

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

THE WEATHER UNDERGROUND, INC.,  
a Michigan corporation,

Plaintiff,

vs.

Case No. 2:09-CV-10756  
Hon. Marianne O. Battani

NAVIGATION CATALYST SYSTEMS, INC.,  
a Delaware corporation; BASIC FUSION, INC.,  
a Delaware corporation; CONNEXUS CORP.,  
a Delaware corporation; and FIRSTLOOK, INC.,  
a Delaware corporation,

Defendants.

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**MOTION AND MEMORANDUM FOR AN ORDER COMPELLING  
COMPLIANCE WITH MAY 25, 2010 ORDER COMPELLING DISCOVERY  
AND TO COMPEL PRODUCTION**

NOW COMES Plaintiff, The Weather Underground, Inc., ("Plaintiff"), by and through its counsel, Traverse Legal, PLC, and pursuant to F.R.C.P. § 37(a)(1), (a)(3)(iii)-(iv) states as follows for its Motion for an Order Compelling Defendant to Comply with its May 25, 2010 Court Order Compelling Discovery (Docket #82) and To Compel Production. In support of this motion, Plaintiff states as follows:

**NCS's Domain Portfolio**

1. Plaintiff served Defendant Navigation Catalyst Systems (NCS) with its First Interrogatories and First Request for Production on January 19, 2010.
2. As part of Plaintiff's First Request for Production, Plaintiff requested in Request No. 35 that NCS "Produce a list of all domains registered by Defendant since inception, including domain registered and later dropped under the Add Grace Period (AGP).
3. Request No. 36 requested specific information related to each domain identified in the list responsive to Request No. 35:

"36. For each domain identified in response to Request # 35 above, produce:

- a. Date of registration;
- b. Registrar used;
- c. All WHOIS information, including administrative, technical, and other contacts;
- d. Archived website displayed, or if archived website is unavailable, a description of website used in connection with the domain name including hyperlinks and meta-tags;
- e. Revenue, both gross and net, and profits from each domain name;
- f. Date when You ceased serving as Registrant;
- g. Reason for having ceased serving as Registrant;

- h. All correspondence received by third parties related to that domain name and all responses thereto.

**RESPONSE:**

4. NCS did not provide documents responsive to Request Nos. 35 or 36.

5. On March 26, 2010, Plaintiff filed a Motion and Brief for an Order Compelling Responses to Plaintiff's First Request for Production and Interrogatories to Defendant (Docket No. 46), including responses to Request Nos. 35 and 36.

6. On April 9, 2010, accompanying NCS's response to Plaintiff's Motion and Brief for an Order Compelling Responses to Plaintiff's First Request for Production, Seth Jacoby, President of NCS's parent corporation, Firstlook, Inc., declared as follows:

"4. Since its inception, NCS has identified approximately 16 million domain names for registration and has registered approximately 1.5 million domain names after the Add Grace Period. Currently, NCS's domain name portfolio contains 320,772 names.

5. I have reviewed Plaintiff's Request for Production Nos. 35-39. Literal compliance with those requests, as drafted, would not be possible for the reasons set forth below. Attempting to comply with this request "as best as possible" would take many weeks if not months, consume all database resources, and require expenditure in capital equipment without any guarantee that data could be retrieved or that data that could be retrieved was accurate and/or easily understood.

6. There are numerous technical hurdles in complying with Request Nos. 35-39, as drafted. They include:

- a. Early registration systems maintained no records at all.
- b. Earlier lists of domains owned were maintained in spreadsheets that no longer exist.
- c. Databases from older systems either no longer exist or were archived to tape long ago.
- d. Trying to restore tape backups and retrieve anything useful would be a major undertaking in itself and may well result in failing to produce anything useful.
- e. Many, larger, older database tables were deleted due to disk space limitations.

f. Interpreting data in older systems would be difficult if not impossible without the engineers who programmed the systems who are no longer around.

g. The systems have been re-written several times which would mean that significant effort would have to be spent determining how the system worked at each iteration and what any surviving data means.

h. Ads, links, and keywords displayed on pages are generated by a third-party and that information is not recorded.

i. Verisign (the registry) only makes the last 3 months of reporting available for records relating to registrar operations, which includes registrations, deletions, transfers, etc.

j. The queries that would need to be written to aggregate any data points for 16 million domains (or as many of them as possible) would be very complex, spanning multiple databases and systems. Simply running them would likely take weeks to complete execution and completely consume all database server resources during that period.

k. Additionally, long running queries of this sort tend to fail mid-execution which would require the process to begin again from the beginning. Indeed, it is not likely possible to even attempt this without an investment in additional hardware.

