 28 U.S.C. § 2201(a) (emphasis added). The Ninth Circuit instructs the district  
 27



1 courts to "balance concerns of judicial administration, comity, and fairness to the litigants" in  
 2 determining whether to hear a case under the Act. Chamberlain v. Allstate Ins. Co., 931 F.2d  
 3 1361, 1367 (9th Cir. 1991)(citing Brillhart, 316 U.S. at 495.)

4 The interests of judicial administration and fairness to the litigants strongly disfavor a grant  
 5 of jurisdiction. Plaintiff has already filed an opposition before the PTO and, having not exhausted  
 6 the administrative procedures, now seeks to bring the same argument to District Court. Pursuing  
 7 the matter in dual forums is inefficient and consumes limited judicial resources that could be put  
 8 to better use by the parties and this Court. The issue underlying Plaintiff's complaint involves the  
 9 suspension of a free Yahoo! Groups web page, used by a non-profit organization, whose members  
 10 exchange excess items for free; hardly a situation in which declaratory judgment is required to  
 11 preserve fair treatment towards the litigants. Plaintiff will not be harmed by any delay caused by  
 12 dismissal of its complaint. Furthermore, Plaintiff's defunct Yahoo! Group web site has already  
 13 been replaced by Plaintiff with a new, free, Yahoo! Group under the name "SunnyvaleFree" to  
 14 service the needs of the Sunnyvale recycling community. See Request for Judicial Notice,  
 15 attached herewith, Exhibit 2. For these reasons, The Freecycle Network requests the Court  
 16 exercise its discretion, and dismiss Plaintiff's declaratory judgment claim.

17  
 18  
 19  
 20 **B. Plaintiff Fails to Allege the Elements of a Tortious Interference Claim**

21 Plaintiff's cause of action for tortious interference with business relations fails as a matter  
 22 of law because plaintiff has failed to allege each element of a tortious interference claim. "The  
 23 elements which a plaintiff must plead to state the cause of action for intentional interference with  
 24 contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's  
 25 knowledge of this contract; (3) defendant's intentional acts designed to induce a breach of  
 26 disruption of the contractual relationship; (4) actual breach or disruption of the contractual  
 27

relationship; and (5) resulting damage." Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal.3d 1118, 1126 (1990). In addition, the act inducing a breach of contract must be wrongful. Quelimane Co. v. Stewart Title Guaranty Co., 19 Cal.4th 26, 56 (Cal. 1998). Plaintiff's complaint fails to allege each element of tortious interference in that it (1) does not allege that The Freecycle Network's contact with third party Yahoo! was wrongful, and (2) does not allege facts from which a pecuniary loss can be shown as all local group items posted are free, and all local volunteers are unpaid as far as The Freecycle Network understands.

#### 1. Plaintiff Fails to Allege a Wrongful Act

California state law requires that the plaintiff in a cause of action for intentional interference with contractual relations allege, in part, that The Freecycle Network's actions are wrongful. Quelimane Co., 19 Cal.4th at 55. California follows the Second Restatement of Torts approach to determining whether an action that induces interference with contract is wrongful. *Id.* at 56. "If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from defendant's objective that as against the plaintiff the interference may be found to be not improper." *Id.* (quoting Rest. 2d Torts, § 766, com. j). Thus, actions that are in pursuit of a legitimate business objective, such as protecting a trademark, are not considered wrongful.

Plaintiff's complaint does not allege that The Freecycle Network acted with criminal, violent, or fraudulent intent in allegedly contacting Yahoo! about Plaintiff's misuse of The Freecycle Network's trademark. Instead, Plaintiff's own exhibits indicate that The Freecycle Network's alleged contact was motivated by a desire to advance its legitimate interest in and

1 requirement to police the FREECYCLE trademark. *See Complaint* Exh. 7, 9. This is precisely the  
 2 type of situation contemplated by the Restatement as not improper. To hold otherwise would  
 3 indicate that whenever a trademark holder contacts an internet service provider about a potential  
 4 trademark issue, and the contact results in termination of a contract, the contracting party could  
 5 sue the trademark holder for tortious interference. Plaintiff's cause of action for tortious  
 6 interference should therefore be dismissed because The Freecycle Network's alleged actions are  
 7 not wrongful as pled.  
 8

## 9 **2. Plaintiff Fails to Allege a Factual Basis for Monetary Damages**

10  
 11 The presence of damages is a pleading requirement in a cause of action for tortious  
 12 interference with business relations. *Quelimane*, 19 Cal.4th at 55. The Restatement states that one  
 13 who wrongfully interferes with a contract between two parties is "subject to liability to the other  
 14 for the pecuniary loss resulting to the other from the failure of the third person to perform the  
 15 contract." *Rest. 2d Torts*, § 766. Plaintiff's complaint does not state any facts from which the  
 16 existence of pecuniary damages can be drawn.  
 17

18 As noted above, the contract at issue between Plaintiff and Yahoo! was a contract for a free  
 19 Yahoo! Group web page. *Complaint* at ¶¶ 14-15. Plaintiff used this contract to promote its local  
 20 area group of gifting unused items away. Given these facts, the complaint only alleges that The  
 21 Freecycle Network interfered with a (free) contract for (free) internet services provided by  
 22 Yahoo!, which Plaintiff used to organize a (free) service whose volunteer members gave items  
 23 away, for free. Nowhere in the complaint does Plaintiff allege the loss of a single dollar due to  
 24 The Freecycle Network's actions. *See Complaint* at ¶¶ 29-35. For this reason alone, because the  
 25 complaint fails to indicate how plaintiff could have suffered any pecuniary loss as a result of The  
 26  
 27

