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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CONNEXUS CORPORATION, FIRSTLOOK, INC. AND EPIC MEDIA GROUP, INC.S' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

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

Defendants Connexus Corporation ("Connexus"), Firstlook, Inc. ("Firstlook"), and Epic Media Group, Inc. (collectively "Added Defendants") hereby move this Court to dismiss the claims against them for lack of personal jurisdiction over each of them.

This Motion is based on the facts set forth in the accompanying Memorandum of Points and Authorities. In summary, Added Defendants do not have the constitutionally mandated "minimum contacts" with the state of Michigan such that the exercise of personal jurisdiction over Added Defendants comports with traditional notions of fair play and substantial justice.

This Motion is supported by the attached Memorandum of Points and Authorities, the Declaration of Charles Nowaczek, the original Defendants' Motion to Dismiss for Lack of Personal Jurisdiction, Navigation Catalyst Systems, Inc.'s Motion for Summary Judgment, the case file, and the arguments of counsel that the Court would entertain at a hearing on this motion.

On March 20, 2009, there was a conference between William A. Delgado, counsel for original Defendants, and Enrico Shaefer, counsel for Plaintiff, in which the original Defendants explained the nature of the Motion to Dismiss and its legal basis and requested but did not obtain concurrence in the relief sought. That resulted in a Motion to Dismiss that was decided by the Court.

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 the Motion for Summary Judgment and its legal basis and requested, but did not obtain, concurrence in the relief sought. That resulted in a Motion for Summary Judgment currently pending before the Court.

On January 31, 2011, there was a conference between William A. Delgado, counsel for Added Defendants, and Enrico Schaefer, counsel for Plaintiff, in which Added Defendants explained the nature of this Motion. Concurrence in the relief sought was not provided.

RESPECTFULLY SUBMITTED this 3rd day of February, 2011.

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED

The issue presented in this Motion is whether any of the Added Defendants have the constitutionally mandated "minimum contacts" with the state of Michigan so that any such Added Defendant would be subject to the personal jurisdiction of this Court? Added Defendants respectfully submit that the answer to this question is "no."

CONTROLLING AUTHORITY

A. Motion to Dismiss

Fed. R. Civ. P. 12(b)(2) allows a defendant to seek dismissal of a complaint by way of motion on the basis that the court lacks personal jurisdiction. The plaintiff always bears the burden of proving jurisdiction exists. *Serras v. First Tenn. Bank Nat'l Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989). Determining whether personal jurisdiction exists is a two-step process. "Where a federal court's subject matter jurisdiction over a case stems from the existence of a federal question, personal jurisdiction over a defendant exists 'if the defendant is amenable to service of process under the [forum] state's long-arm statute and if the exercise of personal jurisdiction would not deny the defendant [] due process.'" *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002) citing *Michigan Coalition of Radioactive Material Users, Inc. v. Girepentrog*, 954 F.2d 1174, 1176 (6th Cir. 1992). 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* Original Motion to Dismiss ("Orig. Mot. Dismiss") at 8, citing cases.

Due process requires that, "in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, 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, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (internal quotation marks and citations omitted). Applying the "minimum contacts" analysis, a court may obtain either general or specific jurisdiction over a defendant. *Bird*, 289 F.3d at 873 ("Personal jurisdiction can be either general or specific, depending upon the nature of the contacts that the defendant has with the forum state.").

The exercise of general jurisdiction is appropriate only when the defendant's activities in the forum state are substantial or "continuous and systematic." *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 416, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984); *Bird*, 289 F.3d at 873 ("General jurisdiction is proper only where 'a defendant's contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state.'"). As one circuit court has noted, "[t]he standard for establishing general jurisdiction is 'fairly high.'" *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

The exercise of specific jurisdiction over Defendants is permissible only if their contacts with Michigan satisfy *all three parts* of the three-part test established in *Southern Machine Co. v. Mohasco Indus., Inc.*, 410 F.2d 374, 381 (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 substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Bird, 289 F.3d at 874, *citing Southern Machine, supra.*

INTRODUCTION

Over fifty years ago, the U.S. Supreme Court announced that a party's constitutional due process rights required certain "minimum contacts" with a forum before that forum could exercise personal jurisdiction over the party. Because Added Defendants lack these "minimum contacts" with the state of Michigan, each of them must be dismissed from this matter.

