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 FREECYCLESUNNYVALE,

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 10 **UNITED STATES DISTRICT COURT**  
 11 **NORTHERN DISTRICT**  
 12 **OAKLAND DIVISION**

13 FREECYCLESUNNYVALE,  
 a California unincorporated association,

14  
 15 Plaintiff,

16 v.

17 THE FREECYCLE NETWORK,  
 an Arizona corporation,

18 Defendant.

Case No. C06-00324 CW

**DECLARATION OF DENNIS S.  
 CORGILL IN SUPPORT OF  
 PLAINTIFF AND  
 COUNTERDEFENDANT  
 FREECYCLESUNNYVALE'S  
 OPPOSITION TO MOTION TO  
 SHORTEN TIME**

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

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 20 THE FREECYCLE NETWORK, INC.,  
 An Arizona Corporation,

21 Counterclaimant,

22 v.

23 FREECYCLESUNNYVALE,  
 a California unincorporated association,

24 Counterdefendant.  
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1 I, Dennis S. Corgill, declare as follows:

2 1. I am an attorney licensed to practice in the State of California. I am an associate  
3 in the law firm Mayer Brown LLP, counsel of record for Plaintiff and Counterdefendant  
4 FreecycleSunnyvale in the above-captioned action. I am one of the attorneys representing  
5 FreecycleSunnyvale. I know the following facts of my own knowledge and, if called as a  
6 witness, could and would competently testify to the following facts.

7 2. Throughout the above-captioned litigation, Defendant and Counterclaimant The  
8 Freecycle Network (“TFN”) has noticed the depositions of only three individuals, Jason Wong,  
9 Lisanne Abraham, and Timothy Oey, all of whom are members of Plaintiff and  
10 Counterdefendant FreecycleSunnyvale. The deposition of Jason Wong was completed on  
11 August 9, 2007. The deposition of Lisanne Abraham was completed on August 10, 2007. The  
12 deposition of Timothy Oey was taken on August 17, 2007. At the end of Mr. Oey’s day-long  
13 deposition, counsel for TFN, Lisa Kobialka indicated that she had no further questions pending  
14 supplemental document production in response to requests that TFN previously served and  
15 FreecycleSunnyvale previously answered. FreecycleSunnyvale produced additional documents  
16 on August 31, 2007.

17 3. There are no outstanding discovery requests that TFN has served upon  
18 FreecycleSunnyvale and that FreecycleSunnyvale has not answered.

19 4. Throughout the above-captioned litigation, TFN has not conducted third-party  
20 discovery under the Federal Rules of Civil Procedure.

21 5. On July 24, 2007, counsel for TFN, Esha Bandyopadhyay, initiated a meet and  
22 confer process pertaining to the declaration of Miles Dennis Robertson, Jr., which was filed on  
23 July 17, 2007, in support of FreecycleSunnyvale’s motion for summary adjudication. *See*  
24 Declaration of Miles Dennis Robertson, Jr., in Support of Plaintiff and Counterdefendant  
25 FreecycleSunnyvale’s Motion for Summary Adjudication (July 17, 2007; Document # 70)  
26 (“Robertson Declaration”). Attached to this Declaration as Exhibit A is a true and correct copy  
27 of the Robertson Declaration.

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1           6.       In the meet and confer conference on July 24, 2007, Ms. Bandyopadhyay objected  
2 that Mr. Robertson had not been identified as a fact witness on FreecycleSunnyvale's initial  
3 disclosures. Attached to this Declaration as Exhibit B is a true and correct copy of letters and  
4 email correspondence that Ms. Bandyopadhyay and I exchanged in the course of the meet and  
5 confer. To help with identification, page numbers have been hand-written in the lower right-  
6 hand corner of the documents collected in Exhibit B. Among the correspondence collected in  
7 Exhibit B are the following, in chronological order:

8           a.       On July 25, 2007, I sent a letter to Ms. Bandyopadhyay by way of email  
9 attachment, explaining why a Fed.R.Civ.P. 37 motion to strike the Robertson  
10 Declaration would be unfounded. (Page 1 of Exhibit B).

11           b.       On July 25, 2007, I sent a letter to Ms. Bandyopadhyay by way of email  
12 attachment, offering to extend the fact discovery cutoff solely for the purpose of  
13 seeking a deposition from Mr. Robertson. (Page 2 of Exhibit B).

14           c.       On July 25, 2007, Ms. Bandyopadhyay sent an email to me, making a  
15 counter proposal to extend the fact discovery cutoff, not only for Mr. Robertson,  
16 but also for Kenneth A. Hedden, Sr., who had been identified on  
17 FreecycleSunnyvale's initial disclosures. (Page 3 of Exhibit B).

18           d.       On July 26, 2007, I sent an email to Ms. Bandyopadhyay, stating the offer  
19 was still open to extend the fact discovery cutoff solely for the purpose of seeking  
20 a deposition from Mr. Robertson. (Page 3 of Exhibit B).

21           e.       On July 27, 2007, I sent a letter to Ms. Bandyopadhyay by way of email  
22 attachment, explaining why a case cited by Ms. Bandyopadhyay did not support a  
23 FED.R.CIV.P 37 motion to strike the Robertson Declaration (page 8 of Exhibit B).

24           f.       On July 30, 2007, Ms. Bandyopadhyay sent an email to me, announcing  
25 that the meet and confer had concluded and that TFN would file a motion under  
26 FED.R.CIV.P 37. (Page 9 of Exhibit B).

1 g. On July 30, 2007, I sent an email to Ms. Bandyopadhyay, again offering to  
2 extend the fact discovery cutoff solely for the purpose of seeking a deposition  
3 from Mr. Robertson. (Page 11 of Exhibit B).


4 h. On July 31, 2007, Ms. Bandyopadhyay sent an email to me, stating that  
5 TFN “is not agreeable to FreecycleSunnyvale’s offer [to extend the fact discovery  
6 cutoff solely for the purpose of seeking a deposition from Mr. Robertson].” Ms.  
7 Bandyopadhyay also stated that TFN was “willing to hear alternative proposals.”  
8 (Page 12 of Exhibit B). Ms. Bandyopadhyay never subsequently identified any  
9 “alternative proposals.”

10 7. On August 22, 2007, FreecycleSunnyvale filed a Reply in Support of Plaintiff and  
11 Counterdefendant FreecycleSunnyvale’s Notice of Administrative Motion and Administrative  
12 Motion for Reconsideration (August 22, 2007; Document # 93). A true and correct copy of that  
13 pleading is attached as Exhibit C.

14 8. On August 30, 2007, counsel for TFN, Lisa Kobialka, initiated a meet and confer  
15 process pertaining to the Robertson Declaration. Attached to this Declaration as Exhibit D is a  
16 true and correct copy of the email that Ms. Kobialka sent to me. On August 31, 2007, I sent a  
17 letter to Ms. Kobialka by way of email attachment. Attached to this Declaration as Exhibit E is a  
18 true and correct copy of my letter of August 31, 2007. In a telephone conference On August  
19 31, 2007, Ms. Kobialka indicated that TFN wanted to take the deposition of Mr. Robertson  
20 before TFN filed its opposition to a summary judgment motion on September 6, 2007. Ms.  
21 Kobialka also indicated that, if Mr. Robertson was not available for deposition, TFN wanted to  
22 schedule an expedited briefing schedule for a FED.R.CIV.P. 37 motion.

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1 I declare under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct. Executed in Palo Alto, California, on September 6, 2007.

