

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 REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION  
FOR JOINDER TO ADD PARTY DEFENDANTS PURSUANT TO FRCP 21**

Plaintiff's Motion for Joinder to Add Party Defendants Pursuant to Fed. R. Civ. P. 21 must be granted because, in the absence of joinder, this court will be unable to provide Plaintiff with complete relief.

Defendant argues that Plaintiff's Motion is procedurally deficient because Plaintiff has failed to comply with the requirements of Fed. R. Civ. P. 15. Defendant supports this inference by arguing, generally, that "[t]he requirements set forth in Rule 15 also apply to motions brought under Rule 21." Since the requirements of Rule 15 also apply to motions under Rule 21, Defendant argues, then, necessarily, Local Rule 15.1 requires the Plaintiff to "attach the proposed pleading to the motion." Defendant has attempted to, once again, misstate the law and confuse the court. Defendant's argument has blatantly confused the **legal test** for joinder under both Rule 15 and Rule 21 with the **procedural requirement** that the Plaintiff attach any amended pleading to a motion under Rule 15.

"A party may resort to Rule 21 to add a party who for some innocent reason has not been made a party to the action and whose presence is necessary or desirable." *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 340, 344 (D. Mass. 1993). "Where the motion to amend comes after responsive pleadings have been served, the standard for adding a party is the same whether the motion is made under Rule 15 or Rule 21 **because in both cases the moving party must demonstrate an absence of prejudice to the nonmoving party.**" *Id.* It is clear from this language that though the standards are the same, the procedural requirements are not. "Rule 21 simply provides that parties may be added by court order 'on such terms as are just.' A

district court has considerable discretion in determining whether additional parties should be included in a pending action.” *Soler v. G & U, Inc.*, 86 F.R.D. 524, 528 (S.D.N.Y. 1980). Consequently, Defendant’s assertion that Plaintiff must include a copy of an amended complaint with its Motion is simply false.

Joinder under Rule 21 is proper where “absent the joinder of these proposed party-defendants, complete relief cannot be accorded among those already parties.” *Day v. Video Connection of Solon, Ohio*, 602 F. Supp. 100, 102 (N.D. Ohio 1982). Defendant argues that Plaintiff’s Motion is substantively defective because it is “untimely, would result in prejudice, and contains futile proposed amendments.” See Def’s Response to P’s Motion, pg. 1.

Plaintiff’s Motion is not untimely, would not result in prejudice, and is not a futile amendment. This Court dismissed Plaintiff’s causes of action as to Defendants Connexus/Epic Media Group and FirstLook on November 13, 2009 under Fed. R. Civ. P. 12(b)(6) for lack of personal jurisdiction. Since that time, significant discovery has been undertaken and Plaintiff has gathered substantial evidence establishing that both FirstLook and Connexus/Epic Media Group used and trafficked in the domain names at issue in this case under 15 U.S.C. § 1125(d), among other applicable laws.

Plaintiff brought this Motion after conducting substantial discovery to ensure that the evidence supported its allegations as to Connexus/Epic Media and FirstLook, two Defendants that were dismissed during an earlier stage of the case. After collecting the necessary evidence, Plaintiff filed its Motion. Defendant readily admits that it had knowledge that Plaintiff intended to file its Motion: “[O]n September 15, at a scheduled

meet-and-confer conference, Plaintiff told NCS it was considering adding these parties....” See D’s Reply pg. 6. In light of this prior knowledge, it cannot be reasonably said that Defendant would be unfairly prejudiced. Simply put, Defendant knew that these parties would be named, had a copy of the original complaint naming these parties, and now complains of prejudice.

Plaintiff’s request for joinder is not a “futile amendment.” Though Defendant Navigation Catalyst Systems registered the domain names, Defendants FirstLook and Connexus/Epic Media used and trafficked in the domain names with a bad faith intent to profit. By way of limited example, Chris Pirrone, who, at the time of the registration of many of the domain names, was the General Counsel of Connexus, See Exhibit A, Epic Media Group bio for Chris Pirrone; see also Exhibit B, LinkedIn profile for Chris Pirrone, reviewed the complaints related to NCS’s cybersquatting and determined whether those complaints had merit. If the claim did have merit, Mr. Pirrone would direct FirstLook employees to “seek resolution and either transfer or delete the domain pursuant to instructions from the claimant.” See P’s Motion for Joinder Exhibit J. Similarly, Mavi Llamas, a FirstLook employee, selected the keyword search terms that were displayed at the domain names owned by NCS. See Exhibit C, Deposition of Mavi Llamas pgs. 219-225. Ms. Llamas stated that NCS “parked” its domain names with FirstLook, meaning FirstLook controlled the advertising links displayed at NCS’s domain names and profited from the use of those domain names. See Exhibit C, Deposition of Mavi Llamas pg. 25. Consequently, Plaintiff’s Motion should be granted, as Plaintiff would be

unable to obtain complete relief in the absence of FirstLook and Connexus/Epic Media Group.

Defendant contends that the joinder of these parties will waste the Court's time and cause delay because (1) substantial discovery has occurred, (2) Plaintiff has filed a lawsuit against these parties in California, and (3) Plaintiff has failed to allege facts to pierce the corporate veil. Substantial discovery has occurred, which has provided Plaintiff with evidence that FirstLook and Connexus/Epic Media Group directly used and trafficked in the domain names at issue in this case. Since, as Defendant claims, NCS has no employees, Plaintiff has deposed employees of FirstLook and Connexus/Epic Media Group. These efforts need not be duplicated. Further, Defendant has been the culprit of any purported delay, as it has argued the subject of personal jurisdiction on four separate occasions; three out of its seven motions have addressed that sole issue, and one of its motions addressed a trademark, WEATHER STICKER, that is not even at issue in this case.

Now, Defendant claims that it will serve judicial economy to deny Plaintiff's Motion because Plaintiff filed suit in California against the same Defendants, despite the fact that Defendant also argues that it will be prejudiced because the parties have "exchanged voluminous discovery." If Plaintiff has deposed FirstLook and Connexus' employees, and if Defendant's argument is accepted, Plaintiff will again need to duplicate its discovery efforts in California, which would not, under any logical theory, serve judicial economy concerns. Should this Court grant Plaintiff's Motion, Plaintiff intends to dismiss its lawsuit in California to focus its efforts on this case, which would

serve judicial economy concerns. Finally, Plaintiff's Motion alleges that both FirstLook and Connexus/Epic Media Group are directly responsible for cybersquatting, specifically, the use or trafficking in the domain names at issue in this case. As such, Defendant's arguments concerning piercing the corporate veil are irrelevant to this Motion.

Accordingly, Plaintiff's Motion must be granted. In the absence of FirstLook and Connexus/Epic Media Group, Plaintiff cannot be afforded complete relief.

Respectfully submitted this 13<sup>th</sup> day of December, 2010.

/s/Enrico Schaefer

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## **CERTIFICATE OF SERVICE**

I hereby certify that on the 13<sup>th</sup> day of December, 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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