IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

THE WEATHER UNDERGROUND, INC.,
a Michigan corporation,

Plaintiff,

v.

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

NAVIGATION CATALYST SYSTEMS, INC.,
a Delaware corporation,

Defendant.

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NAVIGATION CATALYST SYSTEMS, INC.'S RESPONSE TO PLAINTIFF'S MOTION FOR JOINDER TO ADD PARTY DEFENDANTS PURSUANT TO FRCP 21

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STATEMENT OF ISSUES PRESENTED

Should this Court deny Plaintiff's Motion because it fails to comply with governing court rules and also because it fails to satisfy the standard necessary to amend a complaint?

Plaintiff answers "No."

Defendant answers "Yes."

I. INTRODUCTION

Plaintiff's Motion for Joinder is an eleventh hour attempt to cloud the facts and prejudice NCS which, if granted, will add new parties to this case after discovery in this matter (the cut-off for which has already been extended several times) will have closed. This Court should deny this Motion because it is procedurally and substantively defective.

It is procedurally defective because, although disguised as a Rule 21 motion, it is actually a Rule 15 motion to amend pleadings, albeit one that fails to attach a copy of the proposed amended complaint. It is substantively defective because it is untimely, would result in prejudice to NCS, contains futile proposed amendments, and threatens to waste this Court's time given that Plaintiff just recently filed a suit against the very parties it seeks to add in this Motion, concerning the very same allegations, in California.

This dispute has gone on long enough. The parties, and more importantly this Court, have spent countless hours and resources moving this case to a resolution. A dispositive motion is currently pending that, if granted, will dispose of this case in its entirety. Accordingly, this Court should deny this Motion and allow this case to reach its much needed conclusion.

II. STATEMENT OF FACTS

A. Pre-Discovery

On February 2, 2009, nearly two years ago, Plaintiff filed its Complaint in this matter in which it alleged that Navigation Catalyst Systems, Inc., ("NCS"), Basic Fusion, ("Basic"), Connexus Corp., ("Connexus"), and FirstLook, Inc., ("Firstlook"), conspired to violate various federal statutes, and committed various common-law torts, with regard to Plaintiff's various websites. (DE #1, *Plaintiff's Complaint*).

On April 15, 2009, NCS, Basic, Connexus, and Firstlook moved to dismiss on the ground that this Court lacked personal jurisdiction over them. (DE #15, *Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(B)(2) or, in the Alternative, Transfer*). This Court ultimately granted that motion as it related to Basic, Connexus, and Firstlook, and dismissed those parties from this case. (DE #21, *Opinion and Order*). Plaintiff, in its recently filed Opposition to NCS's Motion for Summary Judgment, does not challenge this Court's ruling that it lacks general personal jurisdiction over NCS. (*Plaintiff's Response to Defendant's Motion for Summary Judgment*, p.5, dated November 30, 2010 and filed under seal). As such, this Court's ruling that it lacks personal jurisdiction over Basic, Connexus, Firstlook, and general personal jurisdiction over NCS, remains unchallenged.

Furthermore, in that Motion, NCS, Basic, Connexus, and Firstlook established that personal jurisdiction, according to Sixth Circuit law, cannot be exercised over "passive" websites where no commercial activity occurs, and that the websites at issue in this case were, in fact, "passive." (DE #15, pp. 3. 11-15).

In addition, NCS, Basic, Connexus, and Firstlook explained their inter-relationship, and that their level of corporate connectivity was necessary because, according to ICANN, registration of a domain name can only be done by a registrar which, in turn, cannot be a registrant. (DE #15, Motion to Dismiss, *Declaration of Seth Jacoby*, ¶2). This is why Basic is separately incorporated as a registrar and NCS is separately incorporated as a registrant. (*Id.*, ¶3) Moreover, as pointed out in the initial Motion to Dismiss, Firstlook is a separately incorporated domain name monetization company. (*Id.*) Deposition testimony has underscored this corporate relationship, and differing corporate roles, particularly with respect to Firstlook and Basic, each

of whom have had third-party customers other than NCS. (*Exhibit A, Excerpts from Deposition Testimony of Seth Jacoby and Mavi Llamas*).

