IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

THE WEATHER UNDERGROUND, INC.,
a Michigan corporation,

Plaintiff,

vs.

NAVIGATION CATALYST SYSTEMS, INC., a Delaware corporation; CONNEXUS CORP., a Delaware corporation; FIRSTLOOK, INC., a Delaware corporation; and EPIC MEDIA GROUP, INC., a Delaware corporation;

Defendants.

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

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

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NOW COMES Plaintiff Weather Underground, by and through its attorneys Traverse Legal, PLC and Anthony Patti, and responds to Defendants Connexus Corporation, FirstLook, Inc., and Epic Media Group, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction as follows:

I. INTRODUCTION

Personal jurisdiction is proper over Defendants Connexus, FirstLook, and Epic Media because those entities have engaged in a carefully calculated and concerted scheme to infringe upon the trademark rights of Plaintiff, as well as other Michigan-based companies. Connexus Corporation admittedly merged with Epic Advertising, which itself merged into Epic Media Group, Inc. Alternatively, and as claimed by Defendants, Connexus is a wholly owned subsidiary of Epic Media Group and, as such, is an alter ego of Epic Media Group. Either way, personal jurisdiction can be exercised over Epic Media Group based on the actions of Connexus.

Specific jurisdiction is proper over Connexus, FirstLook, and Epic Media both under the *Zippo* test, because Defendants create, operate, and maintain interactive commercial websites that target Michigan residents and Michigan trademark owners, *See Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), and under *Calder*'s effects test because Defendants committed intentionally tortious acts that were expressly aimed at trademark holders and consumers in the State of Michigan and that caused harm to the Plaintiff in the State of Michigan, *See Calder v. Jones*, 465 U.S. 783 (1984). Consequently, Defendants' Motion to Dismiss must be denied.

II. STANDARD OF REVIEW

A party may file a motion to dismiss under Fed. R. Civ. P. 12(b)(2) where the court lacks personal jurisdiction over the Defendants. "In considering a motion to dismiss, '[t]he court must construe the complaint in a light most favorable to the plaintiff, and accept all of [the] factual allegations as true.'" *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002). Where, as here, the Court "is able to decide the motion upon the [pleadings] alone, a plaintiff is required to set forth only a prima facie case for jurisdiction to avoid dismissal." *Ford Motor Co. v. Great Domains, Inc.*, 141 F. Supp. 2d 763, 770 (E.D. Mich. 2001).

III. FACTS

On February 26, 2009, Plaintiff Weather Underground filed a nine-count Complaint with this Court that alleged that Defendant Navigation Catalyst Systems, Inc., as well as Defendants Basic Fusion, Inc., Connexus Corp., and FirstLook Inc., were responsible for the unlawful cybersquatting and trademark infringement of Plaintiff Weather Underground's trademarks. On April 14, 2009, Defendants NCS, Basic Fusion, Inc., Connexus Corp., and FirstLook Inc. filed a Motion to Dismiss, which argued that this Court does not have specific jurisdiction over those Defendants because they had not purposely availed themselves of acting the State of Michigan or caused a consequence in the State of Michigan. These arguments were premised on the fact that the Defendants' websites are passive and that their actions did not directly target the State of Michigan. On November 13, 2009, this Court denied Defendants' Motion to Dismiss as to NCS, but dismissed Defendants Connexus, Basic Fusion, and FirstLook

from this case. In holding that Defendant NCS is subject to specific personal jurisdiction within the State of Michigan, this court stated,

> In light of allegations regarding Defendant's purposeful targeting and poaching Plaintiff's successful mark, the Court finds NCS entered into the forum. Because Weather Underground's principal place of business is in Ann Arbor, Michigan (Pl.'s Br. 2), and it has claimed infringement of its trademarks under the Lanham Act, among other federal and state causes of action (Compl. ¶ 6), the Court further finds for purposes of this motion that the injury occurred in Michigan.

Weather Underground, Inc. v. Navigation Catalyst Sys., Inc., 688 F. Supp. 2d 693, 701 (E.D. Mich. 2009).

On November 25, 2009, Defendant NCS filed a Motion for Reconsideration concerning the issue of personal jurisdiction. The Court denied Defendant's Motion on January 11, 2010 and declined to entertain Defendant's contention that the "Plaintiff's nerve center is in California and therefore its principal place of business is in California." See Dkt. No. 30, 01-11-2010 Order Denying Defendant's Motion for Reconsideration. On October 26, 2010, Defendant filed a Motion for Summary Judgment on October 26, 2010, which again argued that this Court did not have subject matter jurisdiction over the Defendant because the Defendant's tortious actions were not directed at Plaintiff's "nerve center," which, Defendant claims, is located in California and not Michigan.

On November 18, 2010, Plaintiff filed a Motion for Joinder to Add Party Defendants Epic Media Group, Connexus, and FirstLook. Discovery had revealed those parties had participated in the cybersquatting and trademark infringement of Plaintiff's marks and, thus, purposely availed themselves of the laws of Michigan. On January 14, 2011, this Court granted Plaintiff's Motion for Joinder, and Plaintiff

subsequently filed its First Amended Complaint on January 21, 2011. Defendant, in response, filed a Motion to Dismiss on February 3, 2011. This Motion to Dismiss argues, for the fourth time in this lawsuit, that Defendants Connexus, and FirstLook and now Epic Media Group are not subject to specific personal jurisdiction in Michigan.

