

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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**PLAINTIFF'S MOTION FOR JOINDER TO ADD PARTY  
DEFENDANTS PURSUANT TO FED. RULE OF CIV. PROC. §21**

NOW COMES Plaintiff, The Weather Underground, Inc. (“Plaintiff”), by and through its counsel, Traverse Legal, PLC, and states as follows for its Motion for Joinder to Add Party Defendants in this action.

1. F.R.C.P. §21 authorizes a Federal District Court to add parties on motion of any party or its own initiative at any stage of the action and on terms that are just.

2. Pursuant to Defendant’s earlier Motion to Dismiss, the Court previously found it had personal jurisdiction over Defendant Navigation Catalyst Systems, Inc., for the reason that it was the registrant of the domain names which are the subject matter of this lawsuit, but that Plaintiff had failed to sufficiently state allegations necessary for the Court acquire personal jurisdiction over Defendants Connexus Corporation and FirstLook, Inc. Discovery has established that Connexus Corporation and FirstLook, Inc., are alter-egos of NCS and/or have directly participated in the registration, trafficking and/or use the infringing domains which are the subject matter of this lawsuit. Upon information and belief pursuant to press releases, Connexus Corporation merged with Epic Media Group and is now conducting its business as Epic Media Group (formerly known as Connexus Corporation.

3. Plaintiff will not be afforded meaningful relief without the addition of the requested parties for the reasons indicated in its Brief in Support of Motion for Joinder to Add Party Defendants.

4. Plaintiff relies on its Brief in Support of Motion for Joinder to Add Party Defendants in further support of this Motion.

## **MEET AND CONFER**

5. On October 5, 2010 undersigned counsel conferred with NCS's attorney, Mr. Delgado. Having failed to resolve these issues, Plaintiff has been forced to seek this Court's intervention.

WHEREFORE, Plaintiff prays that this Court respectfully grant its Motion for Joinder to Add Party Defendants and issue Its Order allowing Plaintiff to file its amended complaint to include the joinder of Epic Media Group, LLC, formerly known as Connexus Corporation, and FirstLook, Inc., to the existing claims in the lawsuit.

Respectfully submitted this 18<sup>th</sup> day of November, 2010.

/s/Enrico Schaefer

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## CERTIFICATE OF SERVICE

I hereby certify that on the 18<sup>th</sup> day of November, 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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**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR JOINDER TO ADD PARTY  
DEFENDANTS PURSUANT TO FED. RULE OF CIV. PROC. §21**

NOW COMES Plaintiff, The Weather Underground, Inc. (“Plaintiff”), by and through its counsel, Traverse Legal, PLC, and states as follows for its Brief in Support of Motion for Joinder to Add Party Defendants in this action.

### **Background**

Pursuant to Defendant’s earlier Motion to Dismiss, the Court previously found pursuant to Fed. R. Civ. P. 12(b)(2) that Plaintiff had failed to sufficiently state allegations necessary for the Court to assume personal jurisdiction over originally named Defendants Connexus Corp. (“Connexus”)<sup>1</sup>, FirstLook, Inc. (“FirstLook”), and Basic Fusion, Inc. (“Basic Fusion”). The Court determined it had personal jurisdiction over Defendant Navigation Catalyst Systems, Inc., (“NCS”) as the registrant of the domain names which are the subject matter of this lawsuit, and as the company that was engaged in the registration, trafficking and/or use of the infringing domains which are the subject matter of this lawsuit, and that NCS targeted the Plaintiff in its domain name poaching activities. (See November 13, 2009, Opinion and Order, Exhibit B).

Discovery in this matter has established the conduct of employees and officers of Connexus and FirstLook are pervasive in accomplishing the cybersquatting activities alleged in Plaintiff’s Complaint, and therefore Connexus and FirstLook must be joined in order to afford the Plaintiff the relief it seeks in this matter.