B. Discovery

On January 13, 2010, this Court set an initial discovery cutoff date of July 12, 2010. (DE #31, *Scheduling Order*). Plaintiff opposed NCS's proposed longer discovery period of twelve months, advocating instead for a shorter six-month timeframe. (DE #70, *Plaintiff's Motion to Extend Discovery Cutoff Deadline*, ¶¶ 2-5). On April 22, 2010, despite having advocated strenuously for a shorter discovery period, Plaintiff asked this Court to extend the discovery cutoff deadline by 60 days and to set a new discovery cutoff of September 12, 2010. (*Id.*) The Court eventually entered the parties' stipulation for an extension of 90 days. *(Id.*) On September 10, 2010, this Court entered an Order extending the discovery cutoff date, again, to December 10, 2010. (DE #118, *Order*). The Court noted in that Order that "[t]his will be the final extension of dates," given that the cutoff had already been extended two times. (*Id.*)

The parties have engaged in considerable discovery in this matter, as evidenced by the numerous extensions granted by this Court, and have also engaged in considerable discovery-related motion practice. In fact, the parties have exchanged seven sets of interrogatories, eight sets of document requests, and numerous responses and supplemental responses. Plaintiff has served no fewer than 39 third-party subpoenas, and the parties will have conducted approximately 14 depositions by the time discovery finally closes.

III. LAW AND ARGUMENT

A. This Court Should Deny This Motion as Procedurally Defective

The requirements set forth in Rule 15 also apply to motions brought under Rule 21. *E.g.*, *Amore v. Accor North America,* 529 F. Supp. 2d 85, 91-95 (D. D.C. 2008) (analogizing Rule 15

to Rule 21 and denying proposed addition of party defendant as futile because plaintiff failed to adequately state veil-piercing claim); *Cortigiano v. Oceanview Manor*, 227 F.R.D. 194, 201 (E.D.N.Y. 2005) (parties are permitted to add parties under Rule 21 when they have "satisf[ied] the requirements under *Fed. R. Civ. P. 15 (a)* for leave to amend . . . ."); *Sly Magazine, LLC v. Weider Publications*, 241 F.R.D. 527, 532-33 (S.D.N.Y. 2007) (applying traditional Rule 15 factors of undue delay and prejudice in denying motion brought under Rule 21); *Goston v. Potter*, No. 08-cv-478, 2010 U.S. Dist. Lexis 121039, *13-18 (N.D.N.Y. September 21, 2010) (unpublished cases are collected, alphabetized, and attached as *Exhibit B*). Indeed, according to the Tenth Circuit, "Rule 15(a) governs the addition of a party . . . because it is actually a motion to amend." *United States ex rel. Precision Co. v. Kock Indus., Inc.*, 31 F.3d 1015, 1018 (10th Cir. 1994).

As such, in addition to subjecting Rule 21 motions to traditional defenses of futility, undue delay, and prejudice, Rule 21 motions are subject to the requirement, codified at Local Rule 15.1, that "[a] party who moves to amend a pleading shall attach the proposed pleading to the motion." *See also Goston* at *14-15 ("As a motion to amend, however, Plaintiff has not submitted a proposed amended complaint . . . ."); *Termarsch v. Fabrizio & Brook, P.C.*, No. 06-12514, 2006 U.S. Dist. Lexis 86117, *4 (E.D. Mich. November 15, 2006) ("[t]he purpose of this rule is to alert the Court and the opposite party as to what the proposed amendment will do. That way, the opposing party can have a basis for responding to the motion to amend.") (*Exhibit B*).

In this case, Plaintiff, despite in effect asking for leave to amend its Complaint, has not submitted, as required by local rules, a proposed amended complaint. As such, this Motion is dead on arrival and should be denied.

B. This Court Should Deny This Motion as Substantively Defective

In addition to being procedurally defective, Plaintiff's Motion is substantively defective in that it fails to satisfy Rule 15's requirement of timeliness, and that Rule's dictates that courts should not allow amendments that are futile or that will prejudice the non-movant. *Coe v. Bell*, 161 F.3d 320, 341 (6th Cir. 1998) (citations and quotations omitted). Courts also consider the promotion of judicial economy when electing whether to add parties. *E.g., Bank of Okla., N.A. v. Tharaldson Motels II, Inc.*, No. 09-cv-030, 2010 U.S. Dist. Lexis 68603, *10 (D.N.D. July 8, 2010) (*Exhibit B*).

i. This Motion is Untimely

The lack of timeliness is best demonstrated by Plaintiff's delay in bringing this Motion after it learned about the relationship between the parties, and overall delay in seeking information relative to NCS's corporate relationships.