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6 Dennis S. Corgill  
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# **EXHIBIT A**

September 6, 2007, Declaration of Dennis S. Corgill in Support of  
Plaintiff and Counterdefendant FreecycleSunnyvale's Opposition to  
Motion to Shorten Time

FreecycleSunnyvale v. The Freecycle Network  
Case No. C06-00324  
(N.D. Cal. filed Jan. 18, 2006)

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14 FREECYCLESUNNYVALE,

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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT**  
**OAKLAND DIVISION**

13 FREECYCLESUNNYVALE,  
14 a California unincorporated association,

15 Plaintiff,

16 v.

17 THE FREecycle NETWORK,  
18 an Arizona corporation,

19 Defendant.

20 THE FREecycle NETWORK, INC., an  
21 Arizona Corporation,

22 Counterclaimant,

23 v.

24 FREECYCLESUNNYVALE, a California  
25 unincorporated association,

26 Counterdefendant.

Case No. C06-00324 CW

**DECLARATION OF MILES DENNIS  
ROBERTSON, JR., IN SUPPORT OF  
PLAINTIFF AND  
COUNTERDEFENDANT  
FREECYCLESUNNYVALE'S MOTION  
FOR SUMMARY ADJUDICATION**

Date: August 23, 2007  
Time: 2:00 p.m.  
Before: Hon. Claudia Wilken  
Location: Courtroom 2

1 I, Miles Dennis Robertson, Jr., declare as follows:

2 1. I am a resident of Stillwater, Oklahoma. I am a former senior volunteer for The  
3 Freecycle Network, Inc. ("TFN"), the Defendant and Counterclaimant in the above-captioned  
4 lawsuit. I know the following facts of my own knowledge and, if called as a witness, could and  
5 would competently testify to the following facts.

6 2. In late 2003 or early 2004, I read an article about freecycling and the formation of  
7 online freecycling groups. The article contained an email address for Deron Beal, who was  
8 described as a founder of a freecycling group. I sent an email to Mr. Beal and indicated that I  
9 was interested in starting an online freecycling group for my local area. I asked Mr. Beal what I  
10 needed to do. In the ensuing email exchange, Mr. Beal first asked if I had experience moderating  
11 groups. I replied with several examples of groups that I was currently moderating. (Among the  
12 groups that I was then moderating was a weight loss group for men and an equine related buy-  
13 sell-trade group.) Mr. Beal then sent a second email, telling me that the best way to figure out  
14 how to form and moderate an online freecycling group was to join two or three of the groups that  
15 were already active. Mr. Beal indicated that it was pretty much self explanatory. Mr. Beal's two  
16 emails were very brief and to the point. In those emails, Mr. Beal suggested that I could use any  
17 files that I found on an online freecycling group. Mr. Beal also advised that I could copy and use  
18 any files as I found them. Mr. Beal also advised that I could modify any files to suit my local  
19 situation. There was no mention of any requirements that he or his staff be "co-owners" of the  
20 group, nor any mention of any requirement to display a Freecycle logo.

21 3. A few months after my email exchange with Mr. Beal, I acted on the advice that  
22 Mr. Beal had forwarded. I joined Mr. Beal's online freecycling group in Tucson, Arizona, and  
23 one or two others that Mr. Beal recommended. When I joined the freecycling group in Tucson,  
24 Arizona, I was surprised that I did not find any indication that Mr. Beal was actively involved  
25 with that group.

26 4. On April 12, 2004, I entered into a group service account with Yahoo! and started  
27 my own online freecycling group for Stillwater, Oklahoma. I named the online group  
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1 "FreecycleStillwaterOK." Following upon Mr. Beal's suggestion, I copied files from other  
2 online recycling groups to use to create my own files. Most of the files contained basic  
3 instructions on how to use the online group, what to post, and what not to post. I immediately set  
4 out to modify the copied files to suit my own preferences. After I modified those files, I posted  
5 them to my online freecycling group.

6 5. At no point during the time when I was setting up my own online freecycling  
7 group did anyone contact me to advise me as to what I could do and could not do. No one asked  
8 me to sign a contract agreeing to what was expected of me or my group. I was unaware that any  
9 one checked on what I was doing.

10 6. At the time that I set up my own online freecycling group, I was unaware of TFN  
11 or its website. The website was not mentioned in the article that sparked my interest in  
12 freecycling. In his two emails to me, Mr. Beal did not mention the existence of a freecycle  
13 website, and he did not suggest that I visit a website for information on how to start an online  
14 freecycling group.

15 7. Throughout 2004, I ran the FreecycleStillwaterOK online freecycling group  
16 independently and without any assistance or guidance from any one, including TFN or Mr. Beal.

17 8. Toward the end of 2004, as the activity of freecycling was getting more publicity,  
18 I happened upon another article that mentioned a website, and I visited it for my first time. This  
19 turned out to be TFN's website at [www.freecycle.org](http://www.freecycle.org). In searching the website, I found where  
20 "approved" groups were listed by their State. I sent an email to an address on the website and  
21 inquired about getting my local group listed. Afterwards, my online freecycling group showed  
22 up in the listing on TFN's website. Again, no one from TFN contacted me to advise me as to  
23 what I could do and could not do. No one asked me to sign a contract agreeing to what was  
24 expected of me or my group. I was unaware of whether anyone joined my group to look over the  
25 files or archives. If someone did join my group to look over the files, they did not identify  
26 themselves or contact me in any way.

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1           9.       Later, perhaps in an email exchange with another freecycling group moderator, I  
2 learned that TFN had an online discussion group for moderators. I joined that discussion group  
3 for additional information, as I was interested in finding more information to help my group  
4 grow.

5           10.       Shortly after joining the online discussion group for moderators, I read about  
6 leadership groups that had formed. I sent an email to the person posting the message about the  
7 leadership groups, indicating that I had time on my hands to volunteer and would be willing to  
8 assist in anyway I could.

9           11.       Shortly after I volunteered for a leadership group, I received an email from a  
10 woman who was known to me as Deanna and who identified herself as TFN's Group Outreach  
11 and Assistance ("GOA") for Oklahoma. Deanna asked if I would be interested in being a New  
12 Group Approver ("NGA") for Oklahoma. This was sometime right after the Christmas holiday  
13 2004 or possibly the first week of January 2005. I agreed to become the NGA for Oklahoma.  
14 On January 9, 2005, Nancy Castleman sent a congratulatory email, announcing that I had agreed  
15 to take the appointment as NGA for Oklahoma. Shortly thereafter I received my first new group  
16 to approve.

17           12.       The training that I received to be an NGA came by joining an online discussion  
18 group for TFN NGAs. This discussion group was moderated by an "NGA Coordinator."  
19 Basically, the training came when an NGA would post a question to the group and the members  
20 of the group with an interest in the question would offer suggestions.

21           13.       While I was an NGA, the applicants who wanted an online freecycling group to  
22 be listed on TFN's website received minimal guidance. TFN's website contained some very  
23 brief instructions on how to set up an online group through Yahoo! TFN's website also provided  
24 group files that an applicant could use or modify for an online freecycling group. For example,  
25 there was a "welcome" file which contained the text of an email message for a new member, a  
26 "Freecycle Etiquette" file which provided instructions on how members could use the online  
27 group, and an "exit" file which contained the text of an email message for a member departing  
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1 from the group. Moderators of new online freecycling groups were supposed to read these files  
2 and to conduct themselves accordingly. Otherwise, there was no formal instruction or training  
3 whatsoever. In the NGA discussion group, we were often reminded by one or more of the more  
4 experienced NGAs that NGAs needed to give new online freecycling groups minimum  
5 instructions on how to set up an online group with Yahoo! and how to get the group up and  
6 running. The reason was that, if the owner and moderator of a new online group could figure out  
7 how to set up the group on their own, then they could figure out how to run the group by, for  
8 example, copying files from TFN's website.

