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15 **UNITED STATES DISTRICT COURT**  
 16 **NORTHERN DISTRICT OF CALIFORNIA**  
 17 **OAKLAND DIVISION**

18 FREECYCLESUNNYVALE,  
 19 a California unincorporated association,

20 Plaintiff,

21 v.

22 THE FREECYCLE NETWORK,  
 23 an Arizona corporation,

24 Defendant.

CASE NO. C06-00324 CW

**OPPOSITION TO THE FREECYCLE  
 NETWORK, INC.'S MOTION TO  
 SHORTEN TIME PURSUANT TO CIVIL  
 L.R. 6-3**

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

25 THE FREECYCLE NETWORK, INC., an  
 26 Arizona Corporation,

27 Counterclaimant,

28 v.

FREECYCLESUNNYVALE, a California  
 unincorporated association,

Counterdefendant.

1 Having failed to convince this Court to delay the hearing on Plaintiff and  
2 Counterdefendant FreecycleSunnyvale's motion for summary judgment on naked licensing,  
3 Defendant and Counterclaimant The Freecycle Network, Inc. ("TFN") now seeks to preclude  
4 evidence that it has long known about from a witness about whom TFN has long and intimate  
5 knowledge. Pursuant to Civil L.R. 6-3(c), FreecycleSunnyvale opposes TFN's motion for an  
6 order shortening time on its motion to strike the Declaration of Miles Dennis Robertson Jr.  
7 because the motion is baseless on its face and is simply more dilatory conduct by TFN.

### 8 **I. INTRODUCTION**

9 TFN's motion seeks to shorten time for the parties to brief a Fed.R.Civ.P. 37 motion to  
10 strike the Declaration of Miles Dennis Robertson, Jr. in Support of Plaintiff and Counterdefendant  
11 FreecycleSunnyvale's Motion for Summary Adjudication (the "Naked Licensing Motion") (July  
12 17, 2007; Document # 70) ("Robertson Declaration") because Mr. Robertson was not disclosed in  
13 FreecycleSunnyvale's initial disclosures. But Mr. Robertson is no surprise witness and TFN  
14 suffered no prejudice. *See* Exh. A to Declaration of Dennis S. Corgill in Support of Opposition to  
15 Motion to Shorten Time (attaching Robertson Declaration) ("Corgill Dec.").

16 In fact, Mr. Robertson was a senior TFN volunteer who gave his time to TFN in several  
17 significant roles and ways. Mr. Robertson was a New Group Approver for TFN, a Group  
18 Outreach and Assistant (GOA) volunteer for TFN, the GOA coordinator for all TFN GOAs, and  
19 a member of the eight person TFN central committee known as The Hub. *See* Robertson  
20 Declaration ¶¶ 2, 11, 19, 33, 34 (Exh. A to Corgill Dec.). That Mr. Robertson was well-known to  
21 TFN is obvious, and TFN does not argue otherwise. In short, the Robertson Declaration presents  
22 evidence well-known to TFN from a witness well-known to TFN.

23 A failure to disclose a witness is harmless if the witness's identity is already known to the  
24 other party. *See* Advisory Committee Notes to 1993 Amendments to FED.R.CIV.P. 37(c). Like  
25 the overwhelming evidence of TFN's naked licensing, the evidence that Mr. Robertson's identity,  
26 and indeed his testimony, was already known to TFN is similarly overwhelming.

27 Nonetheless, TFN asserts that it has been "ambushed" and that TFN will "suffer  
28 prejudice" if this Court considers the Robertson Declaration. That claim is preposterous on its

1 face. First, as shown above, TFN has long-known of Mr. Robertson as demonstrated by his  
2 declaration and documents TFN itself produced identifying Mr. Robertson. Second, the evidence  
3 he presents is of acts by TFN of which TFN was obviously well-aware. Third, when TFN first  
4 complained that it had not had the opportunity to depose Mr. Robertson, Freecycle Sunnyvale  
5 twice offered to stipulate to extend the fact discovery cutoff so that TFN could seek discovery  
6 from him, notwithstanding that TFN had long known of Mr. Robertson and his evidence. TFN  
7 declined the offers because it also wanted to extract an extension of the discovery cut-off for a  
8 declarant whose identity had been disclosed. And TFN's assertion that it would have deposed  
9 Mr. Robertson had it only known of him is belied by the fact that TFN took NO third party  
10 discovery whatsoever. *See* Corgill Dec. ¶¶ 2-4, 6(a), (b), (d), (g). TFN will not "suffer prejudice"  
11 from consideration of the Robertson Declaration.