For example, Plaintiff did not notice a deposition in this matter until August, despite serving its first interrogatories and document requests in January. Put differently, during the first seven months of discovery, Plaintiff did not seek to ask a single in-person question of any representative of NCS, EPIC, Connexus, or Firstlook.[1] This delay becomes more conspicuous when considering Plaintiff originally sought to include these parties in this suit. Put differently, after this Court dismissed these parties, rather than immediately delve into discovery relative to their corporate relationship, Plaintiff waited seven months to notice a deposition. Plaintiff's delay caused this Motion to be untimely and appropriate to deny.

[1] Plaintiff will undoubtedly argue that the delay was caused by it having to engage in disputes with NCS regarding various objections to its discovery requests. In reality, these disputes were purely a function of Plaintiff's unrealistic and overbroad requests. Accordingly, this Court should disregard this anticipated excuse and not allow Plaintiff to benefit from the delay it created. In any event, this anticipated excuse does not explain why Plaintiff, to date, has not adequately sought any information relative to the relationship between Connexus and Epic.

Furthermore, Plaintiff's Motion relies on evidence it obtained as early as February 2010, including the transcript from a hearing held by this Court on February 11, 2010. (***Plaintiff's Motion***, p. 3). That hearing occurred over ***nine*** months ago. Moreover, Plaintiff's Motion heavily relies upon the deposition testimony of Lily Stevenson and Donnie Misino which it obtained in August 2010. Despite obtaining this testimony in August, Plaintiff waited almost three months before filing this Motion.

Furthermore, on September 15, at a scheduled meet-and-confer conference, Plaintiff told NCS it was considering adding these parties, yet again waited to do so. Notably, the evidence upon which Plaintiff's Motion relies all pre-dates that meet-and-confer, including NCS's Supplemental Responses to First Set of Requests for Production, attached as Exhibit E to Plaintiff's Motion, which were served on Plaintiff in mid-June. Plaintiff's delay in bringing this Motion, well after it learned of the allegedly supportive evidence, causes this Motion to be untimely and appropriate to deny.

In sum, Plaintiff waited over seven months before conducting depositions in this matter which it now claims produced evidence sufficient to add three defendants to this case, and waited over two months after conducting those depositions, before bringing this Motion. Accordingly, this Court should deny this Motion as untimely.

ii. *Granting this Motion Would Prejudice NCS*

This Court should also deny this Motion in order to avoid prejudicing NCS. As this Court is well aware, this dispute has been filled with significant discovery disputes and motion practice, and has been quite contentious. In fact, at the outset, the parties and this Court engaged in significant motion practice relative to personal jurisdiction that resulted in the dismissal of three parties. Only now, after the parties have exchanged voluminous discovery and conducted

numerous depositions, was this dispute finally nearing a resolution. In fact, currently pending before this Court is a motion to dismiss that could dispose of this case entirely. As stated in *Momentum Luggage v. Jansport, Inc.*:

> Because of the contentious nature of this case, it has consumed an unusual amount of time and resources of the parties and the Court in what should have been a relatively straightforward trademark infringement case. Over the past few months, the parties and the Court have spent considerable time resolving disputes regarding, among other things, Jansport's two motions to compel discovery from plaintiff, Jansport's objections to plaintiff's document requests and interrogatories, the location, timing, and payment of travel expenses and fees for depositions of Jansport witnesses, plaintiff's three requests to send letters to Jansport's customers, plaintiff's request for sanctions, Jansport's Motion to Dismiss the statutory damages claim, and disputes over briefing schedules. It is in the interest of all to bring this litigation to the speedy resolution for which plaintiff has successfully argued in order to put some limit on the burden and cost of this litigation. *Momentum Luggage v. Jansport, Inc.*, No. 00 Civ. 7909, 2001 U.S. Dist Lexis 415, *10-11 (S.D.N.Y. January 23, 2001) (*Exhibit B*); *see also H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 112 F.R.D. 417, 419-22 (S.D.N.Y. 1986)

Furthermore, granting this Motion will undoubtedly reset the clock on this case and usher forth more depositions, interrogatories, document requests, and motion practice. Again, as stated in *Jansport, Inc.*:

> Plaintiff's claim that the addition of new defendants will not delay discovery or trial, because it will quickly serve them with the complaint and provide them with copies of all discovery, is unpersuasive. The briefs regarding the amendment of the complaint were not fully submitted until January 10, 2001, and depositions are scheduled to start on January 24, 2001. If new defendants were added, the Court would grant them the full time to answer or move. New parties would also have a right to be heard as to the appropriate schedule for this litigation. All of this would necessarily increase the length and expense of discovery and delay the trial date. *Id.*, *10, n. 5.