Connexus and Firstlook are Delaware corporations with their principal places of business in El Segundo, California. Epic is a Delaware corporation with its principal place of business in New York, New York. None of the Defendants has any offices, employees, bank accounts, or other property in Michigan. Or, put differently, none of the Defendants have the constitutionally-mandated "minimum contacts" that are required by traditional notions of fair play and substantial justice before this Court can exercise personal jurisdiction over them.

Admittedly, Defendant NCS owns various domain names where it hosts various websites, and these websites can be viewed by residents of Michigan. But, that is not sufficient to exercise personal jurisdiction. As this Court previously noted, the Sixth Circuit has adopted the jurisdictional test set forth in the seminal case of *Zippo* which holds that personal jurisdiction cannot be exercised over operators of "passive" web sites where no commercial activity occurs. In its First Amended Complaint, Plaintiff essentially concedes that NCS operates only "passive" web sites. These web sites simply contain hyperlinks to other third party web sites. No business transactions or commercial activity take place on NCS's web sites at all. As such, there is no personal jurisdiction over NCS, Firstlook, Connexus, or Epic pursuant to *Zippo*.

Furthermore, for the same reasons explained in NCS's Motion for Summary Judgment ("NCS MSJ"), there is no personal jurisdiction pursuant to the "effects test" of *Calder v. Jones*.

As noted in the NCS MSJ, no conduct was "expressly aimed" at Michigan, and Plaintiff, having its headquarters in California, does not feel any harm in Michigan. The undisputed evidence gathered through discovery reveals that California is home to the majority of Plaintiff's officers and employees, its annual shareholder meeting, its board of directors meetings, and two thirds of its servers. So, whatever harm Plaintiff alleges would be felt in California.

In conclusion, Plaintiff's headquarters and "principal place of business," as that phrase is defined by *Hertz v. Friend*, is in California, *International Shoe* and principles of reasonableness dictate that this matter proceed in California not Michigan.

Statement of Facts

Introduction to Defendants' Operations. On May 4, 2010, Epic acquired Connexus but continued to operate it as a wholly-owned subsidiary. Connexus continues to be the parent company of Firstlook. In turn, Firstlook continues to be the parent of NCS. Declaration of Charles Nowaczek, dated February 2, 2011 ("Nowaczek Decl."), at ¶¶ 2-3.

Since this Motion follows an amendment to the original complaint, the Added Defendants will assume that the Court is familiar with how Defendants operate their business having previously read the Orig. Mot. Dismiss and its supporting papers, including the Declaration of Seth Jacoby of April 15, 2009 ("Original Jacoby Decl.") (Docket No. 15), and the NCS MSJ and its supporting papers (Docket No. 122). Both Motions, their supporting documents, and the arguments made therein are incorporated herein by reference.

To briefly summarize, however: NCS is a bulk registrant of domain names which utilizes Basic Fusion as its registrar. Domain names registered by NCS are monetized by Firstlook. Firstlook monetizes the domain names by creating dynamic websites which contain hyperlinks to

third party sites. When a visitor comes to a website which appears on an NCS-owned domain and clicks on one of those hyperlinks, they are transported away from the NCS domain to that of a third party, and NCS and Firstlook profit on a "pay-per-click" basis. *See Weather Underground, Inc. v. Navigation Catalyst Systems, Inc.*, 688 F. Supp. 2d 693, 695 (E.D. Mich. 2009) ("*NCS I*") and Orig. Mot. Dismiss at pp. 4-6.

No commercial activity takes place on NCS-owned domains. *Id*. Even Plaintiff implicitly concedes that no commercial activity takes place on these sites because it admits that NCS's domains redirect visitors to the website of a third-party when the visitor clicks on a hyperlink. *See* First Amended Complaint at ¶ 71 ("Many of the web sites on the infringing domains redirect or show advertisements to Plaintiff's competitors…"); *see also* Plaintiff's Opposition to NCS's Motion for Summary Judgment (Docket No. 133) (no argument set forth by Plaintiff that any commercial activity takes place on the NCS websites).

Added Defendants' Lack of Michigan Contacts. None of the Added Defendants reside in Michigan. Rather, Epic, Connexus, and Firstlook are all Delaware corporations. Epic has its principal places of business in New York, and Connexus and Firstlook have their principal place of business in California. Nowaczek Decl. at ¶ 4; see also FAC at ¶¶ 3-5.

Further, none of the Defendants have systematic and/or continuous contact with Michigan. None of Epic, Connexus or Firstlook has an office anywhere in Michigan. None of Epic, Connexus or Firstlook has any employees, bank accounts or other property in Michigan. *Id*. at ¶ 5-6; *see also* Orig. Mot. Dismiss. pp. 6-7. Again, Plaintiff has implicitly conceded this is true, at least as to Connexus and Firstlook, because it has conducted extensive discovery over the last year, but the FAC does not allege that any such systematic and/or continuous contacts exist.

