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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.

CASE NO. C 06-00324 CW

**THE FREecycle NETWORK, INC.'S  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN OPPOSITION TO  
 PLAINTIFF'S SUPPLEMENTAL MOTION  
 FOR SUMMARY JUDGMENT**

**[FED. R. CIV. P. 56]**

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

22 Counterclaimant,

23 v.

24 FREECYCLESUNNYVALE,  
 a California unincorporated association,

25 Counterdefendant.  
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 OPPOSITION TO PLAINTIFF'S SUPPLEMENTAL  
 MOTION FOR SUMMARY JUDGMENT

CASE NO. C 06-00324 CW  
 60383-0001/LEGAL13706599.2

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## I. INTRODUCTION

1  
2 FreecycleSunnyvale's original Corrected Notice of Motion and Motion for Summary  
3 Judgment, or in the Alternative, Summary Adjudication ("First Motion") raised a host of factual  
4 issues that preclude an award of summary judgment. A complete failure to prove its allegations  
5 with respect to the three trademarks at issue, THE FREECYCLE NETWORK, FREECYCLE  
6 and the logo. These issues of fact were adequately explained in The Freecycle Network, Inc.'s  
7 ("The Freecycle Network") Memorandum of Points and Authorities in Opposition to Plaintiff's  
8 Motion for Summary Adjudication under Fed. R. Civ. P. 56 ("First Opposition") and in the  
9 subsequent oral argument. FreecycleSunnyvale has now supplemented its argument with its  
10 Supplemental Notice of Motion and Motion for Summary Judgment ("Supplemental Motion"),  
11 by attempting to equate without any supporting evidence whatsoever that FreecycleSunnyvale  
12 stands in the shoes of Tim Oey, a defendant in a different litigation pending in the District Court  
13 of Arizona. FreecycleSunnyvale cannot assume that it is one in the same with Mr. Oey. In fact,  
14 Mr. Oey already unsuccessfully tried that tactic. An Arizona District Court determined that Mr.  
15 Oey is not the same as FreecycleSunnyvale, denying Mr. Oey's motion to change venue and  
16 transfer the Arizona litigation to this Court, as well as finding personal jurisdiction over Mr. Oey  
17 for his specific acts that form the basis for that litigation in Arizona. FreecycleSunnyvale is now  
18 attempting to ask this Court to overrule another Court's findings, namely that Mr. Oey is not the  
19 same as FreecycleSunnyvale, and the causes of action and allegations in that case are different  
20 from those present in the instant litigation.

21 In addition to intentionally misquoting the Ninth Circuit's ruling in the related case The  
22 Freecycle Network, Inc. v. Tim Oey, 2007 WL 2781902 (9th Cir. Sep. 26, 2007),  
23 FreecycleSunnyvale's Supplemental Motion raises additional issues of fact beyond those already  
24 raised in its First Motion, and the allegations in its pleadings contradict the arguments it is now  
25 attempting to make in its Supplemental Motion. As discussed below, these new factual issues  
26 add additional weight to The Freecycle Network's argument that substantial issues of material  
27 fact preclude an award of summary judgment.



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**III. ARGUMENT**

Based on a Ninth Circuit decision regarding whether the Lanham Act covers trademark disparagement, FreecycleSunnyvale seeks without any viable legal or evidentiary support summary adjudication on the following five separate causes of action: (1) FreecycleSunnyvale’s claim for declaratory judgment of non-infringement of The Freecycle Network’s trademarks; (2) FreecycleSunnyvale’s claim for tortious interference with business relations; (3) The Freecycle Network’s counterclaim for trademark infringement under the Lanham Act; (4) The Freecycle Network’s counterclaim for unfair competition under the Lanham Act; and (5) The Freecycle Network’s counterclaim for unfair competition under California Business and Processional Code. As the Ninth Circuit did not address the validity of The Freecycle Network's Marks or address the issue of infringement, FreecycleSunnyvale can only make its motion by misquoting the opinion and attempting to place itself in the shoes of a defendant without ever explaining how it is appropriate to do so as there are different facts and different parties involved in the Arizona Case.

