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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FREECYCLESUNNYVALE,) C-06-00324 CW
)
PLAINTIFF,) SAN JOSE, CALIFORNIA
)
VS.) SEPTEMBER 27, 2007
)
FREECYCLE NETWORK,) PAGES 1-47
)
DEFENDANT.)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CLAUDIA WILKEN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: MAYER BROWN
BY: IAN N. FEINBERG AND
ERIC BUTLER EVANS
TWO PALO ALTO SQUARE, SUITE 300
PALO ALTO, CALIFORNIA 94306

FOR THE DEFENDANT: PERKINS, COIE
BY: LISA KOBIALKA
101 JEFFERSON DRIVE
MENLO PARK, CALIFORNIA 94025

GIGI C. HOANG
4 EMBARCADERO SQUARE, SUITE 2400
SAN FRANCISCO, CALIFORNIA 94111

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

1 SAN JOSE, CALIFORNIA

SEPTEMBER 27, 2007

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENED AND THE
14:14:43 4 FOLLOWING PROCEEDINGS WERE HELD:)

14:14:43 5 THE CLERK: CALLING THE MATTER OF
14:14:45 6 FREECYCLESUNNYVALE VERSUS FREECYCLE NETWORK, CIVIL
14:14:51 7 ACTION NUMBER C-06-0324.

14:14:57 8 COUNSEL, PLEASE COME FORWARD AND STATE
14:14:59 9 YOUR APPEARANCES FOR THE RECORD.

14:15:02 10 MR. FEINBERG: IAN FEINBERG WITH MAYER
14:15:05 11 BROWN FOR PLAINTIFF, FREECYCLESUNNYVALE.

14:15:09 12 MS. KOBIALKA: GOOD AFTERNOON, YOUR
14:15:09 13 HONOR. LISA KOBIALKA OF PERKINS, COIE ON BEHALF OF
14:15:14 14 FREECYCLE NETWORK.

14:15:15 15 MS. HOANG: GIGI HOANG, PERKINS, COIE ON
14:15:19 16 BEHALF OF THE DEFENDANT, FREECYCLE NETWORK.

14:15:22 17 MR. EVANS: ERIC EVANS, MAYER BROWN FOR
14:15:25 18 FREECYCLESUNNYVALE.

14:15:27 19 THE COURT: ALL RIGHT. SO THIS IS ON FOR
14:15:28 20 PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND
14:15:31 21 DEFENDANT'S MOTION TO STRIKE.

14:15:38 22 IS SOMEONE ON THE TELEPHONE?

14:15:40 23 THE CLERK: NO.

14:15:41 24 THE COURT: WHAT'S THAT WEIRD NOISE?

14:15:44 25 THE CLERK: IT'S COMING FROM THE -- I

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14:16:40 25

DON'T KNOW WHAT'S CAUSING IT.

THE COURT: IT SOUNDS LIKE SOMEBODY IS ON THE PHONE.

THE CLERK: I DON'T KNOW.

THE COURT: OH, WELL.

SO JUST OUT OF CURIOSITY, MAYBE I'VE BEEN TOLD THIS BEFORE, BUT WHAT EXACTLY IS IT THAT FREECYCLESUNNYVALE DID TO OFFEND THE FREECYCLE NETWORK AND GET ITSELF BOOTED OFF THE YAHOO GROUPS? JUST OUT OF CURIOSITY. IT DOESN'T HAVE ANYTHING TO DO WITH THE MOTION.

MS. KOBIALKA: SO THE MEMBERS OF FREECYCLESUNNYVALE DECIDED THAT THEY DIDN'T WANT TO COMPLY WITH VARIOUS RULES AND REGULATIONS --

THE COURT: SUCH AS WHAT?

MS. KOBIALKA: -- THAT THE FREECYCLE NETWORK HAD, WHICH INCLUDED PROPER USAGE OF ITS TRADEMARKS.

ALSO, THERE WERE A NUMBER OF VARIOUS GROUPS THAT THE MEMBERS WERE INVOLVED IN, AND THEY BASICALLY JUST DECIDED THEY DIDN'T LIKE THE DIRECTION THE FREECYCLE NETWORK WAS GOING, TOOK A NUMBER OF ACTIONS, INCLUDING OPPOSED -- I BELIEVE THEY OPPOSED A TRADEMARK APPLICATION THAT WE HAD THAT WAS ABOUT TO BE PUBLISHED FOR REGISTRATION.

14:16:43 1 THEY MADE A NUMBER OF STATEMENTS IN
14:16:47 2 PUBLICATIONS STATING THAT YOU SHOULD USE FREECYCLE
14:16:50 3 AS A GENERIC TERM. THERE WAS A NUMBER OF
14:16:53 4 ACTIVITIES THAT WENT ON.

14:16:54 5 THE COURT: OKAY. WELL, SO FAR I'VE
14:16:55 6 HEARD TWO: YOU THINK THEY OPPOSED YOUR TRADEMARK
14:16:59 7 APPLICATION; AND YOU THINK THEY SPOKE OUT ABOUT
14:17:01 8 THEIR VIEW THAT FREECYCLE SHOULD BE GENERIC.

14:17:03 9 MS. KOBIALKA: NO. ACTUALLY IT WASN'T
14:17:05 10 JUST THAT THEY SPOKE OUT ABOUT THEIR VIEW.

14:17:07 11 THEY ACTUALLY WENT OUT AND TOLD
14:17:09 12 INDIVIDUALS THAT IT IS A GENERIC TERM, THIS IS HOW
14:17:12 13 YOU MAKE IT GENERIC, GO OUT AND DO X, Y, AND Z TO
14:17:16 14 ENSURE THAT EVERYBODY CAN USE FREECYCLE AS A
14:17:18 15 GENERIC TERM. THERE'S QUITE A BIT OF DOCUMENTATION
14:17:21 16 ON IT.

14:17:21 17 AND THERE'S ALSO ANOTHER CASE THAT'S
14:17:23 18 PENDING IN ARIZONA AS IT RELATES TO A SPECIFIC
14:17:26 19 INDIVIDUAL, TIM OEY, WHO APPARENTLY IS ALSO A
14:17:28 20 CO-OWNER OF FREECYCLESUNNYVALE.

14:17:30 21 AND IN THAT PARTICULAR INSTANCE, THERE
14:17:32 22 WAS ACTUALLY AN INJUNCTION THAT WAS ISSUED IN THE
14:17:35 23 ARIZONA COURT WHICH HAS SINCE BEEN REMANDED BY THE
14:17:38 24 NINTH CIRCUIT.

14:17:38 25 BUT THERE WAS QUITE A FEW THINGS THAT

14:17:40 1 WENT ON, INCLUDING --

14:17:41 2 THE COURT: WELL, I'M INTERESTED IN WHAT
14:17:43 3 THEY WERE. I'VE HEARD TWO. ARE THERE ANY MORE?

14:17:46 4 MS. KOBIALKA: SO, FOR EXAMPLE, MR. OEY
14:17:48 5 ACTUALLY DRAFTED OUR TRADEMARK POLICY.

14:17:51 6 HE THEN TURNED AROUND AND TOLD, IN
14:17:52 7 VARIOUS E-MAIL POSTINGS AND ON POSTER BOARDS, HOW
14:17:56 8 TO USE THE MARK IMPROPERLY, KNOWING FULL WELL THAT
14:17:59 9 WAS A COMPLETE VIOLATION --

14:18:00 10 THE COURT: YOU SAID THAT ALREADY.
14:18:01 11 THAT'S THING NUMBER TWO.

14:18:03 12 THING NUMBER ONE WAS OPPOSING THE
14:18:05 13 TRADEMARK APPLICATION.

14:18:05 14 THING NUMBER TWO WAS KEEPING OUT IN
14:18:06 15 VARIOUS WAYS, OR ENCOURAGING OTHERS TO DO THIS OR
14:18:07 16 THAT WITH RESPECT TO THE GENERICNESS OF THE TERM.

14:18:11 17 IS THERE ANYTHING ELSE? DID THEY POST
14:18:13 18 PETS? DID THEY POST ILLEGAL DRUGS? DID THEY FAIL
14:18:18 19 TO COMPLY WITH THE PENGUIN PATROL'S DIRECTIVES?
14:18:22 20 DID THEY DO ANYTHING OTHER THAN THOSE TWO THINGS
14:18:25 21 THAT YOU'VE MENTIONED?

14:18:25 22 MS. KOBIALKA: THERE -- I'M GOING TO HAVE
14:18:28 23 TO GO BACK AND THINK ABOUT IT, BUT I BELIEVE THERE
14:18:30 24 WERE ACTUALLY A NUMBER OF DIFFERENT THINGS THAT
14:18:32 25 THEY HAD DONE WHICH VIOLATED THE --

14:18:35 1 THE COURT: BUT YOU CAN'T THINK OF ANY OF
14:18:37 2 THEM?

14:18:37 3 MS. KOBIALKA: I'D HAVE TO LOOK QUICKLY
14:18:38 4 BACK AT WHAT I HAVE, BUT I'M RECALLING SPECIFICALLY
14:18:41 5 IN CONNECTION WITH MR. OEY.

14:18:43 6 I ALSO BELIEVE THAT THE MEMBERS DECIDED
14:18:45 7 THEY DIDN'T WANT TO BE PART OF THE FREECYCLE
14:18:47 8 NETWORK ANY LONGER AS WELL, BECAUSE --

14:18:48 9 THE COURT: RIGHT. BUT YOU KICKED THEM
14:18:50 10 OFF YAHOO GROUPS, SO MY QUESTION IS, WHY DID YOU
14:18:54 11 KICK THEM OFF OF YAHOO GROUPS?

14:18:55 12 MS. KOBIALKA: BECAUSE THEY WERE USING
14:18:56 13 THE TRADEMARK. THEY WERE USING FREECYCLE -- THEY
14:18:58 14 CONTINUED TO USE FREECYCLE EVEN THOUGH THEY WERE NO
14:19:01 15 LONGER AFFILIATED WITH FREECYCLE NETWORK, WHICH WAS
14:19:04 16 THE --

14:19:05 17 THE COURT: IN WHAT SENSE WERE THEY NO
14:19:07 18 LONGER AFFILIATED?

14:19:08 19 MS. KOBIALKA: THEY DECIDED THAT THEY
14:19:09 20 WERE GOING TO BE THEIR OWN GROUP HAVING THEIR OWN
14:19:12 21 SET OF RULES.

14:19:13 22 THEY WERE GOING TO DO GIFTING AND
14:19:14 23 RECYCLING OVER THE INTERNET SEPARATE AND APART FROM
14:19:18 24 THE FREECYCLE NETWORK.

14:19:19 25 THEY WERE NO LONGER GOING TO BE AN

14:19:20 1 AFFILIATED MEMBER OF THE FREECYCLE NETWORK ITSELF.

14:19:23 2 THE COURT: HOW DID THEY COMMUNICATE
14:19:25 3 THAT?

14:19:25 4 MS. KOBIALKA: I BELIEVE THERE'S A NUMBER
14:19:26 5 OF DIFFERENT MEMBERS OF THE FREECYCLESUNNYVALE -- I
14:19:29 6 THINK THERE WERE TWO INDIVIDUALS THAT INFORMED THE
14:19:31 7 FREECYCLE NETWORK THEY NO LONGER WANTED TO BE
14:19:33 8 AFFILIATED, AND ONE INDIVIDUAL WAS ASKED TO NO
14:19:35 9 LONGER -- TO STEP DOWN FROM THE VARIOUS POSITIONS.

14:19:38 10 THE COURT: SO, WHAT, THEY DIDN'T WANT TO
14:19:41 11 BE LISTED ON FREECYCLE.ORG ANYMORE? IS THAT WHAT
14:19:44 12 HAPPENED?

14:19:45 13 MS. KOBIALKA: I THINK IN PART, YES.
14:19:46 14 THEY DIDN'T WANT TO BE LISTED. THEY DIDN'T WANT TO
14:19:49 15 BE AFFILIATED IN ANY WAY WITH THE FREECYCLE
14:19:49 16 NETWORK.

