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9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**
 11 **OAKLAND DIVISION**

13 FREECYCLESUNNYVALE,
 14 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,
 25 a California unincorporated association,

26 Counterdefendant,

CASE NO. C 06-00324 CW

**OPPOSITION TO
 FREECYCLESUNNYVALE'S
 ADMINISTRATIVE MOTION FOR
 RECONSIDERATION OF THIS COURT'S
 AUGUST 10, 2007 ORDER DENYING
 PLAINTIFF'S MOTION FOR SUMMARY
 JUDGMENT WITHOUT PREJUDICE**

I. INTRODUCTION

Plaintiff FreecycleSunnyvale (“Plaintiff”) makes an inappropriate Motion for Reconsideration of this Court’s August 10, 2007, Order Denying Plaintiff’s Motion for Summary Judgment Without Prejudice (“Motion”), seeking to have its Motion for Summary Adjudication Under Fed.R.Civ.P. 56 (“MSJ”) heard on September 13, 2007. Wholly apart from the fact that counsel for The Freecycle Network is now not available on September 13, 2007 for such a hearing, there is simply no good cause to permit Plaintiff’s premature MSJ at this point in the case.¹ As a preliminary matter, The Freecycle Network would like to complete discovery in this case, including expert discovery, so it can file, if appropriate, its own summary judgment motion, as well as fully and properly oppose Plaintiff’s MSJ, so that all motions can be heard at the same time. For example, The Freecycle Network has yet to take the deposition of at least one important witness, Tim Oey, one of the founders of Plaintiff. Declaration of Esha Bandyopadhyay in Opposition to Freecyclesunnyvale’s Administrative Motion for Reconsideration of this Court’s August 10, 2007, Order Denying Plaintiff’s Motion for Summary Judgment Without Prejudice (“Bandyopadhyay Dec.”), filed herewith, ¶¶ 2-3.

Moreover, this Court has explicitly stated that it “prefers to consider all summary judgment motions and cross-motions at the same time.” *See* Order Granting as Modified the Parties’ Stipulated Request for Order Changing Time (Docket Entry No. 81) (“July 30, 2007 Order”) at 1-2.² As such, hearing all related motions at the same time would be in compliance with this Court’s Order. *See id.* When The Freecycle Network attempted to meet and confer with Plaintiff regarding this Court Order, Plaintiff ignored The Freecycle Network’s multiple requests to discuss the matter, forcing The Freecycle Network to file its Administrative Motion

¹ Plaintiff failed to comply with the local rules, which imposes a 5 page limit for all motions for administrative relief. L.R. 7-11(a). Furthermore, Plaintiff did not even attempt to meet and confer with The Freecycle Network regarding this Motion for Reconsideration.

² The Court also denied Plaintiff’s Motion for Summary Judgment without prejudice “to renoticing for February 28, 2008.” *See* Order Denying Plaintiff’s Motion for Summary Judgment Without Prejudice and Denying Defendant’s Administrative Motion to Change Hearing Date as Moot (Docket No. 85) (“August 10, 2007 Order”).

1 to Change Hearing Date On Plaintiff's Motion for Summary Adjudication. *See* Motion to
 2 Change Time of Hearing on Plaintiff's Motion for Summary Adjudication (Docket Entry
 3 No. 82).

4 Now, without regard to the evidence that The Freecycle Network requires in order to
 5 oppose Plaintiff's premature MSJ, Plaintiff makes the bold unsupported request for a motion for
 6 reconsideration, even though the parties are far from completing discovery or expert discovery.
 7 Contrary to Plaintiff's claims, additional ongoing discovery is required for The Freecycle
 8 Network to file its cross-motions on substantive issues, which are not limited to discovery issues,
 9 as well as to fully develop all relevant facts to oppose aspects of Plaintiff's MSJ.³

10 Here, The Freecycle Network has not had the opportunity to depose all material witnesses
 11 in this case. Bandyopadhyay Dec., ¶¶ 2-3. In fact, The Freecycle Network was contemplating a
 12 cross-motion due to Plaintiff's failure to identify apparently key witnesses during discovery taken
 13 thus far prior to the filing of Plaintiff's MSJ. Specifically, the parties entered into a stipulation to
 14 extend the discovery date to November 1, 2007 and to not propound any additional deposition
 15 notices. On this same day, however, Plaintiff filed its MSJ on July 17, 2007, attaching the
 16 declaration of Miles Dennis Robertson, Jr., an apparently key witness that Plaintiff *never*
 17 *identified* in discovery, including in its initial disclosures and discovery responses.