## 12 **II. FACTUAL BACKGROUND**

13 On July 24, 2007, TFN initiated the meet and confer process regarding the Robertson  
14 Declaration. TFN objected to the Robertson Declaration because Mr. Robertson had not been  
15 identified as a fact witness in FreecycleSunnyvale's initial disclosures. On July 25, 2007,  
16 FreecycleSunnyvale responded by way of letter, explaining that the failure to identify Mr.  
17 Robertson was harmless because Mr. Robertson and his evidence was well-known to TFN.  
18 FreecycleSunnyvale specifically pointed out that *TFN itself* had identified Mr. Robertson as one  
19 of TFN's senior volunteers in documents that TFN produced to Freecycle Sunnyvale. *See* Corgill  
20 Dec. ¶¶ 5, 6(a).

21 Notwithstanding that the omission of Mr. Robertson was harmless, later that same day  
22 (July 25, 2007), FreecycleSunnyvale offered to extend the fact discovery cutoff so that TFN could  
23 seek discovery from Mr. Robertson. TFN rejected that offer unless FreecycleSunnyvale agreed  
24 also to extend discovery for an additional witness who *was* identified on FreecycleSunnyvale's  
25 initial disclosures. On July 30, 2007, TFN stated that the meet and confer process had concluded  
26 because FreecycleSunnyvale would not agree to extend discovery for the disclosed witness, and  
27 announced its intention to file a FED.R.CIV.P. 37 motion. *See* Corgill Dec. ¶¶ 6(b)-(f).  
28

1 On July 30, 2007, FreecycleSunnyvale again offered to extend the fact discovery cutoff so  
2 that TFN could seek discovery from Mr. Robertson. On July 31, 2007, TFN responded that it  
3 was “not agreeable to FreecycleSunnyvale’s offer.” Although TFN stated that it was “willing to  
4 hear alternative proposals,” TFN never identified those “alternative proposals.” By failing to  
5 accept FreecycleSunnyvale’s offer, or to offer any “alternative proposals” of its own, TFN  
6 demonstrated that it was not prejudiced by any nondisclosure of Mr. Robertson but instead simply  
7 wanted to use the Robertson issue to gain a tactical advantage. *See* Corgill Dec. ¶¶ 6(g), (h).

8 On August 16, 2007, TFN opposed FreecycleSunnyvale’s motion to schedule the Naked  
9 Licensing Motion for a September 2007 hearing. TFN argued that it needed discovery from Mr.  
10 Robertson and from experts. *See* Opposition to FreecycleSunnyvale’s Administrative Motion  
11 2:10-25 (August 16, 2007; Document # 90). This Court did not credit TFN’s arguments and set a  
12 September 27, 2007, hearing date for the Naked Licensing Motion. *See* Order Granting  
13 Plaintiff’s Motion (August 24, 2007; Document # 96).

14 On August 30, 2007—little more than a week before its opposition to Naked Licensing  
15 Motion is due—TFN again sought discovery from Mr. Robertson. In the alternative, TFN sought  
16 expedited briefing on a FED.R.CIV.P. 37 motion to strike the Robertson Declaration.  
17 FreecycleSunnyvale responded the next day, pointing out that a separate motion was not  
18 necessary because TFN could present any evidentiary objections in TFN’s opposition to the  
19 Naked Licensing Motion. *See* Corgill Dec. ¶ 8.

20 On September 4, 2007—just two days before its opposition to the Naked Licensing  
21 Motion is due—TFN filed two motions. One is a motion to shorten time so that this Court may  
22 hear a FED.R.CIV.P. 37 motion concurrently with the Naked Licensing Motion. The second is a  
23 FED.R.CIV.P. 37 motion seeking to strike the Robertson Declaration. FreecycleSunnyvale now  
24 responds to the first motion, the motion to shorten time.