14:19:49 17 THEY DIDN'T AGREE WITH THE FACT THAT THEY
14:19:52 18 WERE RECEIVING FUNDING FROM WASTE MANAGEMENT. IT
14:19:53 19 DIDN'T LIKE THE DIRECTION THEY WERE GOING. THEY
14:19:55 20 DIDN'T LIKE SOME OF THE RULES AND REGULATIONS THAT
14:19:57 21 WERE BEING PUT IN PLACE. THEY THOUGHT THEY WERE
14:19:59 22 TOO STALINISTIC.

14:20:01 23 AND THEY CALLED MR. BEAL, WHO WAS THE
14:20:03 24 FOUNDER OF THE FREECYCLE NETWORK, I UNDERSTAND
14:20:05 25 QUITE A FEW NAMES AS A RESULT, WHICH WAS JUST

14:20:08 1 BASICALLY ANTITHETICAL TO THE OVERALL IDEA AND
14:20:12 2 POINT BEHIND THE FREECYCLE NETWORK, WHICH IS TO
14:20:14 3 HAVE PEOPLE WORK TOGETHER AS A COMMUNITY TO REDUCE
14:20:17 4 WASTE.

14:20:18 5 THE COURT: OKAY.

14:20:23 6 MR. FEINBERG: CAN I RESPOND QUICKLY TO
14:20:24 7 SOMETHING?

14:20:25 8 THE COURT: OH, NO. I'M SURE IT'S
14:20:26 9 DISPUTED. I WAS JUST CURIOUS.

14:20:29 10 MR. FEINBERG: I WAS ACTUALLY JUST GOING
14:20:30 11 TO HAND YOU UP THE NINTH CIRCUIT DECISION WHICH
14:20:32 12 CAME DOWN YESTERDAY.

14:20:33 13 THE COURT: OH. YOU CAN GIVE IT TO THE
14:20:35 14 COURTROOM DEPUTY AND --

14:20:37 15 MR. FEINBERG: SHE'S CLEARLY AWARE OF IT.

14:20:39 16 THE COURT: THE COURTROOM DEPUTY, I SAID.

14:20:39 17 MR. FEINBERG: OH, I'M SORRY (HANDING).

14:20:43 18 THE COURT: THAT'S WHO HANDS IT UP TO ME.
14:20:45 19 SO THEY REVERSED THE INJUNCTION?

14:20:47 20 MR. FEINBERG: YES. AND IT'S NOT ON
14:20:49 21 FIRST AMENDMENT GROUNDS WHICH, FRANKLY, YOUR HONOR,
14:20:51 22 I NAIVELY EXPECTED IT TO BE.

14:20:54 23 BASICALLY WHAT THEY SAID, AND I'M SURE
14:20:55 24 THERE WILL BE A DISPUTE, BUT WHAT THEY SAID IS ALL
14:20:58 25 OF THE THINGS THAT OPPOSING COUNSEL COMPLAINED OF

14:21:02 1 AREN'T ACTIONABLE; THEREFORE, YOU CAN'T HAVE A
14:21:04 2 PRELIMINARY INJUNCTION BASED ON IT, INCLUDING
14:21:07 3 THINGS LIKE GENERICIDE ISN'T A CLAIM, ENCOURAGING
14:21:12 4 PEOPLE TO USE A MARK OR PURPORTED MARK GENERICALLY
14:21:17 5 IS A RISK OF HAVING A MARK.

14:21:19 6 THE REASON I BRING THIS UP IS WE WOULD
14:21:20 7 LIKE TO REQUEST PERMISSION TO MOVE FOR SUMMARY
14:21:22 8 JUDGMENT ON THE COUNTERCLAIMS, BECAUSE WE BELIEVE
14:21:24 9 THIS NINTH CIRCUIT DECISION, WHICH IS THE LAW OF
14:21:28 10 THE CASE, EVISCERATES THEIR COUNTERCLAIMS, WHICH
14:21:30 11 ARE TORT AND ESSENTIALLY THE SAME THINGS THEY
14:21:31 12 COMPLAINED OF.

14:21:31 13 THE COURT: I WISH YOU'D TOLD ME THIS
14:21:33 14 YESTERDAY. I WOULD HAVE HAD TIME TO READ IT.

14:21:36 15 MR. FEINBERG: WE'RE NOT GOING TO
14:21:37 16 ACTUALLY BRING THE MOTION TODAY.

14:21:38 17 THE COURT: WELL, NO, BUT I WOULD HAVE
14:21:40 18 BEEN CURIOUS.

14:21:42 19 SO, WELL, THAT WAS ONE OF MY QUESTIONS IS
14:21:44 20 WHAT COUNTERCLAIMS ARE THERE THAT AREN'T THE
14:21:46 21 SUBJECT OF THIS MOTION?

14:21:47 22 MR. FEINBERG: THERE ARE TORT CLAIMS
14:21:49 23 AGAINST MR. OEY, AND WE BELIEVE THAT THEY ARE GONE.
14:21:53 24 I'M SURE OPPOSING COUNSEL DISAGREES, BUT WE THINK
14:21:55 25 THAT THEY CANNOT SURVIVE SUMMARY JUDGMENT.

14:21:57 1 THE COURT: RIGHT. BUT, I MEAN, WHICH
14:21:59 2 COUNTERCLAIMS ARE NOT THE SUBJECT OF THE MOTION
14:22:01 3 YOU'VE ALREADY MADE?

14:22:02 4 MR. FEINBERG: NONE OF THE COUNTERCLAIMS
14:22:03 5 ARE THE SUBJECT OF THIS MOTION.

14:22:05 6 THIS IS STRICTLY ON OUR DECLARATORY
14:22:07 7 RELIEF AND THEIR COUNTERCLAIM FOR INFRINGEMENT.

14:22:09 8 THE ISSUE OF WHETHER OR NOT --

14:22:10 9 THE COURT: SO THAT'S AT LEAST ONE OF THE
14:22:12 10 COUNTERCLAIMS THAT IT ADDRESSES?

14:22:15 11 MR. FEINBERG: WELL, THE QUESTION IS
14:22:16 12 WHETHER THEY HAVE NAKEDLY LICENSED THE MARK AND,
14:22:19 13 THEREFORE, HAVE NO MARK TO PROTECT AND NO MARK TO
14:22:22 14 REGISTER.

14:22:23 15 THE COURT: I KNOW THAT'S THE ISSUE.

14:22:24 16 BUT MY QUESTION IS, WHICH OF THE
14:22:26 17 COUNTERCLAIMS DOES THAT ISSUE AFFECT AND WHICH OF
14:22:28 18 THE COUNTERCLAIMS DOES IT NOT AFFECT?

14:22:30 19 MR. FEINBERG: BOTH OF THE TRADEMARK
14:22:32 20 INFRINGEMENT COUNTERCLAIMS.

14:22:34 21 THE COURT: OKAY. NONE OF THE OTHER
14:22:35 22 COUNTERCLAIMS?

14:22:36 23 MR. FEINBERG: NO.

14:22:36 24 THE COURT: YOU BETTER ASK YOUR FRIEND
14:22:38 25 HERE.

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14:23:01 13
14:23:02 14
14:23:04 15
14:23:07 16
14:23:09 17
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(PAUSE IN PROCEEDINGS.)

MR. FEINBERG: MY SENSE IS THAT THE NINTH
CIRCUIT HAS EVISCERATED --

THE COURT: YEAH, BUT I'M NOT ASKING YOU
THAT.

MR. FEINBERG: I UNDERSTAND THAT.

THE COURT: I'M ASKING YOU, WHICH
MOTIONS -- WHICH COUNTERCLAIMS DID YOU MOVE ON IN
THE MOTION THAT'S BEFORE ME TODAY, AND WHICH ONES
DID YOU NOT MOVE ON IN THE MOTION THAT'S BEFORE ME
TODAY?

MS. KOBIALKA: WELL, THE FIRST --

THE COURT: MAYBE YOU KNOW.

MS. KOBIALKA: THE FIRST CLAIM THAT --
FREECYCLE NETWORK'S COUNTERCLAIMS, ACCORDING THE
TITLE OF THEIR MOTION, WHICH I BELIEVE WAS A
DECLARATORY JUDGMENT ON THE ISSUE OF
INFRINGEMENT --

THE COURT: THIS SAYS ALL OF THEM.

MR. FEINBERG: WE MOVED ON ALL OF THEM,
BECAUSE IF THEY DON'T HAVE A TRADEMARK TO SUPPORT
THEIR COUNTERCLAIMS, THERE'S NOTHING THERE.

THE COURT: WHAT ELSE IS IN THE CASE
BESIDES YOUR CLAIM AGAINST THEM AND ALL OF THEIR
COUNTERCLAIMS AGAINST YOU?

14:23:25 1 MR. FEINBERG: THERE'S NOTHING ELSE.

14:23:26 2 WE, AT ONE POINT, HAD A TORTIOUS
14:23:29 3 INTERFERENCE CLAIM, AND WE DROPPED THE DAMAGES
14:23:31 4 CLAIM AND THAT CLAIM WILL DROP OUT, TOO.

14:23:34 5 THE COURT: SO YOU THINK THAT YOUR
14:23:36 6 TRADEMARK, YOUR NEGLIGENT LICENSING ISSUE AFFECTS
14:23:41 7 ALL OF THEIR COUNTERCLAIMS?

14:23:46 8 MR. FEINBERG: YES.

14:23:47 9 THE COURT: OKAY. WELL, I TEND TO THINK
14:24:01 10 THAT -- TO AGREE WITH YOU THAT THIS NAKED LICENSING
14:24:06 11 TERM -- I DON'T REALLY LIKE IT, IT REMINDS ME OF --
14:24:09 12 I GET THIS PICTURE OF PEOPLE AT THE D.M.V.

14:24:13 13 BUT IT SEEMS TO ME THAT THE NAKED
14:24:18 14 LICENSING DOES MEAN THAT THEY CAN HAVE NO TRADEMARK
14:24:25 15 CLAIM AGAINST YOU, BECAUSE YOU GOT YOUR -- OR YOU
14:24:29 16 GOT YOUR PERMISSION TO USE THE TRADEMARK BEFORE
14:24:31 17 THEY EVEN ARGUABLY STARTED TO PUT IN CONTROLS AND
14:24:34 18 SO ON AND SO FORTH.

14:24:36 19 I HAVE A QUESTION IN MY MIND NOW, AT
14:24:38 20 LEAST, AS TO WHETHER THEY PERHAPS RECAPTURED THEIR
14:24:42 21 TRADEMARK SUBSEQUENTLY AND MIGHT HAVE SOME KIND OF
14:24:45 22 TRADEMARK CLAIM AGAINST SOMEBODY OTHER THAN YOU,
14:24:47 23 WHICH THEN MIGHT KEEP ALIVE SOME COUNTERCLAIMS
14:24:51 24 HAVING TO DO WITH INDUCEMENT OR SOMETHING ELSE.

14:24:56 25 SO I'M CONCERNED ABOUT THE RECAPTURE

14:24:58 1 ISSUE AND WHAT COUNTERCLAIMS MIGHT STILL BE ALIVE
14:25:01 2 IF THERE WAS A DISPUTE OF FACT OR AN UNCERTAINTY
14:25:04 3 ABOUT THE RECAPTURE ISSUE.

14:25:06 4 MR. FEINBERG: WELL, FIRST OF ALL, WHAT
14:25:09 5 THE -- THE TORT CLAIMS, I THINK -- I APOLOGIZE FOR
14:25:13 6 NOT GETTING THIS ORDER OUT TO YOU EARLIER FROM THE
14:25:16 7 NINTH CIRCUIT, BUT WE JUST GOT IT YESTERDAY MORNING
14:25:19 8 AND IT WAS JUST IN THE LEGAL PAPERS TODAY.