Additionally, granting this Motion will force this Court to re-open discovery in this matter, something this Court does not seem inclined to do. (DE #118, *Order*) ("[t]his will be the final extension of dates.").

In sum, granting this Motion will significantly prejudice NCS by delaying resolution of this dispute and also by adding layers upon layers of additional discovery and motion practice to a dispute that has already been fairly contentious. As such, this Court should deny Plaintiff's Motion and allow this case to reach a much needed resolution.

iii. Granting this Motion Would be Futile

Granting this Motion is futile because the added parties would be immediately dismissed due to a lack of personal jurisdiction, and because Plaintiff has failed to sufficiently allege veil piercing.

First, this Court has already held that it lacks personal jurisdiction over Connexus and Firstlook, two of the entities Plaintiff now asks this Court to exercise jurisdiction over. (DE #21). Plaintiff's Motion does not change the facts as they existed when the Court dismissed these parties. This Court declined to exercise jurisdiction over Connexus and Firstlook on those facts. Accordingly, granting this Motion relative to Connexus and Firstlook is futile because those two entities, if added, will surely successfully move for dismissal on the basis that this Court lacks personal jurisdiction over them.

Additionally, Plaintiff has alleged no basis to support this Court exercising jurisdiction over Epic. In fact, Plaintiff's only allegation relative to Epic is that "Upon information and belief . . . Connexus Corporation merged with Epic . . .". (***Plaintiff's Motion***, p.2, fn. 1). This allegation does not inform this Court of the basis on which it could exercise personal jurisdiction

over Epic. As such, like Connexus and Firstlook, if added, Epic will also successfully move to dismiss on the basis that this Court lacks personal jurisdiction of Epic.

Second, Plaintiff's Motion fails to allege facts sufficient to state a veil-piercing claim, the basis on which Plaintiff relies in its Motion. As this Court is well aware, under Michigan law, "absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities" whose veils may be pierced if the corporate existence "has been used to subvert justice or cause a result that would be contrary to some other clearly overriding public policy." *Dutton Partners, LLC v. CMS Energy Corp.*, No. 292094, 2010 Mich. App. Lexis 2150, *10-11 (Mich. App. November 16, 2010) (*Exhibit B) citing Seasword v. Hilti, Inc.,* 449 Mich. 542, 548 (1995); *Wells v. Firestone Tire & Rubber Co.*, 421 Mich. 641, 650 (1985). Accordingly, to pierce the corporate veil, parties must plead and prove: "(1) the corporate entity is a mere instrumentality of another entity or individual; (2) the corporate entity must have been used to commit fraud or a wrong; and, (3) as a result, the plaintiff must have suffered an unjust injury or loss." *RDM Holdings, Ltd. v. Continental Plastics, Co.,* 281 Mich. App. 678, 715 (2008). "Relevant factors in showing that a subsidiary is a mere instrumentality of its parent might be that the parent and subsidiary shared principal offices, or had interlocking boards of directors or frequent interchanges of employees, that the subsidiary is the parent's exclusive distributing arm, or the parent's revenues are entirely derived from sales by the subsidiary." *Seasword*, 449 Mich. At 548 n 10 (citations and quotations omitted). "Other factors include undercapitalization of the corporation, the maintenance of separate books, the separation of corporate and individual finances, the use of the corporation to support fraud or illegality, the honoring of corporate formalities and whether the corporation is merely a sham." *Laborers' Pension Trust Fund* v. *Weinberger Homes*, 872 F.2d 702, 704-05 (6th Cir. 1988)(citations omitted).

In this case, Plaintiff's allegations in the Motion fail to properly allege facts to support a veil-piercing allegation because they relate only to NCS's alleged lack of identity without sufficiently alleging the other elements that establish a piercing claim. Specifically, Plaintiff's allegations largely amount to nothing more than that Connexus employees and Firstlook employees provided services on behalf of NCS. This alone, however, ignores that proof of "some overlapping management between subsidiary and parent is an insufficient basis to pierce the corporate veil." *Corrigan v. U.S. Steel Corp*., 478 F.3d 718, 726 (6th Cir. 2007). This defect would immediately be addressed by a motion to dismiss for failure to state a claim.

