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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,
 a California unincorporated association,

25 Counterdefendant,
 26

CASE NO. C 06-00324 CW

**DECLARATION OF DERON BEAL IN
 SUPPORT OF THE FREECYCLE
 NETWORK, INC.'S OPPOSITION TO
 PLAINTIFF'S MOTION FOR SUMMARY
 ADJUDICATION UNDER FED.R.CIV.P. 56**

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

28 DECLARATION OF DERON BEAL IN SUPPORT OF THE FREECYCLE
 NETWORK, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR
 SUMMARY ADJUDICATION UNDER FED.R.CIV.P. 56
 CASE NO. C 06-00324 CW
 60383-7001/LEGAL13536897.2

1 I, Deron Beal, declare as follows:

2 1. I am the founder, Executive Director and Board Chair of The Freecycle Network,
3 Inc. (“The Freecycle Network”). I make this declaration in support of The Freecycle Network’s
4 opposition to Plaintiff and Counterdefendant FreecycleSunnyvale’s (“Plaintiff’s”) Motion for
5 Summary Adjudication Under Fed.R.Civ.P. 56. I have personal knowledge of the facts stated
6 and if called to testify as a witness, would competently testify thereto.

7 2. The Freecycle Network is a nonprofit corporation incorporated under the laws of
8 the State of Arizona. The Freecycle Network encourages and helps to coordinate the efforts of
9 member groups throughout the world to gift and thus enable the reuse of goods. The
10 organization was started in Tucson, Arizona, with a single reuse group. Today, The Freecycle
11 Network is a worldwide organization, with thousands of local Freecycle groups and more than
12 an estimated 3.6 million individual members. The Freecycle Network’s mission is to build a
13 worldwide gifting movement that reduces waste, saves precious resources and eases the burden
14 on our landfills while enabling our members to benefit from the strength of a larger community.

15 3. The Freecycle Network maintains its own web site to assist members in their
16 efforts to gift items on a globally local basis and thus, through reuse, reduce the amount of used
17 items being thrown away. The web site is located at the URL www.freecycle.org. The site also
18 maintains a directory of all member groups, which lists the individual group links and provides
19 resources for volunteers to create new local recycling groups as well as guidelines and required
20 rules for existing groups.

21 4. The Freecycle Network has been using the trademarks FREECYCLE, THE
22 FREECYCLE NETWORK, and the distinctive “The Freecycle Network” logo (collectively
23 “The Freecycle Network’s Marks” or the “Marks”) continuously since at least May 1, 2003. The
24 Freecycle Network has strict guidelines as to the use of the Marks, and expends much effort in
25 policing potential infringement of the Marks. A true and correct copy of The Freecycle
26 Network’s current Trademark and Copyright Policy is attached hereto as Exhibit 1.

1 10. On January 4, 2004, I surveyed the volunteers moderating local Freecycle groups
2 asking them to vote on whether The Freecycle Network should officially modify the standing
3 rule of “Keep it Free” to say “Keep It Free, Legal & Appropriate For All Ages” within The
4 Freecycle Network’s rules. It was overwhelmingly approved as the requirement is critical to
5 defining and maintaining the Freecycle Ethos. In addition, that all items must be free was
6 required of all groups previous to this poll as well, just without the explicit phrasing regarding
7 legality and appropriateness for all ages.

8 11. As the number of member groups in The Freecycle Network has grown, The
9 Freecycle Network, through its local group moderators, Group Outreach and Assistance, and the
10 Modsquad, has created more specific guidelines on how to post items, how to maintain the web
11 site, criteria to approve group members, and requirements on what items are allowable. Many of
12 the standards are described in The Freecycle Network Etiquette. Attached hereto as Exhibit 7 is
13 a true and correct copy of The Freecycle Network’s Rules & Etiquette Guidelines. However,
14 due to the growing and evolving nature of the service, The Freecycle Network allows individual
15 local Freecycle groups to create their own standards to fit the needs of their own community so
16 long as it complies with The Freecycle Network’s fundamental requirements.

