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

14 FREECYCLESUNNYVALE,  
 a California unincorporated association,

15 Plaintiff,

16 v.

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

19 Defendant.

20 THE FREECYCLE NETWORK, INC.  
 21 an Arizona corporation,

22 Counterclaimant,

23 v.

24 FREECYCLESUNNYVALE,  
 25 a California unincorporated association,

26 Counterdefendant.

CASE NO. C 06-00324 CW

**THE FREECYCLE NETWORK, INC.'S  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 DEFENDANT'S MOTION TO STRIKE  
 UNDER F.R.C.P. 37(c).**

Date: September 27, 2007  
 Time: 2:00 p.m.  
 Before: Honorable Claudia Wilken  
 Location: Courtroom 2

**I. INTRODUCTION**

1  
2 The Freecycle Network, Inc. (“The Freecycle Network”) moves this Court to strike or  
3 otherwise refuse to consider the Declaration of Mr. Miles Dennis Robertson, Jr. (Docket Entry  
4 No. 70) submitted by Plaintiff Freecyclesunnyvale (“Plaintiff”) in support of its motion for  
5 summary adjudication and for sanctions pursuant to Fed. R. Civ. P. 37. Plaintiff’s recent Motion  
6 for Reconsideration misleads the Court by representing that the parties have completed discovery  
7 in this matter. However, this is not the case because The Freecycle Network has not yet taken the  
8 deposition of Miles Dennis Robertson, Jr., a key person with knowledge of the circumstances giving  
9 rise to the claims in the present case.

10 The parties in this matter stipulated that only specific limited discovery remained to be  
11 completed in the pending action. Plaintiff did not identify Mr. Robertson in its Fed. R. Civ. P.  
12 Rule 26 disclosures or otherwise during the discovery period. Following the filing of the  
13 stipulation, Plaintiff disclosed for the first time Mr. Robertson as someone with relevant  
14 information. As such, the deposition of Mr. Robertson was not contemplated in the stipulation.  
15 Instead, the information within the personal knowledge of Mr. Robertson and its importance only  
16 became known to The Freecycle Network when Plaintiff filed its motion for summary  
17 adjudication that was supported by the declaration of Mr. Robertson.

18 Plaintiff’s late identification of Mr. Robertson effectively sandbagged The Freecycle  
19 Network into entering into a limiting discovery stipulation, one which extends the discovery  
20 cutoff for only previously noticed depositions. Prior to agreeing to the terms of the stipulation,  
21 Plaintiff improperly caused The Freecycle Network to believe that Plaintiff complied with its  
22 discovery obligations and identified all known potential witnesses. Although Plaintiff agreed to  
23 extend the discovery cut-off to permit The Freecycle Network to take the deposition of Mr.  
24 Robertson, it filed its Motion for Reconsideration before The Freecycle Network had the  
25 opportunity to go forward with Mr. Robertson’s deposition and falsely represented to the Court  
26 that all discovery had been completed. More recently, Plaintiff informs The Freecycle Network  
27 that it cannot produce Mr. Robertson as it does not represent him.

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1 Due to Plaintiff's actions and misrepresentations, The Freecycle Network hereby moves to  
2 strike the declaration of Mr. Robertson. The Freecycle Network also requests the Court to have  
3 this briefing done on an expedited basis so this motion can be heard at the same time as the  
4 summary judgment motion on September 27, 2007.

## 5 II. STATEMENT OF FACTS

6 The Freecycle Network has not had the opportunity to depose all material witnesses in this  
7 case. *See* Declaration of Esha Bandyopadhyay in Opposition to Freecycle Sunnyvale's  
8 Administrative Motion for Reconsideration ("Bandyopadhyay Decl."), ¶¶ 2-3 (Docket Entry No.  
9 91). Specifically, the parties entered into a stipulation to extend the discovery date to November  
10 1, 2007 and to not propound any additional deposition notices. *Id.* On the very same day,  
11 however, Plaintiff filed its Motion for Summary Adjudication Under Federal Rule of Civil  
12 Procedure 56 ("MSJ") and a supporting declaration of Miles Dennis Robertson, Jr. Mr.  
13 Robertson is apparently a key witness that Plaintiff *never identified* in discovery, including in its  
14 initial disclosures and written discovery responses. *Id.*, ¶¶ 2-3, Exhs. A-E. In fact, the earliest  
15 notice The Freecycle Network received that Plaintiff may rely on Mr. Robertson as a witness was  
16 when Plaintiff electronically filed his declaration in support of Plaintiff's MSJ on the evening of  
17 July 17, 2007, after the stipulation was filed. To date, Plaintiff has not provided an explanation as  
18 to its failure to identify Mr. Robertson as a person with knowledge or otherwise describe  
19 information relevant to the claims in the present matter that are within the personal knowledge of  
20 Mr. Robertson. *Id.*, ¶ 3, Exh. F. Only after The Freecycle Network brought this issue to  
21 Plaintiff's attention did Plaintiff supplement its disclosures to identify Mr. Robertson as a person  
22 with knowledge. *Id.*

