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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NAVIGATION CATALYST SYSTEMS, INC.S' MOTION FOR SUMMARY JUDGMENT ON ITS AFFIRMATIVE DEFENSE OF LACK OF PERSONAL JURISDICTION

REDACTED VERSION PURSUANT TO PROTECTIVE ORDER

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO THIS HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, pursuant to Fed. R. Civ. P. 56, Defendant Navigation Catalyst Systems, Inc. ("NCS") hereby moves this Court for summary judgment on its third affirmative defense of lack of personal jurisdiction in its Answer to Complaint and Demand for Jury and for entry of an Order dismissing Plaintiff's claims.

This Motion is based on the facts and arguments set forth in the accompanying Memorandum of Points and Authorities; to wit, that NCS does not have the constitutionally mandated "minimum contacts" with the state of Michigan such that the exercise of personal jurisdiction over NCS comports with traditional notions of fair play and substantial justice. In particular, pursuant to the Supreme Court's decision in *Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010), Plaintiff's "principal place of business" is its "nerve center" in San Francisco, California, such that NCS cannot be said to have "expressly aimed" its conduct at the state of Michigan and such that Plaintiff cannot be said to have felt the "brunt of the harm" in Michigan for purposes of the "effects test" enunciated in *Calder v. Jones*, 465 U.S. 783 (1984).

This Motion is supported by the attached Memorandum of Points and Authorities, the case file, and the arguments of counsel that the Court would entertain at a hearing on this Motion.

On or about September 8, 2010, there was a conference between William A. Delgado, counsel for NCS, and Enrico Schaefer, counsel for Plaintiff, in which NCS explained the nature of this Motion and its legal basis and requested, but did not obtain, concurrence in the relief sought.

RESPECTFULLY SUBMITTED this 26th day of October, 2010.

/s/William A. Delgado
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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED

The issues presented in this Motion are:

(1) Whether this Court may exercise general jurisdiction over NCS, given that NCS does not have substantial or "continuous and systematic" contacts with Michigan;

(2) Whether this Court may exercise specific jurisdiction over NCS, given that NCS registers and operates passive websites and, therefore, has not purposefully availed itself of acting in Michigan under the "sliding scale" approach of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997); and

(3) Whether this Court may exercise specific jurisdiction over NCS, given that Plaintiff's "principal place of business" is in San Francisco, California pursuant to the "nerve center" test promulgated by the Supreme Court in *Hertz Corp. v. Friend,* 130 S.Ct. 1181 (2010), such that NCS cannot be said to have "expressly aimed" its conduct at the state of Michigan and such that Plaintiff cannot be said to have felt the "brunt of the harm" there for purposes of the "effects test" enunciated in *Calder v. Jones*, 465 U.S. 783 (1984).

NCS respectfully submits that the answer to each of these issues is "no."

CONTROLLING AUTHORITY

A. Motions For Summary Judgment

Fed. R. Civ. P. 56(c) provides that summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *United States v. Miami Univ.*, 294 F.3d 797, 805 (6th Cir. 2002) (same). "After the moving party has satisfied its burden, the burden shifts to the non-moving party to set forth '*specific facts* showing that there is a genuine issue for trial.'" *Jacob v. Township of West Bloomfield*, 531 F.3d 385, 389 (6th Cir. 2008) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (emphasis added). The non-moving party "cannot rely on conclusory allegations to counter a motion for summary judgment." *Nix v. O'Malley*, 160 F.3d 343, 347 (6th Cir. 1998).

"By its very terms, th[e] standard [set forth in Fed. R. Civ. P. 56(c)] provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). With respect to the materiality requirement, only factual disputes "that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

Before discovery has closed, summary judgment is appropriate where, as here, additional discovery would not lead to genuine issues of material fact. *See Miami Univ.*, 294 F.3d at 815 (holding that district court did not abuse its discretion in denying discovery before ruling on

summary judgment motion where "there were no genuine issues of material fact"); *EBI-Detroit, Inc. v. City of Detroit,* 476 F. Supp. 2d 651, 652 (E.D. Mich. 2007) (noting that "it is appropriate for this Court to decide a summary judgment before discovery has commenced" when it "can decide claims as a matter of law, or where the facts conceded by the parties in their pleadings are sufficient to decide the matter, [and] additional discovery would be superfluous").