14:25:22 9 THE COURT: WELL, I HAVEN'T READ TODAY'S
14:25:24 10 PAPER.

14:25:25 11 MR. FEINBERG: IT IS -- THE PROBLEM WITH
14:25:27 12 THE RECAPTURE IS, A, IT DOESN'T GO AGAINST, AGAINST
14:25:31 13 MR. OEY, AND THE TORT --

14:25:33 14 THE COURT: I AGREE.

14:25:34 15 MR. FEINBERG: -- AND THE TORT CLAIMS
14:25:36 16 WILL GO AWAY.

14:25:37 17 BUT MORE IMPORTANTLY, THEY HAVE -- THE
14:25:39 18 ESSENCE OF THE TRADEMARK IS MAINTAINING QUALITY.

14:25:42 19 THIS FREE AND LEGAL AND APPROPRIATE FOR
14:25:46 20 ALL AGES ISN'T A MEASURE OF QUALITY. IT'S A SCOPE
14:25:49 21 OF A LICENSE.

14:25:50 22 THE COURT: OKAY. BUT LET'S ASSUME FOR
14:25:52 23 THE PURPOSES OF DISCUSSION JUST FOR A MOMENT THAT I
14:25:55 24 THINK THERE MIGHT BE AN ISSUE ABOUT WHETHER THEY,
14:25:57 25 IN FACT, INSTITUTED SUFFICIENT CONTROLS LATER, AND

14:26:02 1 PERHAPS EVEN DID SO SUFFICIENTLY TO RECAPTURE THEIR
14:26:06 2 TRADEMARK.

14:26:07 3 WHICH OF YOUR COUNTERCLAIMS THEN MIGHT
14:26:10 4 ARGUABLY, AT LEAST, AND ASSUMING THOSE FACTS WHICH
14:26:13 5 I KNOW YOU DISAGREE WITH, WHICH OF YOUR
14:26:15 6 COUNTERCLAIMS MIGHT THEN ARGUABLY SURVIVE?

14:26:18 7 MR. FEINBERG: THEIR COUNTERCLAIMS?

14:26:19 8 THE COURT: THEIR COUNTERCLAIMS.

14:26:20 9 MR. FEINBERG: I DON'T THINK ANY OF THEM
14:26:21 10 SURVIVE, BECAUSE IF MR. OEY HAD THE RIGHT TO USE
14:26:25 11 FREECYCLE BECAUSE HE WAS NAKEDLY LICENSED, THEN
14:26:28 12 THEIR COUNTERCLAIMS ARE GONE.

14:26:29 13 THE COURT: DID HE HAVE THE RIGHT TO
14:26:31 14 INDUCE SOMEONE WHO WASN'T NAKEDLY LICENSED AND WHO
14:26:34 15 WAS FULLY CLOTHED AND IS SUBJECT TO CONTROLS AND
14:26:37 16 ENCOURAGE THEM TO MISUSE THE TRADEMARK EVEN THOUGH
14:26:40 17 MR. OEY HIMSELF COULD USE THE TRADEMARK AS HE
14:26:43 18 CHOSE?

14:26:43 19 MR. FEINBERG: ALL RIGHT. SO WE GET A
14:26:46 20 LITTLE BIT INTO THE NINTH CIRCUIT HOLDING HERE, BUT
14:26:48 21 THE NINTH CIRCUIT SAID THERE IS NO SUCH THING AS
14:26:51 22 GENERICIDE IF YOU USE A TRADEMARK AS A VERB, OR YOU
14:26:55 23 TRY TO DESTROY ITS VALUE, WHICH IS REALLY WHAT
14:26:58 24 THEIR COUNTERCLAIMS ARE ABOUT. IT'S NOT
14:27:00 25 ACTIONABLE.

14:27:00 1 SO THE PROBLEM IS WE'RE NOW IN AN AREA
14:27:03 2 WHERE, WHEN WE MADE OUR MOTION, THERE WASN'T ANY
14:27:05 3 NINTH CIRCUIT LAW, OR PARTICULARLY GOOD LAW, AND
14:27:08 4 NOW THERE IS.

14:27:09 5 AND SO MY VIEW IS IF MR. -- IF --

14:27:12 6 THE COURT: OKAY. WELL, LET ME ASK IT A
14:27:14 7 DIFFERENT WAY, THEN. LET'S SET ASIDE THE NINTH
14:27:17 8 CIRCUIT OPINION.

14:27:18 9 LET'S SAY, JUST FOR PURPOSES OF
14:27:20 10 DISCUSSION, THAT ALTHOUGH THEY NAKEDLY LICENSED
14:27:23 11 YOU, THEY FULLY CLOTHED LICENSED OTHER PEOPLE
14:27:29 12 LATER; AND, FURTHERMORE, THEY INSTITUTED ADEQUATE
14:27:32 13 CONTROLS; AND, FURTHERMORE, YOU INDUCED THOSE
14:27:35 14 PEOPLE TO VIOLATE THE TRADEMARK IN A REAL WAY, AN
14:27:40 15 ACTUAL VIOLATION.

14:27:41 16 WHICH COUNTERCLAIM WOULD SURVIVE, IF ANY?

14:27:43 17 MR. FEINBERG: I DON'T THINK ANY OF THEM.

14:27:45 18 AND MORE IMPORTANT, THE PROBLEM WITH THAT
14:27:46 19 IS IT'S NOT JUST US. IT'S EVERYONE ELSE WHO WAS
14:27:51 20 NAKEDLY LICENSED, WHICH MEANS THERE ARE 20 OR 30 OR
14:27:54 21 50 OR 200 FOLKS RUNNING AROUND WHO HAVE THE RIGHT
14:27:57 22 TO USE THIS WITHOUT REGARD TO THEIR RULES, WHICH IN
14:27:59 23 MY VIEW, ALTHOUGH IT HASN'T BEEN BRIEFED BY EITHER
14:28:02 24 SIDE BECAUSE WE REALLY HADN'T SEEN THIS RECAPTURE
14:28:05 25 ARGUMENT UNTIL THEIR OPPOSITION, BUT THERE IS NO

14:28:08 1 TRADEMARK RIGHT AT THAT POINT. THERE ARE TOO MANY
14:28:11 2 PEOPLE WHO HAVE THE RIGHT TO USE IT WITHOUT
14:28:13 3 RESTRICTION.

14:28:13 4 THE COURT: OKAY. AND WHAT WOULD YOU
14:28:16 5 LIKE TO SAY?

14:28:17 6 MS. KOBIALKA: THERE'S ABSOLUTELY NO
14:28:19 7 EVIDENCE OF THESE HUNDREDS OR 20 OR 30 OTHER
14:28:23 8 INDIVIDUALS WHO WERE SUPPOSEDLY NAKEDLY LICENSED BY
14:28:26 9 THE FREECYCLE NETWORK. IT JUST DOESN'T EXIST.

14:28:29 10 THEY'VE SUBMITTED DECLARATIONS OF PRETTY
14:28:32 11 SPECIFIC INDIVIDUALS.

14:28:33 12 WE'VE BEEN ABLE TO REBUT EACH AND EVERY
14:28:35 13 ONE, DESCRIBING SPECIFICALLY THE RULES AND THE
14:28:37 14 ETIQUETTE AND THE GUIDELINES THAT WERE PROVIDED TO
14:28:40 15 THEM IN CONNECTION WITH THESE MARKS.

14:28:43 16 AND WE NEED TO BE VERY CLEAR HERE. WE'RE
14:28:46 17 NOT TALKING ABOUT ONE TRADEMARK.

14:28:48 18 WE'RE TALKING ABOUT THREE DIFFERENT
14:28:49 19 TRADEMARKS. THE PLAINTIFF IN THIS CASE DOESN'T
14:28:49 20 EVEN COME CLOSE TO ADDRESSING EACH AND EVERY ONE OF
14:28:51 21 THOSE TRADEMARKS. ONE IS A LOGO; ONE IS THE WORD,
14:28:53 22 THE MARK FREECYCLE; AND THE OTHER ONE IS THE
14:28:56 23 FREECYCLE NETWORK.

14:28:57 24 YET THEY'RE ATTEMPTING TO BUNDLE ALL
14:28:59 25 THREE AND SAY THAT SOMEHOW ALL THREE NOW HAVE BEEN

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NAKEDLY LICENSED.

BUT IF YOU LOOK CAREFULLY AT THE RECORD AND THE EVIDENCE THAT WE'VE PROVIDED -- AND IN THIS CASE, THE EXHIBITS WE PROVIDED ARE REALLY REPRESENTATIVE EXAMPLES BECAUSE THERE ARE TENS OF THOUSANDS OF PAGES THAT GO TO ALL OF THE EFFORTS THAT THE FREecycle NETWORK HAD IN ENSURING THAT ITS RULES AND GUIDELINES AND ETIQUETTES WERE PROPERLY ENFORCED, INCLUDING AS EARLY AS 2003, TOWARDS THE END OF 2003, AS WELL AS IN 2004.

BUT TURNING TO THIS ISSUE, YOU'VE GOT TO ACTUALLY HAVE EVIDENCE. YOU CAN'T JUST MAKE THE STATEMENT THAT SUPPOSEDLY OTHER INDIVIDUALS HAVE BEEN NAKEDLY LICENSED. THEY HAVEN'T PROVIDED ANY OF THAT.

SO IF YOU LOOK AT THE INDIVIDUALS THAT -- THE COURT: WELL, FOR WHAT -- YOU'RE TALKING ABOUT FOR THE COUNTERCLAIMS. FOR THE COUNTERCLAIMS, THOSE ARE YOUR CLAIMS, SO YOU HAVE THE BURDEN OF PROOF.

ALL THEY HAVE TO DO IS POINT OUT THAT YOU HAVE NOT PRESENTED ANY EVIDENCE ON YOUR COUNTERCLAIMS AND THE BURDEN IS ON YOU TO PRESENT SOME.

MS. KOBIALKA: THAT WE HAVEN'T NAKEDLY

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LICENSED? THAT'S THEIR CLAIM. THEY HAVE THE
BURDEN --
THE COURT: NO, ON YOUR COUNTERCLAIMS.
MS. KOBIALKA: RIGHT. OUR
COUNTERCLAIM -- AS I UNDERSTAND IT, WE DIDN'T MOVE
FOR SUMMARY JUDGMENT ON THE ISSUE OF TRADEMARK
INFRINGEMENT.
THAT IS WHAT -- AND A DETERMINATION THAT
THE -- BECAUSE THEIR DECLARATORY JUDGMENT ACTION
WAS FOR A DETERMINATION THAT THE MARK IS DEEMED
GENERIC.
THEY'VE ADDITIONALLY INCLUDED THE SUMMARY
JUDGMENT ON THE ISSUE OF NAKED LICENSING.
BUT IF YOU LOOK AT THEIR DECLARATORY
JUDGMENT ACTION, IT WAS ACTUALLY ON THE
DETERMINATION THAT THE MARK WOULD BE DEEMED
GENERIC.
WE SUED FOR TRADEMARK INFRINGEMENT, BUT
AS I UNDERSTOOD IT, THAT CLAIM IS NOT PUT AT ISSUE
HERE IN THE SENSE THAT WE DIDN'T CROSS MOVE FOR A
DETERMINATION OF TRADEMARK INFRINGEMENT.
WHAT WE HAVE DEMONSTRATED IS THAT WE DO,
IN FACT, HAVE A TRADEMARK THAT WE HAVE GONE OUT AND
AGGRESSIVELY PROTECTED. WE HAVE TAKEN GREAT PAINS
TO DESCRIBE ALL THE DIFFERENT PROCEDURES, RULES,

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ETIQUETTE, ETHOS.