9 14. My typical practice as an NGA was as follows: (1) An individual who wanted to  
10 set up a new online freecycling group would apply through TFN's website. (2) I would receive  
11 information from TFN regarding an application to set up a group in my state, Oklahoma. (3) I  
12 would contact the individual and obtain basic information about where they were located, how  
13 large of a geographic area they intended to cover, and whether they lived in that area. NGAs  
14 were not supposed to approve groups that would geographically cover an area that was too small  
15 or too large, groups that overlapped with existing groups, or groups where the owner did not live  
16 in the area covered by the group. (4) I would advise that person to set up an online group and get  
17 back to me when the online group was up and running. (5) While the individual was setting up  
18 the online freecycling group, I would contact moderators in Oklahoma, typically by posting an  
19 email to an online discussion group for Oklahoma moderators. In my email to the discussion  
20 group, I would ask if there was any reason not to allow the applicant to moderate an online  
21 freecycling group. This was the only reference check. (6) When a new online freecycling group  
22 was set up, the new group notified me that they were ready for an "inspection." This inspection  
23 consisted of making sure that the new group had certain group files, such as the "welcome" file,  
24 the "Freecycle Etiquette" file, and the "exit" file. If the online group contained these files, I  
25 approved the group, and the group was listed on TFN's website.

26 15. Only at a later time did I learn that a moderator's handbook had been created by a  
27 moderator of an online freecycling group in Virginia. That handbook, which was created in  
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1 approximately November 2004, was not yet approved by TFN. Because this handbook was  
2 available and other moderators on the moderator online discussion group recommended it, I let  
3 moderators of new groups know about this manual. Several months later, in the spring of 2005,  
4 TFN approved a moderator's manual that was posted on TFN's website.

5 16. One other thing that a NGA had to do was to make sure that "EF", or  
6 "Ersatzfriend" was a co-owner of the group. EF was a fictional person who was created by TFN.  
7 EF had an email account, which permitted EF to be listed as a co-owner. EF was passed off to  
8 the online freecycling group owner as a safety valve in case something ever happened. For  
9 example, if the owners and moderators were locked out of their group by Yahoo!, EF could  
10 always go in and save the group.

11 17. Even though I required new groups to have EF as a co-owner before the new  
12 groups would be approved and listed on TFN's website, at this time I did not add EF as a co-  
13 owner of my online freecycling group in Stillwater. I knew that, if EF was listed as a co-owner,  
14 TFN could come in and take over my group. I just did not want to risk losing ownership and  
15 control of my online freecycling group.

16 18. When I started as an NGA, I approved many groups that did not adopt TFN's  
17 logo, which is a stylized presentation of the word "freecycle" and includes a guitar and a bicycle.  
18 Some did not like the color. Some did not like the stylized presentation or the overall  
19 appearance, and many previously had their own graphics and logos. Later, NGAs were told that  
20 new groups had to use TFN's logo and to include a trademark and copyright notice on the home  
21 page of the group. I then began to inspect new groups to make sure that the new groups had  
22 TFN's logo as well as the trademark and copyright notice.

23 19. After having served as the NGA of Oklahoma for a short period of time, a woman  
24 known to me as Nancy Castleman sent an email to me, stating that the GOA of Oklahoma  
25 (Deanna) had recommended me as a possible GOA. Ms. Castleman asked if I would be  
26 interested in becoming a GOA. Again having time on my hands, and believing in freecycling, I  
27 accepted and became a volunteer GOA. A GOA was not allowed to be a GOA for the state in  
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1 which he or she had an online freecycling group or for the state in which the GOA was also the  
2 NGA. I started as the GOA for Kansas, Nebraska, South Dakota, and North Dakota. By the  
3 time I left TFN in August 2005, I had been the GOA over at least a dozen states at one time or  
4 another. Even though I took on these new volunteer duties for TFN, I continued as the NGA for  
5 Oklahoma until August 2005. When I took on additional volunteer work at the beginning of  
6 August 2005, I trained my co-owner of the Stillwater online freecycling group to become the  
7 NGA for Oklahoma. My co-owner was subsequently appointed NGA for Oklahoma.

8 20. The duties of a GOA were quite separate and different from the NGA duties. As  
9 an NGA, I contacted individuals who indicated they were interested in starting an online  
10 freecycling group or had already started their own freecycling group, and wanted to get it listed  
11 on TFN's website. As a GOA, we were listed as "Group Outreach Assistance", to "help" groups  
12 owners make their groups run well. I also responded to complaints about online freecycling  
13 groups. NGAs were forbidden from looking at up and running online groups to see if there were  
14 any problems. If an NGA heard about a problem, the NGA was supposed to report the problem  
15 to the appropriate GOA.

16 21. There was an online discussion group for GOAs that was moderated by Nancy  
17 Castleman. Nancy Castleman and other senior volunteers instructed GOAs that we were not, in  
18 any way, to get involved in any group other than our own, unless a complaint was made against  
19 an online freecycling group. We were advised not to join local groups or even to join online  
20 local discussion groups for moderators in our assigned states. The only reason that we were to  
21 make contact with an online freecycling group was if a member of a group listed on TFN's  
22 website initiated a complaint against a particular group. Then, and only then, was a GOA to join  
23 or apply for membership in that particular group. The GOA would then make contact with the  
24 group's owners to discuss the "problems." GOAs were told that the reason for our "non-  
25 involvement" was to assure the local group owners that they had full and total control over their  
26 local groups. Mr. Beal did not want it to appear that TFN was monitoring groups in anyway.  
27 Mr. Beal specifically told the online discussion group for GOAs that we should not look for  
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1 problems. GOAs were not to go looking for problems but were supposed to let problems come  
2 to them.

3 22. In addition to receiving information from the online discussion group for GOAs, I  
4 also communicated regularly with Dianna, the GOA for Oklahoma. Dianna became my mentor  
5 for GOA activities.

6 23. When I first became a GOA, complaints were made to TFN's website. If the  
7 complaint was about an online freecycling group in one of my states, the complaint would be  
8 forwarded to me. Later, a list of the GOAs and our email addresses was posted on TFN's  
9 website. This allowed members to submit complaints directly to the appropriate GOAs.

10 24. While complaints from members of online freecycling groups usually were about  
11 their own groups, complaints might also concern a neighboring group. One reason that this  
12 might happen is that neighboring groups might have different policies on what kinds of items  
13 could be posted. For example, different groups had different policies about whether pets could  
14 be posted. If a member did not believe that pets should be posted, the member might complain  
15 either that his or her own group allowed pet postings or that a neighboring group allowed pet  
16 postings.

17 25. When a member made a complaint about an online freecycling group in one of  
18 my states, I responded by email to let the member know that the complaint had been received  
19 and that I would look into the matter as best as time allowed. Because I was assigned to multiple  
20 states that had numerous online freecycling groups, a complaint was not always investigated  
21 immediately. Most often, a second or third complaint about a particular group was needed  
22 before I would start an investigation.