B. Determining A Corporation's Principal Place Of Business

In *Hertz Corp. v. Friend,* 130 S.Ct. 1181 (2010), the Supreme Court resolved a split among the Courts of Appeals regarding the interpretation of the phrase "principal place of business" for purposes of determining diversity jurisdiction:

> We conclude that "principal place of business" is best read as referring to the place where a corporation's officers *direct, control, and coordinate the corporation's activities*. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters-provided that the headquarters is the actual center of direction, control, and coordination, i.e., the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Hertz, 130 S.Ct. at 1192 (emphasis added). Applying the "nerve center" test to the petitioner, the Supreme Court found that petitioner's unchallenged declaration suggested that its principal place of business was located in New Jersey. *See id.* at 1195. Nonetheless, the Supreme Court vacated the Ninth Circuit's judgment and "remand[ed] the case for further proceedings consistent with [its] opinion" because "respondents should have a fair opportunity to litigate their case in light of [its] holding." *Id.*

As the Supreme Court made clear in *Harper v. Virginia Department of Taxation,* 509 U.S. 86 (1993): "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and *must be given full retroactive effect in all cases*

still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." 509 U.S. at 97 (emphasis added); *Hatchett v. United States*, 330 F.3d 875, 882-83 (6th Cir. 2003) (following *Harper*). Because the Supreme Court in *Hertz* applied the "nerve center" test to the parties before it, this Court is likewise obligated to apply the "nerve center" test to determine Plaintiff's "principal place of business."

INTRODUCTION

This Court previously determined that it could validly exercise personal jurisdiction over NCS because NCS's conduct was "expressly aimed" at Michigan and Plaintiff felt the "brunt of the harm" in Michigan. This determination was based on Plaintiff's blatant misrepresentations in its Complaint, Response to NCS's Motion to Dismiss, and the Affidavit of Jeff Ferguson that Plaintiff's "principal place of business" is in Ann Arbor, Michigan. The *undisputed facts*, however, establish that Plaintiff's "nerve center" – where its officers direct, control and coordinate the corporation's activities – is, in fact, in San Francisco, California.

For purposes of the "effects test" enunciated in *Calder v. Jones*, 465 U.S. 783 (1984), then, NCS's allegedly tortious conduct would be deemed "expressly aimed" at San Francisco (not Michigan) and any harm to Plaintiff would likewise be felt in San Francisco (not Michigan). Thus, NCS did not purposefully avail itself of the privilege of acting Michigan and the exercise of personal jurisdiction over NCS in Michigan is improper.

STATEMENT OF FACTS

NCS's Operations. NCS is a Delaware corporation with its principal place of business in El Segundo, California. (*See* Declaration of Seth Jacoby dated Apr. 14, 2009 ("Jacoby Decl."), at ¶ 13.)[1] NCS operates as a domain name holding company which acquires domain names in bulk (i.e., it is a "registrant" of domain names). (*Id.* at ¶ 3.) After NCS registers domain names through a registrar, the NCS system submits the domain names to a related domain name monetization company which creates web pages for the domain names. These passive web

[1] The Jacoby Declaration was filed in support of NCS's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) or, in the Alternative, Transfer, filed on April 15, 2009. It is part of the Motion filed as Docket No. 15. NCS hereby incorporates by reference the Jacoby Declaration.

pages consist of hyperlinks to products and services that a visitor might be interested in based on the domain name itself. (*Id*. at ¶ 7.) When a visitor clicks on a hyperlink to a third party advertiser, the user is transported *away* from NCS's domain and to the web site owned by the third party advertiser that provides the product or service the user is seeking. (*Id.* at ¶ 9.) Thus, NCS does not sell any products or services, and visitors to an NCS domain *cannot* conduct any business on that site; they can only click on the hyperlinks or input search criteria into a search box. (*Id*. at ¶¶ 9, 11.)