23 The Freecycle Network attempted to meet and confer with Plaintiff regarding the  
24 deposition of Mr. Robertson on a number of occasions. *Id.*, ¶¶ 2-3, Exhs. A-E; Declaration of  
25 Lisa Kobialka In Support Of The Freecycle Network's Motion to Strike ("Kobialka Decl.") filed  
26 herewith, ¶2, Exh. A. However, Plaintiff ignored The Freecycle Network's multiple requests to  
27 discuss the matter, and then stated it would extend the discovery deadline with respect to Mr.  
28 Robertson's deposition. *See* Bandyopadhyay Decl., ¶¶2-3, Exhs. A-E (Docket Entry No. 91); *see*

1 also Kobialka Decl., ¶2. In the meantime, Plaintiff filed a Motion for Reconsideration without  
2 providing The Freecycle Network the opportunity to depose Mr. Robertson, forcing The  
3 Freecycle Network to oppose that motion. In Plaintiff's Reply in Support of its Motion for  
4 Reconsideration, Plaintiff falsely represented that all discovery necessary in connection with its  
5 MSJ had been taken, which simply was not true. Reply in Support of Freecyclesunnyvale's  
6 Notice of Administrative Motion for Reconsideration ("Reply") at 2 (Docket Entry No. 93). In  
7 light of the Court's recent Order on this matter and Plaintiff's unwillingness to resolve this matter  
8 now with The Freecycle Network, including its recent disclosure that it does not represent Mr.  
9 Robertson, The Freecycle Network does not have enough time to depose Mr. Robertson. Indeed,  
10 Plaintiff's counsel informed counsel for The Freecycle Network late last week that Mr. Robertson  
11 is not represented by Plaintiff's counsel and that The Freecycle Network must use the Fed. R.  
12 Civ. P. 45 third-party subpoena process in order to obtain testimony from Mr. Robertson.

13 As a direct result of Plaintiff's conduct, The Freecycle Network will be unable to question  
14 Mr. Robertson regarding the facts discussed in his declaration and gather information from Mr.  
15 Robertson that may dispute those facts. Under these circumstances, this Court's consideration of  
16 Mr. Robertson's declaration would result in substantial prejudice to The Freecycle Network. The  
17 Freecycle Network is substantially prejudiced by (1) Plaintiff's failure to disclose Mr. Robertson  
18 in a timely manner during discovery, (2) Plaintiff's failure in providing Plaintiff's a sufficient  
19 opportunity to depose Mr. Robertson before filing its Motion for Reconsideration to change the  
20 MSJ hearing date, despite its offer to extend the discovery deadline with respect to Mr.  
21 Robertson's deposition, (3) Plaintiff's failure to inform The Freecycle Network that it did not  
22 represent Mr. Robertson, such that The Freecycle Network could go through the appropriate third  
23 party subpoena procedures in a timely manner, and (4) Plaintiff's false representation to the Court  
24 that all discovery in the case had been completed at a time when Plaintiff was aware that The  
25 Freecycle Network was seeking to take the deposition of a previously undisclosed witness who  
26 supplied a fact declaration in support of Plaintiff's motion for summary adjudication. In order to  
27 prevent such prejudice, The Freecycle Network files this Motion to Strike. The Freecycle  
28 Network respectfully requests that the Court strike the declaration of Miles Dennis Robertson, Jr.

1 filed in support of Plaintiff's MSJ and allow The Freecycle Network the opportunity to amend its  
2 opposition should such an amendment be necessary.

### 3 III. ARGUMENT

#### 4 A. There Was No Justification for Plaintiff's Failure to Disclose Mr. Robertson

5 Federal Rule of Civil Procedure 37(c) provides that "[a] party that without substantial  
6 justification fails to disclose information required by Rule 26(e)(1) or 26(e)(1) or to amend a prior  
7 response to discovery as required by Rule 26(e)(2), is not [...] permitted to use as evidence at a  
8 trial, at a hearing, or on a motion any witnesses or information not so disclosed." Failure to  
9 comply with the disclosure requirements will result in the exclusion of that evidence unless the  
10 failing party shows that there was substantial justification for the failure or that the failure was  
11 harmless. Fed.R.Civ.Proc. 37(c); Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101,  
12 1106 (9th Cir. 2001). The burden is on the violating party to prove that the violation was  
13 harmless. *Id.* Courts have applied this preclusionary rule to motions for summary judgment.  
14 *See, e.g., Ebewo v. Martinez*, 309 F.Supp.2d 600, 607 n.2 (S.D.N.Y. 2004). Its purpose is to  
15 prevent the practice of "sandbagging" an opposing party with new evidence. Ventra v. United  
16 States, 121 F.Supp.2d 326, 332 (S.D.N.Y. 2000).