23 26. As a GOA, I investigated violations of the "rules" set forth in the "Freecycle  
24 Etiquette" file. Those rules basically stated that everything must be free, legal, and appropriate  
25 for all ages. More often, complaints did not focus on the character of the items that members  
26 sought to freecycle. For some people, "appropriate for all ages" applied to a member's email  
27 address that was shown when the email was posted to an online freecycling group. For example,  
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1 some complaints concerned the signature lines on another member's email post, such as  
2 signature lines with information advertising a business. One signature line indicated that  
3 member was an agent for an insurance company and that people should come see that member  
4 for their insurance needs. Some complaints were that other members used vulgar or offensive  
5 language in their email addresses and that the group owner did not prohibit these kinds of email  
6 addresses.

7 27. When investigating complaints, I kept Nancy Castleman generally informed of  
8 what I was doing. Sometimes, the group owner would agree that the complaint was legitimate  
9 and then resolve the problem. If so, my job was done. Sometimes, the group owner would  
10 refuse to resolve the problem. Group owners who refused to cooperate usually objected that, as  
11 the owner, they ran the group and made the decisions. As a group owner myself, I understood  
12 this concern. In these situations, I had to make judgment calls as to whether to press the issue. I  
13 cannot speak for other GOAs, but personally I usually did not press the issue, especially if the  
14 complaint seemed minor.

15 28. Only if an online freecycling group had flagrant violations, such a permitting  
16 postings of items for sale, was an action ever taken against an owner due to a member's  
17 complaint. The action that I took was to remove the group from the list of approved groups on  
18 TFN's website. The standard practice was to email an individual known to me as Dean, who  
19 worked in the "back office" for TFN's Website. Dean would de-list groups. If the delisting  
20 from the TFN Website did not persuade an owner to comply with my requests, I would then  
21 report the group to Dean, who responsible for sending cease and desist notices to group owners.  
22 If cease and desist notices did not work, TFN would file a report with Yahoo! to get the group  
23 terminated. My understanding is that the person who was actually responsible for filing reports  
24 with Yahoo! was Emily (who had an email address with "gowriterotica"). My understanding  
25 was that Emily had developed a relationship with the trademark officers at Yahoo, and could, it  
26 seemed, get them to act on her wishes.

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1           29.     In approximately June or July of 2005, after I had been a GOA for a while, the  
2 GOAs were asked to check to see if EF had been added as a co-owner when they had a  
3 complaint against a group. To do this, we had to email "Judy," the lady who was keeper of the  
4 password for "EF". Approximately that same time, GOAs were also asked to check to see if  
5 TFN's logo had been updated and the trademark and copyright notice was correct and up to date.  
6 I added these additional checks when I investigated complaints. If there was a problem, I would  
7 mention to the group owner that I noticed the problem while looking into the complaint. GOAs  
8 were not asked to routinely check all groups to see if EF was a co-owner, if TFN's logo was up  
9 to date, or if the trademark and copyright notice was correct. I only checked on these matters if I  
10 was already investigating a complaint.

11           30.     Action was taken against group owners who refused to add EF as a co-owner, or  
12 to display either TFN's logo or the trademark and copyright notice. For example, in Oklahoma,  
13 the online freecycling groups for Lawton and Tulsa refused to add EF as a co-owner. These  
14 groups were taken off the list of approved groups on TFN's website. TFN also reported these  
15 groups to Yahoo!, who then terminated these groups. TFN then set up new online freecycling  
16 groups for Lawton and Tulsa. Deanna, as the GOA of Oklahoma, asked me, as the NGA for  
17 Oklahoma, to be an owner of the two replacement groups, and I took on these duties in addition  
18 to my other volunteer responsibilities. The two replacement groups were listed on TFN's  
19 website.

20           31.     During this time period, Dianna, the GOA for Oklahoma, informed me that EF  
21 was not listed as an owner of my Stillwater freecycling group and that I had to add EF as a co-  
22 owner. When I realized that she was serious, I added EF. About six to eight weeks later, I  
23 removed EF as a co-owner of my group. As a senior volunteer within the network, I was seeing  
24 what was being done to groups that did not follow TFN's directions. I did not want to risk losing  
25 ownership and control of my online freecycling group.

26           32.     Although EF was supposed to be used only in the rare case when a group was left  
27 without an owner, I am aware of one instance when TFN used EF to bully its way into a group,  
28



1 displace the original owner, and take over the group. The owner of the group in Lansing,  
2 Michigan known as Mid-Michigan Freecycle Network (or MMFN) was contacted about  
3 complaints of selling and the group being used as a general discussion forum. The owner  
4 refused to contact us, as she told me later, because she didn't know who these people were that  
5 were contacting her about problems with her group. Like all the rest of us, she had been given  
6 no direction or restrictions as it was "her" group. So she ignored our emails and instructed her  
7 co-owner to do the same. During this dispute, Judy specifically noted to other TFN volunteers,  
8 including me, that she was against using EF to take over a group. Judy was instructed to use EF  
9 to replace the owner. TFN first used EF to appoint an interim moderator for MMFN, giving  
10 control of the group to Robin, the coordinator of the "IMOD" team. Then, TFN used EF to  
11 appoint me and the interim moderator as new co-owners. Finally, TFN used EF to remove the  
12 original owner as an owner. By the time the original owner realized she had lost her group, the  
13 IMOD team had control, and the original owner was not one of the people selected to control the  
14 MMFN group from that point.

15 33. In late July or early August 2005, a senior TFN volunteer known to me as  
16 Stephanie indicated that she and Mr. Beal wanted me to become the most senior GOA (known as  
17 the GOA Coordinator). I accepted the position of GOA Coordinator and became a member of  
18 the Hub. On August 5, 2005, Mr. Beal sent an email announcing that I had accepted the position  
19 as GOA Coordinator.

20 34. The creation of the Hub was already in the works at the time of my  
21 "promotion", and the Hub was initially started within the first few days after my  
22 accepting the position of GOA Coordinator. The Hub was a group of eight people  
23 who occupied the top TFN positions. I was included because I was the GOA  
24 Coordinator. Mr. Beal told the members of the Hub that all Hub conversations  
25 were strictly confidential and could not be disclosed to others, including TFN  
26 volunteers who were not Hub members. After two weeks as the GOA Coordinator  
27

28

1 and a member of the Hub, I left TFN. I still own and moderate freecycling groups  
2 that are no longer a part of The Freecycle Network.

3  
4 I declare under penalty of perjury under the laws of the United States of America that the  
5 foregoing is true and correct. Executed in Stillwater, Oklahoma, on 7/14/2007

6  
7  
8   
9 Miles Dennis Robertson, Jr.

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# **EXHIBIT B**

September 6, 2007, Declaration of Dennis S. Corgill in Support of  
Plaintiff and Counterdefendant FreecycleSunnyvale's Opposition to  
Motion to Shorten Time

FreecycleSunnyvale v. The Freecycle Network  
Case No. C06-00324  
(N.D. Cal. filed Jan. 18, 2006)



July 25, 2007

VIA EMAIL AND U.S. MAIL

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**Dennis S. Corgill**  
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dcorgill@mayerbrownrowe.com

Re: Disclosure of Witness in *FreecycleSunnyvale v. The Freecycle Network, Inc.*, Case No. C 06-00324 CW (N.D. Cal. filed Jan. 18, 2006)

Dear Esha:

Thank you for your telephone call yesterday during which you initiated the meet and confer process for a FED.R.CIV.P. 37 motion on the grounds that Miles Dennis Robertson, Jr., was not disclosed as a potential witness.