I MEAN, I CAN GO ON AND ON ABOUT THE THINGS THAT THE FREecycle NETWORK HAS DONE TO, IN FACT, PROTECT INDIVIDUALS WHO DECIDED TO BECOME MEMBERS OF THE FREecycle NETWORK AND BECOME A PART OF THAT PARTICULAR GROUP, AND ALL THOSE RULES WERE ACTUALLY ENFORCED THROUGHOUT, AND CONTINUE TO BE ENFORCED THROUGH TODAY.

SO WE HAVE DEMONSTRATED WITH EXTENSIVE EXHIBITS, AND I CAN GO THROUGH AND START TO DESCRIBE, AND ONE OF THE MOST IMPORTANT THINGS --

THE COURT: WELL, NO. I GUESS YOU CAN -- I'M FAMILIAR WITH THE EXHIBITS.

MS. KOBIALKA: ALL RIGHT. AND THE EVIDENCE RIGHT NOW IS THAT MR. DERON BEAL HIMSELF MONITORED ALL OF THE VARIOUS NEW GROUPS THAT STARTED TO JOIN STARTING IN THE OCTOBER 2003 TIMEFRAME. HE SET FORTH THAT IN HIS DECLARATION.

THAT IS NOT DISPUTED BY THE PLAINTIFF IN THIS PARTICULAR CASE.

AND IN OCTOBER, HE STARTED HAVING THE MODERATORS DO A LOT OF THE WORK. HE REQUESTED THAT THE MODERATORS ENSURE THAT THEY ADDRESS THE DAY-TO-DAY PROBLEMS AND ISSUES THAT WOULD COME UP AND ENSURE THAT PEOPLE ARE COMPLYING.

14:32:06 1 AND WHEN INDIVIDUALS WEREN'T COMPLYING,
14:32:08 2 AS EARLY AS EARLY 2004, THERE WAS A DETERMINATION
14:32:13 3 OF A GROUP WHO DIDN'T ACTUALLY --

14:32:15 4 THE COURT: RIGHT. BUT THE CAUSE OF ALL
14:32:17 5 OF THAT IS THAT NONE OF IT WAS DONE AT THE TIME
14:32:20 6 THAT FREECYCLESUNNYVALE GOT THEIR LICENSE.

14:32:23 7 MS. KOBIALKA: IT WAS.

14:32:23 8 THE COURT: NO, IT WASN'T. ALL THAT WAS
14:32:24 9 DONE TO THEM IS THE OFT QUOTED E-MAIL, DON'T USE IT
14:32:29 10 COMMERCIALLY.

14:32:30 11 SO IT SEEMS THAT --

14:32:31 12 MS. KOBIALKA: YOU'RE TALKING ABOUT WITH
14:32:33 13 RESPECT TO THE LOGO.

14:32:34 14 BUT THERE WAS ACTUALLY OTHER DISCUSSIONS
14:32:36 15 THAT HAD OCCURRED, AND THAT'S ALSO IN THE EVIDENCE
14:32:38 16 IN THE RECORD WHERE MR. BEAL AND MR. KAUFMAN, WHO
14:32:41 17 WAS A MEMBER OF THE FREECYCLE NETWORK, PROVIDED THE
14:32:43 18 ETIQUETTE THAT HAD BEEN SET FORTH THAT THE
14:32:45 19 FREECYCLE NETWORK --

14:32:47 20 THE COURT: BUT THAT WAS LATER.

14:32:48 21 MS. KOBIALKA: NO. IT WAS ACTUALLY AT
14:32:50 22 THE TIME --

14:32:50 23 THE COURT: NO, IT WASN'T.

14:32:51 24 MS. KOBIALKA: IT WAS IN OCTOBER OF 2003.

14:32:53 25 THE COURT: RIGHT. BUT THE E-MAIL WENT

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OUT EARLIER THAN THAT.

MS. KOBIALKA: WHICH E-MAIL ARE YOU REFERRING TO?

THE COURT: THE E-MAIL THAT SAID, YEAH, FREECYCLE -- I CAN PROBABLY QUOTE THE WHOLE THING, IT WAS MENTIONED SO FREQUENTLY -- YEAH, FREECYCLE, GO AHEAD AND USE IT. JUST DON'T USE IT COMMERCIALY. SO-AND-SO CAN GET YOU A FANCY SCHMANCY LOGO, WHATEVER.

MS. KOBIALKA: YEAH, THAT'S DATED OCTOBER 9TH, 2003.

PRIOR TO THAT, MR. BEAL HAD HAD DISCUSSIONS WITH MS. ABRAHAM, THAT'S IN HIS DECLARATION, AS WELL AS IN THE DOCUMENTS, AND MR. KAUFMAN AS WELL IN WHICH THE ETIQUETTE WAS PROVIDED.

AND THE ETIQUETTE LISTS NOT FOR PROFIT, NO POLITICS, NO SPAMMING, PROCEDURES FOR POSTING, WHAT WORDS TO USE AND HOW TO POST.

YOU HAD TO AGREE TO THE YAHOO TERMS AND CONDITIONS.

THIS IS NOT CHALLENGED. ALL OF THIS WAS OCCURRING BACK IN SEPTEMBER OF 2003 AND OCTOBER.

THERE WAS A BAN ON THE CURBSIDE PICK UP. THERE WAS NO FIRST COME, FIRST SERVE. THERE WAS NO

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BARTER OFFERS.

AND THESE THINGS ARE IMPORTANT, BECAUSE THE FACT THAT THE FREecycle NETWORK IS DOING THESE THINGS FOR FREE IS WHAT DISTINGUISHES IT FROM OTHER ENTITIES SUCH AS CRAIG'S LIST OR EBAY OR SOME OF THE OTHER WEB SITES WHERE YOU'RE ACTUALLY ALLOWED TO BARTER THINGS OR TRADE THINGS, SO IT'S A ONE-FOR-ONE EXCHANGE, WHICH WAS NOT THE PRINCIPLE UNDER WHICH THE FREecycle NETWORK ITSELF WAS FOUNDED.

SO WE'VE BEEN ABLE TO IDENTIFY QUITE A BIT, AND THAT IS NOT CHALLENGED AT ALL.

IN FACT, SOME OF THAT CAME DIRECTLY OUT OF THE DECLARATION OF MR. KAUFMAN HIMSELF.

AND THEN WE HAD ADDITIONALLY DOCUMENTS THAT WERE ATTACHED TO MY DECLARATION, AS WELL AS MR. BEAL'S DECLARATION.

SO AT THAT TIME, ALL OF THAT WAS IN PLACE AND ACTUALLY DID EXIST AND WAS PROVIDED TO MS. ABRAHAM, WAS PROVIDED TO MR. KAUFMAN, AND LATER TO MR. ROBERTSON AS WELL.

MR. FEINBERG: CAN I RESPOND QUICKLY TO A COUPLE POINTS?

THE COURT: NO. WHEN SHE'S FINISHED, YOU CAN RESPOND.

14:34:41 1 MS. KOBIALKA: OKAY. AFTER THAT TIME,
14:34:42 2 WHEN THERE STARTED TO BECOME MORE AND MORE GROUPS
14:34:45 3 THAT WERE JOINING, MR. BEAL, HE'S PROVIDED A
14:34:49 4 DECLARATION, HE MONITORED IT HIMSELF.

14:34:51 5 BUT THEN HE CAME AND DECIDED IMMEDIATELY
14:34:53 6 THEREAFTER, SO OCTOBER 9TH, 2003, TO NOT ONLY HAVE
14:34:57 7 MODERATORS, BUT TO HAVE A MOD SQUAD.

14:35:00 8 AND THE PURPOSE OF THE MOD SQUAD WAS TO
14:35:02 9 ENSURE THAT PEOPLE COMPLIED WITH THE RULES, AND
14:35:04 10 THEY HAD THIS RULE OF TWO STRIKES AND YOU'RE OUT,
14:35:06 11 AND THEY EVENTUALLY DEVELOPED A MANUAL THAT WAS
14:35:08 12 PROVIDED.

14:35:09 13 BUT THIS POLICING WAS ONGOING.

14:35:11 14 SO AS OF DECEMBER 9TH, 2003, THERE'S
14:35:14 15 EXHIBIT 100 WHICH DEMONSTRATED HOW THE FREECYCLE
14:35:17 16 NETWORK WAS ACTUALLY POLICING ITS TRADEMARKS.

14:35:21 17 THERE WAS AN INSTANCE IN LINCOLN COUNTY
14:35:23 18 WHERE SOMEONE WAS USING IT.

14:35:25 19 SO THESE GUIDELINES AND RULES AND
14:35:26 20 PROCEDURES HAD BEEN AROUND REALLY AT THAT TIME, AND
14:35:29 21 THAT'S WHAT THE RECORD SHOWS.

14:35:30 22 WE HAVE NUMEROUS EXHIBITS THAT WE
14:35:32 23 PROVIDED FROM THAT TIMEFRAME TO DEMONSTRATE THAT,
14:35:35 24 AS WELL AS MR. BEAL'S DECLARATION, WHICH IS NOT
14:35:37 25 CHALLENGED.

14:35:38 1 I THINK THAT, YOU KNOW, THE THINGS THAT
14:35:40 2 THE PLAINTIFF ARE ATTEMPTING TO POINT TO ARE THESE
14:35:43 3 PERCEPTIONS THAT THESE INDIVIDUALS MAY OR MAY NOT
14:35:47 4 HAVE HAD AT THE TIME, BUT THEY ALL CLEARLY KNEW
14:35:49 5 THAT THEY WERE BECOMING MEMBERS OF THE FREECYCLE
14:35:51 6 NETWORK.

14:35:51 7 OTHERWISE WHY WOULD MR. BEAL BE
14:35:54 8 CONTACTING THEM OR SUGGESTING THAT THEY WOULD HAVE
14:35:56 9 THIS INFORMATION OR SUCH THAT THEY WOULD BE POSTED
14:35:59 10 OR HAVE A LINK TO THE FREECYCLE NETWORK'S WEB SITE?

14:36:02 11 SO THERE WAS ALL THESE DIFFERENT
14:36:06 12 PROVISIONS THAT EXISTED BACK THEN THAT THEY
14:36:08 13 CONTINUED TO AGGRESSIVELY PURSUE AND MAKE SURE --
14:36:11 14 AS THE GROUP GOT BIGGER, THEY HAD TO MAKE SURE THAT
14:36:14 15 THEY WERE ADDRESSING THE ISSUES AND CONCERNS THAT
14:36:17 16 WERE COMING UP, BECAUSE LIKE MANY SMALL GRASSROOTS
14:36:21 17 MOVEMENTS THAT CATCH FIRE, YOU'VE GOT TO ADDRESS
14:36:23 18 THINGS AS THEY CHANGE, AND PARTICULARLY AS THE
14:36:25 19 FREECYCLE NETWORK BEGAN TO HAVE INTERNATIONAL
14:36:27 20 REPRESENTATION IN DIFFERENT COUNTRIES, IT WAS
14:36:29 21 IMPORTANT FOR THEM TO ENSURE THAT THEIR RULES
14:36:32 22 REFLECTED AND WERE USEFUL TO ALL OF THOSE VARIOUS
14:36:36 23 GROUPS.

14:36:37 24 AND SO TO REFLECT THE CHANGES THAT WERE
14:36:39 25 HAPPENING WITHIN THE FREECYCLE NETWORK IN JANUARY

14:36:41 1 OF 2004, THERE WAS A VOTE THAT WAS TAKEN WHETHER OR
14:36:46 2 NOT WE SHOULD EXPAND THIS PRINCIPLE OF JUST BEING
14:36:49 3 FREE, WHICH HAD EXISTED FROM THE INCEPTION OF THE
14:36:51 4 FREECYCLE NETWORK. IT WAS, IN POINT OF FACT, THE
14:36:55 5 POINT OF IT, TO BE FREE, LEGAL, AND APPROPRIATE FOR
14:36:57 6 ALL AGES BECAUSE OF THE ISSUES THAT WERE COMING UP
14:37:00 7 AND AS THE GROUP WAS GROWING BIGGER.