18 Bandyopadhyay Decl., ¶¶ 2-3, Exhs. A-E. Plaintiff has not provided an explanation as to its
 19 failure to disclose this witness's name and has subsequently supplemented its discovery
 20 responses after filing its MSJ. Bandyopadhyay Decl., ¶ 3, Exh. F. To suggest that no further
 21 discovery is necessary to oppose Plaintiff's MSJ is absurd, particularly since even Plaintiff
 22 realized it needed to supplement its disclosures *after* filing its summary judgment motion.

23 In part, due to Plaintiff's failure to identify this witness, The Freecycle Network was not
 24 fully prepared to submit its motion for summary judgment as a cross-motion by August 9, 2007,
 25 and notified opposing counsel of this fact. Bandyopadhyay Dec. ¶¶ 4-5, Exhs. G-H.

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 27
 28 ³ The parties agreed to cooperatively complete the remaining discovery, which involves
 depositions of a number of witnesses in the case for both sides.

1 Furthermore, contrary to Plaintiff's claims, an expert declaration will likely be necessary for
2 opposing Plaintiff's premature motion, and expert disclosures have yet to occur.

3 Plaintiff's request is likely tempered by its desire to avoid any cross-motions by The
4 Freecycle Network, which will be based in part on the evidence that it is still diligently obtaining
5 through discovery of Plaintiff. The Freecycle Network should not, however, be prejudiced from
6 an opportunity to complete discovery so that it can fully oppose Plaintiff's MSJ, as well as
7 present its own motion for summary judgment, as appropriate. Accordingly, The Freecycle
8 Network respectfully requests that the Court deny Plaintiff's Motion.

9 II. ARGUMENT

10 A. Plaintiff's Motion for Reconsideration is Inappropriate Since Plaintiff 11 Cannot Prove Any Highly Unusual Circumstances.

12 Absent "highly unusual circumstances," reconsideration is appropriate only where the
13 court is presented with newly-discovered evidence, the court "committed clear error or the initial
14 decision was manifestly unjust," or there is an intervening change in controlling law. School
15 Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993); United
16 States v. James, 915 F.Supp. 1092, 1098 (S.D. Cal. 1995). Local Rule 7(b)(1) further provides
17 that the moving party must specifically show a "manifest failure by the Court to consider
18 material facts or dispositive legal arguments which were presented to the Court before such
19 interlocutory order."

20 Plaintiff seeks to dismiss the Court's August 10, 2007 Order, but does not have a
21 reasonable basis for doing so. Plaintiff's attempt to manipulate the language of the local rules
22 cannot hide its failure to meet the requirements explicitly stated in Local Rule 7-9. Here,
23 Plaintiff claims that "[The Freecycle Network] did not apprise the Court of material facts
24 concerning the nature" of Plaintiff's MSJ. Given that Plaintiff simply ignored The Freecycle
25 Network when it attempted to discuss the Court's July 30, 2007 Order and further failed to
26 respond to its administrative motion to the Court, suggesting that The Freecycle Network was
27 somehow at fault for Plaintiff's decision to file a summary judgment motion before the close of
28 discovery and expert discovery is simply not grounds for a motion for reconsideration. Plaintiff,

1 without any notice to The Freecycle Network, filed its MSJ, and did so without attempting to
 2 discuss a mutually agreeable hearing date with The Freecycle Network. It is now absurd to
 3 blame The Freecycle Network as the reason that the Court should reconsider its Order to dismiss
 4 without prejudice Plaintiff's MSJ. The bottom line is that Plaintiff cannot demonstrate that the
 5 Court failed to consider any "material facts or dispositive legal arguments" that were presented to
 6 it before the August 10, 2007 Order. Any attempt by Plaintiff to present facts or legal arguments
 7 now is improper and in violation of the rules.⁴

8 Since Plaintiff failed to bring these issues before the Court's Order, it cannot show that
 9 the Court "manifestly failed to consider these material facts or dispositive legal arguments." *Id.*
 10 Moreover, Plaintiff failed to show that the Court "committed clear error or the initial decision
 11 was manifestly unjust," or that there is an intervening change in controlling law." *See School*
 12 *Dist. No. 1*, 5 F.3d at 1263; *James*, 915 F.Supp. at 1098. As a result, Plaintiff's Motion for
 13 Reconsideration should be denied.