17 12. Each local Freecycle group has volunteer moderators to monitor and oversee the
18 web site and the members’ compliance with The Freecycle Network’s guidelines. Since May 1,
19 2003, the moderators help existing member groups with day-to-day problems, such as spam and
20 voluminous amounts of emails, and are also responsible for the enforcement of The Freecycle
21 Network’s procedural and substantive standards. The moderators pledge to comply with the
22 “oath of honor and Freecycle Etiquette.” This includes encouraging “good manners in terms of
23 scheduling pick-ups, ... being punctual,” using the “Freecycle” name only for “noncommercial
24 uses, ... remaining open to member input by occasionally polling the members, but also to
25 “make the tough calls and decisions.” Attached hereto as Exhibit 8 is a true and correct copy of
26 an email bearing Bates numbers FN081260-61. Attached hereto as Exhibit 9 is a true and
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1 correct copy of an email bearing Bates numbers FN079059-62. Attached hereto as Exhibit 10 is
2 a true and correct copy of emails bearing Bates numbers FN077390-92. Attached hereto as
3 Exhibit 11 is a true and correct copy of an email bearing Bates numbers FN080716-17.
4 Attached hereto as Exhibit 12 is a true and correct copy of a page from The Freecycle Network
5 Web site bearing Bates numbers FN081661-63. Attached hereto as Exhibit 13 is a true and
6 correct copy of emails bearing Bates numbers FN077562-65. Attached hereto as Exhibit 14 is a
7 true and correct copy of a document bearing Bates number FN07458. Attached hereto as
8 Exhibit 15 is a true and correct copy of an email bearing Bates numbers FN077741-42.
9 Attached hereto as Exhibit 16 is a true and correct copy of an email bearing Bates number
10 FN076930. Attached hereto as Exhibit 17 is a true and correct copy of pages from The
11 Freecycle Network Web site bearing Bates numbers FN000017-21.

12 13. The moderators inspect and supervise the appropriateness of members' messages
13 and postings, ensure that the local groups have a back-up co-owner, maintain an efficient and
14 practical web site, and answer questions by applying and policing The Freecycle Networks'
15 rules and standards. See Exhibit 12. Attached hereto as Exhibit 18 is a true and correct copy of
16 a document bearing Bates number FN076444. Attached hereto as Exhibit 19 is a true and
17 correct copy of a document bearing Bates numbers FN077357-65. For members that fail to
18 comply with the Freecycle Etiquette, moderators are responsible for enforcing the Freecycle
19 "two strikes & you're out" policy by unsubscribing members after two inappropriate postings.
20 Also, if local volunteers refuse to follow the guidelines, they are asked to step down from their
21 role.

22 14. With the large number of member groups throughout the country and the world,
23 issues may arise regarding the application and extent of The Freecycle Network's standards. To
24 help resolve the "tough calls," The Freecycle Network created the Freecycle ModSquad
25 Moderators ("Modsquad") in October 13, 2003 as an official forum where member group
26 owners and moderators discuss issues regarding the quality of the service. The Modsquad
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1 provides a forum for moderators to discuss issues and challenges they face when inspecting and
2 supervising the local groups. With the wide scope of possible items and subjects, The Freecycle
3 Network structured the process to allow the Modsquad the ability to exercise some discretion
4 within the defined parameters set by The Freecycle Network. The forum provides a format to
5 promulgate the required rules and also enables volunteers to vote on some rules as is appropriate
6 to our mission. There are nearly 10,000 local volunteer moderators from around the world,
7 offering advice, opinions, and fun stories about their own groups. In addition, the Modsquad
8 forum allows moderators to share press releases and links to resources, group promotional
9 material, and provides updates to issues within The Freecycle Network. *See* Exhibits 9, 18.
10 Attached hereto as Exhibit 20 is a true and correct copy of an email bearing Bates numbers
11 FN077372-73. Attached hereto as Exhibit 21 is a true and correct copy of a document bearing
12 Bates numbers FN076445-61. Attached hereto as Exhibit 22 is a true and correct copy of pages
13 from The Freecycle Network web site bearing Bates numbers FN000006-07. Attached hereto as
14 Exhibit 23 is a true and correct copy of an email bearing Bates numbers FN078107. Attached
15 hereto as Exhibit 24 is a true and correct copy of emails bearing Bates numbers FN077227-35.
16 Attached hereto as Exhibit 25 is a true and correct copy of an email bearing Bates numbers
17 FN077268-70. Attached hereto as Exhibit 26 is a true and correct copy of an email bearing
18 Bates numbers FN 077268-70. Attached hereto as Exhibit 27 is a true and correct copy of an
19 email bearing Bates numbers FN076482-83.