Under FED.R.CIV.P. 37(c)(1), evidence from an undisclosed witness may be used if any failure to disclose the witness is "harmless." A failure to disclose a witness is harmless if the witness's identity is already known to the other party or disclosed by other parties. *See* Advisory Committee Notes to 1993 Amendments to FED.R.CIV.P. 37(c).

Mr. Robertson is not a surprise witness. Mr. Robertson is well-known to The Freecycle Network ("TFN") and to its Executive Director, Deron Beal. Mr. Robertson was an NGA, a GOA, the GOA Coordinator, and a member of The Hub.

Further, TFN disclosed the identity of Mr. Robertson, as well as his senior status within TFN. *See, e.g.*, FN 066925, FN 068170, FN 070599.

Pursuant to FED.R.CIV.P. 26(e), FreecycleSunnyvale will supplement its Initial Disclosures to include the identity of Mr. Robertson, an identity already known to TFN.

We consider this matter resolved pursuant to L.R. 37-1.

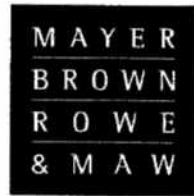
Sincerely,

A handwritten signature in black ink that reads "Dennis S. Corgill".

Dennis S. Corgill

Berlin Brussels Charlotte Chicago Cologne Frankfurt Hong Kong Houston London Los Angeles New York Palo Alto Paris Washington, D.C.

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July 25, 2007

VIA EMAIL AND U.S. MAIL

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[dcorgill@mayerbrownrowe.com](mailto:dcorgill@mayerbrownrowe.com)

Re: Disclosure of Witness in *FreecycleSunnyvale v. The Freecycle Network, Inc.*, Case No. C 06-00324 CW (N.D. Cal. filed Jan. 18, 2006)

Dear Esha:

Thank you for returning my telephone call today. On condition that The Freecycle Network agrees not to bring a motion under FED.R.CIV.P. 37, FreecycleSunnyvale will agree (1) that the discovery cut-off of August 3, 2007, does not apply to a deposition of Miles Dennis Robertson, Jr., and (2) that the hearing date for the motion currently scheduled for August 23, 2007, may be moved to September 6, 2007, with corresponding adjustments to the briefing schedule.

Sincerely,

A handwritten signature in cursive script that reads "Dennis S. Corgill".

Dennis S. Corgill

**Corgill, Dennis S.**

---

**From:** Corgill, Dennis S.  
**Sent:** Thursday, July 26, 2007 8:53 AM  
**To:** 'Bandyopadhyay, Esha (Perkins Coie)'  
**Subject:** RE: Disclosure of Witness in FreecycleSunnyvale v. The Freecycle Network

Esha,

I will let you know as soon as I am able. By the way, the offer in my last letter remains open.

Cheers,  
Dennis

-----Original Message-----

From: Bandyopadhyay, Esha (Perkins Coie) [mailto:BANDE@PerkinsCoie.com]  
Sent: Thursday, July 26, 2007 8:18 AM  
To: Corgill, Dennis S.  
Subject: RE: Disclosure of Witness in FreecycleSunnyvale v. The Freecycle Network

Dennis:

Please advise as to FreecycleSunnyvale's position on our proposal as we will otherwise need to move forward with a motion in order to continue the August 23rd hearing date. I look forward to hearing from you.

Best regards,  
Esha

-----Original Message-----

From: Bandyopadhyay, Esha (Perkins Coie)  
Sent: Wednesday, July 25, 2007 2:47 PM  
To: 'Corgill, Dennis S.'  
Subject: RE: Disclosure of Witness in FreecycleSunnyvale v. The Freecycle Network

Dennis:

Thank you for your letter of earlier this afternoon. We are hopeful that the parties can reach some sort of mutual agreement in order not to unnecessarily burden the Court. We propose the following: The Freecycle Network will agree not to bring a motion under Federal Rule of Civil Procedure 37 if FreecycleSunnyvale will agree that 1) the August 3, 2007, discovery cutoff will not apply to depositions of Miles Dennis Robertson, Jr. or Kenneth A. Hedden, Sr. and 2) that the hearing date for the motion currently scheduled for August 23, 2007, may be moved to September 20, 2007, with corresponding adjustments to the briefing scheduling in order to afford The Freecycle Network sufficient opportunity to conduct the additional depositions.

Please feel free to contact me should you have any questions or concerns.

Best regards,  
Esha

-----Original Message-----

From: Corgill, Dennis S. [mailto:DCorgill@mayerbrownrowe.com]

Sent: Wednesday, July 25, 2007 2:12 PM

To: Bandyopadhyay, Esha (Perkins Coie)

Subject: Disclosure of Witness in FreecycleSunnyvale v. The Freecycle Network

Esha,

Thank you for returning my call today. I am sorry that the tenor of our discussion became acrimonious, and I apologize for my part in that.

Please see the attached letter.

Cheers,  
Dennis

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July 27, 2007

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Re: Hearing on Motion in *FreecycleSunnyvale v. The Freecycle Network, Inc.*, Case No. C 06-00324 CW (N.D. Cal. filed Jan. 18, 2006)

Dear Esha:

With respect to the recently filed Motion for Summary Judgment, FreecycleSunnyvale agrees to moving the hearing date to September 6, 2007, the date originally requested by The Freecycle Network.

With respect to the Declaration of Mr. Robertson, as I explained earlier, any objection under FED.R.CIV.P. 37 is unfounded and, therefore, frivolous. If you are aware of legal authority to the contrary, please let us know. Otherwise, we consider this matter concluded.

With respect to depositions of Messrs. Hedden and Robertson, FreecycleSunnyvale will not agree to extend discovery. The Freecycle Network's failure to seek any third party discovery during the discovery period is not grounds to delay the hearing on the Motion for Summary Judgment.

If you have any questions, please feel free to call.

Sincerely,

A handwritten signature in black ink that reads "Dennis S. Corgill".

Dennis S. Corgill



**Corgill, Dennis S.**

---

**From:** Bandyopadhyay, Esha (Perkins Coie) [BANDE@PerkinsCoie.com]  
**Sent:** Friday, July 27, 2007 11:56 AM  
**To:** Corgill, Dennis S.  
**Subject:** RE: Timing issues in FreecycleSunnyvale v. The Freecycle Network



FRE\_Joint Stipulation re\_MSJ..  
FRE\_Order - Joint Stipulation...

<<FRE: Joint Stipulation re: MSJ Hearing.DOC>> <<FRE: Order - Joint Stipulation re: MSJ Hearing.DOC>> Dennis-

I write in response to your letter of earlier this morning. We will not file The Freecycle Network's motion to change the hearing date, though it is unfortunate that your delay in responding to our proposal has resulted in wasted time and resources in preparing the motion.

Thank you for agreeing to move the hearing date on FreecycleSunnyvale's Motion for Summary Judgment to September 6, 2007. Attached please find a joint stipulation and proposed order pursuant to Local Rule 6-2. Please let me know if the attached drafts are acceptable, and we will take care of the filing.

