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THE FREECYCLE NETWORK, INC.

17 IN THE UNITED STATES DISTRICT COURT
18 DISTRICT OF ARIZONA

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

21 Plaintiff,

22 v.

23 TIM OEY,
24 an individual

25 Defendant.

CASE NO. 06-CV-00173-RCC

THE FREECYCLE NETWORK, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF *EX*
PARTE MOTION FOR TEMPORARY
RESTRAINING ORDER AND MOTION
FOR PRELIMINARY INJUNCTION

Date: April 24, 2006
Time: 2:00 p.m.
Before: Honorable Raner C. Collins
Location: Courtroom 5B

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1 I. INTRODUCTION

2 This is a case about revenge. Defendant Tim Oey, (“Defendant” or “Oey”), frustrated
3 that he was asked to step down from a leadership position in The Freecycle Network, Inc. (“The
4 Freecycle Network”), seeks to destroy its valuable trademarks, which The Freecycle Network
5 owns after extensive use and development of valuable goodwill. The Freecycle Network
6 coordinates programs throughout the world to promote the reusing, recycling, and gifting of
7 goods. Protection of The Freecycle Network’s trademark rights is essential in order to properly
8 identify legitimate members of The Freecycle Network, and to accomplish its goal of centralized
9 coordination of recycling services. Indeed, the Freecycle Network has strict guidelines as to the
10 use of its trademarks. Additionally, The Freecycle Network actively polices potentially
11 infringing uses of its trademarks. As a result, The Freecycle Network has been able to obtain
12 corporate sponsorship and funding which enables it to cover its administrative costs.

13 Defendant publicly recognized the validity of The Freecycle Network’s trademarks on
14 numerous occasions while he was affiliated with The Freecycle Network. Upon being asked to
15 step down from The Freecycle Network, however, Defendant began to misuse the trademarks,
16 and consistently ignored requests to cease such misuse. Moreover, Defendant openly admits that
17 he has encouraged others to infringe the marks by stating “...I have encouraged people to use the
18 term freecycle as a generic term which would block The Freecycle Network (TFN), and all
19 others, from holding a trademark...” See Complaint, Exh. F.¹ Additionally, Defendant has
20 targeted individuals dedicated to the active promotion of reusing, recycling, and gifting, and has
21 encouraged them to join an opposition filed by the Yahoo! group FreecycleSunnyvale with the
22 Trademark Trial and Appeal Board (“TTAB”) regarding the registration of The Freecycle
23 Network’s trademarks.² Furthermore, Defendant has made and disseminated false statements
24 about The Freecycle Network and its trademarks.

25 _____
26 ¹ “Complaint” refers to The Freecycle Network’s Complaint in this action, filed on April
27 4, 2006. Declaration of Esha Bandyopadhyay in Support of The Freecycle Network, Inc.’s *Ex*
28 *Parte* Motion for Temporary Restraining Order and Motion for Preliminary Injunction
 (“Bandyopadhyay Decl.”), ¶2, Exh. A.

² FreecycleSunnyvale filed its opposition on January 18, 2006. Declaration of Deron
Beal (hereinafter “Beal Decl.”) filed herewith, ¶6, Exh. H.

1 The Freecycle Network has compelling evidence that Defendant has contributorily
2 infringed, and continues to contributorily infringe, upon The Freecycle Network's trademarks.
3 The Freecycle Network has further compelling evidence that Defendant has engaged in
4 disparagement of The Freecycle Network's valid trademarks, injurious falsehood, and
5 defamation. Most notably, this evidence includes Defendant's own admissions of engaging in
6 such conduct. Accordingly, The Freecycle Network respectfully requests entry of a preliminary
7 injunction and temporary restraining order prohibiting Defendant from further engaging in this
8 unlawful conduct.