20 15. The Freecycle Network created the New Group Approvers (“NGAs”) in
21 September 2004 to specifically evaluate the need for, assist, and approve new Freecycle groups
22 in accordance with The Freecycle Network guidelines as this task became too much for myself
23 alone. However, the NGAs have little discretion as they must ensure the new group’s
24 compliance with The Freecycle Network’s requirements. The NGAs scrutinize the group’s size
25 and geographic requirements, such as the one group per community rule and the general required
26 guidelines are in place. In addition, NGAs must also inspect the new group’s site to see if it
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1 complies with The Freecycle Network's requirement to maintain a high quality look on its web
2 site, specifically including making sure that there are no spelling and grammar mistakes in The
3 Freecycle Network database entry and ensuring the accuracy of the internet address and link
4 (URL). The NGAs also make sure new member groups set up "Ersatzfriend," a central holding
5 email address for the organization that enables the "main office" to step in to find a replacement
6 owner, or a comparable co-owner in the event that the original owner gets locked out of his or
7 her group. There is one NGA per state and if the local group is inappropriately established the
8 new potential volunteer moderator will be turned down. Attached hereto as Exhibit 28 is a true
9 and correct copy of emails bearing Bates numbers FN077508-15. Attached hereto as Exhibit 29
10 is a true and correct copy of an email bearing Bates numbers FN073489-90. Attached hereto as
11 Exhibit 30 is a true and correct copy of emails bearing Bates numbers FN077494-96.

12 16. To combat the concern that groups would be abandoned if an owner disappeared,
13 The Freecycle Network, through a vote by all group moderators worldwide, required each group
14 to have a back-up co-owner or set up Ersatzfriend. A replacement owner would continue to
15 enforce The Freecycle Network's rules and Etiquette in the event an owner is locked out by the
16 group by Yahoo!, or if an owner abandons the group. Each group owner may decide to use
17 Ersatzfriend or another local backup co-owner. Oey was required to personally add this ID as a
18 backup co-owner in the local group in which he was a volunteer moderator. The co-owner
19 requirement reduces confusion by allowing The Freecycle Network the ability to delineate the
20 official group in each area. For a period of one year during which it was required that all groups
21 have Ersatzfriend as a co-owner, many local groups were removed from The Freecycle Network
22 for noncompliance. Adding Ersatzfriend at this time is optional per a later volunteer poll we
23 opted to hold. Attached hereto as Exhibit 31 is a true and correct copy of an email bearing Bates
24 numbers FN076915-18.

25 17. The Freecycle Network Group Outreach and Assistance ("GOAs") team is
26 composed of volunteer local moderators throughout the country that are responsible for not only
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1 policing and moderating their own local groups, but also for educating local groups of the
2 required guidelines in their region of responsibility and, when needed, requiring that local
3 volunteers step down if unwilling to follow the guidelines. GOAs work with local moderators
4 and NGAs to help make the functioning of the local groups run more smoothly by assisting with
5 inter-group issues, such as flame wars, as well as overlapping issues with other member groups.
6 GOAs also provide support to owners who no longer want to be involved in the group by
7 providing support and advice in replacing the owner with another experienced member. The
8 Freecycle Network also maintains an online discussion group to facilitate communication among
9 NGAs called FreecycleSNGA as well as a separate leadership team for the GOAs. *See* Exhibits
10 5, 10. Attached hereto as Exhibit 32 is a true and correct copy of an email bearing Bates
11 numbers FN077408-13. Attached hereto as Exhibit 33 is a true and correct copy of emails
12 bearing Bates numbers is FN077408-13. Attached hereto as Exhibit 34 is a true and correct
13 copy of a document bearing Bates numbers FN077482-83. Attached hereto as Exhibit 35 is a
14 true and correct copy of emails bearing Bates numbers FN077357-65. Attached hereto as
15 Exhibit 36 is a true and correct copy of an email bearing Bates numbers FN080672-73.
16 Attached hereto as Exhibit 37 is a true and correct copy of a document bearing Bates numbers
17 FN80680-81. Attached hereto as Exhibit 38 is a true and correct copy of emails bearing Bates
18 numbers FN077629-31. Attached hereto as Exhibit 39 is a true and correct copy of emails
19 bearing Bates numbers FN077482-85.