See, *e.g.*, FAC at ¶ 22 (alleging jurisdiction but no reference to any employees, bank accounts, or property in Michigan).

ARGUMENT

I. THE COURT LACKS PERSONAL JURISDICTION OVER THE ADDED DEFENDANTS.

A. Plaintiff Cannot Establish General Jurisdiction Over Added Defendants In Michigan.

For the same reasons set forth in the original Motion to Dismiss, the exercise of general jurisdiction over the Added Defendants in Michigan is not appropriate because their activities in Michigan are not substantial nor "continuous and systematic." In fact, this Court has already ruled that general jurisdiction was not appropriate over NCS because of it did not have any offices, employees, bank accounts, or other property in Michigan. *NCS I*, 688 F. Supp. 2d at 697; *see also* Original Jacoby Decl. at ¶ 14 and Nowaczek Decl. at ¶ 4-5. Since the same is true for the Added Defendants, the same result must necessarily follow.

Nothing in the First Amended Complaint alters the analysis. The FAC merely alleges that Connexus and Firstlook provided NCS with the instrumentalities to accomplish the acts complained of (FAC at ¶¶ 11-14) and that Epic has accepted the liabilities of the other defendants (FAC at ¶ 9).[1] The FAC does not allege any new facts about Added Defendants' contacts with the state of Michigan (e.g., employees, bank accounts, property) to support a finding of general jurisdiction. Nor do such facts exist. If they did, Plaintiff would have certainly brought them to the Court's attention during the briefing of NCS's MSJ, and, yet, Plaintiff did no such thing.

[1] This allegation is, of course, highly contested.

In short, Added Defendants have no contact with Michigan, much less the "continuous and systematic" contact required to establish general jurisdiction.

B. Plaintiff Cannot Establish Specific Jurisdiction Over Added Defendants In Michigan.

As noted, *supra*, specific jurisdiction over Added Defendants is permissible only if each of their contacts with Michigan satisfy *all three parts* of the *Mohasco* test. *Bird*, 289 F.3d at 874. These three parts are: (i) the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; (ii) the cause of action must arise from the defendant's activities there; and (iii) the acts of the defendant or consequences caused by the defendant must have substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Southern Machine Co. v. Mohasco Indus., Inc.*, 410 F.2d 374, 381 (6th Cir. 1968).

1. Added Defendants have not purposefully availed themselves of the privilege of acting in Michigan or causing a consequence in Michigan.

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

As explained in the Orig. Mot. to Dismiss, and, as noted by this Court, 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." *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. Because NCS's websites are passive websites that simply provide informational hyperlinks, 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 the Added Defendants 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 Connexus and Firstlook 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)). However, "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 (emphasis added) (*citing Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998)).

Here, the exercise of specific personal jurisdiction over Connexus and Firstlook in Michigan is improper because Plaintiff cannot satisfy all the three prongs of the "effects test." Specifically, Plaintiff cannot show that the conduct in question was expressly aimed at Michigan or that the harm was felt in Michigan. Nor can Plaintiff show the "something more" that demonstrates that Connexus or Firstlook directed any activity toward Michigan.

In ruling on the Orig. Mot. 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 injury occurred in Michigan." *NCS I*, 688 F. Supp. 2d at 701.[2] On this second point, the Court's decision was correctly premised: corporations feel harm at their principal place of business. *Children's Orchard, Inc. v. Children's Orchard Store No. 142, Inc.*, 2010 WL 2232440 *7 (E.D. Mich. 2010) (acknowledging that "the alleged harm is felt at [Plaintiff's] principal place of business in Michigan…"). Unfortunately, the Court accepted Plaintiff's representation that its "principal place of business" is in Ann Arbor and that representation is not true.

For all of the reasons set forth in the NCS MSJ, Plaintiff's principal place of business is actually in San Francisco, California. Two-thirds of its top executives work in the San Francisco office, including the President, their Director (of Technology), the Vice-President of Sales and Advertising, and the Vice-President of Business Development. At least twenty-eight employees work in San Francisco, but only three or four work in Ann Arbor. The shareholder meetings and the Board of Director Meetings take place in San Francisco. Mot. Sum. Jud. at 6-8. Thus, while Plaintiff maintains *an* office in Ann Arbor, Michigan, its principal place of business is located in San Francisco. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1186 (2010) (holding that a corporation's principal place of business is at its "nerve center" or "the place where [Plaintiff's] high level officers direct, control, and coordinate the corporation's activities"). Accordingly, because

[2] Notably, the undisputed evidence uncovered during discovery indicates that the employees who were responsible for the registration of the domain names at issue did ***not*** know of Plaintiff or its location at the time of registration. *See* Motion for Protective Order at p. 10 and supporting documents (Docket No. 125-127).

