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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE FREECYCLE NETWORK, INC.,
an Arizona non-profit organization,

Plaintiff,

v.

TIM OEY and JANE DOE OEY,

Defendants.

No. CIV06-173-TUC-RCC

**DEFENDANTS' REPLY TO
PLAINTIFF'S OPPOSITION TO
MOTION TO STAY OR TRANSFER**

The Freecycle Network, Inc. v. Oey et al

Doc. 48

As the Court has already surmised, the question of whether The Freecycle Network ("TFN") has any valid trademark rights in the term "FREECYCLE" is crucial to both the case at hand and the earlier filed California action. In fact, the Court based its order for preliminary injunction on the premise that TFN had rights in the term "FREECYCLE." That is why Defendants simply cannot understand TFN's opposition to the motion at hand. Looking at the representations TFN has made to this Court and to the Court in the Northern District of California, the earlier filed action, it would appear that this is one of the rare instances where

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both TFN and Tim Oey agree, i.e., pursuing the question of trademark validity in two different forums is a waste of judicial economy with the potential to produce inconsistent results.¹

In TFN's oral arguments before this Court, TFN asserted the following:

- "... what you have is two proceedings, because the trademark opposition proceeding is actually before the Trademark Trial and Appeal Board . . . [i]t is essentially litigation, so you would have to do discovery, you'd have a trial. It's actually the same thing. So rather than having two proceedings going, we moved to stay one of them so that the Northern District case will proceed on the trademark, the Freecycle [sic]." Exhibit A: Preliminary Injunction Transcript at 7.

In TFN's filings before the Court in the Northern District of California, the earlier filed action, TFN asserted the following:

- "Pursuing the matter in dual forums is inefficient and consumes limited judicial resources that could be put to better use by the parties and this Court." Exhibit B: FreecycleSunnyvale v. The Freecycle Network, Defendant's Memorandum in Support of Motion to Dismiss at 6.

- "Plaintiff will not be harmed by any delay caused by dismissal of its complaint."

Exhibit B: *Id.*

- "... this case is not appropriate for the court's limited judicial resources."

Exhibit B: *Id.* at 5

¹ TFN is disingenuous as to their assertions that they had no knowledge that Tim Oey and FreecycleSunnyvale were linked before the filing of this action. Defendants ask that the Court take notice that the emails submitted with FreecycleSunnyvale's complaint in the earlier filed action in the Northern District also appear in the filings before the Court here. (Exhibit D: FreecycleSunnyvale v. The Freecycle Network, Complaint Exhibit B) and Tim Oey is designated as the agent for Service of Process in that case also (Exhibit E: Declaration of Tim Oey in Opposition to Plaintiffs' Motion for Preliminary Injunction at Exhibit B). Defendants also attach a copy of the transcript of the court proceedings on the motion for preliminary injunction where Deron Beal describes the position of Tim Oey as the moderator of FreecycleSunnyvale (Exhibit A at 33-34).

- “Plaintiff’s failure to exhaust all remedies apart from declaratory relief is a waste of judicial resources.” Exhibit C: FreecycleSunnyvale v. The Freecycle Network, Reply to Plaintiff’s Opposition to Motion to Dismiss at 4 [original in bold].

- “As stated clearly in The Freecycle Network’s moving papers, the pending opposition before the PTO represents yet another reason why Plaintiff’s complaint should be dismissed, namely that administrative resources are already being utilized for purposes of determining registerability of The Freecycle Network’s trademark.” Exhibit C: *Id.* at 5.

- “Moreover, dismissal of Plaintiff’s Complaint will prevent inconsistent results from parallel proceedings” Exhibit C: *Id.*

- “. . . the trademark opposition requires Plaintiff to take contrary legal positions. Plaintiff alleges in its opposition before the PTO that The Freecycle Network failed to police its mark . . . [t]his is not merely arguing a case in the alternative, it is attempting to create inconsistent results.” Exhibit C: *Id.*

- “Since Plaintiff already exercised its administrative option, it need not additionally waste judicial resources.” Exhibit C: *Id.*

In this regard, it is also interesting to note that in most of TFN’s papers they support their arguments by citing that Tim Oey, a non-lawyer, changed his mind as to whether TFN had valid trademark rights in the term “FREECYCLE.” This is cited as evidence of Tim Oey’s “malicious intent” to disparage TFN’s alleged marks. While Defendants deny this assertion, equity would seem to dictate that TFN should be held to the same standard of reasoning on which it bases its cause of action, i.e., that filing this action in spite of their musings that dual proceedings are a waste of judicial economy with the potential to produce inconsistent results proves that this action was brought with a “malicious intent.”

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FOR ALL OF THE FOREGOING REASONS, it is respectfully requested the
Defendants' Motion for Transfer or Stay be granted.

DATED this 25th day of May, 2006.

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By: /s/Ashley L. Kirk
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Original of the foregoing
electronically filed this 25th
day of May, 2006, with:

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