NCS's Lack of Michigan Contacts. NCS does not have systematic and/or continuous contact with Michigan. NCS does not have an office anywhere in Michigan. (*Id.* at ¶ 14.) NCS does not have any employees, bank accounts or other property in Michigan. (*Id*.) NCS has never filed a lawsuit in the state of Michigan or otherwise availed itself of the Michigan legal system. (*Id*.) NCS does not have a registered agent for service of process in Michigan. (*Id*.) NCS has never sought to qualify to do business in Michigan and NCS does not have a business license in Michigan. (*Id*.)

NCS's only contact with Michigan has been in connection with matters that do not arise from this lawsuit. From time to time, NCS will sell one of its domain names to a third party. For example, as previously noted, NCS sold 8 domain names to corporations who have their principal place of business in Michigan. (*Id.* at ¶ 16.) None of these domain names is related to this case. (*Id.*)

Plaintiff's Office and Operations in Michigan. Plaintiff has an office at 300 North Fifth Avenue, number 240, in Ann Arbor, Michigan. (Dep. of Jeffrey Masters, taken on Aug. 3, 2010 ("Masters Dep.") at 35:1-9.) Only three of Plaintiff's 35 to 40 employees work in this office.

(Dep. of Alan Steremberg, taken on July 28, 2010 ("Steremberg Dep.") at 36:25-37:12.) They include:

- [redacted]. (Dep. of Christopher Schwerzler, taken on Apr. 29, 2010 ("Schwerzler Dep.") at 87:9-12, 100:6-20.) [redacted] (*Id.* at 88:9-13, 89:3-5; Masters Dep. at 22:20-23:3.) [redacted] (Schwerzler Dep. at 88:9-13, 88:25-89:2.)
- One part-time accountant: Kelly Luck. (Masters Dep. at 35:10-15; Schwerzler Dep. at 100:21-101:2.)

Plaintiff also employs two part-time employees in customer support, Christine Stowe and Lori Kilburg, who work remotely from Highland, Michigan and work in the Ann Arbor office once a month. (*Id.* at 100:13-17; Masters Dep. at 20:25-22:9, 35:15-18; Steremberg Dep. at 37:4-12.) [redacted] (Schwerzler Dep. at 97:18-98:11.) [redacted]. (*Id.* at 98:12-99:1.)

Plaintiff's Office and Operations In San Francisco, California. Plaintiff has an office at 185 Berry Street in San Francisco, California. (*Id.* at 100:2-5.) [redacted] (*Id.* at 87:18-21; Steremberg Dep. at 36:25-37:12.) The following executives work in the San Francisco office:

- [redacted]. (Schwerzler Dep. at 88:9-16, 89:23-25.)
- [redacted]. (*Id.* at 88:17-24; 90:1-3.)
- [redacted]. (*Id.* at 88:9-13, 89:6-8; 90:7-8.)
- [redacted]. (*Id.* at 88:9-13, 89:11-13; 90:9-10.)

For the last few years, the annual Board of Directors meeting has taken place in the San Francisco office. (Steremberg Dep. at 55:15-56:2; Schwerzler Dep. at 90:13-17.) The annual shareholders meeting also takes place at this office. (*Id.* at 90:13-20; Masters Dep. at 41:2-13.)

In addition, all but one of at least 6 meteorologists employed by Plaintiff work in the San Francisco office. (*Id.* at 22:20-23:3.) [redacted]. (Schwerzler Dep. at 97:18-98:11.) [redacted]. (*Id.* at 98:12-99:1.)