7. There are various other hurdles in attempting to comply with this request. This is just a small list of potential problems that can be immediately noticed. Suffice it to say that the process would be extremely labor- and cost- intensive and the results cannot be guaranteed. The data that might be extracted could be potentially inaccurate or ambiguous and, ultimately, useless.” (Emphasis Added)

7. Defendant NCS has never explained how or why the spreadsheets which contained the list of domain names were destroyed. Moreover, NCS has never explained why it has not produced the data available from Verisign which is stored for a 3 month period.

8. On April 22, 2010, Plaintiff filed a Motion and Brief to Extend Discovery Cutoff Deadline (Docket No. 70) due in large part to NCS’s failure to provide documents responsive to the aforementioned requests.

9. After having reviewed documents related to both Plaintiff's Motion to Compel Discovery (Docket N. 46), Defendant's Motion to Compel Discovery (Docket No. 61), and Plaintiff's Motion to Extend Discovery (Docket No. 70) and after having conducted two hearings on the issues on May 12, 2010 and May 19, 2010, the Court issued an Order Compelling Discovery (Docket No. 82) on May 25, 2010.

10. In that Order the Court ordered NCS to within 25 days:

"21. With regard to RFP #36, NCS shall produce a list of all domain names registered by NCS for January 1, 2004, July 1, 2004 and each year thereafter on those same dates through 2009. NCS does not need to produce any domains registered and then dropped during the 5 day Add Grace Period (AGP). To the extent NCS alleges that prior registrations are not available or cannot reasonably be produced, NCS is ordered to provide an affidavit stating in detail the specific reasons as to why it cannot produce any such list of domain names. NCS will further provide a Rule 30(b)(6) deponent concerning its assertion that information cannot be reasonably produced."

11. On June 18, 2010, NCS provided a supplemental response to Plaintiff's First Set of Interrogatories and First Request for Production. With regard to Request No. 35, NCS stated as follows:

35. Produce a list of all domains registered by Defendant since inception, including domain registered and later dropped under the Add Grace Period (AGP).

**SUPPLEMENTAL RESPONSE:**

Pursuant to the Order, NCS has conducted a reasonable and diligent search for responsive documents which would show the NCS domain name portfolio as of January 1, 2004 and July 1,

2004 and each year thereafter on the same date through 2009. NCS confirms that it is unable to produce such documents. Pursuant to the Order, an affidavit explaining NCS's inability to produce such documents accompanies this response. As explained in the affidavit, NCS will continue to seek the documents from Iron Mountain. In addition, NCS believes it is possible to obtain a snapshot of domains registered by Basic Fusion on particular dates from Verisign. Although such a snapshot would contain domain names owned by registrants other than Navigation Catalyst Systems who used Basic Fusion as a registrar, at least Verisign can provide some information. NCS is willing to issue a subpoena to Verisign for such information or Plaintiff can issue the subpoena directly, at Plaintiff's option.

12. A declaration by Seth Jacoby supported NCS's supplemental response.

Attached as Exhibit A. Jacoby stated, in relevant part, as follows:

**Request No. 35**

6. I have reviewed the Court's Order regarding Request No. 35 and understand it to require a list of all domain names registered by NCS on January 1, 2004 and July 1, 2004 and every year thereafter on the same dates until 2009.

7. NCS is unable to comply with this request for various reasons detailed below. As a general matter, though, NCS does not keep historic lists of its domain name portfolio. Attempting to recreate the lists at specific moments in time through data sources would not be successful for the reasons I noted in my earlier declaration and which include the following:

- a. Early registration systems maintained no records at all.
- b. Earlier lists of domains owned were maintained in spreadsheets that no longer exist.
- c. Many, larger, older database tables were deleted due to disk space limitations.