9 II. STATEMENT OF FACTS

10 A. Plaintiff The Freecycle Network and its Marks

11 The Freecycle Network is a nonprofit Arizona corporation with member groups
12 throughout the world dedicated to encouraging and coordinating the reusing, recycling, and
13 gifting of goods. Beal Decl., ¶2. Starting with a single recycling community in Tucson, The
14 Freecycle Network has grown to a worldwide organization with thousands of local recycling
15 groups, and more than two million individual members. *Id.* The Freecycle Network maintains
16 an Internet Web site, located at www.freecycle.org, which maintains a directory of local
17 recycling groups throughout the world and provides resources for volunteers to create new local
18 recycling groups. *Id.*, ¶3. Because of its efforts toward such laudable goals, The Freecycle
19 Network has successfully obtained corporate sponsorship to cover its administrative expenses
20 and enable it to continue promoting recycling, reusing, and gifting of goods. *Id.*, ¶4.

21 The Freecycle Network has been using the trademarks FREecycle, THE
22 FREecycle NETWORK, and the distinctive "The Freecycle Network" logo (collectively "The
23 Freecycle Network's Marks" or the "Marks") exclusively and continuously since at least May 1,
24 2003. *Id.*, ¶5. The Freecycle Network has strict guidelines as to the use of the Marks, and
25 expends much effort in policing potential infringement of the Marks. *Id.*, ¶5, Exhs. E-F.

26 As a result of its extensive use and promotion of the Marks, The Freecycle Network has
27 built up and now owns valuable goodwill that is symbolized by these trademarks. For example,
28 publications such as CNN.com, The Motley Fool, CBS News, and The Washington Post have

1 praised The Freecycle Network and its efforts in promoting the reusing, recycling, and gifting of
2 goods. *Id.*, ¶2, Exhs. A-D. Furthermore, the Marks comprise an important portion of The
3 Freecycle Network's intellectual property and are very important to The Freecycle Network's
4 identity. *See id.*, ¶6. On November 22, 2005, The Freecycle Network's FREECYCLE
5 trademark and distinctive logo were approved for publication on the Principal Register by the
6 United States Patent and Trademark Office ("PTO"). *Id.*, ¶6, Exh. G. A notice of publication
7 was issued on December 28, 2005. *Id.* Subsequently, however, an opposition proceeding was
8 instituted on January 18, 2006, in regard to the registration of the FREECYCLE mark. *Id.*, ¶6,
9 Exh. H. Accordingly, federal registration of The Freecycle Network's Marks is pending. *Id.*, ¶6.

10 The Freecycle Network gives its local groups permission to use the Marks for local
11 promotions of programs that encourage reusing, recycling, and gifting. *Id.*, ¶7. Accordingly,
12 The Freecycle Network's Marks are used to identify local recycling organizations which
13 participate within The Freecycle Network organization. *Id.* The Freecycle Network's Marks are
14 further used by The Freecycle Network to promote recycling of usable items within a
15 community. *Id.* Individual recyclers rely on the Marks to know that they are dealing with a local
16 organization affiliated with the well-known The Freecycle Network. *Id.*

17 **B. Defendant Tim Oey**

18 Defendant was an active member of The Freecycle Network from early 2004 until late
19 2005. *Id.*, ¶8. During this time, Defendant held a variety of positions within The Freecycle
20 Network, one of which involved participating in an intellectual property working group tasked
21 with developing guidelines for protecting The Freecycle Network's intellectual property
22 (including The Freecycle Network's Marks). *Id.* In fact, Defendant vigorously defended The
23 Freecycle Network's rights to The Freecycle Network's Marks in public e-mail exchanges and
24 various Internet for a while he was a member of The Freecycle Network. *Id.* For example, in an
25 e-mail dated September 17, 2004, Defendant stated, in pertinent part, "Everyone in the Freecycle
26 network needs to protect the "Freecycle" trademark." *See* Complaint, Exh. A. Additionally,
27 Defendant prepared trademark protection guidelines in order to preserve The Freecycle
28 Network's Marks. *Beal Decl.*, ¶8. In an e-mail dated January 5, 2005, he wrote a list of

1 guidelines entitled "How To Protect the Freecycle Trademark." See Complaint, Exh. B. In fact,
2 there is no doubt Defendant believed The Freecycle Network's Marks are valid and worthy of
3 protection. See Complaint, Exh. C ("...the Freecycle trademark...is real, Freecycle is using it,
4 and has the right to defend it to a degree even without registration").