As shown below, FreecycleSunnyvale is far from meeting its burden of proving that it is entitled to summary judgment and, at the very least, each of these causes of action requires a determination of at least one material issue of fact, precluding summary judgment.

**A. The Ninth Circuit Did Not Adjudicate Any of FreecycleSunnyvale’s or The Freecycle Network’s Causes of Action in the California Case**

As an initial matter, and contrary to FreecycleSunnyvale’s assertions, the Ninth Circuit’s Oey opinion did not adjudicate any of FreecycleSunnyvale’s claims against The Freecycle Network, nor did it adjudicate any of The Freecycle Network’s claims against FreecycleSunnyvale. Oey dealt only with the narrow issue of Tim Oey’s appeal from “a preliminary injunction preventing him ‘from making any comments that could be construed as to disparage upon [The Freecycle Network]’s possible trademark and logo’ and requiring that he ‘remove all postings from the [I]nternet and any other public forums that he has previously made that disparage [The Freecycle Network]’s possible trademark and logo.’” Oey, 2007 WL 2781902, at \*1. Notably, the Oey opinion only mentions FreecycleSunnyvale and the California

1 Case in passing, in a footnote discussing the stayed opposition proceedings before the United  
2 States Patent and Trademark Office's Trademark Trial and Appeal Board. Id., n.2. In fact, the  
3 Ninth Circuit went out of its way to specifically note that it is not adjudicating The Freecycle  
4 Network's rights in its trademarks, stating "[w]e express no opinion regarding the validity of  
5 TFN's claimed mark." Id., n.6. Given that the claims and counterclaims in the California Case  
6 are tied, in part, to the validity of The Freecycle Network's Marks and concern  
7 FreecycleSunnyvale's infringement of The Freecycle Network's Marks due to its continued use of  
8 these Marks without authorization, FreecycleSunnyvale cannot plausibly claim that Oey  
9 provides a final adjudication of the California Case when the very same opinion specifically  
10 disclaims adjudication of The Freecycle Network's trademark rights.

11 Furthermore, the Court in the Arizona case already determined that this litigation is  
12 distinct from the Arizona dispute. In the Arizona Case, Mr. Oey attempted to argue that the case  
13 against him was the same issues involved in this case. The Arizona Court rejected this claim,  
14 thereby denying Mr. Oey's motion to transfer. Kobialka Decl., ¶ 4, Ex. 3. It appears that  
15 FreecycleSunnyvale is hoping that if it continues to make an argument that has already been  
16 rejected, namely that it stands in the shoes of Mr. Oey, that this Court will rule in its favor. The  
17 fact of the matter is that the allegations involved in the Arizona Case are distinct and involve  
18 different claims, conduct and parties. As such, FreecycleSunnyvale's requested relief should be  
19 denied.

20 **1. FreecycleSunnyvale's Supplemental Motion Intentionally Misstates Highly**  
21 **Relevant Portions of the Ninth Circuit's Oey Opinion**