- d. Interpreting data in older systems would be difficult if not impossible without the engineers who programmed the systems who are no longer around.
- e. The systems have been re-written several times which would mean that significant effort would have to be spent determining how the system worked at each iteration and what any surviving data means.

8. After reviewing all currently-available data sources available to NCS and conferring with my on-staff engineers, it was determined that it was not possible to recreate such lists with accuracy. As a result, we considered possible alternatives for purposes of satisfying this request.

9. For example, starting in March 2009, we have periodically sent portfolio snapshots to Iron Mountain. We were able to locate copies of the files sent to Iron Mountain. Unfortunately, they have been encrypted using Iron Mountain's public key, and we are unable to open these files.

10. We contacted Iron Mountain to determine whether we could get the snapshot for June 1, 2009 directly from them but were informed that the person who handles these requests was presently in Europe and, therefore, difficult to reach, and Iron Mountain would not release the documents without approval from ICANN regardless.

Executed on this 17<sup>th</sup> day of June 2010 at New York, New York.



Seth Jacoby

13. Seth Jacoby admits that they maintained lists of domains, par. 7b., but states in the most conclusory fashion that these spreadsheets “no longer exist.” The domain name lists that were stored as data were supposedly destroyed because of “space limitations.” Other data, which includes the list of domain names, apparently exists but can allegedly only be extracted by unspecified employees who no longer work for NCS.

14. There could be no legitimate reason to destroy the above referenced spreadsheets which contained the list of domains registered by NCS, and we suspect other valuable data, except to destroy valuable evidence of cybersquatting other trademarks by NCS.

15. The key issue in this case is whether NCS has engaged in ‘bad faith’ cybersquatting and thus is liable for statutory damages. Under the ACPA, the issue of bad faith intent is determined by reviewing a variety of factors, the most important one being a review of NCS’s domain portfolio to determine if NCS’s registration of typos of Plaintiff’s trademarks is isolated. For instance, 15 U.S.C. § 1125(d)(1)(B)(VIII) provides that one of the bad faith factors is whether: “the registrant’s registration or acquisition of multiple domain names that are identical or confusingly similar to marks of others.” NCS has admitted in discovery that it had no permission from any third party trademark owner to register confusingly similar domain names.

16. NCS has argued and will no doubt continue to argue at trial that they are not a mass cybersquatter and that they engage in all sorts of activities, such as blacklisting trademarks to avoid registering typos of trademark protected names and



purging their domain portfolio of ones that have apparently snuck by. NCS has maintained that their registration of trademarks is isolated and compromises only a small part of their portfolio of domains.

17. If a significant percentage of NCS's domain portfolio are typos of trademarks, a jury will likely reject NCS's defenses and conclude that NCS's business model is to target and violate trademarks, including those of the Plaintiff. There could be no more powerful evidence of "bad faith" intent, triggering statutory damages, than the content of their domain portfolio. Conversely, NCS should welcome the opportunity to establish the cleanliness of their domain portfolio.

18. Allowing NCS to make the "we are not mass cybersquatters" argument while at the same time having intentionally destroyed and/or refused to produce its list of domains is patently unfair and prejudicial to Plaintiff, which will be unable to effectively impeach these bogus defenses, which go to the heart of this case.

19. To date, NCS has not provided documents responsive to Request No. 35, namely a list of all domain names registered by NCS for January 1, 2004, July 1, 2004 and each year thereafter on those same dates through 2009, as required in paragraph 21 of the May 25, 2010 Order Compelling Discovery.

20. It is beyond credibility that NCS can not reproduce any list of domain names it owns and has owned, total or partial, either itself or through one of its companies such as domain Registrar, Basic Fusion, or its Parking Company, Firstlook. Moreover, to the extent NCS is utilizing proxy services to protect its domain portfolio, it

would have to have a list of domains it owns that utilize such a service, through Domain Name Proxy, LLC or otherwise.

**NCS's Ownership of Domain Names Incorporating Plaintiff's Trademarks**

21. Not only has NCS failed to produce its entire domain portfolio for the relevant period (2004 to present), but it has even failed to completely produce the domain names it owns, or has owned, incorporating Plaintiff's trademarks. Specifically, as part of Plaintiff's First Request for Production, Plaintiff requested in Request No. 31 that NCS produce documents related to all of the Domains At Issue, which was defined, in paragraph 5, to include all of the known domain names listed in the Complaint as well as "any other domains registered now or at any time by NCS incorporating all or some of Plaintiff's registered trademarks."