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<sup>1</sup> Upon information and belief pursuant to recent press releases, Connexus Corporation merged with Epic Media Group (“Epic Media”) and is now conducting its business as Epic Media Group. See press release, Exhibit A, and therefore Plaintiff’s will request the Court in its prayer for relief to add Epic Media Group f/k/a Connexus Corp as the proper party in interest in this matter.

**A. Defendant NCS is a Shell Company with No Employees, Bank Accounts or Assets**

While Defendant NCS is the named registrant of the infringing domain names in this matter, it has absolutely no employees or bank accounts! (See transcript of February 11, 2010, hearing on Motion to Compel Initial Disclosures, Exhibit C, pp. 6). NCS has no company financial statements even though NCS is the registrant of the domain names and as owner of the domains should have a valuable domain portfolio. The only financial information produced pursuant to document requests is from Connexus and FirstLook, and none from NCS. Connexus is the sole stockholder of NCS, and Connexus, FirstLook, and NCS share the same CEO, Art Shaw (Exhibit D). There are no monies exchanged among NCS, Connexus, and FirstLook; no invoices for services among NCS, Connexus, and FirstLook; and, no communications between NCS, Connexus, and FirstLook (See Response to Request for Production No. 16, Exhibit E). There are no written agreements among NCS, Connexus, and FirstLook (See Response to Request for Production, number 17-19, Exhibit E). In sum, NCS is simply a corporate shell for the registration of domain names and all of the activities required to implement the cybersquatting activities are performed by Connexus and FirstLook. The Defendant's own expert witness in this case states in his expert's report he was retained by FirstLook (not NCS) to offer an opinion in this case whether First Look filtering systems are designed to prevent the trademark infringement alleged in this case (Exhibit F, excerpt from expert report of Defendant's expert, Richard E. Korf).

**B. Actual Cybersquatting Activities are Conducted by Connexus and FirstLook.**

The registration of the infringing domain names were accomplished by employees of Connexus. Payments made to purchase the infringing domain names were made by someone other than NCS because it has no bank accounts. Efforts to market and sell domain names in the NCS domain portfolio are performed by FirstLook employees (See series of correspondence relating to offer of sale of domain name registered by NCS by FirstLook employee Iris Freeman, Exhibit G). The individual designated as the Domain Name administrator who receives and provides response and review of domain name disputes with trademark holders for NCS is Connexus (now Epic Media) employee Lily Stevenson (See template email, Exhibit H). Lily Stevenson also personally screens domain names for inclusion into the NCS portfolio (See deposition of Lily Stevenson, Exhibit I, pp. 25). All third-party complaints concerning trademark infringement for domain names held by NCS are forwarded to Seth Jacoby, President of FirstLook (See NCS Domain Registration Compliance Standard Operating Procedures, Exhibit J). All of the individuals identified in Defendant NCS's Rule 26 disclosures as having knowledge of matters related to the lawsuit are either Connexus or FirstLook employees (See amended Rule 26 disclosures, Exhibit K).

**C. NCS has been Misrepresented to the Court as an Automated Stand Alone Entity that Selected and Registered the Disputed Domain Names.**

Defendant NCS has asserted from the beginning of the case and throughout discovery it is an automated stand alone entity, and in its earlier Motion to Dismiss convinced the Court its sister companies, Connexus and FirstLook were not involved in



the selection and registration of domains. Defendant has also repeatedly represented to the Court in Motions to Compel discovery from NCS in this matter, that NCS is simply an automated entity with no information to share in discovery. The Magistrate has since found the hide the ball gamesmanship with respect to non-parties Connexus and FirstLook is disingenuous, as indicated by the following ruling from the Magistrate in one of Plaintiff's Motions to Compel Discovery:

“THE COURT: I – I – I don't really understand quite frankly why Judge Battani dismissed all of the companies at the beginning of this case. Andy maybe she'll reconsider that as it goes through.

But your defendants' response earlier that they didn't have any company – any employees and somehow this seemed to have been done by magic or by avatars. I – I did not find particularly forthcoming. I do share some of the plaintiff's concerns about gamesmanship.