22 The extent to which FreecycleSunnyvale is willing to twist Oey to suit its needs can be  
23 seen in the intentional misquotations of Oey that appear in the Supplemental Motion. *See*  
24 Supplemental Motion at 3-6. For example, the Oey opinion contains a sentence which states  
25 that Oey's statements were "not likely to cause confusion, mistake, or deceive anyone as to the  
26 connection of Oey's services (or any other) with TFN." Oey, 2007 WL 2781902, at \*3 (citation  
27 omitted). This same quote appears in FreecycleSunnyvale's Supplemental Motion as "not likely  
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1 to cause confusion, mistake, or deceive anyone as to the connection of [Sunnyvale's] services  
2 [or any other] with TFN." Supplemental Motion at 5. FreecycleSunnyvale's substitution of  
3 Oey's name with its own is clearly improper as this section of the Oey opinion, just as with the  
4 entire Oey opinion, does not address The Freecycle Network's claims against  
5 FreecycleSunnyvale. *See Oey*, 2007 WL 2781902, at \*3. The Supplemental Motion contains no  
6 less than four such intentional misquotations and/or incorrect citations to Oey.<sup>1</sup> *See*  
7 Supplemental Motion at 5-6. Most egregious is FreecycleSunnyvale's citation to page 3 of Oey  
8 to support the statement that "The Ninth Circuit has now held that its acts... infringed no right  
9 under the Lanham Act." *Id.* at 5. This is a remarkable assertion, considering that this page of  
10 the Oey opinion does not mention FreecycleSunnyvale at all, does not mention any act taken by  
11 FreecycleSunnyvale, and does not determine any final rights under the Lanham Act at all. Oey,  
12 2007 WL 2781902, at \*3. Indeed, the allegations in the Oey opinion address trademark  
13 disparagement, whereby Tim Oey the individual encouraged others to use the term in its generic  
14 sense, which is very different from the trademark allegations involved in this case. Here, while  
15 FreecycleSunnyvale is accused of contributory infringement or inducing others to improperly  
16 use The Freecycle Network's Marks without permission and misusing the Marks, it is not  
17 accused of trademark disparagement. The Freecycle Network's Answer to Amended Complaint  
18 and Amended Counterclaim ("Answer") at ¶¶ 71-72, 77, 79-81 (Docket No. 46). Indeed,  
19 FreecycleSunnyvale makes no attempt to claim otherwise. It simply tries to claim that The  
20 Freecycle Network's allegations against it are the same genericide allegations against Mr. Oey.  
21 This is inaccurate, as FreecycleSunnyvale, unlike Mr. Oey, is a direct competitor to The  
22 Freecycle Network, and has used The Freecycle Network's Marks as its own while inducing  
23 others to use the Marks as well. FreecycleSunnyvale's blatant attempt to rewrite Ninth Circuit

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26 <sup>1</sup> Despite Plaintiff's best efforts to confuse the issue, there is a clear factual and legal  
27 distinction between Tim Oey *the person* and FreecycleSunnyvale, the *California unincorporated*  
28 *association that offers recycling services that are in direct competition to those offered by The*  
*Freecycle Network.*



1 case law to suit its needs should be rejected. The Freecycle Network respectfully requests that  
2 this Court ignore these arguments.

3 **2. The Ninth Circuit’s Holding on Generic Use in Oey Does Not Affect The**  
4 **Freecycle Network’s Claims in the California Case**

5 The Ninth Circuit’s statement regarding actions for generic use of a trademark is that  
6 “the use of a mark in its generic sense is actionable under the Lanham Act only when such use  
7 also satisfies the elements of a specified cause of action – e.g., infringement, false designation of  
8 origin, false advertising, or dilution.” Oey, 2007 WL 2781902, at \*6. FreecycleSunnyvale’s  
9 Supplemental Motion attempts to argue that the Oey opinion’s discussion of generic use  
10 provides a legal basis for summary adjudication of The Freecycle Network’s counterclaims. *See*  
11 Supplemental Motion at 4-5. This is quite simply false. The Ninth Circuit stated that generic  
12 use is only actionable under the Lanham Act when said generic use satisfies the elements of a  
13 specific cause of action recognized under the Act. *Id.* The Freecycle Network’s Answer alleges  
14 that FreecycleSunnyvale’s generic use of the Marks violate two such specified causes of action,  
15 trademark infringement and unfair competition. *See* Answer at ¶¶ 66-92 (Docket No. 46). This  
16 includes contributory infringement, a cause of action that FreecycleSunnyvale simply ignores.  
17 The final adjudication of these claims, as discussed below, at the very least rests on several  
18 material issues of disputed fact. Since The Freecycle Network pled its argument regarding  
19 FreecycleSunnyvale’s generic use of the Marks in the exact format specified by the Ninth  
20 Circuit in Oey, the Oey opinion strongly supports the continued validity of these claims.

