Weather Underground, Incorporated v. Navigation Catalyst Systems, Incorporated et al Doc. 155 Att. 3

Exhibit B

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WILLENKEN WILSON LOH & LIEB LLP

January 24, 2011

<u>VIA ELECTRONIC MAIL AND U.S. MAIL</u>

Enrico Schaefer, Esq.
Traverse Legal
810 Cottageview Drive, Suite G-20
Traverse City, MI 49684

Re: *Weather Underground v. Navigation Catalyst Systems, Inc.*

Dear Enrico:

I am writing to follow-up on NCS's Motion for Protective Order which was heard on January 13, 2011. I have reviewed the hearing transcript from January 13, 2011, the arguments presented, and the Court's ruling.

In reviewing the Court's order, I understand that the Court has ruled that *Shelton* only applies to trial counsel or litigation strategy in the pending case. The Court went on to say that "Here it sounds like he's in the chain. I don't know whether you call this legal advice or not legal advice, you can argue about that…" Unfortunately, after much consideration, I do not understand what the Court was referring to when she uses the word "this." The Court continued by saying "I don't find this matter as being privileged…" Again, after much consideration, I do not understand what the Court means when it refers to "this matter." And, of course, the Court was completely silent as to whether any privilege which might exist was somehow waived.

Unfortunately, my confusion on this issue necessarily affects how we proceed with the Pirrone deposition. In your original meet and confer letter, you took the position that NCS had waived any attorney-client privilege which protects information you seek. In its Motion for Protective Order, NCS argued that it had not waived the attorney-client privilege. In your opposition, you again argued that NCS had waived the privilege. This exercise of letter writing and motion practice has one thing in common: both sides agree that there is *some* underlying information that *is* privileged.

Since both sides apparently agree that some information is privileged and the Court did not make a determination on whether any privilege has been waived, it appears that Mr. Pirrone can be made available for deposition to answer questions that would ***not*** implicate the attorney-client privilege or the attorney work product doctrine. And, if

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such questions were asked, we would interpose the appropriate objection and instruct Mr. Pirrone not to answer the question. If it is your position that the Court's order obligates NCS to produce Mr. Pirrone and to have him answer all questions, irrespective of any applicable privilege, then please let me know immediately so that we can seek clarification from the Court on this issue.

Let me also take this opportunity to address several statements you made during the oral argument which, in my opinion, were inaccurate and unsupported by any evidence in this matter and which similarly support a request for clarification. For example, at the hearing, you stated: "What we do have an interest in is to find out why Mr. Pirrone decided to register domains that incorporated our trademarks, and it is clear from the testimony...that he, in fact, was at least a, if not the, decision-maker in terms of registering the domains."

You also stated that "Lily Stevenson also says Pirrone—she consults Pirrone on trademark matches, whether to register a domain....So, again, the key witness on why did you register this domain...is Mr. Pirrone."

These statements are inaccurate for two reasons. First, many of the domains that are at issue were registered ***before*** 2007. Since you have researched the LinkedIn Profiles of every other witness in the case, it stands to reason that you have also done so for Mr. Pirrone. And, assuming you have reviewed that profile, you know he did not join Connexus until April 2007 so that it would have been impossible for him to have "decided to register domains that incorporated [your] trademarks" to the extent such registrations occurred before April 2007.

More importantly, none of the deposition testimony which you submitted as exhibits in your opposition supports the argument that Mr. Pirrone has ever regularly played a part in the registration process at all. Indeed, I personally attended the deposition of every deponent in this matter and do not recall anyone ever saying that Mr. Pirrone regularly played a role in the registration process.

At the hearing, you also stated that Mr. Misino testified that "[Pirrone] is actually deciding if a domain is kept." The Misino transcript says no such thing. In the pages you submitted from the Misino deposition, Mr. Misino testifies that he did not discuss setting up a proxy service for purposes of protecting NCS from potential liability and discovery. He says nothing at all about who makes a decision as to whether to keep a domain or how that process is managed. It is as though Mr. Misino was talking about apples, and you are talking about the weather in China.

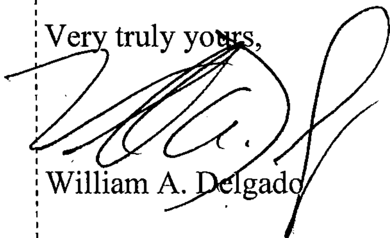
Lastly, at the hearing, you also stated that if the software generated a 75 percent fuzzy match the "software would automatically spin it upstairs to people like Chris Pirrone, in fact, apparently primarily Chris Pirrone. And then before they would register it...Chris Pirrone is the person who makes that decision."

This argument was particularly galling. None of the testimony you submitted in your papers supports that argument. Nor, to the best of my recollection, does any such testimony exist. As you know, the software identifies domain names that match a trademark in the PTO database either through a fuzzy match or an n-gram match at a 60% threshold level. The human reviewers (Dennis Rhee, David Hull, and Lily Stevenson) then review those matches and make a decision whether to exclude a domain name from registration in a sequential order (i.e., first Dennis, then David, then Lily, then back to Dennis). That information is not forwarded to Mr. Pirrone nor did he make a decision on registration based on this "match" information.

In short, a large part of your argument was simply inaccurate and unsupported by the record. Given the Court's reference to Mr. Pirrone being a decision-maker, one can only assume that she believed your statements regarding his role in the registration process. As a result, clarification on the scope of the deposition would be appropriate.

Please let me know when you would like to meet and confer regarding these issues. I will be traveling throughout the remainder of this week but will try to make myself available based on your schedule.

Very truly yours,



William A. Delgado

cc: Ben Steffans (via e-mail)