Additionally, it ignores other relevant facts undoubtedly in the possession of Plaintiff; to wit, Connexus has a different subsidiary, Traffic Marketplace, from which it also derives revenue and which is not involved in this lawsuit, and with which the Firstlook employees have no contact. (*Declaration of Seth Jacoby*). Accordingly, Plaintiff's proposed additions are futile, and its Motion should be denied.

Moreover, Plaintiff's veil-piercing allegations do not contain any allegations relative to fraud, wrongdoing, or misuse of the corporate form, something also required by Michigan law with regard to veil-piercing claims. *Dutton Partners* at *12-14 (reversing trial court's denial of defendant's failure-to-state-a-claim motion due to complaint's failure to properly allege that defendant used entity to commit fraud or wrongful acts). Specifically, Plaintiff fails to allege that Connexus, Epic, or Firstlook "merely used [NCS] to commit fraudulent or otherwise acts," that "[NCS] was so controlled or manipulated by [Connexus, Epic, or Firstlook] in relation to [NCS's] maintenance [and] ownership . . . [Connexus, Epic, or Firstlook were] somehow abusing its corporate shield for their own purposes." *Id.*, *13. This factual absence is even more damning given that "[w]hen a cause of action seeks to pierce the corporate veil on the basis of

fraud, it is subject to Fed. R. Civ. P. 9(b)," which of course requires that "the circumstances constituting fraud or mistake shall be stated with particularity." *Southeast Texas Inns, Inc. v. Prime Hospitality*, 462 F.3d 666, 672 (6th Cir. 2006). At best, Plaintiff has alleged that NCS is a sham and that it shared employees with Connexus and Firstlook. This is not sufficient to state a claim for veil-piercing because it is not sufficiently specific pursuant to Fed. R. Civ. P. 9(b). Accordingly, Plaintiff's proposed additions are futile, and its Motion should be denied.

Finally, this Motion's proposal to add Epic is futile given that the alleged injury occurred well before Epic began its relationship with Connexus. Indeed, Plaintiff's own Motion – at Exhibit A – demonstrates that Epic did not begin its relationship with Connexus until May 2010,[2] well after, according to Plaintiff's own discovery responses, the alleged injury in this case occurred. (*Exhibit C, Plaintiff's Supplemental Domain List*).[3] As such, any attempt to prove that Epic caused Plaintiff's alleged injury will surely be futile.

iv. Denying this Motion Promotes Judicial Economy

Lastly, this Court should deny this Motion to preserve judicial economy given that Plaintiff just recently filed an identical suit, against Basic, Connexus, Firstlook, Epic, and Domain Name Proxy, LLC, in the Central District Court for California. (*Exhibit D, California Complaint*.) In fact, Plaintiff filed the California action a mere six days before it filed this Motion. This Court should defer to that action as that Court certainly has jurisdiction over Connexus, Firstlook, and Epic as they each conduct business in California. As such, denying this Motion and granting NCS's Motion for Summary Judgment, will allow the California action

[2] Although Exhibit A to Plaintiff's Motion does not indicate what year Epic began its relationship with Connexus, NCS anticipates that, given Plaintiff's reference to that relationship as "recent," Plaintiff agrees that this occurred in May 2010.

[3] NCS admits the Interrogatory Response attached at Exhibit C is incomplete insofar as Plaintiff recently submitted an informal spreadsheet detailing additional domain names. Nonetheless, after cross-referencing the two lists, Exhibit C contains the last-in-time domain entry and, as such, is complete for purposes of this Motion.

to proceed and will have the desired effect of saving the parties and, more importantly, this Court the time and resources associated with jurisdictional-based motion practice.

IV. CONCLUSION

This Court should not permit Plaintiff to end-around Rule 15 by seeking to add defendants, previously dismissed by this Court, without complying with that Rule's procedural requirements. This Court should not waste its time by allowing parties to be added who are already parties to a suit in California, commenced by Plaintiff shortly before filing this Motion. And this Court should not entertain a request that Plaintiff waited nearly seven months to solicit evidence to support, and that is riddled with futility. It is time to bring this dispute to a resolution.

Respectfully submitted,

By: /s/ Benjamin K. Steffans

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CERTIFICATE OF SERVICE

A copy of the foregoing Navigation Catalyst Systems, Inc.'s Response To Plaintiff's Motion For Joinder To Add Party Defendants Pursuant To FRCP 21 was filed electronically with the Court on December 3, 2010. Notice of this filing was sent to all parties by operation of the Court's electronic filing system.

Dated: December 3, 2010

By: /s/ Benjamin K. Steffans
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