20 18. One of the larger issues concerning The Freecycle Network is when a local
21 moderator steps down without a replacement moderator. To resolve that issue, the Interim
22 Moderator Team (“I-Mods”) are responsible for temporarily moderating the group’s compliance
23 with The Freecycle Network’s rules and Etiquette where the moderators have abandoned or
24 wanted to stop moderating their group. Moreover, I-Mods set up a replacement group for
25 deleted groups or for groups that have been removed from the network. The new groups must
26 comply with The Freecycle Network’s rule requiring that replacement or headless groups have at
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1 least two co-owners, Ersatzfriend and an interim nonlocal volunteer moderator. This enables the
2 member group to have a backup owner, Ersatzfriend, and an active I-mod co-owner moderating
3 the group while seeking a new local moderator to take over. Within approximately 3 months of
4 finding and training a new local moderator, I-Mods will remove themselves as co-owner and
5 promote the new local moderator to co-owner. The local co-owner may keep Ersatzfriend as a
6 back-up owner or designate another local moderator to be a co-owner. Furthermore, the I-Mods
7 are responsible for monitoring local groups for compliance with The Freecycle Network's
8 policies and to ensure that the member groups are not misusing the Mark. Attached hereto as
9 Exhibit 40 is a true and correct copy of emails bearing Bates numbers is VN077464-96..
10 Attached hereto as Exhibit 41 is a true and correct copy of an email bearing Bates numbers
11 FN076997-98.

12 19. In March 2003, The Freecycle Network established the Penguin Patrol, also
13 known as the Trademark Guidelines Development Team, to make public the guidelines and
14 policies for the protection of The Freecycle Network's intellectual property, including copyright
15 and trademark protection. This development team has since become the Freecycle Trademark
16 Team which also educates moderators and the general public on trademark matters and answers
17 any questions in addition to pro-active policing of The Freecycle Network's trademark policies.
18 The Trademark Team monitors the online member groups and identifies "rogue groups," that is,
19 online groups that fail to comply with the Freecycle Network's rules and thus are denied access
20 to the official The Freecycle Network's approved group list. Further, the Trademark Team
21 monitors dissident owners and moderators that express ideas against the rules set out by The
22 Freecycle Network to prevent the dissidents from undermining The Freecycle Network's rules
23 and Etiquette. The Trademark Team polices The Freecycle Network's services by sending cease
24 and desist letters to non-compliant groups and dissidents. The Trademark Team also handles
25 administrative tasks in the database that generates the The Freecycle Network group list on
26 www.freecycle.org, track group approvals in process, and track rogue groups. This ensures the

1 functionality and efficiency of the service. Moreover, to combat “safety concerns” associated
2 with The Freecycle Network’s services, the Trademark Team identifies safety and security
3 issues and educates moderators about safety issues. *See* Exhibit 6. Attached hereto as Exhibit
4 42 is a true and correct copy of a document bearing Bates numbers FN81741-74. Attached
5 hereto as Exhibit 43 is a true and correct copy of a document bearing Bates numbers FN081802-
6 06.