21 **3. The Ninth Circuit’s Oey Opinion Does Not Affect The Existence of a**  
22 **Genuine Issue of Material Fact Regarding The Freecycle Network’s**  
23 **Counterclaims for Trademark Infringement and Unfair Competition under**  
24 **the Lanham Act**

25 FreecycleSunnyvale’s Supplemental Motion alleges that the Oey decision contains five  
26 independent bases for summary adjudication of The Freecycle Network’s counterclaims for  
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1 trademark infringement and unfair competition<sup>2</sup> under the Lanham Act. As FreecycleSunnyvale  
 2 did not state which of these alleged bases apply to each cause of action, The Freecycle Network  
 3 will address each of them as they apply to both causes of action. Each of these alleged “bases”  
 4 is founded in a misrepresentation by FreecycleSunnyvale that the Ninth Circuit’s discussion of  
 5 Tim Oey’s actions as an individual are somehow identical to the actions taken by  
 6 FreecycleSunnyvale as an entity using the Marks in direct competition with The Freecycle  
 7 Network. Each of FreecycleSunnyvale’s “bases” is further contradicted by the correct, unedited  
 8 quotations from Oey, by the applicable statutory language from the Lanham act, and from the  
 9 allegations in FreecycleSunnyvale’s own Amended Complaint for Declaratory Judgment of  
 10 Trademark Non-Infringement and tortious Interference With Business Relations (“Amended  
 11 Complaint”) (Docket No. 20).

12 **a. Use in Commerce**

13 FreecycleSunnyvale’s first argument is that the Oey opinion states that Oey did not use  
 14 the Marks in commerce, and that Oey’s use of the Marks is identical to FreecycleSunnyvale’s  
 15 use of the Marks, and that the Oey therefore opinion bars The Freecycle Network’s  
 16 counterclaims. *See* Supplemental Motion at 5. This argument is both a logical fallacy and is  
 17 contradicted by FreecycleSunnyvale’s own Amended Complaint. As discussed extensively  
 18 above, the Ninth Circuit did not characterize FreecycleSunnyvale’s actions, status or causes of  
 19 actions in Oey. *See Oey*, 2007 WL 2781902, at \*3-4. Furthermore, FreecycleSunnyvale’s  
 20 Amended Complaint states “FreecycleSunnyvale promotes freecycling through the internet [sic]

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 23 <sup>2</sup> The Freecycle Network notes in passing that, once again, a portion of the Supplemental  
 24 Motion dealing with the applicable standard under the Lanham Act contains a “quotation,”  
 25 purportedly from the Ninth Circuit’s Oey opinion, that does not actually appear in the *Oey*  
 26 opinion. *Compare* Supplemental Motion at 5 “Unfair competition requires that one ‘in  
 27 commercial advertising or promotion, misrepresent[] the nature, characteristics, qualities, or  
 28 geographic origin of [a] person’s goods, services, or commercial activities,’” to Oey, 2007 WL  
 2781902 at \*4 “There is no evidence that Oey’s statements were made in ‘commercial  
 advertising or promotion.’ *Id.* § 1125(a)(1)(B). And, even if such evidence existed, §  
 1125(a)(1)(B) creates liability only for *product* disparagement- i.e., misrepresentation of “the  
 nature, characteristics, qualities, or geographic origin’ of ‘another person’s *goods, services, or  
 commercial activities.*’ *Id.* (emphasis added).” *Id.* (emphasis in original).

1 and, in particular, its Yahoo! Groups online services account.” Amended Complaint at ¶ 19.  
2 This statement, and similar statements in the Amended Complaint about FreecycleSunnyvale’s  
3 recycling and promotional efforts, firmly establish that FreecycleSunnyvale was using the Marks  
4 “in commerce” to provide recycling services in Sunnyvale, California. *See* Amended Complaint  
5 at ¶¶ 16-22.

6 **b. Likelihood of Confusion**

7 Sunnyvale’s second argument relies on an alleged quotation from the Ninth Circuit’s  
8 Oey opinion, also discussed above, in which FreecycleSunnyvale deleted Tim Oey’s name and  
9 substituted it with FreecycleSunnyvale’s name.<sup>3</sup> *See* Supplemental Motion at 5-6. In addition to  
10 being an obvious abuse of citation to case law, FreecycleSunnyvale’s underlying assertion that  
11 its use of the Marks was not likely to cause confusion is once again contradicted by the  
12 Amended Complaint it filed. *See* Amended Complaint at ¶¶ 13-25. The Amended Complaint  
13 itself states that FreecycleSunnyvale and The Freecycle Network perform the same recycling  
14 functions, through the same Yahoo! Groups, in the same geographic region. *Id.*  
15 FreecycleSunnyvale is hoping to forget that it was once a member of The Freecycle Network,  
16 abiding by its rules. *Id.* at ¶ 22. It also hopes to forget that it elected to part ways with The  
17 Freecycle Network, and despite being asked to stop using The Freecycle Network's Marks, it  
18 decided to continue doing so even though it was no longer affiliated with The Freecycle  
19 Network. *Id.* at ¶¶ 32-34. This overlap creates a genuine issue of material fact as to whether the  
20 public was confused about the source of the services offered by FreecycleSunnyvale, an issue  
21 that FreecycleSunnyvale fails to provide any evidence to the contrary.