14:37:03 8 AND THE MOD SQUAD HAD SIGNIFICANT
14:37:06 9 CORRESPONDENCE WITH MR. BEAL. HE DIDN'T JUST WALK
14:37:08 10 AWAY AND SAY, "OKAY, THIS IS NOW AN OPPORTUNITY FOR
14:37:11 11 THE MODERATORS OR THE MOD SQUAD TO DEAL WITH."

14:37:14 12 HE CONTINUED TO HAVE CORRESPONDENCE WITH
14:37:16 13 THEM THROUGHOUT TO ENSURE THAT THESE THINGS WERE
14:37:19 14 COMPLIED WITH AND CONTINUED TO CREATE STRUCTURE AND
14:37:22 15 ADDITIONAL RULES AND HIERARCHY TO ENSURE THAT
14:37:25 16 PEOPLE WERE COMPLYING WITH THE RULES BECAUSE THIS
14:37:27 17 WAS STARTING TO CATCH, YOU KNOW, CATCH FIRE. IT
14:37:30 18 WAS EXPANDING PRETTY AGGRESSIVELY THROUGHOUT THE
14:37:34 19 WORLD.

14:37:34 20 AND AS A REFLECTION OF THAT, THEY STARTED
14:37:38 21 THE PENGUIN PATROL, WHICH WAS SPECIFIC TO THE
14:37:41 22 TRADEMARKS, AND THAT WAS IN THE 2004 TIMEFRAME.

14:37:44 23 THEN THEY HAD THE NEW GROUP APPROVERS,
14:37:47 24 WHICH DID NOT, CONTRARY TO THE DECLARATION
14:37:49 25 SUBMITTED BY PLAINTIFF, JUST APPROVE GROUPS WILLY

14:37:52 1 NILLY. IN FACT, WE PROVIDED EVIDENCE WHERE GROUPS
14:37:54 2 HAD TO WAIT FOR APPROVAL.

14:37:56 3 AND THESE NEW GROUP APPROVERS WOULD
14:37:58 4 INSPECT THE SITE AND ENSURE THAT THIS WOULD COMPLY
14:38:01 5 WITH WHAT THE FREECYCLE NETWORK'S PHILOSOPHY WAS,
14:38:05 6 AS WELL AS ITS RULES AND ETIQUETTE.

14:38:06 7 IT CONTINUED ON WITH THE GROUP OUTREACH
14:38:08 8 ASSISTANCE AS WELL IN SEPTEMBER 2004.

14:38:11 9 AND AT ONE POINT, THE PLAINTIFF ITSELF,
14:38:14 10 IN OCTOBER 2004, SAID, "YOU KNOW WHAT? I REALLY
14:38:17 11 WANT A CLEAR TRADEMARK POLICY."

14:38:19 12 SO NOT ONLY DID THEY ACKNOWLEDGE THERE
14:38:22 13 WAS A TRADEMARK POLICY IN PLACE, BUT THEY WANTED TO
14:38:24 14 CLARIFY IT AND MAKE IT SHARPER AND CLEANER, AND
14:38:27 15 THAT'S EXHIBIT 103.

14:38:28 16 WHEN IT BECAME APPARENT AT THE TIME THAT
14:38:31 17 SOME OF THESE OWNERS AND MODERATORS WERE
14:38:35 18 DISAPPEARING, THEY WERE MOVING AND NOT MAINTAINING
14:38:38 19 THE WEB SITES, IT BECAME IMPORTANT TO TRY AND HAVE
14:38:42 20 INTERIM MODERATORS THERE SO THAT YOU COULD CONTINUE
14:38:42 21 THE QUALITY AND THE STANDARDS, WHICH IS THE REASON
14:38:45 22 FOR HAVING THE I MODS.

14:38:46 23 SO IT'S PRETTY EXTENSIVE THE AMOUNT OF
14:38:48 24 WORK THAT THE FREECYCLE NETWORK PUT IN WITH
14:38:51 25 MR. BEAL AT THE CENTER OF IT TO TRY AND ENSURE THAT

14:38:53 1 ITS QUALITY STANDARDS WERE BEING MAINTAINED
14:38:56 2 THROUGHOUT.

14:39:00 3 I WANTED TO MAKE SURE THAT THE ETIQUETTE
14:39:04 4 ITSELF WAS ACTUALLY CIRCULATED BY THE PLAINTIFF IN
14:39:06 5 2004. THAT'S EXHIBIT 16.

14:39:08 6 THE PLAINTIFF ALSO POLICED THE MARKS
14:39:11 7 THEMSELVES. THAT'S EXHIBIT 73.

14:39:13 8 SO THERE'S QUITE A BIT ON THE PLAINTIFF'S
14:39:16 9 SIDE WHERE THEY ACTUALLY WERE GOING OUT AND TRYING
14:39:19 10 TO ENFORCE THESE RULES THEMSELVES.

14:39:23 11 AND EXAMPLES OF THE CONSTANT
14:39:25 12 CORRESPONDENCE THAT MR. BEAL HAD EARLY IN 2004 IS
14:39:30 13 EXHIBIT 36, AND THAT IS WITH THE MODS TO ENSURE
14:39:33 14 THAT THEY WERE REALLY GOING OUT THERE AND FOLLOWING
14:39:35 15 UP WITH THE VARIOUS MEMBER GROUPS.

14:39:40 16 THE COURT: COULD YOU FINISH UP --

14:39:42 17 MS. KOBIALKA: ABSOLUTELY.

14:39:42 18 THE COURT: -- SHORTLY?

14:39:43 19 MS. KOBIALKA: SURE. IN ADDITION TO THIS
14:39:45 20 ISSUE ABOUT THERE ARE THREE SEPARATE MARKS AND
14:39:47 21 REALLY THESE MARKS HAVE NOT BEEN IDENTIFIED
14:39:50 22 SEPARATELY, THEY'VE BEEN BUNDLED TOGETHER, THERE
14:39:53 23 IS, YOU KNOW, AN EXTRAORDINARY AMOUNT OF PROOF THAT
14:39:56 24 I THINK NEEDS TO COME FORWARD BY A PLAINTIFF
14:39:58 25 SEEKING TO STRIP A PARTY OF ITS TRADEMARK RIGHTS.

14:40:02 1 IT'S NOT SOMETHING WHERE YOU CAN JUST
14:40:03 2 MAKE STATEMENTS THAT, "OH, THERE ARE OTHER PARTIES
14:40:06 3 OUT THERE" WITHOUT ACTUALLY PROVIDING PROOF THAT
14:40:09 4 THEY WERE SUPPOSEDLY NAKED LICENSING, AND I REALLY
14:40:12 5 THINK THAT THEY HAVE TO ADDRESS ALL OF THE
14:40:13 6 SUBSTANTIVE EVIDENCE THAT WE PROVIDED IN OUR
14:40:15 7 OPPOSITION, WHICH THEY FRANKLY DIDN'T DO.

14:40:17 8 THE LAST POINT I HAD WAS THEY REALLY
14:40:19 9 MISREPRESENTED THE DOCUMENT PRODUCTION.

14:40:21 10 THERE'S A DISPUTE WITH RESPECT TO
14:40:23 11 DOCUMENT REQUEST NUMBER 64, AND IF YOU LOOK VERY
14:40:27 12 CAREFULLY AT THE EXHIBIT 1 THAT WAS ATTACHED TO
14:40:31 13 MR. CORGILL'S DECLARATION, AND THIS IS SUPPOSEDLY
14:40:34 14 WHERE THE QUOTE THAT THEY USED FOR THEIR REPLY
14:40:38 15 BRIEF CAME FROM, IT'S ACTUALLY A MISQUOTE. IT'S
14:40:41 16 NOT ACCURATE.

14:40:42 17 THEY FILLED IN WORDS IMPROPERLY THERE AND
14:40:44 18 IT TAKES OUT OF CONTEXT ACTUALLY WHAT THE DISPUTE
14:40:47 19 WAS.

14:40:48 20 SO THE REQUEST HAD TO DO WITH EVERY
14:40:50 21 SINGLE DOCUMENT, INCLUDING ARCHIVED ELECTRONIC
14:40:53 22 FILES, OF BASICALLY EVERY POSTING, WEB PAGE,
14:40:57 23 ANYTHING THAT EXISTED OF EVERY MEMBER GROUP OF THE
14:41:00 24 ENTIRE FREecycle NETWORK, AND WE INFORMED THE
14:41:04 25 PLAINTIFF THAT THAT WAS UNDULY BURDENSOME AND

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OVERLY BROAD.

WE HAD DISCUSSIONS GOING BACK AND FORTH ASKING FOR THEM TO NARROW, MAYBE PICK AND SELECT A NUMBER OF GROUPS AND WE CAN PROVIDE THAT.

MOST OF THAT INFORMATION ALSO WAS PUBLIC AND WE HAD PROVIDED IT, IN FACT, WITH RESPECT TO QUITE A FEW OF THESE DIFFERENT ENTITIES.

THE PLAINTIFF CAME BACK AND IDENTIFIED SOME, I THINK IT WAS 15 OR 20, DIFFERENT SITES OR GROUPS THAT THEY WANTED THE DOCUMENTATION FROM, BUT SAID THAT, "NO, WE STILL RESERVE THE RIGHT TO COME BACK AND KEEP ASKING FOR MORE," WHICH WE WERE JUST UNABLE TO REACH AGREEMENT UPON.

HOWEVER, WE DID NOTIFY THEM SPECIFICALLY THAT QUITE A FEW OF THOSE ON THE LIST WERE PUBLICLY AVAILABLE AND THEY COULD GET IT THEMSELVES.

QUITE A FEW OF THEM ON THE LIST WE'D ALREADY PROVIDED THOSE DOCUMENTS.

AND IT SAYS IN OUR LETTER, QUOTE, "THE FREecycle NETWORK HAS ALREADY PROVIDED THE VAST MAJORITY OF THESE DOCUMENTS IN EARLIER DOCUMENT PRODUCTIONS, INCLUDING FROM," AND IT GOES ON TO IDENTIFY THE WEB SITE NAME.

THE ONLY STATEMENT THAT WE MADE WAS "THE FREecycle NETWORK MAY NOT HAVE DIRECT ACCESS TO THE

14:42:08 1 ARCHIVES FOR THESE GROUPS AND MAY NOT BE ABLE TO"
14:42:12 2 ACCESS, "SECURE ACCESS ON YOUR BEHALF AS THESE
14:42:16 3 GROUPS WERE CREATED BY LOCAL MODERATORS WHO MAY
14:42:19 4 RETAIN SOLE CONTROL OVER ACCESS TO THOSE GROUPS."

14:42:23 5 AND WHAT WE WERE REFERRING TO THERE ARE
14:42:25 6 THOSE INDIVIDUALS WHO DECIDED THEY NO LONGER WANTED
14:42:27 7 TO BE PART OF THE FREECYCLE NETWORK SUCH THAT WE
14:42:30 8 DON'T HAVE ANY KIND OF ACCESS TO THEIR OLD FILES
14:42:32 9 THAT MAY HAVE EXISTED.

14:42:33 10 AND TO THE EXTENT WE DID, WE PRODUCED
14:42:36 11 THEM, OR THERE WAS A FEW INSTANCES IN WHICH THE
14:42:39 12 MODERATORS DID NOT PROVIDE THE FREECYCLE NETWORK
14:42:42 13 ACCESS TO ALL OF THEIR FILES, BUT REPRESENTED THAT
14:42:44 14 THEY WOULD DO THE POLICING AND MONITORING MORE
14:42:46 15 AGGRESSIVELY THAN SOME OF THE OTHER MODERATORS ON
14:42:50 16 THE OTHER WEB SITES.