7 20. The Freecycle Network requires that local groups, members and volunteers abide
8 by all required guidelines as it is set up to be part of The Freecycle Network as well as on an
9 ongoing basis. For example, local groups must be Yahoo! groups, must require that all items be
10 free, may not geographically overlap with existing groups and must follow all required
11 guidelines. If they do so, they are allowed to continue to use the mark and receive a link on
12 Freecycle.org to the local Yahoo! group they are volunteering to moderate.. As the number of
13 member groups increases nationally and internationally, The Freecycle Network has created a
14 more detailed application procedure and guidelines for how potential members will be allowed
15 to join The Freecycle Network. In a rapid, but structured process, committees comprised of
16 participating moderators established policies and modified them through extensive discussion to
17 prevent overlapping and duplicate groups. The committees also created more detailed guidelines
18 for use of the Freecycle name and logo for existing registered groups. Existing groups unwilling
19 or unable to abide by the guidelines can no longer use the Freecycle name and logo.

20 21. To maximize efficiency and to minimize confusion, The Freecycle Network
21 created guidelines regarding the number and organization of member groups. For example, only
22 one member group is permitted per community. Since it would be difficult to monitor larger
23 communities, any new group larger than one county is automatically denied. The Freecycle
24 Network required a smaller group format for its member groups to allow better organization and
25 responsiveness from group moderators. In addition, The Freecycle Network uses the “first
26 come-first serve” method, in which existing groups receive priority over newly formed groups.

1 The local volunteers maintain the local groups by managing the Yahoo! group and supervising
2 the group's activities, including answering members' questions, inspecting and monitoring
3 posts, links, and files for SPAM and ensuring members' compliance with The Freecycle
4 Network's Rules and Etiquette. Local volunteer moderators are authorized to ban flagrant
5 offenders from the member group. Local volunteers are not permitted to fully moderate or
6 approve all local posts.

7 22. When The Freecycle Network first began in 2003, I policed the local member
8 groups personally to ensure that the Freecycle Ethos, Rules, and Etiquette were maintained. As
9 The Freecycle Network expanded, I could no longer supervise all member groups personally. In
10 response, The Freecycle Network quickly formed new, more formalized mechanisms, such as
11 the ModSquad, New Group Approvers, and Group Outreach and Assistance, to deal with the
12 needs of a larger network of member groups.

13 23. Since 2003, I have regularly reviewed The Freecycle Network Modsquad
14 discussion forum. The forum contains a voluminous amount of emails from moderators
15 regarding members' compliance with The Freecycle Network's guidelines. It is evident from
16 the discussion forum that the moderators actively supervise the groups by inspecting their
17 postings. I have personally reviewed emails regarding the appropriateness of members'
18 messages and postings, including compliance with the "free, legal, and appropriate for all ages"
19 standard. In most instances, the standard of "free, legal, and appropriate for all ages" is clear,
20 such in the context of posts involving pornography or alcohol. On rare occasions, moderators
21 will solicit advice from other moderators to interpret at the fringes what the phrase means.
22 Based on the volume and quality of responses that this discussion forum receives a day, it is my
23 understanding that the Modsquad is an effective mechanism for monitoring The Freecycle
24 Network's Rules and Etiquette. Likewise, since the guidelines are posted publicly on our site,
25 GOAs are constantly notified of indiscretions by members and volunteers of local groups and
26 they contact local volunteers to assure compliance directly and pro-actively.

1 24. The Freecycle Network has instituted a database on its web site at
2 www.freecycle.org containing comprehensive resources and guidelines regarding the operation
3 and management of a member group. Such resources include the Moderator Manual, Getting
4 Immediate Help, the Rules & Etiquette Guidelines and Policies, Copyright & Trademark Policy,
5 and publications on how to moderate member groups, notices, and responses to questions posed
6 by moderators in the past. The database also includes text files on crossposting, denying
7 members and member groups, organizing emails, and other operational information. These
8 resources minimize any confusion and inconsistencies among member groups.