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26 <sup>3</sup> As noted above, FreecycleSunnyvale’s version of the quote reads “the connection of  
27 [Sunnyvale’s] services” while the actual quote from Oey reads “the connection of Oey’s  
28 FreecycleSunnyvale offers no explanation as to why it decided to substitute its name for Oey’s  
name in the quotation.

1                   **c. Use in Commercial Advertising and Promotion**

2           FreecycleSunnyvale's third argument is that it did not "use TFN's Purported Marks in  
3 commercial advertising and promotion" and only used the Marks "in non-commercial debate."  
4 Supplemental Motion at 6 (quotation marks removed). This statement is, once again, directly  
5 contradicted by the Amended Complaint, which states that FreecycleSunnyvale used the Marks  
6 as part of its name and on its Internet Web site. *See* Amended Complaint at ¶¶ 16-22.  
7 FreecycleSunnyvale's causes of action are grounded in the allegation that FreecycleSunnyvale  
8 was using the Marks to provide recycling services and that The Freecycle Network interfered  
9 with its use of the Marks. *See id.* at ¶¶ 40-55. It is beyond disingenuous for FreecycleSunnyvale  
10 to now allege that it did not perform the acts that form the very underpinning of its entire  
11 Amended Complaint.

12                   **d. Misrepresentation**

13           FreecycleSunnyvale's fourth argument displays a lack understanding about the nature of  
14 15 U.S.C. § 1125(a)(1)(B) and highlights the manipulative manner in which FreecycleSunnyvale  
15 is erroneously quoting relevant law. *See supra* at n.2. FreecycleSunnyvale is apparently  
16 attempting to argue that § 1125(a)(1)(B) only applies when an infringer misrepresents a  
17 trademark owner's products, based on its selective quotation of the relevant statute. *See*  
18 Supplemental Motion at 6. However, 15 U.S.C. § 1125(a)(1)(B) applies to any use of a mark  
19 which "in commercial advertising or promotion, misrepresents the nature, characteristics,  
20 qualities, or geographic origin of *his or her or another person's goods, services, or commercial*  
21 *activities.*" 15 U.S.C. § 1125(a)(1)(B) (emphasis added). This section of the Lanham Act is  
22 clearly drawn to cover a situation in which an infringing user of a mark uses the mark to  
23 misrepresent its own product or service as belonging to another, which is the case at hand.<sup>4</sup>

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26                   <sup>4</sup> FreecycleSunnyvale apparently "forgot" to quote the very portion of 15 U.S.C. §  
27 1125(a)(1)(B) that applies to its actions. *Compare* Supplemental Motion at 5 "[a] person's  
28 goods, services, or commercial activities" with 15 U.S.C. § 1125(a)(1)(B) "his or her or another  
person's goods, services, or commercial activities."

1 FreecycleSunnyvale, once affiliated with The Freecycle Network, continued to make  
2 unauthorized use of the Marks, thereby misrepresenting the origin of FreecycleSunnyvale.

3 **e. Falsity**

4 FreecycleSunnyvale's fifth argument is based on the trademark disparagement cause of  
5 action that The Freecycle Network brought against Oey in the Arizona Case, and specifically on  
6 the Oey court's determination that Oey's opinion statements about the validity of the Marks do  
7 not qualify as false statements of fact. *See* Supplemental Motion at 6; *see also* Oey, 2007 WL  
8 2781902 at \*4-5. This argument is nonsensical for the simple reason that The Freecycle  
9 Network did not allege a trademark disparagement cause of action against FreecycleSunnyvale,  
10 and falsity is not a required element for either trademark infringement or unfair competition  
11 under the Lanham Act. *Id.* at \*3-5. FreecycleSunnyvale's argument, that the Ninth Circuit's  
12 regard on a cause of action not at issue in this case somehow bars the causes of action that The  
13 Freecycle Network did allege is utterly without merit.