14:42:51 17 SO IT'S A VERY SMALL SUBSECTION THAT WAS
14:42:54 18 BEING DISCUSSED IN CONNECTION WITH THAT PARTICULAR
14:42:56 19 QUOTE, AND THEY COMPLETELY MISREPRESENTED IT AND
14:42:59 20 SAID THAT WE BASICALLY STATED WE DON'T HAVE
14:43:02 21 POSSESSION, CUSTODY, OR CONTROL OF THESE DOCUMENTS,
14:43:04 22 WHICH IS ABSOLUTELY UNTRUE, AND IF YOU LOOK AT THE
14:43:07 23 VERY SAME LETTER, WHICH IS A JUNE 7TH, 2007 LETTER,
14:43:11 24 IT SETS THAT FORTH QUITE CLEARLY.

14:43:13 25 THE COURT: THE DECLARATORY JUDGMENT, AS

14:43:18 1 I HAVE IT, SEEMS TO BE DECLARATORY JUDGMENT THAT
14:43:22 2 THEY DID NOT INFRINGE YOUR TRADEMARK.

14:43:24 3 ARE YOU SAYING IT WAS A DECLARATORY
14:43:26 4 JUDGMENT THAT YOU DON'T HAVE A TRADEMARK?

14:43:27 5 MS. KOBIALKA: IN PART TWO, THAT WAS -- I
14:43:29 6 BELIEVE THE REQUEST FOR RELIEF WAS THAT THEY
14:43:31 7 DON'T -- THAT THERE IS NO TRADEMARK.

14:43:33 8 THE COURT: OKAY. AND THEN YOU REFER TO
14:43:36 9 CLAIMS YOU HAVE AGAINST THEM. ARE THOSE YOUR
14:43:41 10 COUNTERCLAIMS?

14:43:43 11 MS. KOBIALKA: THAT'S CORRECT.

14:43:43 12 THE COURT: YOU HAVE SOME OTHER CLAIM
14:43:45 13 AGAINST THEM BESIDES YOUR COUNTERCLAIMS?

14:43:46 14 MS. KOBIALKA: NO. WITH RESPECT TO
14:43:48 15 FREECYCLESUNNYVALE, WE ONLY HAVE THE COUNTERCLAIMS
14:43:51 16 THAT ARE IN THIS CASE.

14:43:51 17 THE COURT: OKAY.

14:43:52 18 MS. KOBIALKA: AND THAT HAVE BEEN
14:43:52 19 ASSERTED.

14:43:53 20 THE COURT: OKAY. SO IF I WERE TO FIND
14:43:55 21 THAT YOU HAD NAKEDLY LICENSED FREECYCLESUNNYVALE
14:44:00 22 ITSELF AND, THUS, THEY COULD NOT BE ACCUSED OF
14:44:02 23 INFRINGING YOUR TRADEMARKS, BUT I SAID THAT THERE
14:44:06 24 WAS A DISPUTE ABOUT WHETHER YOU HAD RECAPTURED YOUR
14:44:09 25 TRADEMARK AND WHETHER YOU DID HAVE A TRADEMARK

14:44:14 1 VIS-A-VIS SOME OTHER PEOPLE, WHICH OF YOUR
14:44:17 2 COUNTERCLAIMS IN YOUR VIEW WOULD SURVIVE?

14:44:20 3 MS. KOBIALKA: WELL, WE STILL WOULD
14:44:21 4 PROBABLY HAVE OUR TRADEMARK INFRINGEMENT CLAIM.

14:44:25 5 THE COURT: AGAINST WHOM?

14:44:26 6 MS. KOBIALKA: AGAINST
14:44:27 7 FREECYCLESUNNYVALE, BECAUSE THE DETERMINATION IS
14:44:29 8 GOING TO NEED TO BE MADE IN TERMS OF AT WHAT POINT,
14:44:33 9 TO THE EXTENT YOU DETERMINE THERE'S BEEN NAKED
14:44:36 10 LICENSING, THE RECAPTURE ACTUALLY OCCURRED.

14:44:39 11 THE COURT: NO, THE RECAPTURE WOULD NEVER
14:44:40 12 OCCUR -- THERE WOULD NEVER BE ANY RECAPTURE
14:44:46 13 VIS-A-VIS THEM. IT WAS ALWAYS SENIOR TO YOUR
14:44:49 14 RECAPTURE.

14:44:50 15 SO IF I FELT THERE WAS SOME ISSUE ABOUT
14:44:52 16 RECAPTURING VIS-A-VIS OTHER PEOPLE WHO GOT THE
14:44:55 17 PERMISSION TO USE YOUR WORD AFTER YOU HAD BEGUN
14:44:58 18 CLOTHED LICENSING, WHICH OF YOUR COUNTERCLAIMS
14:45:02 19 WOULD SURVIVE?

14:45:03 20 MS. KOBIALKA: I BELIEVE WE HAVE A
14:45:04 21 COUNTERCLAIM FOR UNFAIR COMPETITION AND -- TO BE
14:45:08 22 FRANK, I CAN'T REMEMBER IT VERBATIM OFF THE TOP OF
14:45:11 23 MY HEAD AT THE MOMENT, BUT I BELIEVE THAT WOULD
14:45:14 24 SURVIVE BECAUSE I THINK THERE'S ADDITIONAL CONDUCT
14:45:16 25 OUTSIDE OF JUST TRADEMARK INFRINGEMENT THAT WAS THE

14:45:18 1 BASIS FOR OUR COUNTERCLAIMS.

14:45:20 2 THE COURT: THAT'S THE ONLY ONE, THEN?

14:45:22 3 MS. KOBIALKA: THAT'S THE ONLY ONE THAT'S
14:45:23 4 COMING TO MIND. I WOULD LIKE TO BE ABLE TO TAKE A
14:45:26 5 LOOK --

14:45:26 6 THE COURT: IS THAT YOUR 17200 CLAIM?

14:45:28 7 MS. KOBIALKA: I BELIEVE THAT'S CORRECT.
14:45:29 8 LET ME --

14:45:31 9 (PAUSE IN PROCEEDINGS.)

14:45:31 10 MS. KOBIALKA: YEAH, WE HAD A 17200,
14:45:35 11 17500 CLAIM.

14:45:36 12 THE COURT: DOES THAT --

14:45:37 13 MS. KOBIALKA: AND WE HAD A CLAIM UNDER
14:45:38 14 THE LANHAM ACT AS WELL. SO A 43(A) CLAIM.

14:45:42 15 THE COURT: AND THOSE ARE ADDRESSED TO
14:45:43 16 PEOPLE OTHER FREECYCLESUNNYVALE?

14:45:45 17 MS. KOBIALKA: NO.

14:45:46 18 THIS PARTICULAR CLAIM, HOWEVER, HAD TO GO
14:45:48 19 TO MISREPRESENTING THE NATURE, THE CHARACTERISTICS,
14:45:53 20 AND QUALITIES OF THE FREECYCLE NETWORK'S SERVICES
14:45:56 21 THEMSELVES, AND THAT THERE WAS A NUMBER OF
14:45:58 22 STATEMENTS THAT THEY HAD MADE THAT HAD DAMAGED THE
14:46:05 23 FREECYCLE NETWORK.

14:46:06 24 SO WE HAD THAT ADDITIONAL CLAIM SEPARATE
14:46:09 25 AND APART FROM OUR TRADEMARK INFRINGEMENT CLAIM.

14:46:12 1 THE COURT: WHAT IS THAT, SOME KIND OF
14:46:13 2 TRADE LIABLE CLAIM?

14:46:14 3 MS. KOBIALKA: YEAH. I THINK IT'S A
14:46:16 4 FALSE ADVERTISING TYPE OF CLAIM WHERE THEY WERE
14:46:19 5 MAKING STATEMENTS ABOUT US WHILE THEY HAD THEIR
14:46:22 6 COMPETE AND SERVICE.

14:46:23 7 THE COURT: OKAY. SO YOU'RE TALKING
14:46:25 8 ABOUT AN UNFAIR COMPETITION CLAIM AGAINST
14:46:30 9 FREECYCLESUNNYVALE FOR DOING WHAT?

14:46:35 10 MS. KOBIALKA: SO WE HAVE INDUCING
14:46:36 11 INFRINGEMENT, THAT'S PARAGRAPH 75 --

14:46:40 12 THE COURT: INDUCING INFRINGEMENT.

14:46:41 13 MS. KOBIALKA: WE ALSO HAD ENCOURAGING
14:46:43 14 THE MISUSE OF THE MARKS.

14:46:49 15 THE COURT: AND WHAT ELSE?

14:46:51 16 MS. KOBIALKA: THOSE WERE THE TWO PRIMARY
14:46:53 17 ALLEGATIONS THAT SUPPORTED THE --

14:46:55 18 THE COURT: AND THEN THIS FALSE --

14:46:56 19 MS. KOBIALKA: -- THE 43(A).

14:46:57 20 THE COURT: -- ADVERTISING?

14:46:58 21 MS. KOBIALKA: YES, AND THE UNFAIR
14:47:00 22 COMPETITION.

14:47:02 23 THE COURT: I THOUGHT THE UNFAIR
14:47:03 24 COMPETITION WAS INDUCING AND ENCOURAGING OTHERS TO
14:47:07 25 USE YOUR TRADEMARK.

14:47:08 1 MS. KOBIALKA: IT IS UNDER 43(A), AS WELL
14:47:09 2 AS 17200 AND 17500 IS WHAT I MEANT.

14:47:12 3 THE COURT: AND THEN FALSE ADVERTISING.

14:47:21 4 OKAY. DID YOU WANT TO --

14:47:22 5 MR. FEINBERG: CAN I MAKE A FEW COMMENTS,
14:47:24 6 YOUR HONOR?

14:47:25 7 THE COURT: YES.

14:47:26 8 MR. FEINBERG: ONE --

14:47:26 9 THE COURT: LET ME ASK YOU FIRST, ARE YOU
14:47:28 10 SUING THEM FOR SOME SORT OF DECLARATION THAT THEY
14:47:30 11 DON'T HAVE A TRADEMARK AT ALL, OR ARE YOU SIMPLY
14:47:33 12 SUING THEM FOR A DECLARATION THAT YOU DON'T
14:47:34 13 INFRINGE IT?

14:47:35 14 MR. FEINBERG: BOTH. BUT I DON'T KNOW
14:47:36 15 WHETHER -- I MEAN, THERE'S A STANDING QUESTION.

14:47:38 16 IF WE ARE HELD TO BE NAKEDLY LICENSED,
14:47:42 17 I'M GOING TO HAVE TO LOOK, AND SO WILL OPPOSING
14:47:45 18 COUNSEL, AT WHAT WE HAVE STANDING TO DO AT THIS
14:47:47 19 POINT, BECAUSE IT ISN'T CLEAR TO ME THAT WE HAVE
14:47:50 20 STANDING TO COMPLAIN ABOUT WHAT THEY'VE DONE TO
14:47:52 21 OTHER PEOPLE OR WHAT THEY MIGHT DO TO OTHER PEOPLE.

14:47:56 22 I REPRESENT FREECYCLESUNNYVALE. I HAVE,
14:47:59 23 FRANKLY, NO INTEREST IN REPRESENTING, ON A PRO BONO
14:48:03 24 BASIS, AND OPPOSING HER ON A PRO BONO BASIS, THE
14:48:06 25 REST OF THE UNIVERSE OF PEOPLE WHO MAY HAVE

14:48:09 1 SOMETHING, SOME AX TO GRIND WITH MR. BEAL, AND I
14:48:11 2 SUSPECT YOU WOULD JUST AS SOON NOT SEE US FOR THE
14:48:13 3 NEXT OF THE THREE YEARS ON A WEEKLY BASIS.

14:48:16 4 THE COURT: AND THEN WHAT DID YOU SAY
14:48:18 5 ABOUT YOUR TORTIOUS INTERFERENCE CLAIM AGAINST
14:48:20 6 THEM? YOU WERE SORT OF WAVING YOUR HANDS ABOUT
14:48:23 7 THAT. ARE YOU SAYING YOU'LL DISMISS THAT?

