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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 SUPPORT OF
 MOTION TO SHORTEN TIME**

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

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

22 Counterclaimant,

23 v.

24 FREECYCLESUNNYVALE,
 25 a California unincorporated association,

26 Counterdefendant.

I. INTRODUCTION

1 Pursuant to Civil Local Rule 6-3, Defendant The Freecycle Network, Inc. ("The Freecycle
2 Network") hereby submits the following memorandum of points and authorities in support of its
3 Motion to Shorten Time regarding the briefing schedule for its Motion to Strike, filed
4 concurrently herewith. The Freecycle Network requests expedited briefing such that the Motion
5 to Strike may be heard before the Court on September 27, 2007, concurrently with Plaintiff
6 FreecycleSunnyvale's summary judgment motion (Docket No. 76). The Freecycle Network's
7 Motion to Strike seeks to exclude evidence cited in FreecycleSunnyvale's summary judgment
8 motion and, being thus related, hearing both The Freecycle Network's Motion to Strike and
9 FreecycleSunnyvale's summary judgment motion at the same time will streamline proceedings
10 before the Court by consolidating hearings on two related motions into one. Further, The
11 Freecycle Network will suffer prejudice if an expedited briefing schedule is not granted, because
12 it will be forced to argue at the summary judgment hearing against evidence it was ambushed by
13 and never had the opportunity to take discovery on. The Freecycle Network therefore
14 respectfully requests the Court to grant its Motion to Shorten Time.
15

II. STATEMENT OF FACTS

16 On July 17, 2007, FreecycleSunnyvale filed a motion for summary adjudication, attaching
17 as evidence the Declaration of Miles J. Robertson, Jr. ("Robertson Declaration"), whom
18 FreecycleSunnyvale had never previously identified during fact discovery. FreecycleSunnyvale's
19 summary judgment motion is currently set to be heard on September 27, 2007.
20

21 On August 30, 2007, counsel for The Freecycle Network informed counsel for Freecycle
22 Sunnyvale that it planned to file a motion to strike the Robertson Declaration. Declaration of Lisa
23 Kobialka in Support of The Freecycle Network's Motion to Shorten Time ("Kobialka Decl."), ¶ 2,
24 Ex. 1. To avoid filing a formal motion to shorten time, counsel for The Freecycle Network
25 attempted to meet and confer with counsel for Freecycle Sunnyvale to stipulate to an expedited
26 briefing schedule for the motion to strike, such that it could be heard on September 27, 2007 at
27 the same time as FreecycleSunnyvale's summary judgment motion. Id.
28

1 On August 31, 2007, counsel for FreecycleSunnyvale informed counsel for The Freecycle
2 Network for the first time that it did not represent Mr. Robertson, who is a third party. Id., ¶ 3,
3 Ex. 2. Counsel for FreecycleSunnyvale further refused to stipulate to an expedited briefing
4 schedule regarding The Freecycle Network's Motion to Strike, stating that "[t]here is no need for
5 expedited briefing on a separate motion." Id.

6 Despite FreecycleSunnyvale's response, counsel for The Freecycle Network contacted
7 counsel for FreecycleSunnyvale again on August 31, 2007 in a further effort to resolve the
8 dispute and avoid filing a motion to strike with the Court. Id., ¶ 4, Ex. 3. Counsel for The
9 Freecycle Network proposed that they be permitted to take the deposition of Mr. Robertson prior
10 to filing The Freecycle Network's opposition to FreecycleSunnyvale's summary judgment motion.
11 Id. To date, counsel for FreecycleSunnyvale have not responded to The Freecycle Network's
12 proposal. Id., ¶ 5.

13 III. ARGUMENT

14 A. LEGAL STANDARD

15 Civil Local Rule 6-3 provides that a motion to shorten time must set forth (1) the reasons
16 for shortening time, (2) the efforts made to obtain a stipulation to change time, and (3) the
17 substantial harm or prejudice that would occur if the Court did not change the time.
18

19 B. AN EXPEDITED BRIEFING SCHEDULE WILL STREAMLINE THE 20 PROCEEDINGS BY CONSOLIDATING HEARINGS ON TWO RELATED MOTIONS INTO ONE

21 The Freecycle Network's Motion to Strike bears directly upon FreecycleSunnyvale's
22 motion for summary judgment. It seeks to exclude the Robertson Declaration filed in support of
23 FreecycleSunnyvale's summary judgment motion, which is improperly before the Court because
24 Mr. Robertson was never previously identified by FreecycleSunnyvale until the filing of its
25 summary judgment motion. Because The Freecycle Network's Motion to Strike and
26 FreecycleSunnyvale's summary judgment motion are thus related, it makes sense and would be
27 efficient to hear both motions at the same time.
28