5. "Domains At Issue" means: <qwunderground.com>, <swunderground.com>, <wundertground.com>, <wunederground.com>, <wunnderground.com>, <winderground.com>, <wumderground.com>, <wundeerground.com>, <wunderfround.com>, <wundergtound.com>, <wundergroundr.com>, <udergroundweather.com>, <undegroundweather.com>, <undergroundweather.com>, <undergroudweather.com>, <undergroundwaether.com>, <undergroundwwweather.com>,

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31. Produce all Documents related to the registration of each Domain At Issue and for each domain:

- a. Date of registration;
- b. Registrar used;
- c. All WHOIS information, including administrative, technical, and other contracts;
- d. Archived website displayed, or if archived website is unavailable, a description of website used in connection with the domain name including hyperlinks and meta-tags;
- e. Revenue, both gross and net, and profits from each domain name;
- f. Date when You ceased serving as Registrant;
- g. Reason for having ceased serving as Registrant; and
- h. All correspondence received by third parties related to that domain name and all responses thereto;

**RESPONSE:**

22. On March 1, 2010, Plaintiff received document production from NCS. NCS000001 listed 41 Wunderground domain names, which coincided with the 41 domain names identified and listed in the Complaint (See Exhibit B NCS000001 Confidential).

23. NCS list failed to include wunderphotos.com, which was also listed in the Complaint at paragraph 80.

24. On April 19, 2010, Plaintiff received supplemental document production from NCS, including NCS010712, which supplemented NCS000001 with 7 additional names, including wunderphotos.com, wwatherunderground.com, whetherunderground.com, uundergroundweather.com, and wunderunderground.com.

25. Tellingly NCS produced this additional list of domain names only after Plaintiff had filed a Motion and Brief for an Order Compelling Responses to Plaintiff's First Request for Production and Interrogatories to Defendant (Docket No. 46) on March 26, 2010. In said Brief, at page 15, Plaintiff listed 6 additional domains that Plaintiff had independently discovered, including wwatherunderground.com, whetherunderground.com, uundergroundweather.com, undergground.com (misspelled in the Brief as underground.com), unerground.com (misspelled in the Brief as underground.com), and wunderunderground.com.

26. Despite NCS providing discovery responses that it had no more domain names similar to Plaintiff's trademark, Plaintiff independently discovered that NCS owns, or has owned, the following 11 typo domain names currently or formally registered to NCS:

- a. theundergroundweather.com
- b. thewunderground.com
- c. tropicalweatherunderground.com
- d. undergroundwhether.com

- e. undergroundweather.com
- f. ugroundweather.com
- g. ugweather.com
- h. wungerground.com
- i. wondergrounds.com
- j. wondergroundweather.com
- k. weatherontheground.com

27. To date, and despite having owned or owning, the aforementioned domains, NCS has failed to supplement its responses with a document responsive to Request No. 31.

28. Even more troubling, it appears that NCS has started to conceal its domain registrations of similar domain names by using proxy services. For instance <http://www.wungerground.com> is one of the recently identified domains never disclosed by NCS which had its NCS Whois status concealed by proxy beginning in November 2009. (Exhibit C; Whois Data).

29. Plaintiff even produced, on June 11, 2010, supplemental discovery responses to NCS in the form of WHOIS Records for the domains listed above, along with printouts of the websites resolving to each of those domain names.

30. Moreover, neither in NCS's supplemental production sent on March 31, 2010, namely NCS000186 and NCS000187 listing statistics related to domain names NCS has identified, nor to date has NCS produced information related to the additional 19 domains discovered by Plaintiff since the filing of the Complaint.