NCS's Motion To Dismiss. NCS (and other now-dismissed defendants) filed their Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) or, in the Alternative, Transfer ("Motion to Dismiss" or "Mot. Dismiss") on April 15, 2009. Plaintiff filed its response on May 27, 2009, and NCS filed its reply on May 27, 2009. A hearing on the Motion was held on July 22, 2009. This Court's written order granting in part and denying in part NCS's Motion to Dismiss issued on November 13, 2009 ("Order"). *See Weather Underground, Inc. v. Navigation Catalyst Sys., Inc.*, 688 F. Supp. 2d 693 (E.D. Mich. 2009) (hereinafter, "*NCS I*"). In its Order, this Court

implicitly determined that it could not exercise general jurisdiction over NCS. *NCS I*, 688 F. Supp. 2d at 697. However, this Court held that specific jurisdiction was proper pursuant to the three-prong test articulated in *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968).

With respect to the first prong of "purpose availment," this Court noted that the Sixth Circuit has adopted the sliding scale approach of *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), but declined to rule on whether NCS's activities demonstrated purposeful availment under that approach. *NCS I*, 688 F. Supp. 2d at 699-700. Instead, the Court held that Plaintiff had demonstrated "purposeful availment" through the "effects test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984):

> In light of allegations regarding Defendant's purposeful targeting and poaching Plaintiff's successful mark, the Court finds NCS entered into the forum. *Because Weather Underground's principal place of business is in Ann Arbor, Michigan* (Pl.'s Br. 2), and it has claimed infringement of its trademarks under the Lanham Act, . . . *the Court further finds for purposes of this motion that the injury occurred in Michigan.* . . . Although a corporation does not suffer harm in the same manner as an individual, here, the Affidavit of Jeff Ferguson sufficiently satisfies the Court that *the brunt of the injury is felt in Michigan.*

NCS I, 688 F. Supp. 2d at 701 (emphasis added).

With respect to the second prong of *Mohasco Indus.*, this Court held that NCS's activities satisfied this prong because "Plaintiff's claims would not have occurred in [the] absence of NCS's targeting of Plaintiff." *Id.* at 701-02. With respect to the third prong of reasonableness, the Court held that it was reasonable to exercise jurisdiction over NCS because "[t]he burden on NCS is outweighed by Michigan's interest in protecting its citizens from tortious interference with their trademarks as well as Plaintiff's interest in 'obtaining the most efficient resolution of

controversies,' *as its principal place of business is in Michigan* (Pl's Br. 2)." *Id.* at 702 (emphasis added) (citation omitted).

NCS's Motion For Reconsideration. NCS filed a Motion for Reconsideration of the Order ("Recons. Mot.") on November 25, 2009. In that Motion, NCS asked the Court to reconsider whether Michigan is Plaintiff's "principal place of business" such that it can be said that NCS "expressly aimed" its conduct at the state of Michigan and that Plaintiff felt the "brunt of the harm" there for purposes of the "effects test" enunciated in *Calder*. (Recons. Mot. at 1.) In particular, NCS argued that if the Court had analyzed the question of principal place of business pursuant to the "total activity test" employed by the Sixth Circuit, it would have determined that Plaintiff's "principal place of business" is in California. (*Id.* at 4-6.)

NCS also asked the Court to consider whether the matter should be stayed until resolution of *Hertz v. Friend*, 297 Fed. Appx. 690 (9th Cir. 2008), *cert. granted*, 129 S.Ct. 2766 (June 8, 2009), by the Supreme Court of the United States. The Supreme Court granted *certiorari* in that case to resolve a split among the Courts of Appeals regarding the determination of where a corporation's "principal place of business" is located. (Recons. Mot. at 6-8.)

This Court's written order denying NCS's Motion for Reconsideration issued on January 11, 2010 and rested on the premise that "*Plaintiff asserted in its complaint that it was incorporated in Michigan and that Michigan also was its principal place of business.* Compl. at ¶ 1. " (Order Denying Def. NCS's Mot. for Recons. at 2 (emphasis added).) As demonstrated in this Motion, however, Plaintiff's representations to the Court are plainly untrue.