14 **B. FreecycleSunnyvale is Not Entitled to Summary Judgment and Injunctive Relief on  
15 Its Tortious Interference Claim**

16 Without having raised the issue at all in any of its previous summary judgment briefing,  
17 and without any evidence now, FreecycleSunnyvale claims for the first time in its Supplemental  
18 Motion that it is entitled to summary judgment on its claim for tortious interference with  
19 contractual relations. Supplemental Motion at 7-8. By introducing this new issue for the first  
20 time, this request violates the Court's September 27, 2007 minute order, which permitted  
21 plaintiff to explain how the Oey opinion "affects issues already before the Court" and to discuss  
22 the issue of standing, which FreecycleSunnyvale did not raise.

23 Furthermore, FreecycleSunnyvale's tortious interference claim should be rejected as there  
24 are several issues of material fact regarding FreecycleSunnyvale's claim itself, and  
25 FreecycleSunnyvale ignores The Freecycle Network's affirmative defense of privilege to engage  
26 in the conduct of which FreecycleSunnyvale complains. Answer at ¶ 60.

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1           **1. Several Genuine Issues of Material Fact Exist with Regard to**  
2           **FreecycleSunnyvale's Tortious Interference Claim**

3           FreecycleSunnyvale has thus far failed to show any evidence for at least two of the  
4 required elements of a claim for tortious interference claim, demonstrating that there exist  
5 multiple genuine issues of material fact as to this claim. As FreecycleSunnyvale notes in its  
6 Supplemental Motion, there are five fact-dependent elements that must be satisfied in a claim for  
7 tortious interference with business relations: (1) a valid contract between the plaintiff and a third  
8 party; (2) defendant's knowledge of the contract; (3) defendant's intentional acts designed to  
9 induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of  
10 the contractual relationship; and (5) resulting damages. PG&E Co. v. Bear Stearns & Co., 50  
11 Cal. 3d 1118, 1126 (1990).

12           As an initial matter, there exists a genuine issue of material fact as to whether The  
13 Freecycle Network had knowledge of a contract between the unincorporated California  
14 association named FreecycleSunnyvale and Yahoo! when The Freecycle Network allegedly  
15 contacted Yahoo! regarding the "freecyclesunnyvale" Yahoo! Group. Here, FreecycleSunnyvale  
16 has produced no evidence that The Freecycle Network was aware of the existence of Plaintiff in  
17 this action, the California unincorporated organization named FreecycleSunnyvale, until after  
18 Plaintiff filed suit against The Freecycle Network. In fact, the facsimile that purportedly  
19 constitutes evidence that The Freecycle Network intentionally sought to terminate Yahoo!'s  
20 alleged contract with FreecycleSunnyvale actually demonstrates that at the time of this facsimile,  
21 The Freecycle Network thought that FreecycleSunnyvale was either a group that was rejected  
22 from The Freecycle Network, a group that never applied to join The Freecycle Network, or a  
23 group that had been operating without permission from the start. FreecycleSunnyvale did not  
24 fall into any of these categories. *See* Amended Complaint; *see also* Answer. Given that The  
25 Freecycle Network was not aware of the Plaintiff organization until nearly two months after it  
26 contacted Yahoo!, and given the above facts regarding the alleged contract between Plaintiff and  
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1 Yahoo!, there exists an additional genuine issue of material fact as to whether The Freecycle  
2 Network has knowledge of the alleged contract between the Plaintiff organization and Yahoo!.