31. Recently, Plaintiff has identified an additional list of nine domain names currently owned by, or at one time owned by, NCS, including:

- a. undergroundw.com
- b. gunderground.com
- c. ranunderground.com
- d. sndunderground.com
- e. underfround.com
- f. underground2.com
- g. undergrownd.com
- h. undunderground.com
- i. undergroundwheather.com

32. NCS, as of July 12, 2010, served its Third Set of Interrogatories to Plaintiff asking:

Interrogatory No. 13: State each and every domain name for which Navigation Catalyst Systems, Inc was or is a registrant thereof which You believe infringes one or more of Your trademarks or service marks or which You believe violates any intellectual property rights You believe you have in any way, and, for each domain, state the date of registration.”

33. NCS is making this request in order to further provide only those domain names that Plaintiff has been able to identify, which to date totals approximately 68 domain names.

34. Furthermore, NCS is attempting to shield its domain name assets and avoid providing critical evidence that goes not only to liability under the ACPA but also

to damages in light of the availability of a statutory award of \$100,000 per domain name.

35. While NCS claims that it cannot reproduce any list of domains that it has registered, even as of today's date, it obviously is working directly with these domains. It appears that some of the domains registered with NCS are now listed with the WHOIS data hidden through the domain proxy service, Domain Name Proxy, LLC. For example, wungerground.com changed from being registered by NCS to Domain Name Proxy, LLC on or about November 17, 2009. (Exhibit C, WHOIS History for wungerground.com).

36. The notion that NCS cannot identify what domains it has registered is not credible. Registrars regularly send out notices and reminders for domain registration renewals, expiration notices and compliance with ICANN registrations, among other correspondence. If NCS has no way to say what domains it owns, how does it manage their domain registrations? How do they know what domains to renew or which domains are profitable? How did their employees fill out the spreadsheet consistent with the CAT Training where clearly lists of domains are provided to employees so they can check the "actual website" and optimize the infringing advertisements by hand? How did they know they owned <http://www.wungerground.com> and potentially thousands of other domains and either delete them or put them under a proxy service? How could there be no lists or emails concerning these issues?

37. Even more telling, NCS's own production, namely NCS000185 (Confidential), which is a trademark system diagram prepared by NCS, contains a box

stating “Entire domain portfolio periodically queued for followup trademark review.” (Exhibit D, NCS000185 Confidential). How can it say on one hand it can queue its “domain portfolio” yet on the other than proclaim that it cannot be produced?

38. Counsel for Plaintiff has contacted a third-party company called DomainTools.com which keeps archival WHOIS data and can produce a “Registrant Report” for NCS, or any registrant for that matter. DomainTools.com has confirmed that it can provide archival WHOIS data and can, for a substantial fee, provide the information required to be produced by NCS in the Court’s May 25, 2010 Order Compelling Discovery.

39. Put simply, NCS failure to provide its global list of domains has made it impossible for Plaintiff to identify other domains owned by NCS which may infringe Plaintiff’s trademarks. NCS has provided discovery responses stating that it has no more domain names infringing Plaintiffs marks NCS has selectively provided domain name registrations it owns that would be at issue in this lawsuit.

#### **NCS Has Failed to Produce Underlying Data**

40. NCS’s handling of discovery to present also questions the credibility of NCS’s excuse that it cannot produce a domain portfolio. Recall that NCS has destroyed all of the threat letters it has received by third parties and their responses to those letters. However, internal spreadsheets show that NCS receives approximately 30 threat letters a month concerning approximately 50 typo domain names. (Exhibit E, NCS0000189-190 Confidential, two pages of a 63 page spreadsheet and one page of a 50 page spreadsheet). In short, it appears that NCS has actively destroyed key



documents and data which would tend to establish their bad faith intent while under constant threat of litigation for cybersquatting from 2004 through present (Exhibit F; Timeline including all known threat letters as identified by NCS in its discovery responses, all domain name arbitrations, and all cybersquatting litigation in federal court.)

41. Moreover, NCS has produced two documents, one of which is identified as CAT Training (Exhibit G, NCS 034884-886 Confidential) and provides instructions for selection of keywords and goes on to describe those keywords' importance to search optimization. For example, the following instructions are provided.

### **3. Domain is about a Hospital in Iowa**

Categorize as: Health & Fitness – Healthcare Info

Keywords: Iowa Hospitals, Iowa Doctors, Healthcare Service

In addition, NCS explains what it is that they do, stating:

Our company owns a list of domain names, usually based off misspellings people have typed in while searching for a particular website. After buying these domains, our goal is to provide accurate enough information that when someone lands on the website, they see what they are looking for, therefore using our search engine.