1 **C. THE FREECYCLE NETWORK WILL SUFFER SUBSTANTIAL**
 2 **PREJUDICE IF THE MOTION TO SHORTEN TIME IS DENIED,**
 3 **BECAUSE IT WILL BE FORCED TO ARGUE AGAINST EVIDENCE ON**
 4 **WHICH IT DID NOT HAVE THE OPPORTUNITY TO TAKE**
 5 **DISCOVERY**

6 The Freecycle Network will suffer substantial prejudice if its Motion to Shorten Time is
 7 denied. At the September 27, 2007 hearing on FreecycleSunnyvale's summary judgment motion,
 8 The Freecycle Network will be forced to argue against evidence supporting FreecycleSunnyvale's
 9 summary judgment motion, *i.e.*, the Robertson Declaration, without the benefit of directly
 10 contradictory evidence. Such an unfair advantage is due entirely to FreecycleSunnyvale's
 11 effectively having ambushed The Freecycle Network with the Robertson Declaration after
 12 entering into a stipulation limiting discovery, depriving The Freecycle Network of the opportunity
 13 to depose and propound discovery relating to a key witness.

14 With such apparently uncontroverted evidence, The Freecycle Network faces the very
 15 serious danger that FreecycleSunnyvale will fabricate the appearance of an absence of any triable
 16 issue of fact, thus entitling it to judgment as a matter of law. Thus, denial of The Freecycle
 17 Network's Motion to Shorten Time will cause The Freecycle Network to suffer substantial
 18 prejudice in that it will be required to oppose FreecycleSunnyvale's summary judgment motion
 19 with its hands tied behind its back. This prejudice can only be cured if The Freecycle Network's
 20 Motion to Strike is heard at the same time as FreecycleSunnyvale's summary judgment motion,
 21 which will provide The Freecycle Network with the means to timely challenge and exclude
 22 FreecycleSunnyvale's improper evidence. The Motion to Shorten time should thus be granted.

23 **D. THE REQUIREMENTS OF CIVIL LOCAL RULE 6-3 ARE SATISFIED**

24 Pursuant to Civil Local Rule 6-3(a)(2) and (4)(i), and to avoid filing the present Motion to
 25 Shorten Time before the Court, counsel for The Freecycle Network met and conferred with
 26 counsel for FreecycleSunnyvale to reach a stipulation to shorten the briefing schedule for The
 27 Freecycle Network's Motion to Strike. *See* Kobialka Decl., ¶¶2-3, Exs. 1, 2. Counsel for
 28 FreecycleSunnyvale refused to an expedited briefing schedule, stating that "[t]here is no need for
 expedited briefing on a separate motion." *Id.*, ¶ 3, Ex. 2.

1 In a further effort to meet and confer and resolve this matter without court intervention,
2 The Freecycle Network proposed, in lieu a motion to strike, taking the deposition of Mr.
3 Robertson prior to the time by which it must file its opposition to FreecycleSunnyvale's summary
4 judgment motion. Id., ¶ 4, Ex. 3. The parties discussed extending fact discovery for this limited
5 purpose and had been working toward scheduling the deposition. Id., ¶ 5, Ex. 4. In the interim,
6 however, Plaintiff represented to the Court that all discovery was completed. Further, only days
7 ago, however, counsel for FreecycleSunnyvale informed counsel for The Freecycle Network for
8 the first time that it did not represent Mr. Robertson. Therefore, it has now become necessary for
9 The Freecycle Network to formally subpoena Mr. Robertson, which cannot be accomplished
10 before The Freecycle Network must oppose FreecycleSunnyvale's summary judgment motion.
11 The Freecycle Network's present Motion to Strike and concurrent Motion to Shorten Time were
12 therefore necessitated by FreecycleSunnyvale's delayed disclosure regarding Mr. Robertson's
13 representation.

14 Pursuant to Civil Local Rule 6-3(4)(ii), as stated above, The Freecycle Network's Motion
15 to Strike seeks to exclude to the Robertson Declaration which FreecycleSunnyvale filed in
16 support of its summary judgment motion. The Freecycle Network believes that the Robertson
17 Declaration should be stricken, as FreecycleSunnyvale never identified Mr. Robertson as a person
18 having relevant knowledge until filing its summary judgment motion. The Freecycle Network is
19 currently unaware of FreecycleSunnyvale's position as to why the Robertson Declaration is
20 proper and should not be stricken.

21 Pursuant to Civil Local Rule 6-3(5), all previous time modifications in the case are
22 summarized as follows: On February 2, 2006, the parties stipulated and the Court agreed to
23 extend the time by which The Freecycle Network would file its answer to FreecycleSunnyvale's
24 complaint. On May 5, 2006, the parties stipulated to extending the time for completing
25 mediation, which the Court approved. On July 26, 2006, the parties stipulated to a 90 day
26 extension of fact discovery and other dates in the Court's Case Management Order, which the
27 Court approved. On October 2, 2006, the parties stipulated to and the Court approved a
28 continuance on FreecycleSunnyvale's Motion to Dismiss Amended Counterclaims and Motion to