25 **III. TFN FABRICATES PROCEDURAL HURDLES TO A SUMMARY JUDGMENT**  
26 **DECLARATION THAT HAS NO BASIS IN LAW OR THE RECORD**

27 TFN complains that it was “depriv[ed] of the opportunity to depose and propound  
28 discovery relating to [Mr. Robertson].” TFN Memorandum 4:10-11 (September 4, 2007;

1 Document # 99) (“TFN Memorandum”). This statement is not true. Mr. Robertson was well-  
 2 known to TFN, and TFN does not argue otherwise. Nothing prevented TFN from seeking  
 3 discovery from Mr. Robertson before the fact discovery cutoff. Further, FreecycleSunnyvale  
 4 twice offered to extend the fact discovery cutoff so that TFN could take discovery from Mr.  
 5 Robertson, but TFN refused both offers because it did not also include an agreement to extend the  
 6 discovery cut-off for a disclosed witness.

7 TFN complains that FreecycleSunnyvale only recently notified TFN that counsel for  
 8 FreecycleSunnyvale does not represent Mr. Robertson. TFN Memorandum 5:6-10. But TFN  
 9 never asked who represented Mr. Robertson, and TFN cites no rule or case for the novel  
 10 proposition that FreecycleSunnyvale had a duty to volunteer the fact that it did not represent Mr.  
 11 Robertson. Moreover, TFN does not—and cannot—complain that it was misled. TFN does not  
 12 point to any statement by counsel for FreecycleSunnyvale even implying, much less stating, that  
 13 it represented Mr. Robertson.<sup>1</sup>

14 TFN complains that TFN “is currently unaware of FreecycleSunnyvale’s position as to  
 15 why the Robertson Declaration is proper and should not be stricken.” TFN Memorandum 5:18-  
 16 20. This statement is wrong. In a letter dated July 25, 2007, FreecycleSunnyvale explained why  
 17 the Robertson Declaration should not be stricken. *See* Corgill Dec. ¶ 6(a). FreecycleSunnyvale  
 18 repeated its explanation in a pleading filed on August 22, 2007. *See* Exhibit C to Corgill Dec.  
 19 (attaching Reply in Support of Administrative Motion for Reconsideration 2:24 to 3:20 (August  
 20 22, 2007; Document # 93)).

21 **IV. THE REQUIREMENTS OF CIVIL L.R. 6-3 ARE NOT SATISFIED BECAUSE**  
 22 **TFN WILL NOT BE PREJUDICED IF TIME IS NOT SHORTENED TO HEAR A**  
 23 **FED.R.CIV.P. 37 MOTION**

24 \_\_\_\_\_  
 25 <sup>1</sup> Perhaps TFN is arguing that it should be allowed to assume that every fact witness with  
 26 unfavorable evidence is represented by opposing counsel and, therefore, can be produced  
 27 pursuant to a deposition noticed under FED.R.CIV.P. 30. Such an argument flies in the face of  
 28 common sense and FED.R.CIV.P. 45, which permits third party depositions, regardless of whether  
 the evidence is favorable.

1 TFN must show that TFN will suffer prejudice if TFN's motion to shorten time is not  
2 granted. First, as FreecycleSunnyvale has explained, any evidentiary objection to the Robertson  
3 Declaration can be presented in TFN's opposition to the Naked Licensing Motion. *See*  
4 FED.R.CIV.P. 37(c)(1) (first sentence). There is no FED.R.CIV.P. 37 requirement that evidentiary  
5 objections may only be presented by way of a separate motion, much less one that is briefed on  
6 shortened time. TFN does not argue otherwise.

7 Second, TFN will not suffer prejudice if this Court considers the Robertson Declaration  
8 and decides the Naked Licensing Motion on the merits. As FreecycleSunnyvale has explained, an  
9 undisclosed witness may be used if any failure to disclose the witness is "harmless." A failure to  
10 disclose a witness is harmless if the witness's identity is already known to the other party. *See*  
11 Advisory Committee Notes to 1993 Amendments to FED.R.CIV.P. 37(c). Not only was Mr.  
12 Robertson extremely well known to TFN, but TFN itself identified Mr. Robertson in its own  
13 documents. And Mr. Robertson's declaration is about TFN's own acts, of which it was obviously  
14 well aware. In short, TFN seeks to preclude evidence of which it was painfully aware from a  
15 witness of whom it had long known, in an attempt to conceal from the Court evidence of naked  
16 licensed on a grand scale. Desperation, however, is not a reason to preclude the Robertson  
17 Declaration.

18 **V. CONCLUSION**

19 For the foregoing reasons, FreecycleSunnyvale respectfully requests that this Court deny  
20 TFN's motion to shorten time and strike TFN's motion to strike under FED.R.CIV.P. 37.

21  
22 Dated: September 6, 2007

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