Plaintiff's "principal place of business" is in San Francisco, then Connexus, Firstlook, and 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.

In addition, there is no allegation in the FAC which establishes the "something more" that would be necessary to meet the "effects test." *NCS I*, 688 F. Supp. 2d at 700. The FAC alleges that NCS registers domain names, and Firstlook creates websites for them, thereby monetizing them. FAC at ¶ 68, 71. That is insufficient as a matter of law. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997). ("Creating a site, like placing a product into the stream of commerce, may be felt nation-wide or even world-wide but, without more, it is not an act purposefully directed toward the forum state.").[3]

In short, since the "effects test" cannot be met, Plaintiff cannot satisfy the purposeful availment prong of the *Mohasco* test with respect to Connexus and Firstlook.

c. Personal jurisdiction over Epic is also improper under the "effects test."

If the Court finds that the conduct of which Plaintiff complains was "expressly aimed" at San Francisco or that the "brunt of the injury" was felt in San Francisco, then there is no personal jurisdiction over ***any*** defendant in this matter. Notably, though, even if the Court found that the conduct alleged in the FAC was "expressly aimed" at Michigan or that the harm is felt in Michigan, there is still no personal jurisdiction over ***Epic*** in Michigan. That is true because there is no allegation that ***Epic*** ever engaged in the conduct complained of in the FAC at all. Rather, the FAC alleges:

[3] The Sixth Circuit acknowledged *Cybersell* in *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002).

1. Defendants registered, trafficked in and used 264 domain names which Plaintiff claims violates its trademarks. FAC at ¶ 68.
2. The most "recent" registration occurred on March 26, 2009. *See* Domain No. 72 in Exhibit T to the FAC (wwatherunderground.com registered on March 26, 2009).

As noted, *supra*, however, Epic acquired Connexus in May 4, 2010, more than one year ***after*** the most "recent" alleged violation. Nowaczek Decl. at ¶ 2. Epic could not have "expressly aimed its conduct" at Michigan (or California for that matter) because Epic did not engage in any of the conduct alleged in the FAC. Similarly, there is no allegation in the FAC that Epic engaged in the "something more" that would be required to establish jurisdiction under the "effects test."

Plaintiff's unsubstantiated allegations regarding Epic's legal relationship to the other defendants is of no moment. The FAC is premised on the assumption that Connexus and Epic merged. *See, e.g.*, FAC at ¶¶ 11-14 (each paragraph starting with "Connexus, now Epic Media…"). Pursuant to this assumption, jurisdiction over Connexus necessarily means jurisdiction over Epic as they are one and the same. But, the assumption is faulty. In fact, the companies did *not* merge; Epic operates Connexus as a subsidiary. Nowaczek Decl. at ¶ 2.

So, irrespective of where the conduct was aimed or where the harm is felt, Epic cannot be hailed into Michigan because it never engaged in said conduct at all.

2. Plaintiff's claims do not arise from forum-related activities.

Plaintiff's claims do not arise from the Added Defendants' "forum-related activities" because Added Defendants conduct no activity in the forum. Nowaczek Decl. at ¶¶ 3-5. In its Order on the Orig. Mot. to Dismiss, this Court noted that "Plaintiff's claims would not have occurred in absence of NCS's targeting of Plaintiff." *NCS I*, 688 F. Supp. 2d at 702. While

Added Defendants dispute that they 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. The exercise of jurisdiction over Added Defendants in Michigan would not be reasonable.

For the same reasons detailed in the Orig. Mot. to Dismiss, the exercise of jurisdiction over Added Defendants in this action would not be reasonable. Orig. 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, Plaintiff cannot rely on the "effects test" to show reasonableness because Plaintiff's principal place of business is in San Francisco, not Ann Arbor. 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 Added Defendants in Michigan is therefore improper. *See Bird v. Parsons*, 289 F.3d 865, 874 (6th Cir. 2002).

CONCLUSION

For the foregoing reasons, Added Defendants respectfully requests that the Court grant this motion to dismiss for lack of personal jurisdiction.

RESPECTFULLY SUBMITTED this 3rd day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2011, 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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