1 Freecycle Network's actions, Plaintiff's cause of action for tortious interference should be  
2 dismissed.

3  
4 **3. This Court Lacks Jurisdiction Over Plaintiff's Tortious Interference  
5 Claim**

6 The Freecycle Network notes that Plaintiff's cause of action for tortious interference with  
7 business relations must also be dismissed in the event this Court dismisses plaintiff's cause of  
8 action declaratory judgment. A plaintiff bears the burden of establishing jurisdiction in federal  
9 court. Rio Prop's, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002). Plaintiff claims  
10 federal subject matter jurisdiction for the declaratory judgment claim because the claim arises  
11 under federal law, and claims supplemental jurisdiction for the tortious interference claim based  
12 on the close relation between the tortious interference and declaratory judgment claims.  
13  
14 Complaint at ¶¶ 3-4. As Plaintiff's declaratory judgment claim fails as a matter of law,  
15 supplemental jurisdiction does not exist, and the tortious interference claim must be dismissed for  
16 a lack of subject matter jurisdiction. See Herman Family Revocable Trust v. Teddy Bear, 254  
17 F.3d 802, 806 (9th Cir. 2001) (District court dismissing federal claims for lack of jurisdiction must  
18 also dismiss state claims brought under supplemental jurisdiction).

19  
20 ///

21 ///

22 ///

V. CONCLUSION

For the above stated reasons, The Freecycle Network respectfully requests that the Court dismiss this Complaint.

DATED: February 22, 2006

PERKINS COIE LLP

By \_\_\_\_\_/s/  
Paul J. Andre  
Lisa Kobialka  
Sean Boyle  
Attorneys for Defendant  
The Freecycle Network, Inc.

# Tab 4

Defendant's Request for Judicial Notice

Case No. CIV 06-00173-TUC-RCC  
United States District Court  
District of Arizona

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9  
10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 OAKLAND DIVISION

13 FREECYCLESUNNYVALE,  
14 a California unincorporated association,

15 Plaintiff,

16 v.

17 THE FREECYCLE NETWORK,  
18 an Arizona corporation,

19 Defendant.

CASE NO. C06-00324 CW

**PLAINTIFF FREECYCLESUNNYVALE'S  
OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS UNDER RULE  
12(b)(6)**

Date: March 31, 2006  
Time: 10:00 a.m.  
Place: Courtroom 2 (Oakland)  
Judge: Honorable Claudia Wilken

20 **I. INTRODUCTION**

21 Defendant twice sent non-negotiable ultimatums into this District, claiming trademark  
22 rights to the common terms, "freecycle" and "freecycling," and demanding that Plaintiff "cease  
23 and desist" from using those terms to assist "freecyclers" in the Sunnyvale, California, area.  
24 Defendant also threatened to and did interfere with Plaintiff's Yahoo! group service account. As  
25 a result of Defendant's acts, Yahoo!, an entity whose principal place of business is in this District,  
26 disabled Plaintiff's Yahoo! group, depriving Plaintiff of its chosen method of promoting  
27 freecycling in this District.  
28

1 Having accomplished what it set out to do, Defendant now argues that there is no “case or  
2 controversy” and that Plaintiff has not been damaged. To manufacture support for its baseless  
3 motion, Defendant mischaracterizes the Complaint, relies upon “facts” not before this Court, and  
4 grossly misstates the law. Because Plaintiff more than adequately pleaded its two counts,  
5 Defendant’s motion should be denied.

## 6 **II. STATEMENT OF THE ISSUES TO BE DECIDED**

7 1. Does Plaintiff have a reasonable apprehension that Defendant will file a trademark  
8 infringement action under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)?

9 2. Does Plaintiff state a claim for interference with an existing contract by alleging  
10 that the Defendant intentionally caused Yahoo! to terminate Plaintiff’s account?

## 11 **III. FACTS**

12 The Complaint and its attached Exhibits set forth the following facts, which the Court  
13 must assume true for purposes of the Motion to Dismiss under Rule 12(b)(6). *Trew v.*  
14 *International Game Fish Assoc., Inc.*, 404 F. Supp. 2d 1173, 1177 (N.D. Cal. 2005). This Court  
15 must ignore any additional “facts” on which the Complaint does not rely. *Id.*

16 “Freecycling” is a practice by which a person with an unwanted item, a “freecycler,”  
17 gives the item away rather than destroying the item or sending the item to a landfill. Complaint  
18 ¶¶ 13. Organizations that promote freecycling, such as the parties in this lawsuit, use email  
19 distribution lists to assist freecyclers to announce the items they no longer want. Complaint ¶ 14.

20 Plaintiff operates in Sunnyvale, California, providing support and assistance to local  
21 freecyclers. Complaint ¶¶ 1, 5. Yahoo!, who also resides in this District, contractually provided  
22 Plaintiff with an online group service account which allowed freecyclers in the Sunnyvale area to  
23 announce unwanted items. Complaint ¶¶ 15, 18. Defendant, an Arizona entity, provides  
24 nationwide assistance to local freecycling organizations who use Yahoo!’s online services to assist  
25 freecyclers. Complaint ¶¶ 2, 16. Initially, Defendant enthusiastically supported Plaintiff’s efforts  
26 to assist Sunnyvale area freecyclers. Complaint ¶¶ 19, 20.

27 On or about November 1, 2005, Defendant sent an email to Plaintiff in Sunnyvale, which  
28 was styled as an “official notice to stop using the trademark-protected Freecycle name and logo.”