ARGUMENT

I. THE COURT LACKS PERSONAL JURISDICTION OVER NCS.

As detailed in NCS's Motion to Dismiss, which is hereby incorporated by reference, determining whether personal jurisdiction exists is a two-step process. Where, as here, a federal court's subject matter jurisdiction arises from the existence of a federal question, personal jurisdiction over a defendant exists: (1) if the defendant is amenable to service of process under the forum state's long-arm statute, and (2) if the exercise of personal jurisdiction comports with due process. (*See* Mot. Dismiss at 8, citing *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002).) Because Michigan's Long-Arm Statute extends the state's jurisdiction to the limits imposed by the Due Process Clause, the Court only needs to determine whether an assertion of personal jurisdiction over NCS comports with due process. *See Eastman Outdoors Inc. v. Archery Trade Ass'n*, Civil Case No. 05-74015, 2006 WL 1662641, at *7 (E.D. Mich. June 6, 2006) (Battani, J.) (unpublished) ("[W]hether jurisdiction under Michigan's long-arm statute attaches in a particular case requires a determination of whether the exercise of limited personal jurisdiction violates the Due Process Clause . . . ."); *see also* Mot. Dismiss as 8, citing cases.

To subject a defendant who is not present within the forum to a judgment *in personam*, due process requires that he have certain minimum contacts with it "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). "Personal jurisdiction can be either general or specific, depending upon the nature of the contacts that the defendant has with the forum state." *Bird*, 289 F.3d at 873.

A. Plaintiff Cannot Establish General Jurisdiction Over NCS In Michigan.

As set forth fully in NCS's Motion to Dismiss, the exercise of general jurisdiction over NCS in Michigan is not appropriate here because NCS's activities in Michigan are not substantial nor "continuous and systematic." (*See* Mot. Dismiss at 9-10, citing cases.) As noted by this Court, it is undisputed that NCS does not maintain any offices, employees, bank accounts, or other property in Michigan. *NCS I*, 688 F. Supp. 2d at 697; *see also* Jacoby Decl. at ¶ 14. Nor does NCS have a registered agent for service in Michigan, reside in Michigan, have a business license in Michigan, or even visit Michigan. (*Id.*) Moreover, NCS's sale of 8 domain names that are unrelated to this case to corporations with principal places of business in Michigan is insufficient to establish general jurisdiction. (Mot. Dismiss at 9-10, citing *Bird*, 289 F.3d at 873-74; Jacoby Decl. at ¶ 16.) Based on the foregoing, in ruling on NCS's Motion to Dismiss, this Court declined to find general jurisdiction over NCS. *NCS I*, 688 F. Supp. 2d at 697.

B. Plaintiff Cannot Establish Specific Jurisdiction Over NCS In Michigan.

To determine whether the exercise of specific jurisdiction over NCS is proper, the Sixth Circuit applies the three-part test established in *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968):

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Id. at 381. Specific jurisdiction over NCS is permissible only if its contacts with Michigan satisfy *all three parts* of the *Mohasco* test. *Bird*, 289 F.3d at 874.

1. NCS has not purposefully availed itself of the privilege of acting in Michigan or causing a consequence in Michigan.

a. Personal jurisdiction over NCS is improper under the *Zippo* sliding scale approach.

As explained in NCS's Motion to Dismiss, the Sixth Circuit has adopted the sliding scale approach articulated in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), to identify Internet activity that constitutes purposeful availment. (Mot. Dismiss at 11-12; *see also NCS I*, 688 F. Supp. 2d at 699-700.) Under this approach, "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Zippo*, 952 F. Supp. at 1124; *see also* Mot. Dismiss at 11-12. Because NCS's websites are passive websites that simply provide information, no commercial activity takes place on these sites, and visitors to these sites cannot exchange any commercial information with the host computer, personal jurisdiction over NCS *cannot* be constitutionally exercised. *See Zippo*, 952 F. Supp. at 1124 ("A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction.").

b. Personal jurisdiction over NCS is improper under the "effects test."