I don't like the multiple hats. I don't like the documents coming from one company at one time, another company another time and yet you're claiming they're not sufficiently related to go forward.

So cut the crap. I'm not going to hear it anymore. Answer on behalf of all related companies. And if your guy continues to set up a bunch of extra companies, then you'll answer for them too.

MR. DELGADO: Okay.

THE COURT: Okay, we're done with this discussion.

(Transcript of 5-12-10 hearing, Exhibit L, pp. 10-11.)<sup>2</sup>

As indicated, the facts are now well established that humans from Connexus and FirstLook, select, register, analyze, screen, manage, and monetize the infringing domains! Defendant NCS has misrepresented the true nature of the involvement of

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<sup>2</sup> Please also see Transcript of 2-11-10 hearing, Exhibit C, p. 6, Lines 6 through 23 and Transcript of 3-15-10 hearing, Exhibit M, p. 6, Lines 16 through 21.

Connexus and FirstLook in the scheme to register and commercialize the infringing domains. (See deposition of Donald Misino, Exhibit N, who has worked for FirstLook and now believes he works for Epic Media f/k/a Connexus, p. 26; who worked for the search department of FirstLook which ultimately performed all the domain registration activities for NCS beginning in 2006, pp. 28-36; worked on systems that registered domains for NCS, p. 28; admits that the search department he works for provides search services related to NCS domain registrations, p. 32; and admits that human screeners were the ones that would have provided contextual accuracy for the ads on the web pages for the subject domain, p. 72)

Additionally, employee Lily Stevenson who has worked for Connexus (formerly Vendare Media and presently Epic Media) for the past five years testified she handles the cease and desist letters threatening trademark infringement, UDRP and WIPO complaints for NCS domain names (Exhibit I, p. 16-17). All the cease and desist letters for trademark infringement relative to the domain portfolio are directed at NCS and Stevenson handles them on behalf of NCS who has no employees (Exhibit I, p.65). Ms. Stevenson testified that in every case where a complaint of trademark infringement is received the subject domain names are transferred to the complainant (Exhibit I, p. 17). Stevenson reviews all domain acquisitions for trademark issues (Exhibit I, p. 25). In her deposition, Stevenson provided an explanation of which company she worked for reminiscent of the Abbott and Costello "Who's on First Base" skit, where she explained that although her online Linked In profile says she worked as the domain manager at FirstLook, she explained that FirstLook is an entity of Vendare NetBlue, but that she is

also listed in company literature as the legal compliance manager at Connexus, but that she really does not work for two different companies because those companies are related, and that while she now works for Epic Media she is also working on behalf of FirstLook, and that FirstLook handles domain purchasing on behalf of FirstLook, but those domains are registered to NCS (Exhibit I, pp. 37-41, 45-47, 63-64). It's nearly impossible to follow the interrelationship among Connexus, FirstLook, and NCS and it is certainly beyond disingenuous to argue that the NCS domain portfolio is automated to the extent it requires no employees, income, or assets to acquire, register, and monetize the subject domain names.

Not only should the Court grant Plaintiff's Motion to Add Parties, it should sanction the Defendant for misleading the Court concerning the inter-relationship of the parties, that Plaintiff Wunderground was able to discover only with the aid of the Court in ordering the production of this information from NCS.

### **DISCUSSION AND LAW**

Fed.R.Civ.P. §21 authorizes a Federal District Court to add parties on motion of any party or its own initiative at any stage of the action and on terms that are just. The addition of parties is a matter to be treated liberally and is within the sound discretion of the court. *Messelt v. Security Storage Co.*, D.C. Del. 1951, 11 F.R.D. 342.9. In deciding whether to allow joinder, courts adhere to "the same standard of liberality afforded to motions to amend under Rule 15." *Id.* (quoting *Soler v. G & U, Inc.*, 86 F.R.D. 524, 527-28 (S.D.N.Y.1980)). Thus, while "[i]n the absence of any apparent or declared reason ... the leave sought should, as the rules require, be freely given," a court's refusal to grant

leave to amend is justified on grounds of, inter alia, undue delay and undue prejudice. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). In this case Plaintiff is simply attempting to add back the parties who were named in the original action and dismissed on grounds of lack of jurisdiction and who were all represented by counsel of NCS in this matter.