As I clearly stated during our telephonic discussion on Wednesday, July 25th, we disagree with your assertions regarding The Freecycle Network's grounds for filing a motion under Federal Rule of Civil Procedure 37. FreecycleSunnyvale violated the Federal Rules of Civil Procedure in failing to identify a key witness, Mr. Miles Dennis Robertson, Jr., prior to the close of discovery. As you are no doubt aware, Federal Rule of Civil Procedure 26(a) requires a party to disclose the names of "each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses...." FreecycleSunnyvale failed to meet this burden. In addition, it is well-established that failure to comply with the disclosure requirements of the Federal Rules of Civil Procedure will result in the exclusion of that evidence unless the failing party shows that there was substantial justification for the failure or that the failure was harmless. Fed.R.Civ.Proc. 37(c); Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1001, 1106 (9th Cir. 2001). FreecycleSunnyvale has neither established that it was justified in failing to identify Mr. Robertson during the discovery period, nor has it established that the failure to identify Mr. Robertson was harmless. Failing to identify a witness prior to the close of discovery that FreecycleSunnyvale is relying upon in a summary judgment motion, after entering into a stipulation precluding The Freecycle Network from taking this witness' deposition, does not satisfy FreecycleSunnyvale's burden in this case. As such, The Freecycle Network will be filing a cross-motion under Federal Rule of Civil Procedure 37 as we have complied with our meet and confer requirements. To this end, we need to address the briefing schedule based on the new proposed hearing date. We propose setting August 23, 2007, as the date by which FreecycleSunnyvale may oppose The Freecycle Network's cross-motion, and August 30, 2007, as the date by which The Freecycle Network may file a reply brief in response to FreecycleSunnyvale's opposition. We are happy to discuss this further.

Please let me know if you have any further questions.

Regards,

Esha

-----Original Message-----

From: Corgill, Dennis S. [mailto:DCorgill@mayerbrownrowe.com]

Sent: Friday, July 27, 2007 10:02 AM

To: Bandyopadhyay, Esha (Perkins Coie)

Subject: Timing issues in FreecycleSunnyvale v. The Freecycle Network

Esha,

Thank you for your patience. Please see the attached letter. Please call if you have any questions.

Cheers,  
Dennis

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July 27, 2007

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dcorgill@mayerbrownrowe.com

Re: Disclosure of Witness in *FreecycleSunnyvale v. The Freecycle Network, Inc.*, Case No. C 06-00324 CW (N.D. Cal. filed Jan. 18, 2006)

Dear Esha:

This letter continues the meet and confer process for a FED.R.CIV.P. 37 motion on the grounds that Miles Dennis Robertson, Jr., was not disclosed as a potential witness.

Any motion would be frivolous. This conclusion is not changed by *Yeti By Molly, Ltd. v. Deckers Outdoor Corp*, 259 F.3d 1101 (9th Cir. 2001). In that case, evidence from a timely identified expert witness was excluded because the expert's report was not provided until two years after discovery closed and twenty-eight days prior to trial.

Even if *Yeti* pertained to identifying a potential witness, *Yeti* concerned an expert witness. A party has no reason to know the identity of an opposing party's expert. Here, The Freecycle Network ("TFN") knew the identity of Mr. Robertson, and TFN identified Mr. Robertson in documents that TFN produced.

If you are aware of relevant authority that would make a FED.R.CIV.P. 37 motion not frivolous, please let us know. Otherwise, we consider this matter concluded. There is no need to discuss a briefing schedule on any cross-motion.

Sincerely,

A handwritten signature in cursive script that reads "Dennis S. Corgill".

Dennis S. Corgill

**Corgill, Dennis S.**

---

**From:** Bandyopadhyay, Esha (Perkins Coie) [BANDE@PerkinsCoie.com]  
**Sent:** Monday, July 30, 2007 10:20 AM  
**To:** Corgill, Dennis S.  
**Subject:** RE: Meet and Confer

Dennis-

I write in response to your letter of Friday, July 30th, regarding The Freecycle Network's cross-motion under Federal Rule of Civil Procedure 37 based on FreecycleSunnyvale's failure to identify Miles Dennis Robertson, Jr. as a potential witness. Based on our correspondence last week, both written and telephonic, we do not believe there is any need to "continue" the meet and confer process regarding this cross-motion. Indeed, The Freecycle Network has already met its meet and confer requirements and our position has been set forth clearly with citations to legal authority. Despite your assertions to the contrary, this matter will not be "concluded" until the Court rules upon The Freecycle Network's cross-motion. Moreover, your repeated refusal to acknowledge The Freecycle Network's intent to file a cross-motion will not alter our position. As we stated clearly last week, this is an issue on which we will have to agree to disagree.

To be clear, The Freecycle Network will be filing a cross-motion under Federal Rule of Civil Procedure 37. FreecycleSunnyvale will then have an opportunity to oppose The Freecycle Network's motion. We believe it is in the best interests of both parties to arrive at some sort of agreement regarding the briefing schedule for the cross-motion. Should FreecycleSunnyvale continue to simply deny the existence of the motion, and continue to fail to cooperate in this endeavor, we will have no choice but to indicate the same to the Court.

Please let me know if you have any questions or concerns.

Best regards,  
Esha

-----Original Message-----

From: Corgill, Dennis S. [mailto:DCorgill@mayerbrownrowe.com]

Sent: Friday, July 27, 2007 5:04 PM  
To: Bandyopadhyay, Esha (Perkins Coie)  
Subject: Meet and Confer

Esha,

Please see the attached letter.

Cheers,  
Dennis

Dennis S. Corgill  
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**Corgill, Dennis S.**

---

**From:** Corgill, Dennis S.  
**Sent:** Monday, July 30, 2007 3:21 PM  
**To:** 'ebandyopadhyay@perkinscoie.com'  
**Subject:** Rule 37 Motion

Esha,

With respect to the Declaration of Miles Dennis Robertson, Jr., as previously indicated, any objection under Fed.R.Civ.P. 37 is unfounded and, therefore, frivolous. In an effort not to burden the court with motions, however, FreecycleSunnyvale will not object to extending the discovery cutoff of August 3rd solely with respect to a deposition of Miles Dennis Robertson, Jr. If this is agreeable to The Freecycle Network, please let me know.

Cheers,  
Dennis

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Mobile Telephone: 650.248.0340

**Corgill, Dennis S.**

**From:** Bandyopadhyay, Esha (Perkins Coie) [BANDE@PerkinsCoie.com]  
**Sent:** Tuesday, July 31, 2007 10:53 AM  
**To:** Corgill, Dennis S.  
**Subject:** RE: Rule 37 Motion

Dennis-

The Freecycle Network is not agreeable to FreecycleSunnyvale's offer, which is why we made a counter-proposal. However, we are willing to hear alternative proposals. Please feel free to let me know if you have any questions.

Regards,  
Esha

**From:** Corgill, Dennis S. [mailto:DCorgill@mayerbrownrowe.com]  
**Sent:** Tuesday, July 31, 2007 10:33 AM  
**To:** Bandyopadhyay, Esha (Perkins Coie)  
**Subject:** RE: Rule 37 Motion

Esha,

We are aware of The Freecycle Network's counter-proposal in your email of July 25th. FreecycleSunnyvale is not accepting that counter-proposal. FreecycleSunnyvale's offer in my email of yesterday is limited to a deposition of Mr. Robertson.

If you have any questions, please feel free to call.

Cheers,  
Dennis

**From:** Bandyopadhyay, Esha (Perkins Coie) [mailto:BANDE@PerkinsCoie.com]  
**Sent:** Tuesday, July 31, 2007 10:05 AM  
**To:** Corgill, Dennis S.  
**Subject:** RE: Rule 37 Motion

Dennis-

We continue to disagree with your assertions regarding FreecycleSunnyvale's failure to identify its witnesses as required by the Federal Rules of Civil Procedure.