To satisfy the purposeful availment prong of the *Mohasco* test, Plaintiff may alternatively attempt to rely on the "effects test" articulated by the Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984). Under this test, a court may exercise personal jurisdiction over a defendant if he: (i) commits an intentionally tortious act, (ii) expressly aimed at the forum state, (iii) which causes harm to the plaintiff in the forum state which the defendant knows is likely to be suffered.

NCS I, 688 F. Supp. 2d at 700 (citing *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 835 (N.D. Ill. 2000)). In addition, "the *Calder* test has not been read to authorize personal jurisdiction in a plaintiff's home forum in the absence of 'something more' to demonstrate that the defendant directed this activity toward the forum state." *NCS I*, 688 F. Supp. 2d at 700 (citing *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998)).

Here, the exercise of jurisdiction over NCS in Michigan is improper because Plaintiff cannot satisfy any of the three prongs of the "effects test." Notably, a determination of Plaintiff's principal place of business is necessary to evaluate where NCS's alleged conduct was "expressly aimed" at and where the alleged harm to Plaintiff occurred.

i. This Court must apply the test articulated in *Hertz Corp. v. Friend* to determine Plaintiff's "principal place of business."

In *Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010), the Supreme Court adopted the "nerve center" test for determining a corporation's "principal place of business" for purposes of determining diversity jurisdiction: "'principal place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities."[2] 130 S.Ct. at 1192. Normally, a corporation's headquarters will be its principal place of business. *Id.* Because the Supreme Court in *Hertz* applied the "nerve center" test to the parties before it, this Court is likewise obligated to apply the "nerve center" test to determine Plaintiff's "principal place of business." (*See supra* at 4, citing *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).)

[2] *See* Recons. Mot. at 5, n.4 (explaining why corporation's principal place of business in diversity context is no different than principal place of business for "effects test").

Moreover, that Plaintiff's complaint was filed before the *Hertz* decision issued is of no consequence. *See Hatchett v. United States*, 330 F.3d 875, 883 (6th Cir. 2003) ("'[W]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as "retroactive," applying it, for example, to all pending cases, *whether or not those cases involve predecision events*.'") (emphasis added) (quoting *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995)). Indeed, several district courts in the Sixth Circuit have already applied the "nerve center" test promulgated in *Hertz* to cases filed before that decision issued. *See, e.g.*, *General Motors Co. v. Dinatale*, 705 F. Supp. 2d 740, 743, 745 (E.D. Mich. 2010) (determining plaintiff's "principal place of business" based on test articulated in *Hertz*; complaint filed October 2009); *Harshaw v. Bethany Christian Servs.*, No. 1:08-cv-104, 2010 WL 1692833, at **15, 18 (W.D. Mich. Apr. 26, 2010) (applying *Hertz* to determine previously-dismissed party's "principal place of business" and noting that "all the pre-*Hertz* case law which the parties previously cited, or which this court relied on in *Harshaw 1* (which granted the Harshaws' motion to voluntarily dismiss BCS-HR without prejudice due to the apparent need to preserve diversity), applying the total-activities test, are now irrelevant to the PPB determination").[3]

[3] *Comerica Bank v. Merriweather Road, Ltd.*, No. 09-13497, 2010 WL 2011033 (E.D. Mich. May 19, 2010), represents an anomalous case in which the district court first recognized that the Sixth Circuit's "total activity" test was "no longer good law" following *Hertz*, but then proceeded to apply that test "since it was the prevailing law when [plaintiff] filed this case." 2010 WL 2011033, at *2. The *Comerica* court's failure to apply *Hertz* is directly contrary to the rule of retroactive effect announced by the Supreme Court in *Harper*. (*See supra* at 4.)

ii. There is no genuine dispute that Plaintiff's "nerve center" and thus its "principal place of business" is in San Francisco, California.