5 **C. Defendant's Unlawful Conduct and the Repercussions Therefrom**

6 On or around September 15, 2005, Defendant was asked to resign from his position at
7 The Freecycle Network due to behavior contrary to The Freecycle Network's mission. See
8 Complaint, Exh. D; see also Beal Decl., ¶9. Around this time, Defendant began to publicly
9 disagree with the validity of The Freecycle Network's Marks and started to encourage the
10 destruction of The Freecycle Network's Marks. *Id.* Specifically, Defendant has engaged in a
11 systematic campaign to destroy the value of The Freecycle Network's Marks. *Id.* To this end,
12 Defendant has intentionally made false statements about the validity of The Freecycle Network's
13 intellectual property, including the Marks. *Id.* These statements include assertions that The
14 Freecycle Network does not possess valid trademark rights in the Marks, assertions that at least
15 one of the Marks (specifically the FREECYCLE mark) is a generic term, and assertions that third
16 parties can freely use the Marks. For example, Defendant has stated, "...it is legal for everyone
17 to use the term freecycle ...so have fun with it!" See Complaint, Exh. E. In a more bold
18 admission, Defendant stated "...I have encouraged people to use the term freecycle as a generic
19 term which would block The Freecycle Network (TFN), and all others, from holding a
20 trademark...." See Complaint, Exh. F. Furthermore, Defendant has encouraged others to misuse
21 the Marks by writing "...please contact all the freecycle groups in your state and surrounding
22 states to let them know that freecycle is a generic term...." See Complaint, Exh. G.

23 Additionally, Defendant has made false public assertions regarding The Freecycle
24 Network itself by stating that it is "doing bad things." See *id.* Despite requests from The
25 Freecycle Network to cease from such false assertions, Defendant continues to misuse the Marks
26 and make false, public statements. Beal Decl., ¶9. Moreover, Defendant has indicated publicly
27 that his campaign against The Freecycle Network is intentional and motivated by malice. For
28

1 example, Defendant has urged other to “[d]rive [The Freecycle Network] nuts.” See Complaint,
2 Exh. G.

3 As a direct result of Defendant’s on-going campaign to destroy the value of The
4 Freecycle Network’s Marks and cause damage to The Freecycle Network, The Freecycle
5 Network has already lost a significant portion of its corporate sponsorship. Beal Decl., ¶10.
6 Additionally, The Freecycle Network is being irreparably harmed as it is has lost, and continues
7 to lose, the goodwill and reputation associated with the Marks. *Id.*

8 III. ARGUMENT

9 As this Court is aware, to prevail upon a motion for temporary or preliminary injunctive
10 relief, the moving party must show either (1) a combination of probable success and the
11 possibility of irreparable harm, or (2) that serious questions are raised and the balance of
12 hardships tips in its favor. See Brookfield Comms., Inc. v. West Coast Entm’t Corp., 174 F.3d
13 1036, 1046 (9th Cir. 1999) (granting preliminary injunction in favor of trademark owner); see
14 also Metro Publ’g Ltd. v. San Jose Mercury News, 987 F.2d 637, 639 (9th Cir. 1993); Fed.
15 Deposit Ins. Corp. v. Garner, 125 F.3d 1272, 1277 (9th Cir. 1997).³ The two elements are not
16 separate tests, but rather opposite ends of a single “continuum in which the required showing of
17 harm varies inversely with the required showing of meritoriousness.” San Diego Comm. Against
18 Registration & the Draft v. Governing Board of the Grossmont Union High Sch. Dist., 790 F.2d
19 1471, 1473 n.3 (9th Cir. 1986) (citation omitted).

20 Because The Freecycle Network is likely to succeed on the merits and will suffer
21 irreparable harm if a temporary restraining order does not issue against Defendant, and because
22 the balance of hardships tips sharply in The Freecycle Network’s favor, The Freecycle
23 Network’s *ex parte* motion should be granted.

24 A. The Freecycle Network is Likely to Prevail on the Merits of Its Claims

25
26
27 ³ The standard for issuing a temporary restraining order is substantially the same as the
28 standard for issuing a preliminary injunction. See Stuhlberg Int’l Sales Co. v. John D. Brush &
Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001).