14:48:24 8 MR. FEINBERG: YEAH. WE ALREADY WAIVED
14:48:26 9 THE -- IT SEEMED -- AND INTERESTINGLY, THEY DID NOT
14:48:28 10 TAKE THIS POSITION, BUT IT SEEMED UNSEEMLY FOR A
14:48:32 11 NONPROFIT TO SEEK TORT DAMAGES AGAINST A NONPROFIT,
14:48:35 12 BUT THEY'VE OBVIOUSLY TAKEN A SOMEWHAT DIFFERENT
14:48:38 13 TACT.

14:48:40 14 I THINK ONE THING THAT'S WORTH BEARING IN
14:48:43 15 MIND -- FIRST OF ALL, WE DID MOVE ON THE TRADEMARK
14:48:46 16 COUNTERCLAIMS. I LOOKED WHILE WE WERE TALKING,
14:48:49 17 WHILE OPPOSING COUNSEL WAS TALKING, AND WE CLEARLY
14:48:52 18 MOVED.

14:48:52 19 THE COURT: YEAH. COULD YOU ADDRESS HER
14:48:54 20 THEORIES ABOUT WHICH OF THEM WOULD SURVIVE EVEN IF
14:48:57 21 YOU WERE NAKEDLY LICENSED?

14:48:59 22 MR. FEINBERG: YEAH. AND THEN -- SO WE
14:49:01 23 DID MOVE ON THEIR CLAIMS.

14:49:02 24 THE COURT: RIGHT.

14:49:03 25 MR. FEINBERG: WE ALSO, THE -- THE FACT

14:49:05 1 THAT WE DIDN'T CHALLENGE MR. BEAL AND HIS
14:49:09 2 DECLARATION IS BECAUSE I DIDN'T COME DOWN WITH THE
14:49:12 3 LAST SNOWFALL.

14:49:13 4 I MEAN, NO COMPETENT LAWYER IS GOING TO
14:49:15 5 GET INTO A FACTUAL FIGHT OVER MR. BEAL.

14:49:17 6 I THINK IT TURNS OUT THAT HE'S COMPLETELY
14:49:19 7 MISTAKEN AND WE'LL PROVE IT, BUT IT'S IRRELEVANT TO
14:49:22 8 THIS MOTION, SO WE JUST DIDN'T TAKE HIM ON.

14:49:25 9 ONE OF THE THINGS THAT'S INTERESTING --

14:49:27 10 THE COURT: YOU DIDN'T COME DOWN WITH THE
14:49:28 11 FIRST SNOWFALL?

14:49:30 12 MR. FEINBERG: THE LAST SNOWFALL.

14:49:31 13 THE COURT: THAT'S A NEW ONE. IS THAT
14:49:33 14 KIND OF LIKE NOT HAVING A DOG IN THE FIGHT, OR
14:49:35 15 WHAT?

14:49:36 16 MR. FEINBERG: NO. IT'S JUST THAT I'M
14:49:38 17 NOT SO NAIVE THAT I'M GOING TO TAKE ON EVERY ISSUE.

14:49:41 18 THE COURT: I SEE.

14:49:42 19 MR. FEINBERG: I CHASE ENOUGH WILD
14:49:44 20 RABBITS. I DON'T NEED TO CHASE THEIRS, TOO.

14:49:49 21 ONE OF THE THINGS THAT IS INTERESTING
14:49:49 22 ABOUT THIS, THOUGH, IS WHAT EXACTLY IS THE QUALITY
14:49:51 23 CONTROL THAT THEY'RE EXERCISING? EVEN TODAY IT'S
14:49:55 24 FREE, IT'S LEGAL, AND IT'S APPROPRIATE FOR ALL
14:49:57 25 AGES.

14:49:58 1 THAT ISN'T A QUALITY STANDARD. THAT'S A
14:50:00 2 SCOPE OF USE OF THE TRADEMARK.

14:50:01 3 THEY HAVE BEEN POUNDING PEOPLE OVER THE
14:50:03 4 HEAD ON WHETHER THEY'RE WITHIN THE SCOPE OF WHAT
14:50:05 5 YOU'RE ALLOWED TO USE FREECYCLING FOR, BECAUSE OF
14:50:08 6 COURSE THE MARK FREECYCLE DOES, IN FACT, HAVE THE
14:50:11 7 WORD "FREE" IN IT.

14:50:12 8 BUT THIS WOULD BE LIKE MCDONALD'S SUING
14:50:15 9 PEOPLE BECAUSE THEY LICENSED THE MARK FOR
14:50:18 10 HAMBURGERS, FRENCH FRIES AND MILK SHAKES AND THEY
14:50:21 11 WERE USING IT FOR HEALTH FOOD AND THEY SAID YOU'RE
14:50:25 12 OUTSIDE THE SCOPE OF THE LICENSE.

14:50:27 13 THAT'S NOT QUALITY CONTROL.

14:50:28 14 QUALITY CONTROL WOULD BE IF THEY WERE
14:50:30 15 SELLING LOUSY HAMBURGERS IN A DIRTY RESTAURANT.

14:50:34 16 SO ACTUALLY, I THINK THE PROBLEM THEY'VE
14:50:36 17 GOT HERE, AND ULTIMATELY IF WE DO GO TO TRIAL ON
14:50:38 18 BEHALF OF ALL THESE PEOPLE I HOPE I DON'T
14:50:41 19 REPRESENT, I THINK THEY'VE GOT A PROBLEM BECAUSE I
14:50:43 20 DON'T THINK THEY DO QUALITY CONTROL AT ALL.

14:50:45 21 BUT THAT'S -- WE DON'T NEED TO GET THERE
14:50:47 22 FOR THIS MOTION.

14:50:48 23 THIS ONE WAS A VERY LIMITED MOTION. WE
14:50:50 24 WOULD LIKE PERMISSION TO GET RID OF ALL THESE OTHER
14:50:53 25 COUNTERCLAIMS TO THE EXTENT THEY'RE NOT DISPOSED OF

14:50:55 1 BY THIS MOTION, BECAUSE I DO THINK THAT THE NINTH
14:50:58 2 CIRCUIT'S DECISION YESTERDAY REALLY DOES GUT THE
14:51:01 3 COUNTERCLAIMS.

14:51:02 4 BY THE WAY, YOU HAVE TO READ DENNIS
14:51:07 5 CORGILL'S DECLARATION. SOME OF WHAT SHE SAYS ISN'T
14:51:10 6 IN THE LETTER ISN'T IN THE LETTER BECAUSE THE
14:51:13 7 DECLARATION SAYS HE WAS TOLD THAT IN A TELEPHONE
14:51:15 8 CALL. SO IT'S NOT EXACTLY A CONTRADICTION.

14:51:18 9 THE COURT: WELL, SO, AGAIN I ASK YOU,
14:51:22 10 WHICH OF -- WHAT DO YOU SAY TO HER ARGUMENT AS TO
14:51:25 11 WHICH OF HER COUNTERCLAIMS SURVIVE IF I FIND NO --
14:51:30 12 IF I FIND THAT YOU WERE NAKEDLY LICENSED, BUT THAT
14:51:33 13 THERE'S A DISPUTE ABOUT THE RECAPTURE?

14:51:36 14 MR. FEINBERG: I THINK NOTHING SURVIVES,
14:51:37 15 YOUR HONOR. I THINK NOTHING SURVIVES.

14:51:39 16 THE COURT: RESPOND TO HER ARGUMENT THAT
14:51:41 17 THE INDUCEMENT AND THE ENCOURAGEMENT SURVIVES AND
14:51:44 18 THAT THE FALSE ADVERTISING SURVIVES.

14:51:46 19 MR. FEINBERG: THE PROBLEM IS THAT WHAT
14:51:47 20 WE ARE ALLEGED TO DO IS NOT TO SAY -- NOT TO USE
14:51:50 21 FREECYCLE TO -- IN A CONFUSINGLY SIMILAR WAY.

14:51:54 22 WHAT THEY'RE ACTUALLY SAYING, IF YOU READ
14:51:55 23 IT, IS THAT WE WERE ENCOURAGING PEOPLE TO USE IT IN
14:51:58 24 A NON-TRADEMARK WAY FOR THE PURPOSE OF DESTROYING A
14:52:02 25 TRADEMARK.

14:52:04 1 THAT'S TRADEMARK INFRINGEMENT, AND THAT'S
14:52:06 2 NOT ACTIONABLE.

14:52:07 3 AND IF WE HAD A LICENSE TO USE IT AND WE
14:52:11 4 ENCOURAGE OTHER PEOPLE TO USE IT, IT'S NOT
14:52:14 5 ACTIONABLE.

14:52:15 6 AND SOME OF THOSE FOLKS WILL TURN OUT TO
14:52:18 7 HAVE BEEN NAKEDLY LICENSED AT WELL.

14:52:20 8 AT THIS POINT THEY HAVEN'T ESTABLISHED --
14:52:22 9 NOTWITHSTANDING WHAT OPPOSING COUNSEL SAYS, THEY
14:52:25 10 HAVEN'T ESTABLISHED A RIGHT TO ANYTHING.

14:52:26 11 THEY MADE A REGISTER, OR AN APPLICATION
14:52:29 12 TO REGISTER THE MARK.

14:52:30 13 WE OPPOSED.

14:52:31 14 IT WAS STAYED AT THEIR REQUEST, AS PEOPLE
14:52:33 15 TEND TO DO WHEN THERE'S A DISTRICT COURT ACTION,
14:52:35 16 AND THEY'RE ENTITLED TO STAY IT.

14:52:37 17 BUT THEY DON'T -- THEY HAVE A PURPORTED
14:52:39 18 MARK. THEY DON'T HAVE ANY MARK AT THIS POINT.

14:52:41 19 THE COURT: OKAY. AND WHAT ABOUT THE
14:52:43 20 FALSE ADVERTISING CLAIM AGAINST YOU?

14:52:45 21 MR. FEINBERG: IF WE HAD A LICENSE TO USE
14:52:48 22 THE WORD "FREECYCLE" AND WE USED IT, WE WERE
14:52:51 23 NAKEDLY LICENSED AND WE CAN'T BE GUILTY OF FALSE
14:52:54 24 ADVERTISING.

14:52:54 25 THE COURT: SHE'S SAYING YOU SAID BAD

14:52:55 1 THINGS ABOUT THEM, MAYBE THAT THEY WEREN'T WARM AND
14:52:59 2 FUZZY, OR THAT THEY WERE STALINISTIC, OR WHO KNOWS
14:53:02 3 WHAT. I'M NOT SURE EXACTLY WHAT IT IS.

14:53:04 4 MR. FEINBERG: BUT THAT'S NOT A CLAIM FOR
14:53:06 5 FALSE ADVERTISING.

14:53:07 6 AND, UNFORTUNATELY, WE'RE GETTING A
14:53:09 7 LITTLE BIT IN BETWEEN -- THE NINTH CIRCUIT HAS GONE
14:53:12 8 HEAD-ON ON A LOT OF THE ISSUES THAT YOU'RE ASKING
14:53:14 9 ABOUT.

14:53:14 10 THE COURT: OKAY. I'LL HAVE TO READ IT.

14:53:16 11 SO MAYBE WHAT WE SHOULD DO IS HAVE SOME
14:53:18 12 POST-HEARING BRIEFS THAT WOULD ADDRESS HOW THE
14:53:21 13 NINTH CIRCUIT'S OPINION WOULD AFFECT THE ISSUES.

14:53:23 14 MR. FEINBERG: OKAY. SO IT DOESN'T
14:53:24 15 AFFECT NAKED LICENSING AT ALL.

14:53:27 16 IT DOESN'T AFFECT THE COUNTERCLAIMS,
14:53:28 17 WHICH IS WHY I ASKED FOR PERMISSION TO FILE A
14:53:30 18 MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIMS.

14:53:33 19 THE COURT: YOU ALREADY DID. BUT ANOTHER
14:53:34 20 ONE?

14:53:35 21 MR. FEINBERG: YEAH, BASED ON THE NINTH
14:53:37 22 CIRCUIT CASE.

