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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON ITS AFFIRMATIVE DEFENSE OF LACK OF PERSONAL JURISDICTION

REPLY MEMORANDUM

I. PLAINTIFF CANNOT ESTABLISH SPECIFIC JURISDICTION OVER NCS IN MICHIGAN BECAUSE NCS HAS NOT PURPOSEFULLY AVAILED ITSELF OF THE PRIVILEGE OF ACTING IN MICHIGAN OR CAUSING A CONSEQUENCE IN MICHIGAN.

The exercise of specific jurisdiction over NCS in Michigan is not proper under the three-part test established in *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374 (6th Cir. 1968), because Plaintiff cannot satisfy even the first prong of purposeful availment by relying on either the "effects test" articulated in *Calder v. Jones*, 465 U.S. 783 (1984), or the sliding scale test in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).[1]

A. Personal Jurisdiction Over NCS Is Improper Under The *Zippo* Test.

In its Opposition, Plaintiff argues that specific jurisdiction is proper under the sliding scale test articulated in *Zippo* because NCS's websites are "commercial and interactive." (Opp. at 12.) First, Plaintiff contends that NCS's websites are "interactive" because NCS has "purposefully and intentionally select[ed]" the keywords and content of its websites. (*Id.* at 12-13.) Plaintiff next contends that NCS's websites "invite interaction and the exchange of information, namely, a consumer's desire to reach commercial content relevant to the website address that was incorrectly typed into their web browser's URL bar." (*Id.* at 13.) Plaintiff's nonsensical interpretation of "interactivity" is wrong.[2]

In *Zippo*, the court noted that in evaluating "interactive Web sites *where a user can exchange information with the host computer* . . . , the exercise of jurisdiction is determined by

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[1] Indeed, Plaintiff cannot satisfy the second or third prongs of the *Mohasco* test either. (Opening Br. at 19-20.) Because Plaintiff does not substantively address these prongs or NCS's argument that the exercise of general jurisdiction over NCS in Michigan is not appropriate, which Plaintiff preserves for appeal, NCS likewise does not address those issues herein.

[2] Not surprisingly, Plaintiff fails to cite even a single case to support its misguided interpretation of "interactivity" under the *Zippo* test. (*See generally* Opp. at 12-13.)

examining the *level of interactivity* and *commercial nature* of the exchange of information that occurs on the Web site." *Zippo*, 952 F. Supp. at 1124 (emphasis added). The "interactivity" referenced is the exchange of information *between the user and the host computer*, not between NCS's "keyword optimizers" and the host computer in creating content for NCS's websites, as suggested by Plaintiff.[3] (Opp. at 12.) Moreover, the *Zippo* Court was not referring to the exchange of some metaphysical consumer "desire," but rather the exchange of actual commercial "information," such as a consumer's name, address, and credit card number. Because visitors to NCS's passive websites do not exchange *any* commercial information with the host computer and no commercial activity takes place on these sites, the exercise of specific jurisdiction over NCS in Michigan is not proper under *Zippo*.[4]

B. <u>Personal Jurisdiction Over NCS Is Improper Under The "Effects Test."</u>

In its Opposition, Plaintiff argues that "the *Calder* test . . . [does not] require the court to consider the principal place of Plaintiff's business as an element in establishing personal jurisdiction over the Defendant."[5] (Opp. at 8-9.) Plaintiff's argument fails because it is contrary to the weight of case law, including this Court's decision on NCS's Motion to Dismiss, which was discussed and cited in NCS's Opening Brief.[6]

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[3] Indeed, accepting Plaintiff's nonsensical argument would mean that **every** website in which a person selects the content thereof is "interactive" which is clearly *not* what *Zippo* posits.

[4] That NCS may receive a commission from an unrelated third party when a visitor to its websites clicks on a link to a third party website does not subject NCS to personal jurisdiction under *Zippo* because *visitors* to NCS's website are not exchanging commercial information with the host computer.

[5] NCS has not argued that the *Zippo* test "require[s] the court to consider the principal place of Plaintiff's business as an element in establishing personal jurisdiction over the Defendant." (Opp. at 8.)

[6] Plaintiff's statement that NCS "fail[ed] to cite any case law or to forward a positive argument" to support the statement in its Opening Brief that "a determination of Plaintiff's principal place of business is necessary to evaluate where NCS's alleged conduct was "expressly aimed" at and

In ruling on NCS's Motion to Dismiss, this Court found that the second and third prongs of the "effects test" were satisfied, relying in part on its determination of Plaintiff's "principal place of business": "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 injury occurred in Michigan." (Opening Br. at 17-18, citing *Weather Underground, Inc. v. Navigation Catalyst Sys., Inc.*, 688 F. Supp. 2d 693, 701 (E.D. Mich. 2009) (emphasis added).) Indeed, **courts across the country**, including the Sixth Circuit Court of Appeals, also consider a plaintiff's "principal place of business" in determining whether the "effects test" has been satisfied. *See Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 553 (6th Cir. 2007) (finding that Defendants' conduct "was intentionally directed to cause harm to a Michigan resident" where "Defendants also undoubtedly knew that [Plaintiff] had its principal place of business in Michigan, and that the focal point of its actions and the brunt of the harm would be in Michigan").[7]