9 25. In early 2004, The Freecycle Network created an intellectual property group
10 tasked with developing guidelines for protecting The Freecycle Network's intellectual property,
11 including The Freecycle Network's Marks. Tim Oey was the lead volunteer moderator of the
12 FreecycleSunnyvale group and an active member of The Freecycle Network from early 2004
13 until late 2005. Oey held a variety of positions within The Freecycle Network and also
14 vigorously defended The Freecycle Network's rights to The Freecycle Network's Marks. He
15 also recommended the adoption of a formal public trademark policy. Additionally, Oey
16 prepared trademark protection guidelines in order to further educate and help preserve The
17 Freecycle Network's Marks. Attached hereto as Exhibit 44 is a true and correct copy of an
18 email bearing Bates number FS094525.

19 26. The Freecycle Network requires all its members to abide by The Freecycle
20 Network Trademark policy. Consistent with The Freecycle Ethos of decentralization, The
21 Freecycle Network permits local groups to customize the graphics which appear around or
22 behind the Freecycle logo to fit with their community, while never altering the actual logo itself.
23 However, member groups that fail to properly use both the FREECYCLE trademark and logo
24 are initially sent cease and desist letters. After two such letters, The Freecycle Network then
25 requests that Yahoo! comply with proper trademark usage with the Yahoo! group which is then
26 no longer a local Freecycle group and no longer is permitted to use our trademark for their
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1 confusingly similar service. Yahoo! typically deletes such groups if they refuse to adjust their
2 continued misuse of our mark. Once removed, however, The Freecycle Network does not
3 discourage others from starting their own materials exchange groups or sites; nor is the
4 Freecycle Network seeking to control the entire online materials exchange industry, free or
5 otherwise.

6 27. On October 7, 2003, I was copied on an email from Albert Kaufman, owner of
7 The Freecycle Member group, FreecyclePortland, to Lissy Abraham ("Ms. Abraham")
8 instructing Ms. Abraham on how to set up a member group by following the directions set forth
9 on The Freecycle Network's web site, www.freecycle.org and also instructing Ms. Abraham to
10 send me the URL of her member group to post on The Freecycle Network's web site. In
11 recognition of Plaintiff's status as a local Freecycle group, The Freecycle Network maintained a
12 link to Plaintiff's website on the www.freecycle.org site after assuring that this new group was
13 following our most important guideline "Keep it Free" as stated front and center on our main
14 web page at www.freecycle.org.

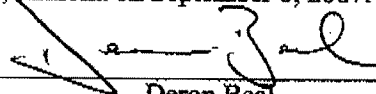
15 28. Two days later, in an October 9, 2003 email, I directed Ms. Abraham to Mark
16 Messinger to assist her in setting up The Freecycle Network logo. I specifically informed her of
17 The Freecycle Network's rule that the use of The Freecycle Network logo was only to be used
18 for non-commercial purposes. This quality control is essential to maintaining The Freecycle
19 Network Ethos of acting selflessly and without personal gain. Attached hereto as Exhibit 45 is a
20 true and correct copy of an email bearing Bates number FS254168.

21 29. As an approved local group, I sent Plaintiff an email on October 9, 2003
22 welcoming it to The Freecycle Network. I explained to Plaintiff how The Freecycle Network
23 operates and its mechanism for giving and receiving advice on how to operate the member
24 group. Attached hereto as Exhibit 46 is a true and correct copy of an email bearing Bates
25 numbers FS254157.

1 30. Miles Dennis Robertson, Jr. contacted me in 2004 requesting information on how
2 to start a member group. I instructed Mr. Robertson on The Freecycle Network's procedures on
3 how to start a local member group (through Yahoo! groups) and provided Mr. Robertson with
4 The Freecycle Network's Rules and Etiquette. I further instructed Mr. Robertson on how to gain
5 experience so that he could be a moderator and monitor The Freecycle Network's Rules and
6 Etiquette. Subsequently, Mr. Robertson created the "FreeStillwaterOK" member group. The
7 group was officially listed on The Freecycle Network's web site. Mr. Robertson was later asked
8 to no longer use our trademark after he took the local group from Freecycle and refused to step
9 down from his moderator role.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Tucson, Arizona on September 6, 2007.

By: 
Deron Beal