1 To obtain injunctive relief, The Freecycle Network need not show that *it will necessarily*
2 prevail on the merits, only that there is a *reasonable probability* of success. Dogloo, Inc. v.
3 Doskocil Mfg. Co., Inc., 893 F.Supp. 911, 917 (C.D.Cal. 1995) citing Gilder v. PGA Tour, Inc.,
4 936 F.2d 417, 422 (9th Cir. 1991); *see also* Wilson v. Watt, 703 F.2d 395 (9th Cir.1983). This
5 standard has been interpreted to mean a “fair chance of success on the merits.” Johnson v.
6 California State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995); Benda v. Grand Lodge
7 of IAM, 584 F.2d 308, 315-16 (9th Cir.1978). As detailed below, The Freecycle Network has
8 more than a fair chance of success on the merits.

10 **1. The Freecycle Network is Likely to Succeed on the Merits of its**
11 **Contributory Trademark Infringement Cause of Action**

12 One branch of contributory infringement encompasses instances when a defendant
13 “intentionally induces a third party to infringe the plaintiff’s mark....” Lockheed Martin Corp.
14 v. Network Solutions, Inc., 194 F.3d 980, 983-84 (9th Cir. 1999). Indeed, the Supreme Court
15 has left little doubt that one who induces another to infringe a trademark will be liable for
16 contributory infringement. Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1382 (9th Cir. 1984);
17 *see also* Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 853-54 (1982) (stating that “if a
18 manufacturer or distributor intentionally induces another to infringe a trademark...the
19 manufacturer or distributor is contributorily responsible....”).

20 Here, Defendant has intentionally induced third parties to infringe the Marks by
21 encouraging misuse of the Marks, and by writing in numerous e-mails and postings that the
22 Marks are not valid, and that The Freecycle Network’s claim to them is erroneous. As described
23 above, Defendant’s inducement includes intentionally erroneous assertions that The Freecycle
24 Network’s Marks are generic and may be freely used by others. *See* Complaint, Exh. E (“...it is
25 legal for everyone to use the term freecycle...so have fun with it!”), Exh. F (“...I have
26 encouraged people to use the term freecycle as a generic term which would block The Freecycle
27 Network (TFN), and all others, from holding a trademark....”), Exh. G (“...please contact all the
28 freecycle groups in your state and surrounding states to let them know that freecycle is a generic

1 term..."). If individuals and entities other than The Freecycle Network begin freely using the
2 Marks in relation to services other than those offered by The Freecycle Network, this will
3 inevitably result in a likelihood of confusion as to the origin of the services. As further detailed
4 above, Defendant's systematic campaign to intentionally destroy The Freecycle Network's
5 intellectual property has resulted in a loss of good will and reputation, as well as a loss in
6 corporate sponsorship. Beal Decl., ¶10.

7 Given Defendant's own admissions that (1) he has encouraged others to misuse and
8 infringe The Freecycle Network's Marks, (2) he has told others that The Freecycle Network has
9 no right to The Freecycle Network's Marks, and (3) he has organized a coordinated attack on
10 The Freecycle Network's Marks which is resulting in massive infringement and damage, there is
11 no doubt that The Freecycle Network will succeed on its claim for contributory trademark
12 infringement.

13 **2. The Freecycle Network is Likely to Succeed on the Merits of its**
14 **Trademark Disparagement Claim**

15 To prevail on its claim for trademark disparagement, the Freecycle Network is required to
16 establish that (i) Defendant made a false statement in regard to The Freecycle Network; (ii) that
17 this false statement was made with malice; and (iii) that The Freecycle Network suffered special
18 damages as a result of the false statement. Big O Tire Dealers, Inc. v. The Goodyear Tire &
19 Rubber Co., 561 F.2d 1365, 1373-74 (10th Cir. 1977).

20 Here, Defendant has intentionally made numerous false statements about The Freecycle
21 Network's intellectual property, including The Freecycle Network's Marks. These statements
22 include open assertions that the Marks are generic, and that The Freecycle Network does not
23 possess valid rights in these Marks. See Complaint, Exh. E ("...it is legal for everyone to use the
24 term freecycle...so have fun with it!"), Complaint, Exh. F ("...I have encouraged people to use
25 the term freecycle..."). These statements are undoubtedly false because The Freecycle Network
26 owns valid rights in the Marks which cannot freely be infringed by the public at large. As stated
27

1 above, the PTO has recognized the validity of The Freecycle Network's FREECYCLE
2 trademark by approving it for publication on the Principal Register. Beal Decl., ¶6, Exh. C.