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

In its Opposition, Plaintiff argues that the "nerve center" test for determining a corporation's "principal place of business" adopted by the Supreme Court in *Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010), is inapplicable because that case involved the determination of diversity jurisdiction. (Opp. at 4-5, 8-9.) But NCS cannot conceive of any reason – and Plaintiff notably does not provide one – why a corporation's "principal place of business" for purposes of

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where the alleged harm to Plaintiff occurred" is thus a bald misstatement. (Opening Br. at 14.) Ironically, Plaintiff itself fails to cite any case law supporting its argument that consideration of a corporation's "principal place of business" is irrelevant in evaluating purposeful availment under the "effects test." (Opp. at 8-9.)

[7] Additional district and appellate court cases in which the court considered a corporation's "principal place of business" in evaluating the "effects test" are listed in Exhibit A because they were too numerous to list herein.

determining diversity jurisdiction would be different from its "principal place of business" for any other reason, including for determining specific jurisdiction under the "effects test."

2. <u>There is no genuine dispute that Plaintiff's "nerve center" and thus its "principal place of business" is in San Francisco, California, such that Plaintiff cannot satisfy the "effects test."</u>

In its Opposition, Plaintiff argues that its "nerve center" is located in Michigan, relying on the affidavit of Jeff Ferguson and its listing of Ann Arbor, Michigan as its address on its trademark registrations and its website. (Opp. at 10-11, 14-15.) But, as explained in NCS's Opening Brief, the conclusory statement in the Ferguson Affidavit that Plaintiff's "principal office" is in Michigan and address listings are not sufficient proof to establish Plaintiff's "nerve center."[8] (Opening Br. at 18-19, citing cases.[9]) Nor is Plaintiff's disingenuous assertion in its Opposition that its Communications Director and Chief Meteorologist "direct the activities of the company from its Ann Arbor office," which employs those two employees and one part-time employee. (Opp. at 11.) Plaintiff's self-serving assertions cannot change the undisputed fact that Plaintiff's "nerve center" is actually in San Francisco where its President and the Director who "focus[es] primarily on technology and operational issues" – the "high level officers [who] direct, control, and coordinate the corporation's activities" – are located. (Opening Br. at 17, citing *Hertz*, 130 S.Ct. at 1186.)

Because Plaintiff's "principal place of business" is in San Francisco, NCS's alleged conduct would be deemed as "expressly aimed" there for purposes of the "effects test" and any alleged harm would be felt by Plaintiff in San Francisco. The exercise of specific jurisdiction

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[8] The other statements in the Ferguson Affidavit are irrelevant under *Hertz*. (Opening Br. at 18-19.)

[9] *See also Sheth v. Namou*, No. 00 C 6944, 2002 WL 1466803, at *2 (N.D. Ill. July 8, 2002) (agreeing with defendants' "more reasonable conclusion" that corporation had its nerve center in Ohio, despite plaintiff's "conclusory, albeit sworn, statement to the effect that the executive headquarters of the corporation" were in Illinois).

over NCS in Michigan is thus improper because Plaintiff cannot satisfy the purposeful availment prong of the *Mohasco* test by relying on the "effects test."

II. THE COURT SHOULD DENY PLAINTIFF'S REQUEST FOR SANCTIONS

Plaintiff's request that the court sanction NCS under Federal Rule of Civil Procedure 11 "on the court's initiative" is a blatant attempt to avoid the rule's stringent requirements that "[a] motion for sanctions must be made separately from any other motion" and "[t]he motion must be served . . . but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service." Fed. R. Civ. P. 11(c)(2). Because Plaintiff failed to follow these procedural requirements of Rule 11, its request for sanctions should be denied.[10] In addition, given that NCS's motion is well-founded, such a Rule 11 motion would fail on its substance as well.

For the foregoing reasons, NCS respectfully requests that the Court grant summary judgment in its favor, dismiss Plaintiff's complaint, and deny Plaintiff's request for sanctions.

RESPECTFULLY SUBMITTED this 17th day of December, 2010.

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[10] *See, e.g.*, *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001) (holding that defendant was not entitled to sanctions award where it "did not comply with the twenty-one day advance service provision"); *Hoydal v. Prime Opportunities, Inc.*, 856 F. Supp. 327, 329 (E.D. Mich. 1994) ("Because defendant's motion for sanctions was included in his motion to dismiss, the court will deny defendant's motion for sanctions as it is not in compliance with Rule 11.") Plaintiff has also improperly included "reasonable attorney's fees" as part of the sanctions requested, though such fees are not allowed as a sanction "on the court's initiative." (Opp. at 17; *see* Fed. R. Civ. P. 11(c)(4), 11(c)(5)(B).)

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 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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