The other document (Exhibit H, NCS 034887 Confidential) produced by NCS is a spreadsheet template wherein NCS employees/contractors are presented typo domains registered by NCS (interesting since they now say they can't do that), asked identify the "actual" high traffic web site (so in our case, they would have actually gone to Plaintiff's web site wunderground.com), review the content on the non-typo company website, and identify which category of advertisements to show on the typo domain for the high traffic

web site, consistent with the CAT Training. For instance, Exhibit G contains the following statement:

Instructions: Google the domain in order to find the actual website. Then, in the space provided, state what the website is about, listing 3 keywords which pertain to the website.

The examples and/or list provided to employees/contractors contain typos relating to primarily trademark protected high traffic web sites, such as webkinz.com (Quantcast estimates having 1.9 million monthly visitors in the United States), which owns a USPTO trademark WEBKINZ (Reg. No. 3565414). (See Exhibits I and J, Quantcast Results and USPTO Trademark).

42. Despite these 'admissions' from NCS evidencing that employees target advertising keywords for the goods and services used in connection with a company's trademark (i.e. making sure that typos of wunderground.com are shown weather advertisements), NCS has thus far not produced the spreadsheets completed by its employees/contractors which would show, among other things, (a) whether they reviewed Plaintiff's web site, either wunderground.com or weatherunderground.com, to optimize the advertisements to show weather advertisements, (b) which web sites they have reviewed to compare against its typo domain list and (c) how many of those web sites and typo domains contain protected trademarks. Plaintiff has even specifically requested this information from NCS in a July 8, 2010 letter. (Exhibit K.)

43. Recall, NCS despite being under constant threat of bad faith cybersquatting litigation and having actually been actively involved in ACPA litigation for

significant periods has a policy to destroy documents and data on a regular basis, with direction to destroy all emails every 30 days and most other documents, data and records every year. (Exhibit L; Connexus Document Retention Policy NCS000007).

44. The software code for registering domains was supposedly provided as a most recent version. That software refers to and appears to pull data from spreadsheets and databases that address the key issue of what criteria causes a domain to be registered. A schematic provided by NCS clearly identifies two databases which provide data used to determine what domains are registered: (a) "Third Party Data" and (b) "Internal Firstlook Data." (Exhibit M, Domain Registration Schematic NCS000184 Confidential). Neither databases have been provided so that the issue of how NCS selects domain names can be verified. The schematic also refers to "Domains sent to Traffic Scoring Service" yet no traffic scoring documents or data have been provided for any domain name. Recall Plaintiff has alleged and NCS denies that it targets high traffic web sites, while at the same time refusing to provide the most basic evidence relevant to these issues.

45. On August 4, 2010 undersigned counsel conferred with NCS's attorney, Mr. Delgado. Moreover, on August 5, 2010, undersigned counsel sent a letter to Mr. Delgado regarding the issues identified herein. (Exhibit N.) Having failed to resolve these issues, Plaintiff has been forced to seek this Court's intervention.

Wherefore, Plaintiff requests that this Court order:

1. Require NCS to pay for a DomainTools.com Registrant Report which will reproduce the data allegedly destroyed by NCS, that is domain registrations for

January 1 and July 1, from 2004 through 2009, consistent with Paragraph 21 of this Court's May 25 Order Compelling Discovery.

2. NCS produce completed spreadsheets from template NCS034887 or any similar effort to optimize parking pages;
3. NCS produce underlying databases, namely "Third Party Data", "Internal Firstlook Data", and "DNS Error Data" as well as any and all documents related to the box titled "Domains Sent to Traffic Scoring Service" as identified in NCS000184;
4. Pay attorney fees and costs of this motion;
5. Provide such other sanctions are allowed by law.

Respectfully submitted this 9<sup>th</sup> day of August, 2010.

/s/Enrico Schaefer

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## CERTIFICATE OF SERVICE

I hereby certify that on 9<sup>th</sup> day of August, 2010, I electronically filed the foregoing paper with the Court using the ECF system which will send notification of such filing to the following:

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