14:53:37 23 THE COURT: OKAY. WELL, I GUESS WE COULD
14:53:39 24 PUT IT THAT WAY, OR WE COULD SAY THAT IT WAS IN
14:53:42 25 FURTHER SUPPORT OF YOUR MOTION YOU'VE ALREADY MADE

14:53:44 1 FOR SUMMARY JUDGMENT ON THE COUNTERCLAIMS.

14:53:45 2 MR. FEINBERG: I THINK THEY'RE ACTUALLY
14:53:46 3 DIFFERENT ISSUES, SO I WOULD PREFER IT AS A
14:53:48 4 SEPARATE MOTION, AND IT'LL BE SHORT BECAUSE
14:53:50 5 BASICALLY I'M GOING TO CITE THE ONE CASE.

14:53:53 6 THE COURT: OKAY. ALL RIGHT. WELL, WHEN
14:53:56 7 DO YOU WANT TO FILE IT?

14:53:58 8 MR. FEINBERG: IN THE NEXT FOUR WEEKS.

14:53:59 9 THE COURT: HOW ABOUT SOONER?

14:54:04 10 MR. FEINBERG: CAN WE HAVE THREE WEEKS?
14:54:06 11 WE'RE GOING TO HAVE -- DENNIS, WHO'S MY LEAD GUY,
14:54:10 12 HAS LEFT THE FIRM, SO I'M A LITTLE BIT SCRAMBLED.

14:54:13 13 THE COURT: OKAY. ALL RIGHT. WE'LL MAKE
14:54:16 14 IT FOUR.

14:54:18 15 MS. KOBIALKA: WILL WE HAVE AN
14:54:19 16 OPPORTUNITY TO RESPOND TO THIS? WE'RE GOING TO DO
14:54:22 17 A FULL BRIEFING?

14:54:22 18 THE COURT: YEAH. YOU CAN FILE YOURS TWO
14:54:24 19 WEEKS LATER, AND YOU FILE YOURS A WEEK AFTER THAT.

14:54:27 20 I DON'T THINK I'LL NEED TO HAVE A HEARING
14:54:28 21 ON IT. I'LL JUST DECIDE IT ON THE PAPERS.

14:54:31 22 AND I WON'T RULE ON THIS UNTIL I GET
14:54:32 23 THAT, BECAUSE SOME OF THAT MIGHT AFFECT THIS.

14:54:35 24 YOU CAN ADDRESS IN THAT HOW THE NINTH
14:54:38 25 CIRCUIT'S OPINION MAY INFLUENCE WHAT WE ALREADY

14:54:42 1
14:54:43 2
14:54:43 3
14:54:45 4
14:54:47 5
14:54:49 6
14:54:51 7
14:54:54 8
14:54:55 9
14:54:58 10
14:55:00 11
14:55:06 12
14:55:09 13
14:55:12 14
14:55:14 15
14:55:16 16
14:55:17 17
14:55:18 18
14:55:19 19
14:55:20 20
14:55:21 21
14:55:23 22
14:55:26 23
14:55:27 24
14:55:28 25

HAVE BEFORE US.

MR. FEINBERG: OKAY.

THE COURT: NOW, DO YOU HAVE ANY OTHER DATES FOR ANYTHING?

OH, YOU HAD A DISPOSITIVE MOTION CUT OFF. YOU DON'T -- YOU'RE NOT HOLDING BACK ANYTHING TO MAKE A DISPOSITION MOTION CUT OFF?

MR. FEINBERG: WELL, AT SOME POINT, IF THE THING ISN'T OTHERWISE RESOLVED -- AND I INTEND TO HAVE A HALLWAY CONVERSATION WITH OPPOSING COUNSEL AS TO WHY THEY WANT US OUT OF HERE, BUT THE -- AT SOME POINT THERE'S GOING TO BE CROSS-MOTIONS ON WHETHER THIS THING IS A MARK, IF WE STILL HAVE STANDING AT THAT POINT.

THE COURT: WHY DON'T YOU ADDRESS THAT IN YOUR NEW MOTION?

MR. FEINBERG: OKAY. BECAUSE IF IT'S GRANTED, I DON'T KNOW IF WE HAVE STANDING.

THE COURT: WELL, WOULD YOU LOOK INTO THAT?

MR. FEINBERG: YES. THERE'S NOT A LOT OF NAKED LICENSE CASES ANYWAY, SO I HAVE MY DOUBTS OF HOW CLOSE I'LL GET.

THE COURT: YEAH, BECAUSE I WANT TO BE ABLE TO KNOW BY THE END OF THE NEXT ROUND OF

14:55:30 1 BRIEFING WHAT, IF ANYTHING, THERE IS LEFT.

14:55:33 2 MR. FEINBERG: ME, TOO.

14:55:34 3 MS. KOBIALKA: AND IN LIGHT OF DOING ALL
14:55:35 4 THIS BRIEFING THIS EARLY, WE DON'T WANT ANY
14:55:38 5 COMPLAINTS ON THEIR SIDE TO THE EXTENT THAT WE GET
14:55:41 6 EXPERTS TO PROVIDE DECLARATIONS IN THIS MATTER,
14:55:43 7 PARTICULARLY AS IT RELATES TO THE NINTH CIRCUIT
14:55:46 8 OPINION, THAT THEY HAVEN'T HAD THE OPPORTUNITY TO
14:55:48 9 GET DISCOVERY BECAUSE THEY'RE DOING THIS WELL
14:55:50 10 BEFORE ANY OF THE EXPERT DISCLOSURES THAT WE HAD
14:55:52 11 AGREED TO IN THIS CASE.

14:55:54 12 THE COURT: WHAT WOULD YOU NEED EXPERTS
14:55:55 13 FOR?

14:55:55 14 WELL, LET'S PUT IT THIS WAY: IF YOU HAVE
14:55:57 15 SOME EXPERTS YOU WANT TO RELY ON IN YOUR
14:56:01 16 OPPOSITION, YOU CAN DO THAT.

14:56:01 17 AND YOU CAN -- IF YOU NEED TO DEPOSE THEM
14:56:03 18 BEFORE YOU FILE YOUR REPLY, I GUESS YOU CAN EITHER
14:56:07 19 STIPULATE OR MOVE FOR AN EXTENSION OF TIME TO FILE
14:56:09 20 YOUR REPLY.

14:56:10 21 BUT I DON'T SEE ANY NEED FOR EXPERTS IN
14:56:12 22 THIS CASE.

14:56:13 23 MS. KOBIALKA: I THINK THERE'S A NUMBER
14:56:13 24 OF ISSUES THAT MAY COME UP, AND IT'S GOING TO
14:56:16 25 DEPEND ON WHAT THE BRIEFING SAYS AS WELL, THAT MAY

14:56:18 1
14:56:21 2
14:56:23 3
14:56:26 4
14:56:29 5
14:56:32 6
14:56:36 7
14:56:39 8
14:56:41 9
14:56:43 10
14:56:45 11
14:56:45 12
14:56:47 13
14:56:49 14
14:56:52 15
14:56:54 16
14:56:56 17
14:56:56 18
14:56:58 19
14:56:59 20
14:57:00 21
14:57:02 22
14:57:03 23
14:57:06 24
14:57:07 25

ACTUALLY MAKE EXPERT TESTIMONY APPROPRIATE.

THE COURT: I DON'T TAKE EXPERTS ON THE
LAW, SO DON'T GET ANY EXPERTS ON TRADEMARK LAW.

MS. KOBIALKA: IT'S NOT.

THE COURT: OKAY. AND THEN -- SO WE'VE
GOT A FURTHER CASE MANAGEMENT CONFERENCE ON THE
20TH OF FEBRUARY. WE'LL WORRY ABOUT THAT LATER.

AND YOU'VE ALREADY TRIED TO SETTLE. YOU
WEREN'T ABLE TO SETTLE, I GUESS.

THAT WAS A WHILE AGO. YOU WANT TO TRY TO
SETTLE AGAIN.

MR. FEINBERG: WE SPENT WEEKS IN
MEDIATION BEFORE AN OUTSTANDING NINTH CIRCUIT
MEDIATOR AND WE WENT AROUND AND AROUND AND AROUND.

THE COURT: BACK IN JUNE OF '06.

MR. FEINBERG: NO.

THE COURT: WHEN WAS THIS?

MS. KOBIALKA: WE WENT ALL THE WAY
THROUGH --

THE COURT: OH, BECAUSE YOU HAD THE NINTH
CIRCUIT THING IN CONNECTION WITH THE OTHER CASE.

THAT'S ANOTHER QUESTION I HAVE. WHAT'S
THE STATUS OF THAT OTHER CASE, AND DOES IT MAKE
SENSE FOR US TO HAVE TWO CASES?

MR. FEINBERG: IT DOESN'T, BUT YOU'VE GOT

14:57:10 1 THE NINTH CIRCUIT DECISION THAT STAYED IT.

14:57:13 2 MS. KOBIALKA: ACTUALLY, NO. THE NINTH

14:57:14 3 CIRCUIT --

14:57:16 4 THE COURT: THEY REMANDED.

14:57:16 5 MS. KOBIALKA: THEY REMANDED, EXACTLY.

14:57:16 6 AND THAT CASE IS STAYED, AND IN THE

14:57:18 7 OPINION, THEY ACTUALLY HAD A FOOTNOTE THAT -- THEY

14:57:18 8 ACTUALLY HAVE AN OPINION SAYING THAT THERE ARE

14:57:21 9 OTHER CAUSES OF ACTION THAT THE FREECYCLE NETWORK

14:57:23 10 HAS.

14:57:23 11 SO I'M NOT SURE WHETHER THAT --

14:57:25 12 THE COURT: SO THE JUDGE IN THE OTHER

14:57:26 13 CASE STAYED HIS CASE?

14:57:28 14 MR. FEINBERG: AFTER HE ISSUED A

14:57:29 15 PRELIMINARY INJUNCTION, HE STAYED IT.

14:57:31 16 THE NINTH CIRCUIT THEN STAYED THE

14:57:33 17 PRELIMINARY INJUNCTION AND REVERSED IT, BUT THAT

14:57:35 18 DOESN'T UNSTAY THE CASE. SO IT'S STILL STAYED.

14:57:37 19 THE COURT: AND HE STAYED IT PENDING THIS

14:57:39 20 CASE?

14:57:39 21 MR. FEINBERG: YES.

14:57:40 22 THE COURT: PENDING THIS CASE?

14:57:41 23 MR. FEINBERG: YES.

14:57:41 24 THE COURT: AND DID WE TALK ABOUT WHETHER

14:57:41 25 HIS CASE COULD BE TRANSFERRED HERE OR MY CASE COULD

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BE TRANSFERRED THERE?

MS. KOBIALKA: THEY TRIED TO TRANSFER THE ARIZONA CASE HERE. IT WAS REJECTED. IT WAS DENIED. THE REQUEST WAS DENIED.

MR. FEINBERG: THIS WAS NOT ME. WE HAD -- MR. OEY, WHO'S THE ONLY INDIVIDUAL, HIS INSURANCE DEFENSE COUNSEL DID IT AND IT WAS NOT TRANSFERRED.

WE WERE NOT OF RECORD.

THE COURT: OKAY. WELL, IF THERE'S NEW AND DIFFERENT GROUNDS BASED ON THE OPINION, YOU CAN CERTAINLY TRY AGAIN.

I MEAN, IT WOULD BE GOOD TO GET THESE THINGS RESOLVED.

OR YOU CAN MOVE TO TRANSFER MY CASE TO ARIZONA. I'D LIKE THAT.

MR. FEINBERG: WE WILL NOT BE DOING THAT, YOUR HONOR.

MS. KOBIALKA: WE'D BE HAPPY TO DO THAT IF YOU WANT.

THE COURT: OKAY. THANK YOU.

MS. KOBIALKA: THANK YOU, YOUR HONOR.

MR. FEINBERG: THANK YOU.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)