3 Furthermore, despite FreecycleSunnyvale's allegation that The Freecycle Network's  
4 actions were "clearly damaging" to its recycling efforts, this statement is once again contradicted  
5 by deposition testimony that indicates there was no, or very little, damage resulting from the  
6 temporary interruption in service caused by Yahoo!. Lianne Abraham, of the three members of  
7 Plaintiff FreecycleSunnyvale and the creator of the "freecyclesunnyvale" Yahoo! Group,  
8 estimated that the number of members lost due to Yahoo!'s action was in the "hundreds."  
9 Kobialka Decl., ¶ 5, Ex. 4 (Deposition of Lianne Abraham ("Abraham Dep.") at 38:4-10). On  
10 the other hand, Tim Oey, another of the three members of FreecycleSunnyvale, estimated that  
11 the "freecyclesunnyvale" Yahoo! Group gained hundreds of members after Yahoo!'s action. *Id.*,  
12 ¶ 6, Ex. 5 (Deposition of Tim Oey at 145:14-146:10). The three members of Plaintiff  
13 FreecycleSunnyvale are equally unsure about the length of time for which their Yahoo! Group  
14 was shut down by Yahoo!. Ms. Abraham stated that the Yahoo! Group was replaced within a  
15 week, while Jason Wong, the third member of FreecycleSunnyvale, estimated that the Yahoo!  
16 Group was not replaced for months. *See id.*, ¶ 5, Ex. 4 (Abraham Dep. at 35:12-18); ¶ 7, Ex. 6  
17 (Deposition of Jason Wong at 30:10-24). Once again, this creates another genuine issue of  
18 material fact regarding a required element of FreecycleSunnyvale's claim for tortious  
19 interference that precludes an award of summary judgment.

20 **2. A Genuine Issue of Material Fact Exists as to Whether Privilege is an**  
21 **Affirmative Defense to FreecycleSunnyvale's Claim of Tortious Interference**  
22 **with Business Relations**

23 Tortious interference claims "will lie for the intentional interference by a third person  
24 with a contractual relationship either by unlawful means or by means otherwise lawful *when*  
25 *there is a lack of sufficient justification.*" Richardson v. La Rancherita La Jolla, Inc.,  
26 98 Cal. App. 3d 73, 80 (1980) (emphasis added, quotation omitted). The question of whether a  
27 defendant's conduct is privileged "turns on a balancing of the social and private importance of  
28 the objective advanced by the interference against the importance of the interest interfered with,

1 considering all the circumstances including the nature of the actor's conduct and the relationship  
2 between the parties." *Id.* (citations omitted). A party is privileged to interfere with another's  
3 contract where "(1) he has a legally protected interest, (2) in good faith threatens to protect it,  
4 and (3) the threat is to protect it by appropriate means." *Id.* at 81 (citation omitted). Further,  
5 "[i]f he has a present, existing interest to protect, such as the ownership or condition of property  
6 . . . he is privileged to prevent performance of the contract of another which threatens it . . . ."  
7 *Id.* (quoting Prosser on Torts (4th ed. 1971), § 129 at 944-45). Most importantly, for purposes of  
8 summary judgment, the question of whether the defendant was privileged to engage in the  
9 conduct complained of "is a question for determination by the trier of fact." Sade Shoe Co. v.  
10 Oschin & Snyder, 162 Cal. App. 3d 1174, 1180 (1984); *see also* Robinson v. State Farm Ins.,  
11 1996 WL 31850, at \*3 (N.D. Cal. Jan. 16, 1996).

12 The Freecycle Network has already presented ample evidence that it has a valid,  
13 legitimate interest in its Marks and in protecting them from infringement. This includes the  
14 evidence of The Freecycle Network's efforts to register its trademarks and pursuing those that  
15 seek to damage its trademark rights. *See Oey*, 2007 WL 2781902 at n.2 and at \*1-3. It  
16 requested Yahoo! to shut down the FreecycleSunnyvale group only after having sent a cease and  
17 desist letter to FreecycleSunnyvale, which FreecycleSunnyvale ignored. Given that the issue of  
18 whether a defendant's conduct was privileged is a question for the fact finder,  
19 FreecycleSunnyvale's bare recitation of the elements of tortious interference in its supplemental  
20 motion for summary judgment is certainly not sufficient to establish that it is entitled to  
21 summary judgment. FreecycleSunnyvale's claim for tortious interference with contractual  
22 relations should therefore go to a jury.

#### 23 IV. CONCLUSION

24 For the foregoing reasons, The Freecycle Network respectfully requests that this Court  
25 deny plaintiff FreecycleSunnyvale's Motion for Summary Adjudication under Federal Rule of  
26 Civil Procedure 56.



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