17 In addition to striking Plaintiff's Declaration, pursuant to Fed. R. Civ. P. 37(c)(1), this  
18 Court may impose appropriate sanctions against Plaintiff including all sanctions set forth in  
19 subsection (b)(3)(A-E) of Rule 37. Tritek Techs., Inc. v. United States, 63 Fed.Cl. 740, 750  
20 (2005). Included in the sanctions available to this Court is an "order refusing to allow [Plaintiff]  
21 to support or oppose designated claims or defenses, or prohibiting [Plaintiff] from introducing  
22 designated matters in evidence." Fed.R.Civ.Proc. 37(b)(2)(B).

#### 23 B. Mr. Robertson's Declaration Should be Stricken From the Record Pursuant 24 to Federal Rule of Civil Procedure 37

25 The Freecycle Network moves to strike the declaration of Miles Dennis Robertson, Jr. on  
26 the ground that Plaintiff failed to list this witness in either its initial disclosures or discovery  
27 responses pursuant to Fed. R. Civ. P. 26(a), which requires a party to disclose the names of "each  
28 individual likely to have discoverable information that the disclosing party *may* use to support its

1 claims or defenses....” Fed.R.Civ.P. 26(a) (emphasis added). The evidence is uncontradicted that  
2 at no time prior to filing its summary adjudication motion did Plaintiff ever disclose Mr.  
3 Robertson as a person with knowledge and Plaintiff’s intention to rely upon Mr. Robertson’s  
4 statements to support its claims or defenses.

5 Further, The Freecycle Network will plainly be prejudiced by Plaintiff’s utilization of a  
6 surprise witness in support of its summary judgment request. Absent the disclosure of Mr.  
7 Robertson as a person with knowledge under Rule 26(a), it would be unreasonable to expect The  
8 Freecycle Network to depose them. *See Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D.  
9 313, 324-26 (C.D. Cal. 2004) (striking declaration offered by plaintiff in support of its opposition  
10 to a summary judgment request under Rule 37 because declarant was not disclosed as witness  
11 during the time established for fact discovery); *see also Fleming v. Verizon New York, Inc.*, Slip  
12 Copy, No. 03 Civ. 5639 (WHP), 2006 WL 2709766, at \*7-9 (S.D.N.Y. Sept. 22, 2006) (striking  
13 declaration offered by plaintiff in support of its opposition to a summary judgment request under  
14 Rule 37 because plaintiff failed to identify the witness in its Rule 26(a) disclosures).

15 Plaintiff failed to be forthright in its disclosures and written discovery responses because it  
16 failed to disclose all witnesses with knowledge regarding the claims and defenses asserted by  
17 Plaintiff in the present action. After ensuring that The Freecycle Network’s opportunity to take  
18 depositions was foreclosed, in its MSJ, Plaintiff relied on the declaration of an apparently key  
19 witness that it never disclosed to The Freecycle Network. *See Bandyopadhyay Decl.*, ¶¶ 2-3  
20 (Docket Entry No. 91). When The Freecycle Network brought this omission to the Plaintiff’s  
21 attention, Plaintiff claimed that the witness was “harmless.” *Id.*, ¶¶2-3, Exhs. A-E. However, the  
22 evidence is uncontroverted that The Freecycle Network had no indication that Plaintiff would be  
23 using Mr. Robertson as a witness in this case until his declaration was filed in support of  
24 Plaintiff’s MSJ. *Id.* Further, Plaintiff used Mr. Robertson’s declaration in support of a MSJ, a  
25 dispositive motion which could preclude The Freecycle Network from asserting defenses to  
26 Plaintiff’s claims and asserting a trademark infringement counterclaim against Plaintiff. Contrary  
27 to Plaintiff’s assertion that the failure to disclose Mr. Robertson’s identity was harmless, it is clear  
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1 that Plaintiff's improper actions directly and substantially prejudice The Freecycle Network's  
2 ability to adequately and fully respond to Plaintiff's dispositive motion.