3 Additionally, there is no doubt that Defendant acted with malice in attempting to
4 disparage the Marks. In fact, Defendant admits his malicious intent by acknowledging that his
5 goal is to "block The Freecycle Network (TFN), and all others, from holding a trademark...."
6 Complaint, Exh. F. Similarly, Defendant admits that his intention is to "[d]rive [The Freecycle
7 Network] nuts." Complaint, Exh. G.

9 Furthermore, The Freecycle Network has and will continue to suffer significant
10 irreparable harm due to Defendant's malicious, false statements. These special damages include,
11 but are not limited to, a loss of goodwill, decreased membership in The Freecycle Network, loss
12 of potential corporate sponsorship, and potential loss of intellectual property rights in The
13 Freecycle Network's Marks. See Beal Decl., ¶10.

14 As such, The Freecycle Network will succeed on the merits on its trademark
15 disparagement claim. And importantly, it appears that Defendant will continue to recklessly
16 disparage The Freecycle Network's Marks with malice unless restrained by this Court.

17
18 **3. The Freecycle Network is Likely to Succeed on the Merits of its
19 Injurious Falsehood Claim**

20 Injurious falsehood entails an intentional publication of an injurious falsehood
21 disparaging another's property. See Gee v. Pima County, 126 Ariz. 116, 116 (Ariz.Ct.App.
22 1980). Generally, injurious falsehood is the publication of matter derogatory to the plaintiff's
23 business which is calculated to prevent others from dealing with him. See Western Techs., Inc.
24 v. Sverdrup & Parcel, Inc., 154 Ariz. 1, 4 (Ariz.Ct.App. 1986). To prevail on its claim for
25 injurious falsehood, The Freecycle Network must show (i) that Defendant published an injurious
26 falsehood to a third party; (ii) that Defendant knew of the falsity of its statement; (iii) that
27 Defendant made an effort to dissuade a third party from dealing with The Freecycle Network;
28 and (iv) that Defendant's actions resulted in a pecuniary loss to The Freecycle Network.

1 Fillmore v. Maricopa Water Processing Systems, Inc., 211 Ariz. 269 (2005) citing Western
2 Techs., 154 Ariz. at 4.

3 As describe above, Defendant has published numerous false statements concerning The
4 Freecycle Network and its Marks. See Complaint, Exh. E (“...it is legal for everyone to use the
5 term freecycle...so have fun with it!”), Complaint, Exh. G (“[The Freecycle Network] are doing
6 bad things”). Additionally, given Defendant’s prior acknowledgement that “...the Freecycle
7 trademark [] ...is real, Freecycle is using it, and has the right to defend it to a degree even
8 without registration” (see Complaint, Exh. C), it is clear that Defendant has actual knowledge of
9 the falsity of his statements. Defendant cannot now be permitted to make the Marks generic by
10 encouraging others to destroy the distinctiveness simply because he no longer wants the Marks to
11 be enforced.

12 Furthermore, in intentionally trying to prevent The Freecycle Network from retaining its
13 valid trademark rights (see Complaint, Exh. F, “...I have encouraged people to use the term
14 freecycle as a generic term which **would block The Freecycle Network (TFN), and all others,**
15 **from holding a trademark...**” (emphasis added)), Defendant is attempting to terminate The
16 Freecycle Network’s contracts and relationships with its corporate sponsors. See Beal Decl, ¶10.
17 Because corporate sponsorship is the sole source of funding for The Freecycle Network to
18 continue its work both nationally and internationally, Defendant’s intentional interference with
19 such agreements, and an ultimate dissolution of the agreements, would result in a devastating
20 pecuniary loss for The Freecycle Network.