In regard to you your proposal below, as you know, FreecycleSunnyvale previously made this proposal in a letter dated July 25, 2007, though FreecycleSunnyvale later withdrew the offer in a subsequent letter. In response to your July 25th letter, I set forth a counter-proposal in an e-mail of that same date. To the extent that FreecycleSunnyvale is now reintroducing its proposal, we request that you please review and respond to The Freecycle Network's counter-proposal in my e-mail of July 25th. Please let me know if you have any further questions.

Regards,  
Esha

**From:** Corgill, Dennis S. [mailto:DCorgill@mayerbrownrowe.com]  
**Sent:** Monday, July 30, 2007 3:21 PM  
**To:** Bandyopadhyay, Esha (Perkins Coie)  
**Subject:** Rule 37 Motion

Esha,

With respect to the Declaration of Miles Dennis Robertson, Jr., as previously indicated, any objection under Fed.R.Civ.P. 37 is unfounded and, therefore, frivolous. In an effort not to burden the court with motions, however, FreecycleSunnyvale will not object to extending the discovery cutoff of August 3rd solely with respect to a deposition of Miles Dennis Robertson, Jr. If this is agreeable to The Freecycle Network, please let me know.

Cheers,  
Dennis

Dennis S. Corgill  
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# **EXHIBIT C**

September 6, 2007, Declaration of Dennis S. Corgill in Support of  
Plaintiff and Counterdefendant FreecycleSunnyvale's Opposition to  
Motion to Shorten Time

FreecycleSunnyvale v. The Freecycle Network  
Case No. C06-00324  
(N.D. Cal. filed Jan. 18, 2006)

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14 FREECYCLESUNNYVALE,

15  
16 **UNITED STATES DISTRICT COURT**  
17  
18 **NORTHERN DISTRICT**  
19  
20 **OAKLAND DIVISION**

21 FREECYCLESUNNYVALE,  
22 a California unincorporated association,

23 Plaintiff,

24 v.

25 THE FREECYCLE NETWORK,  
26 an Arizona corporation,

27 Defendant.

28 THE FREECYCLE NETWORK, INC., an  
Arizona Corporation,

Counterclaimant,

v.

FREECYCLESUNNYVALE, a California  
unincorporated association,

Counterdefendant.

Case No. C06-00324 CW

**REPLY IN SUPPORT OF PLAINTIFF  
AND COUNTERDEFENDANT  
FREECYCLESUNNYVALE'S NOTICE  
OF ADMINISTRATIVE MOTION AND  
ADMINISTRATIVE MOTION FOR  
RECONSIDERATION OF THIS  
COURT'S AUGUST 10, 2007 ORDER  
DENYING PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT WITHOUT  
PREJUDICE**

1                   **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE AN**  
2                   **ADMINISTRATIVE MOTION FOR RECONSIDERATION AND ADMINISTRATIVE**  
3                   **MOTION FOR RECONSIDERATION**

4                   **I. INTRODUCTION**

5                   TFN's opposition to an early disposition of naked licensing issues demonstrates only that  
6                   TFN will go to any length to delay the resolution of a central issue that would streamline this  
7                   action. While TFN objects that it needs all manner of unidentified discovery, TFN is the one  
8                   who has long frustrated discovery on naked licensing. Moreover, while TFN objects that it  
9                   needs an expert to address naked licensing, TFN fails to cite one case in which a court admitted  
10                  expert testimony on naked licensing. For whatever reason, TFN would rather drag this action  
11                  out than allow this Court to narrow the issues left for trial. TFN's dilatory tactics should be  
12                  rejected, and this Court should schedule FreecycleSunnyvale's Naked Licensing Motion for a  
13                  hearing in September 2007.

14                  **II. TFN HAS LONG FRUSTRATED DISCOVERY EFFORTS ON NAKED**  
15                  **LICENSING**

16                  Early in this action, FreecycleSunnyvale sought production of documents concerning  
17                  TFN's relationships with its alleged licensees. Obviously, such documents would indicate if  
18                  TFN retained contractual rights to control quality, if TFN actually controlled quality, or if TFN  
19                  reasonably relied upon any licensee to maintain quality. *See* Exhibit A to Declaration of Dennis  
20                  S. Corgill in Support of Plaintiff and Counterdefendant FreecycleSunnyvale's Motion for  
21                  Summary Adjudication (July 17, 2007; Document # 69).

22                  FreecycleSunnyvale initiated the meet and confer process on June 30, 2006 to obtain  
23                  these documents, but TFN has refused to produce documents that it acknowledges are relevant to  
24                  naked licensing. At first, TFN objected that production was overly burdensome. Only recently,  
25                  in June 2007, TFN admitted that it did not have possession, custody, or control of many of its  
26                  alleged licensees' documents, which only demonstrates that TFN has nakedly licensed its alleged  
27                  trademarks because TFN lacks access to the documents which would enable TFN to exercise  
28                  quality control over its alleged licensees. *See Id.*

                  TFN's suggestion that it was surprised that FreecycleSunnyvale filed its Naked Licensing

1 Motion is disingenuous. Naked licensing was alleged in the original complaint filed in this  
2 action and, as just noted, FreecycleSunnyvale has been seeking relevant discovery throughout  
3 this action. *See* Complaint for Declaratory Judgment of Trademark Non-Infringement and  
4 Tortious Interference with Business Relations ¶ 41 (Jan. 18, 2007; Document # 1). Even though  
5 TFN has denied FreecycleSunnyvale access to whatever licensee documents are in TFN's  
6 possession, custody, or control, FreecycleSunnyvale has presented convincing evidence of naked  
7 licensing, thereby making the Naked Licensing Motion ripe for this Court's review. At the very  
8 least, TFN should not be allowed to postpone the inevitable, and this Court should hear the  
9 Naked Licensing Motion in September 2007.

10 **III. TFN HAS COMPLETED FACT DISCOVERY AND HAS NO GROUNDS TO**  
11 **SEEK ADDITIONAL FACT DISCOVERY**

12 Not only has TFN frustrated discovery on naked licensing issues, but TFN muddles the  
13 record when TFN argues that it needs additional fact discovery. First, TFN has completed its  
14 discovery. The parties stipulated to extend the discovery period solely to schedule already  
15 noticed depositions. *See* Stipulated Request for Order Changing Time under Civil L.R. 6-2, at  
16 2:13-15 (July 17, 2007; Document # 66). TFN completed its last deposition on Friday, August  
17 17, 2007. TFN has no outstanding discovery requests to which FreecycleSunnyvale need reply.  
18 *See* Declaration of Dennis S. Corgill in Support of Plaintiff and Counterdefendant  
19 FreecycleSunnyvale's Reply in Support of Administrative Motion for Reconsideration at ¶¶ 2, 3  
20 (accompanying this Reply). In any event, TFN's argument that it needs additional discovery is a  
21 red herring. In fact, TFN does not dispute that licensing evidence—whether of naked licensing  
22 or licensing that ensures quality control—is peculiarly within the possession, custody, and  
23 control of TFN.