3 The Freecycle Network cannot take the deposition of Mr. Robertson before providing its  
4 submissions responsive to the MSJ. After several meet and confer letters, Plaintiff agreed to  
5 provide Mr. Robertson for deposition. However, before allowing The Freecycle Network the  
6 opportunity to depose Mr. Robertson, Plaintiff filed a Motion for Reconsideration requesting that  
7 the Court move the hearing date of the MSJ. *See id.*, ¶¶2-3, Exh. A-E; *see also* Kobialka Decl.,  
8 ¶2, Exh. A; Motion for Reconsideration (Docket Entry No. 86). In support of its Motion for  
9 Reconsideration, Plaintiff represented to the Court that all fact discovery was completed and,  
10 presumably, the Court relied on this false representation in granting Plaintiff's Motion for  
11 Reconsideration. Motion for Reconsideration at 2 (Docket Entry No. 86). The Court scheduled  
12 the hearing on Plaintiff's MSJ for September 27, 2007 with the inaccurate understanding that The  
13 Freecycle Network had completed necessary discovery. With the current schedule, The Freecycle  
14 Network will not be able to complete the deposition of Mr. Robertson before The Freecycle  
15 Network's opposition papers are due to the Court. This is particularly true where Plaintiff just  
16 informed The Freecycle Network that they could not provide Mr. Robertson for deposition last  
17 week, despite its offer to extend the discovery deadline in order for Mr. Robertson's deposition to  
18 be taken.

19 The Freecycle Network has plainly been prejudiced by Plaintiff's actions, including its  
20 failure to disclose Miles Dennis Robertson, Jr. as a prospective witness at any time prior to  
21 submitting its summary adjudication declarations on July 17, 2007. Plaintiff's conduct is  
22 particularly egregious because on the very day Plaintiff first identified Mr. Robertson as a  
23 potential witness by submitting his declarations, The Freecycle Network agreed to and stipulated  
24 to not propound further additional deposition notices. Plaintiff's conduct effectively eliminated  
25 The Freecycle Network's ability to depose Mr. Robertson and ensured that Plaintiff's submission  
26 Mr. Robertson's declaration without allowing The Freecycle Network to effectively refute the  
27 contents of the declaration. Plaintiff's conduct was without substantial justification and was not  
28 harmless.

1 Plaintiff's conduct clearly constitutes a failure to comply with its disclosure obligations in  
2 violation of Fed. R. Civ. P. 26. Therefore, The Freecycle Network is entitled to sanctions  
3 pursuant to Fed. R. Civ. P. 37. As such, The Freecycle Network hereby requests that the  
4 Declaration of Miles Dennis Robertson, Jr. (Docket Entry No. 70) be stricken and that sanctions  
5 be granted pursuant to Rule 37(c)(1). In the alternative, The Freecycle Network requests that the  
6 Court order that Mr. Robertson be made available for his respective deposition and to allow The  
7 Freecycle Network to supplement its opposition to Plaintiff's MSJ should such supplementation  
8 be necessary following the deposition.

9 The circumstances before the Court in this action are similar to those before the Court in  
10 Jain v. Trimas Corp., 2005 WL 3439932 (E.D. Cal. Dec. 15, 2005). In Jain, the plaintiff  
11 submitted a declaration in support of its opposition to defendant's summary judgment motion. *Id.*  
12 at \*1. In the declaration, the declarant offered expert opinions regarding the issues in the case.  
13 *Id.* at \*2. However, at no time prior to submitting the declaration did plaintiff disclose the  
14 declarant as an expert witness in either its Rule 26 disclosures or written discovery. Defendant  
15 moved the court to strike the declaration. *Id.* In striking the declaration, the Court stated that "the  
16 failure to disclose [declarant] as an expert is not harmless because [the declaration] . . . is the only  
17 evidence of disputed issues between the parties." *Id.* at \*3. Similar to the circumstances in Jain,  
18 Plaintiff's failure to disclose the declarant in a timely is not harmless because Plaintiff is using the  
19 declaration to put forth disputed facts without allowing The Freecycle Network to engage in  
20 discovery regarding those allegations.

#### 21 IV. CONCLUSION

22 For the foregoing reasons, The Freecycle Network respectfully requests that this Court  
23 grant its Motion to Strike under F.R.C.P. 37( c) to strike the declaration of Miles Dennis  
24 Robertson, Jr. from Plaintiff's MSJ. Further, The Freecycle Network requests that the Court  
25 allow The Freecycle Network the opportunity to amend its Opposition to Plaintiff's MSJ should  
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1 such an amendment be necessary.

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DATED: September 4, 2007

**PERKINS COIE LLP**

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By                   s/s Lisa Kobialka                  

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THE FREECYCLE NETWORK, INC.

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