Although Plaintiff submitted an affidavit in connection with its Response to NCS's Motion to Dismiss stating that it maintains its "principal office" in Ann Arbor, Michigan, the following undisputed facts establish that Plaintiff's "nerve center" is in fact in San Francisco, California:

- [redacted] (Schwerzler Dep. at 87:18-21); its Ann Arbor office has only two full-time employees and one part-time employee (Steremberg Dep. at 36:25-37:12). In total, Plaintiff employs approximately 35 to 40 employees, including one employee in each of Los Angeles, New York City, and Rhode Island. (*Id.*)
- [redacted] (Schwerzler Dep. at 88:9-24, 89:6-13, 89:23-90:10); [redacted] (*id.* at 87:9-12, 88:25-89:5).
- All but one of at least six meteorologists employed by Plaintiff work in San Francisco; one meteorologist works in Ann Arbor. (Masters Dep. at 22:20-23:3.)
- [redacted]. (Schwerzler Dep. at 97:18-98:11.)
- The annual shareholders meeting takes place in the San Francisco office, and the annual Board of Directors meeting has also taken place there for the last few years. (*Id.* at 90:13-20; Steremberg Dep. at 55:15-56:2; Masters Dep. at 41:2-13.)

Based on the foregoing undisputed facts, it is clear that Plaintiff's San Francisco office is its corporate headquarters. [redacted] (Schwerzler Dep. at 88:9-24, 89:6-13, 89:23-90:10.) Thus, while Plaintiff maintains an office in Ann Arbor, Michigan, its "nerve center" – "the place where [Plaintiff's] high level officers direct, control, and coordinate the corporation's activities" – is undeniably in San Francisco, California.[4] *Hertz*, 130 S.Ct. at 1186; *see also, e.g.*, *Auxter v. Morgan Stanley Smith Barney LLC*, No. 1:10 CV 228, 2010 WL 767030, at *3 (N.D. Ohio Mar. 5, 2010) ("While Defendant MSSB maintains an office in Cleveland, Ohio, from which Mr. Auxter worked, the 'nerve centers' of the corporate members of Defendant MSSB . . . are clearly their corporate headquarters.").

iii. Because Plaintiff's "principal place of business" is in San Francisco, California, Plaintiff cannot satisfy the "effects test."

To satisfy *Calder's* "effects test," Plaintiff must show that NCS's alleged conduct was "expressly aimed" at Michigan and caused harm to Plaintiff in Michigan. (*See supra* at 13.) In ruling on NCS's Motion to Dismiss, this Court found that both of the second and third prongs of the "effects test" were satisfied because: "NCS knew of Plaintiff and its mark as well as Plaintiff's location" and "[b]ecause Weather Underground's principal place of business is in Ann Arbor, Michigan (Pl.'s Br. 2), . . . the Court further finds for purposes of this motion that the

[4] Even under the Sixth Circuit's "total activity" test promulgated in *Gafford v. General Electric Co.*, 997 F.2d 150 (6th Cir. 1993), which is no longer good law following the Supreme Court's decision in *Hertz*, Plaintiff's "principal place of business" is in California. (*See* Recons. Mot. at 4-6, explaining "total activity" test and listing facts supporting California as Plaintiff's "principal place of business.")

injury occurred in Michigan." *NCS I*, 688 F. Supp. 2d at 701. The Court's findings were based on the Affidavit of Jeff Ferguson, which essentially stated that Plaintiff: (1) has its "principal office" in Michigan, (2) routinely employs students from the University of Michigan, (3) derives more than a quarter of its revenue from Michigan, and (4) originated in Michigan.[5] *Id*. Under the "nerve center" test adopted in *Hertz*, however, these statements from the Ferguson Affidavit are neither relevant nor sufficient to establish Plaintiff's "principal place of business" as being in Michigan.

