

EXHIBIT B

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.
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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
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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.

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