Plaintiff has requested in its Complaint money damages as well as injunctive relief related to the trademark infringement and cybersquatting activities. It is now known that NCS has no employees, conducts no activities on its own, has no bank accounts or a financial statement listing assets. Neither a money judgment nor injunctive relief against NCS will provide Plaintiff the relief it seeks in this matter by way of compensation for damages or injunctive relief prohibiting the illegal cybersquatting activities. "Plaintiff has properly averred that, absent joinder of these proposed party-defendants, complete relief cannot be accorded among those already parties. Accordingly, pursuant to Fed.R.Civ.P. 21, this Court hereby grants the motion by plaintiff for leave to amend the complaint..." *Day v Video Connection of Solon, Ohio*, 602 F. Supp. 100, 102 (N.D. Ohio 1982). Connexus and FirstLook are the entities performing the activities that are cybersquatting and relief against NCS alone will not afford Plaintiff meaningful relief.

It was unknown at the outset of the case by the Plaintiff or the Court the extent to which Connexus and FirstLook were the actual participants in the cybersquatting scheme the Court found occurred in Michigan for purposes of jurisdiction. In its ruling on Defendants' Motion to Dismiss, this Court found it had personal jurisdiction over NCS

based on the cybersquatting activities of NCS in targeting Ann Arbor based Plaintiff Weather Underground, and that “The scope of the conduct suggests that Weather Underground was a target of the activities engaged in by NCS.” (Court opinion, Exhibit B, at page 13). NCS is not fully automated as represented by Defendants. It is now well established that while NCS is the registrant of the domain names at issue that NCS engaged in little or none of the cybersquatting activity, and that those activities were performed by Connexus and FirstLook personnel. NCS, Connexus, and FirstLook are operated by the same officers and employees. Defendant NCS was simply the registrant entity for the infringing domains, and it is Connexus and FirstLook personnel who reviewed, purchased, registered, and monetized all the infringing domains. Cybersquatting was committed by NCS as the registrant of the domains, as well as Connexus and FirstLook who engaged in the actual conduct and actively identified, reviewed, purchased, registered and monetized the domains. Connexus and FirstLook were the companies who targeted the Plaintiff in the domain poaching activities identified by the Court in its earlier opinion and order that dismissed Connexus and FirstLook for lack of jurisdiction. Connexus and FirstLook are both necessary Defendants in this action required to provide the Plaintiff with the relief requested in its Complaint and must be reestablished as party defendants in this matter.

#### **MEET AND CONFER**

On September 15, 2010 undersigned counsel conferred with NCS’s attorney, Mr. Delgado. Having failed to resolve these issues, Plaintiff has been forced to seek this Court’s intervention.

## **CONCLUSION**

The Court previously found the cybersquatting activities directed at the Plaintiff afforded the Court jurisdiction over this matter and personal jurisdiction over NCS. It is now known that Connexus and FirstLook are the entities actively conducting those cybersquatting activities and NCS is the keeper and registered owner of the infringing domains. Any monetary or injunctive relief ordered by the Court with NCS as a lone Defendant in this matter would be necessarily hollow and incomplete as NCS has no assets or employees. The conduct necessary to engage in the cybersquatting activity alleged in Plaintiff's Complaint are performed by Connexus and FirstLook. NCS, Connexus and FirstLook all have common ownership and are all represented by the same legal counsel, and therefore Connexus and FirstLook cannot demonstrate any prejudice in being reestablished as parties to this action. For all of the reasons stated herein, Plaintiff requests the Court issue it's order granting Plaintiff's Motion for Joinder of Epic Media Group f/k/a Connexus Corp and FirstLook as party Defendants in this matter.

Respectfully submitted this 18<sup>th</sup> day of November, 2010.

/s/Enrico Schaefer

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