To the contrary, *Hertz* makes clear that mere assertions by a company or its officers as to the location of a company's "principal executive offices", without more, are not sufficient to establish a principal place of business. *Hertz*, 130 S.Ct. at 1195 (rejecting "that the mere filing of a form like the Securities and Exchange Commission's Form 10-K listing a corporation's 'principal executive offices' would, without more, be sufficient proof to establish a corporation's 'nerve center.'"). This applies regardless of whether the declarations were attested to in federal securities filings (the example provided by the Court) or in unsupported statements in an affidavit.

For that reason, the Supreme Court would undoubtedly likewise reject the Affidavit of Jeff Ferguson stating that Plaintiff's "principal office" is in Michigan as sufficient proof to establish Plaintiff's "nerve center." First of all, statement (1) is conclusory and insufficient on its face. Second, as to statements (2) to (4) from the Ferguson Affidavit, these facts are completely ***irrelevant*** under *Hertz* to the determination of Plaintiff's "center of overall direction, control, and

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[5] In its Reconsideration Motion, NCS alerted the Court that despite Plaintiff's representations to the contrary in the Affidavit of Jeff Ferguson and elsewhere, Plaintiff's business is in fact managed by its executive management team in San Francisco. (Recons. Mot. at 4.)

coordination." *Id.* at 1194. Lastly, the undisputed facts noted above regarding Plaintiff's office and operations in San Francisco (*see supra* at 7-8, 16-17) make clear that Plaintiff's "principal place of business" is in San Francisco.

Accordingly, because Plaintiff's "principal place of business" is in San Francisco, then NCS's alleged conduct would be deemed as "expressly aimed" at San Francisco for purposes of the "effects test" and any alleged harm would be felt by Plaintiff in San Francisco. The "effects test," therefore, cannot be met, and Plaintiff cannot satisfy the purposeful availment prong of the *Mohasco* test.

2. <u>Plaintiff's claims do not arise from forum-related activities.</u>

As explained in NCS's Motion to Dismiss and the Jacoby Declaration, Plaintiff's claims do not arise from NCS's "forum-related activities" because NCS conducts no activity in the forum. (Mot. Dismiss at 14; Jacoby Decl. at ¶¶ 14, 15.) In its Order, this Court noted that "Plaintiff's claims would not have occurred in absence of NCS's targeting of Plaintiff," which NCS has disputed. *NCS I,* 688 F. Supp. 2d at 702. While NCS disputes that it targeted Plaintiff, even assuming, *arguendo*, that such targeting occurred, the targeting activity would have been aimed, not at Michigan, but rather at San Francisco, Plaintiff's "principal place of business."

3. <u>The exercise of jurisdiction over NCS in Michigan would not be reasonable.</u>

For the reasons detailed in its Motion to Dismiss, the exercise of jurisdiction over NCS in this action would not be reasonable. (Mot. Dismiss at 15.) In its Order, this Court found that the exercise of jurisdiction would be reasonable because "[t]he burden on NCS is outweighed by Michigan's interest in protecting its citizens from tortious interference with their trademarks as well as Plaintiff's interest in 'obtaining the most efficient resolution of controversies,' as its

principal place of business is in Michigan." *NCS I*, 688 F. Supp. 2d at 702 (citations omitted). The Court also relied on the "effects test" in finding the exercise of jurisdiction was reasonable. *Id.* But, as shown above (*see supra* at 17-18), Plaintiff cannot rely on the "effects test" to show purposeful availment because Plaintiff's "principal place of business" is in San Francisco, not Michigan. For the same reason, the most efficient resolution of Plaintiff's claims would be obtained in California, not Michigan.

Because Plaintiff cannot establish even one part of the *Mohasco* test, let alone *all three parts*, the exercise of personal jurisdiction over NCS in Michigan is therefore improper. *See Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002).

CONCLUSION

For the foregoing reasons, NCS respectfully requests that the Court grant summary judgment in its favor on its third affirmative defense of lack of personal jurisdiction and dismiss Plaintiff's complaint.

RESPECTFULLY SUBMITTED this 26th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 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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