24 Second, TFN's argument that one of FreecycleSunnyvale's declarants—Miles Dennis  
25 Robertson, Jr.—was not listed in FreecycleSunnyvale's initial disclosures, is much ado about  
26 nothing. Under FED.R.CIV.P. 37(c)(1), evidence of an undisclosed witness may be used if any  
27 failure to disclose the witness is "harmless." A failure to disclose a witness is harmless if the  
28 witness's identity is already know to the other party or disclosed by other parties. *See* Advisory

1 Committee Notes to 1993 Amendments to FED.R. CIV.P. 37(c).

2 Mr. Robertson is no surprise witness. Mr. Robertson is well-known to TFN and its  
3 Executive Director, Deron Beal. Mr. Robertson was a senior TFN volunteer who gave of his  
4 time in several significant roles. Mr. Robertson was a New Group Approver, a Group Outreach  
5 and Assistant (GOA) volunteer, the GOA coordinator for all GOAs, and a member of the eight  
6 person central committee known as The Hub. *See* Declaration of Miles Dennis Robertson, Jr., in  
7 Support of Plaintiff and Counterdefendant FreecycleSunnyvale's Motion for Summary  
8 Adjudication at ¶¶ 2, 11, 19, 33, 34 (July 17, 2007; Document # 70). Any argument by TFN that  
9 it did not know the identity of Mr. Robertson is tantamount to a corporation arguing that it did  
10 not know of a recent senior officer and member of the board of directors.

11 Moreover, TFN cannot argue that it has any serious interest in seeking discovery from  
12 Mr. Robertson because TFN rejected FreecycleSunnyvale's offer to extend the fact discovery  
13 period for the purpose of taking Mr. Robertson's deposition. *See* Declaration of Dennis S.  
14 Corgill in Support of Plaintiff and Counterdefendant FreecycleSunnyvale's Reply in Support of  
15 Administrative Motion for Reconsideration at ¶ 5 (accompanying this Reply). Throughout this  
16 litigation, TFN has failed to engage in any third party discovery whatsoever. *See* Declaration of  
17 Dennis S. Corgill in Support of Plaintiff and Counterdefendant FreecycleSunnyvale's  
18 Administrative Motion for Reconsideration at ¶ 3 (Aug. 13, 2007; Document # 87). TFN has  
19 completed its fact discovery, and TFN should not be allowed to delay a hearing on  
20 FreecycleSunnyvale's Naked Licensing Motion further.

21 **IV. EXPERT DISCOVERY IS NOT NEEDED ON NAKED LICENSING ISSUES**

22 TFN suggests that it needs an expert before it can respond to FreecycleSunnyvale's  
23 Naked Licensing Motion, but TFN never explains itself. TFN cites no case in which a court  
24 received expert testimony to assist fact finding on naked licensing. Nor does TFN explain why  
25 an expert is needed to determine if TFN retained contractual rights to control quality, if TFN  
26 actually controlled quality, or if TFN reasonably relied upon any licensee to maintain quality.

27 TFN's plea for time to conduct expert discovery on naked licensing is belied by the fact  
28 that TFN did not believe that it needed an expert declaration when TFN sought a hearing date of

1 September 6, 2007. On July 27, 2007, TFN filed a joint stipulation requesting a September 6,  
2 2007 hearing date. See Stipulated Request for Order Changing Time under L.R. 6-2 (July 27,  
3 2007; Document # 79). Up to that point, TFN did not express any need for expert discovery on  
4 naked licensing issues. TFN's "need" for expert discovery arose only after this Court's order of  
5 July 30, 2007, and TFN saw an opportunity to delay. See Order Granting as Modified the  
6 Parties' Stipulated Request for Order Changing Time (July 30, 2007; Document # 81) ("*Absent*  
7 *good cause*, the Court prefers to consider all summary judgment motions and cross-motions at  
8 the same time.") (emphasis added). If TFN believed that it could be prepared to oppose the  
9 Naked Licensing Motion for a September 6, 2007 hearing, there is no reason to credit TFN's  
10 recent arguments that it cannot be prepared to oppose the Naked Licensing Motion before a  
11 February 28, 2007 hearing.

12 **V. CONCLUSION**

13 For the foregoing reasons, Plaintiff respectfully requests this Court to reconsider its  
14 July 30, 2007 order, to hear Plaintiff's Naked Licensing Motion in September 2007, and to adjust  
15 the due dates for filing opposition and reply papers in accordance with a new hearing date. In  
16 the alternative, Plaintiff requests this Court to grant Plaintiff leave, under Civil Local Rule  
17 7-9(a), to notice a motion for reconsideration.

18 Dated: August 22, 2007

MAYER, BROWN, ROWE & MAW LLP

By           /s/          Ian N. Feinberg            
Ian N. Feinberg  
Attorneys for Plaintiff  
FREECYCLESUNNYVALE,

# **EXHIBIT D**

September 6, 2007, Declaration of Dennis S. Corgill in Support of  
Plaintiff and Counterdefendant FreecycleSunnyvale's Opposition to  
Motion to Shorten Time

FreecycleSunnyvale v. The Freecycle Network  
Case No. C06-00324  
(N.D. Cal. filed Jan. 18, 2006)

**Corgill, Dennis S.**

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**From:** Kobialka, Lisa (Perkins Coie) [LKobialka@perkinscoie.com]  
**Sent:** Thursday, August 30, 2007 6:06 PM  
**To:** Corgill, Dennis S.  
**Cc:** Bandyopadhyay, Esha (Perkins Coie)  
**Subject:** Meet and Confer  
**Importance:** High

Dennis,

Based on your recent filing the Court representing that all discovery has been completed, we understand that you have no intention of providing Rob Robertson for deposition, despite the offer to do so earlier. As such, we will be making a motion to strike his declaration in light of plaintiff's failure to disclose this apparently relevant fact witness. We intend to make a request to the Court to have this briefing done on an expedited basis so this motion can be heard at the same time as the summary judgment motion. If so, we can discuss the timing of the opposition and reply to this motion.

Please let us know whether you would be willing to agree to an expedited briefing schedule, so this motion can be heard at the same time as the summary judgment hearing, currently scheduled for September 27th. We intend to file this motion in the next day or so and as such, request a prompt response.

Lisa Kobialka  
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# **EXHIBIT E**

September 6, 2007, Declaration of Dennis S. Corgill in Support of  
Plaintiff and Counterdefendant FreecycleSunnyvale's Opposition to  
Motion to Shorten Time

FreecycleSunnyvale v. The Freecycle Network  
Case No. C06-00324  
(N.D. Cal. filed Jan. 18, 2006)



August 31, 2007

VIA ELECTRONIC AND U.S. MAIL

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Re: Robertson Declaration in *FreecycleSunnyvale v. The Freecycle Network*, Case No. C06-00324 (N.D. Cal. filed Jan. 18, 2006)

Dear Lisa:

Thank you for your email of yesterday evening and regarding the declaration of Miles Dennis Robertson, Jr.

First, we cannot produce Mr. Robertson for deposition because we do not represent him. Mr. Robertson is a third party.

Second, to clarify prior discussions, on July 31<sup>st</sup>, The Freecycle Network ("TFN") rejected FreecycleSunnyvale's offer to extend fact discovery for the sole purpose of permitting TFN to take Mr. Robertson's deposition. Because TFN did not thereafter make any alternate proposal, we understand that TFN has no interest in seeking discovery from Mr. Robertson. If TFN wishes to re-open the meet and confer process on this topic, we will be happy to schedule a conference next week, given that Ian Feinberg is out for the vacation weekend.

Third, if you decide not to meet and confer with regard to seeking discovery from Mr. Robertson, TFN is free to raise any evidentiary objections in TFN's opposition to the motion for summary judgment. *See* Fed.R.Civ.P. 37(c)(1) (first sentence). There is no need for expedited briefing on a separate motion.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dennis".

Dennis S. Corgill

cc: Ian N. Feinberg