1 **4. The Freecycle Network is Likely to Succeed on the Merits of its**
2 **Defamation Claim**

3 The crux of a defamation claim under Arizona law is whether the statement makes or
4 implies a provable false assertion of fact. See Miller v. Servicemaster By Rees, 174 Ariz. 518,
5 520 (Ariz. Ct. App. 1993). To prevail on such a claim, The Freecycle Network must establish (i)
6 a false and defamatory statement made by Defendant concerning The Freecycle Network; (ii) a
7 nonprivileged publication of that false statement to a third party; (iii) at least negligence on the
8 part of the Defendant; (iv) and harm to The Freecycle Network as a result of the false statement.
9 *Id.*

10 As set forth above, Defendant has made, and continues to make, false public statements
11 concerning The Freecycle Network and its Marks. See Complaint, Exh. E (“...it is legal for
12 everyone to use the term freecycle...so have fun with it!”), Complaint, Exh. G (“[The Freecycle
13 Network] are doing bad things”). Additionally, Defendant was not given permission to make
14 such assertions, and was specifically asked to stop making these false, public assertions. Indeed,
15 Defendant has no right whatsoever to publish these statements. See Beal Decl., ¶9. Further,
16 given Defendant’s prior acknowledgement that “...the Freecycle trademark [] ...is real,
17 Freecycle is using it, and has the right to defend it to a degree even without registration” (see
18 Complaint, Exh. C), it is clear that Defendant now makes these false assertions with actual
19 knowledge (not just mere negligence) of the falsity of the statement.

20 Finally, there can be no doubt that The Freecycle Network is suffering harm from the
21 negative repercussions of Defendant’s false statements. The goodwill of the Marks is being
22 eroded, and Defendant’s false statements are harming the reputation of The Freecycle Network.
23 Moreover, The Freecycle Network has already suffered a reduction in corporate sponsorship.
24 Beal Decl., ¶10. Accordingly, there is more than a reasonable probability that The Freecycle
25 Network will succeed on its claim of defamation

1 **B. The Irreparable Harm to The Freecycle Network Strongly Favors Issuing a**
2 **Temporary Restraining Order**

3 It is well established in this Circuit that in cases under the Lanham Act, once a plaintiff
4 establishes likelihood of success on the merits, there arises a presumption that the plaintiff will
5 suffer irreparable harm unless an injunction is entered. See Brookfield, 174 F.3d at 1066; see
6 also El Pollo Loco, Inc. v. Hashim, 316 F.3d 1032, 1038 (9th Cir. 2003) (quoting GoTo.com,
7 Inc. v. Walt Disney Co., 202 F.3d 1199, 1205 n.4 (9th Cir. 2000)) (“[i]n a trademark
8 infringement claim, ‘irreparable injury may be *presumed* from a showing of likelihood of success
9 on the merits.’”) (emphasis added). Given The Freecycle Network’s strong showing of a
10 likelihood of success on the merits, this presumption is sufficient to support entry of an
11 immediate injunction.

12 However, even without the presumption, there is more than enough evidence that The
13 Freecycle Network will suffer irreparable harm unless Defendant is immediately enjoined from
14 inducing others to infringe upon The Freecycle Network’s Marks. As stated above, here
15 Defendant publicly announced his intention to infringe The Freecycle Network’s Marks and
16 encouraged others to do so. Among other examples, Defendant has publicly stated “...I have
17 encouraged people to use the term freecycle as a generic term which would block The Freecycle
18 Network (TFN), and all others, from holding a trademark....” See Complaint, Exh. F.
19 Additionally, Defendant has intentionally, knowingly, and maliciously made false and
20 defamatory statements about The Freecycle Network and its Marks. See, e.g., Complaint, Exh.
21 G (“[The Freecycle Network] is doing bad things.”). Further, Defendant has publicly admitted
22 that he has chosen to pursue this course of action in order to “[d]rive [The Freecycle Network]
23 nuts.” See *id.*

24 Such conduct is detrimental to the reputation and goodwill of the distinctive Marks,
25 developed over years of using The Freecycle Network’s Marks to identify its reusing, recycling
26 and gifting efforts. Moreover, Defendant’s actions (as he himself admits) are aimed at
27 destroying the value of The Freecycle Network’s Marks. See Complaint, Exhs. E, F, and G.
28 Furthermore, as stated above, The Freecycle Network has already suffered a decrease in

1 corporate sponsorship and faces the possibility of a complete withdrawal of all such sponsorship
2 due to Defendant's defamation campaign. Accordingly, it is clear that The Freecycle Network is
3 suffering, and will continue to suffer, irreparable harm as a result of Defendant's conduct. *See,*
4 *e.g., Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th
5 Cir. 1991) (stating that "[d]amage to...goodwill qualif[ies] as irreparable harm.")