14 **B. Plaintiff Cannot Show that Good Cause Exists for the Court to Reconsider its**
 15 **August 13, 2007 Order.**

16 Plaintiff clearly disregarded the Court's preference regarding dispositive motions and its
 17 specific instruction regarding renouncing the hearing for Plaintiff's MSJ. Moreover, Plaintiff
 18 cannot show that good cause exists as to why the Court should reconsider its Order.

19 **1. Expert Testimony is Likely Necessary to Dispute Plaintiff's**
 20 **Allegations of Naked Licensing**

21 Plaintiff claims that its MSJ raises one discrete issue – determining whether The
 22 Freecycle Network engaged in naked licensing. Plaintiff then continues to make the bare
 23 assertion that "naked licensing issues do not require expert testimony." Motion at 5. However,
 24 in order to determine whether an owner loses its trademark as a result of naked licensing, a party
 25 must meet a high burden of proof that the owner failed to maintain some level of quality control
 26 over a licensee's service. *Edwin K. Williams & Co. v. Edwin K. Williams & Co-East, Inc.*, 542

27 ⁴ Contrary to Plaintiff's claim, Plaintiff's MSJ raises numerous material issues of fact that
 28 make its motion improper for summary adjudication and this issue alone is not dispositive of the
 entire case.

1 F.2d 1053, 1059 (9th Cir. 1976). The required level of actual quality control is flexible and
 2 varies with “the wide range of licensing situations in use in the modern marketplace.”
 3 Barcamerica Intern. v. Tyfield Importers, Inc., 289 F.3d 589, 598 (9th Cir. 2002).

4 Once fact discovery has been completed, it is very likely that expert testimony will be
 5 necessary. Under Federal Rule of Evidence 702, an expert witness may testify in the form of an
 6 opinion if “such testimony would assist the trier of fact to understand the evidence or determine a
 7 factual issue.” Little Oil Co. v. Atlantic Richfield Co., 852 F.2d 441, 446 (9th Cir. 1988). The
 8 mere fact that both parties are “not for profit and represented *pro bono*” does not discredit the
 9 fact that expert testimony may be needed to determine the naked licensing issues. To the
 10 contrary, due to the flexible and informal circumstances of the licensing arrangement between
 11 the parties, expert testimony may be in even greater need to determine if adequate controls are
 12 satisfied in this non-commercial context. Despite Plaintiff’s assertion that it does not need expert
 13 testimony, The Freecycle Network would be prejudiced if it did not have the opportunity to
 14 complete its expert discovery before having to oppose Plaintiff’s MSJ.

15 **2. The Freecycle Network Will Be Severely Prejudiced if the Hearing**
 16 **Date As It Is Not Available That Date And Wishes To Complete**
 17 **Discovery**

18 As stated above, The Freecycle Network is not available for a hearing on September 13,
 19 2007, and would like to complete discovery to fully oppose Plaintiff’s Motion. Plaintiff has
 20 failed to be forthright in discovery by failing to disclose all witnesses in its initial disclosures
 21 and/or discovery responses. In its MSJ, Plaintiff relied on the declaration of an apparently key
 22 witness that it never disclosed to The Freecycle Network. *See* Bandyopadhyay Decl., ¶¶ 2-3.
 23 Further, the depositions of this witness and another key witness, some of which have been
 24 scheduled, have not yet commenced. *Id.* Realizing that The Freecycle Network has not had the
 25 opportunity to conduct all pertinent discovery, the parties stipulated and indeed, the Court
 26 extended the discovery cut-off until November 1, 2007. As a result, discovery is ongoing in this
 27 case. The Freecycle Network would like the opportunity to adequately respond to Plaintiff’s
 28 MSJ upon completion of discovery.

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III. CONCLUSION

Based on the foregoing, The Freecycle Network respectfully requests that the Court enter an order denying Plaintiff's Administrative Motion for Reconsideration of this Court's August 10, 2007, Order Denying Plaintiff's Motion for Summary Judgment Without Prejudice.

DATED: August 16, 2007

PERKINS COIE LLP

By /s/ Lisa Kobialka
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THE FREECYCLE NETWORK, INC.