6 In contrast to the irreparable harm faced by The Freecycle Network as a result of
7 Defendant's contributory infringement of The Freecycle Network's Marks, there is no potential
8 harm to Defendant. As detailed below, Defendant will not be any less able to engage in and
9 promote legitimate reusing, recycling, and gifting efforts, even if it cannot utilize The Freecycle
10 Network's Marks. Additionally, there will be no chilling effect to Defendant's right to free
11 speech; all that The Freecycle Network is seeking is to prevent Defendant from making
12 defamatory statements that are detrimental to its hard-earned reputation and the goodwill of The
13 Freecycle Network's distinctive Marks.

14 In short, the irreparable harm that The Freecycle Network will sustain absent an
15 immediate injunction far outweighs any inconvenience that Defendant may experience, and
16 therefore, a temporary restraining order and preliminary injunction should be granted in The
17 Freecycle Network's favor.

18 **C. The Balance of Hardships Weighs Strongly in Favor of The Freecycle
19 Network**

20 Although there is no defined test for determining the balance of hardships, the Ninth
21 Circuit has looked to the goodwill and reputation embodied in a trademark as relevant factors
22 that affect the balance. *See Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394,
23 1406 (9th Cir. 1997). As detailed above, The Freecycle Network has suffered, and continues to
24 suffer, significant loss of goodwill and reputation due to Defendant's intentional inducement of
25 others to infringe upon The Freecycle Network's distinctive Marks. Additionally, the Freecycle
26 Network faces the possibility of losing its corporate sponsorship. *Beal Decl.*, ¶10 In contrast to
27 the irreparable harm caused to The Freecycle Network should Defendant be allowed to continue
28 his infringing activity, the proposed temporary restraining order and preliminary injunction will

1 cause Defendant only minimal inconvenience. In particular, Defendant will, in no way, be
2 prevented from engaging in further promotion of reusing, recycling, and gifting efforts even if he
3 cannot utilize The Freecycle Network's Marks. If this Court grants The Freecycle Network's
4 request for a preliminary injunction and temporary restraining order, Defendant will only be
5 prohibited from making false and defamatory statements that affect the hard-earned reputation
6 and goodwill of The Freecycle Network and its distinctive Marks. The Freecycle Network asks
7 only that Defendant be enjoined from intentionally misusing The Freecycle Network's Marks in
8 public fora, and from inducing others to do so with improper and tortious statements and
9 conduct. Accordingly, The Freecycle Network requests that the Court grant a temporary
10 restraining order and preliminary injunction in its favor.

11 **D. The Freecycle Network is Entitled to a Temporary Restraining Order**

12 A temporary restraining order is designed to preserve the status quo and prevent
13 irreparable injury until a Court can conduct a preliminary injunction hearing. See Granny Goose
14 Foods, Inc. v. Bhd. of Teamsters, 415 U.S. 423, 439 (1974). Accordingly, The Freecycle
15 Network has moved for a temporary restraining order covering the time between a hearing on
16 that request and a hearing on its motion for a preliminary injunction.

17 Because a temporary restraining order burdens a defendant less than a preliminary
18 injunction, the standard for issuing a temporary restraining order is equally or less stringent than
19 that for the granting of a preliminary injunction. See Stuhlberg Int'l Sales Co. v. John D. Brush
20 & Co., 240 F.3d 832, 839 n.7 (9th Cir. 2001). For the reasons explained above, The Freecycle
21 Network meets the requirements for a preliminary injunction, and is therefore entitled to a
22 temporary restraining order covering the time until the Court is able to schedule a hearing on the
23 motion for a preliminary injunction.

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IV. CONCLUSION

For the foregoing reasons, The Freecycle Network respectfully requests that this Court grant its *Ex Parte* Motion for Temporary Restraining Order and Motion for Preliminary Injunction.

Dated: April 19, 2006

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By: _____ /s/ _____

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