IV. ARGUMENT

a. Epic Media Group, Inc. and the combination of Epic Advertising and Connexus Corporation merged into a singular whole or, alternatively, the merged Epic Advertising and Connexus Corporation is an alter ego of Epic Media Group, Inc.

Defendants contend that the allegations contained within Plaintiff's First Amended Complaint are "premised on the assumption that Connexus and Epic merged." See Dkt No. 149, Defendants' Motion to Dismiss, pg. 12. This premise, Defendants contend, "is faulty." Defendants rely upon the Declaration of Nowaczek in support of the argument that "the companies did not merge; Epic operates Connexus as a subsidiary." Despite these statements, Defendant Epic Media's own press release contradicts Defendants' claims. Epic Advertising and Connexus Corporation merged on or about March 24, 2010 and, in turn, the merged Epic Advertising and Connexus entity itself merged in fact with Epic Media Group. Defendant's own employees have referred to the deal as a merger in their testimony. (See deposition of Lily Stephenson, Exhibit A, pp. 11, 20, 222.)

Defendants have created a complex corporate hierarchy that is populated by shell companies in an attempt to avoid liability for cybersquatting and trademark infringement. Magistrate Virginia M. Morgan made the most concise statement of this

fact at this Court's hearing on Plaintiff's Motion to Compel, which occurred on May 12, 2010:

> THE COURT: I – I – I don't really understand quite frankly why Judge Battani dismissed all of the companies at the beginning of this case. And maybe she'll reconsider that as it goes through. But your defendants' response earlier that they didn't have any company – any employees and somehow this seemed to have been done by magic or by avatars. I – I did not find particularly forthcoming. I do share some of the plaintiff's concerns about gamesmanship.
>
> I don't like the multiple hats. I don't like the documents coming from one company at one time, another company another time and yet you're claiming they're not sufficiently related to go forward.
>
> So cut the crap. I'm not going to hear it anymore. Answer on behalf of all related companies. And if your guy continues to set up a bunch of extra companies, then you'll answer for them too.
>
> MR. DELGADO: Okay.
>
> THE COURT: Okay, we're done with this discussion.

(Transcript of 5-12-10 hearing, Exhibit B, pp. 10-11.) The facts indicate that Epic Media Group is a sham holding company that was created at the time of the merger to protect the former assets of Epic Advertising from the cybersquatting liabilities of Connexus, which was merged into Epic Advertising and who would have assumed the liabilities of Connexus.

On March 24, 2010, Epic Advertising and Connexus Corporation "announced their intent to **merge**." (See Exhibit C, Epic Media Group Press Release.) The press release evidencing this merger quoted both CEO of Epic Media Group Don Mathis, as well as CEO of Connexus (now Co-CEO of Epic Media Group) Art Shaw, and was prepared by Epic Media Group, Inc. (See Exhibit C, Epic Media Group Press Release.)

Connexus CEO Art Shaw was quoted as stating, “We’re **combining** two market leaders. Both companies will continue to grow their core competencies, while we **combine** our data and technology to increase relevance across all our businesses.” (See Exhibit C, Epic Media Group Press Release.) The press release further read, “The **combined** entity has offices in Los Angeles, New York, Toronto, London, San Francisco, Chicago, Dallas, **Detroit**, and the Silicon Valley.” (See Exhibit C, Epic Media Group Press Release.) On May 18, 2010, SmartBrief, which provides industry-related newsletters, reported, “Epic Advertising and Connexus Corporation today announced the completion of their merger, and the formation of Epic Media Group as the parent company.” Thus, Epic Media Group became the parent corporation of the merged Connexus and Epic Advertising according to published reports.

Epic Media Group is a shell company that has been created to protect the assets of Epic Advertising from the liabilities of Connexus Corporation. Upon Epic Advertising’s merger with Connexus, Connexus’ CEO, Art Shaw, became the Co-CEO of Epic Media Group. Former Epic Advertising CEO Don Mathis became the President and Co-CEO of Epic Media Group. Charles Nowaczek, the former COO of Epic Advertising, became the COO of Epic Media Group. While Mr. Nowaczek’s bio states that “Charles joined Epic Media Group in March of 2006…,” Epic Media Group did not exist in March of 2006; it was created on May 18, 2010. The http://www.theepicmediagroup.com domain name was registered on May 5, 2010. (See Exhibit D, WHOIS Entry for theepicmediagroup.com.) Despite Epic Media Group’s press release, which stated that “[t]he **combined** entity has offices in Los Angeles, New York, Toronto, London, San

Francisco, Chicago, Dallas, **Detroit** and the Silicon Valley," these offices are listed on Epic Media Group's homepage as belonging to Epic Media Group, not Connexus or Epic Advertising. Simply put, Epic Media Group has the same ownership and operations structure that you would expect to see in a merger of the former Epic Advertising with Connexus, which, in fact, actually occurred and has been confirmed by Epic Media Group's press releases. Defendants are now making the effort to back away from the concept of a merger due to the significant potential liability against Connexus by the cybersquatting activities as described in this lawsuit and potentially others to come.

Under Eastern District of Michigan precedent, "where the two companies merge in effect, if not formally, the resulting corporation takes on the liabilities of both." *Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1110 (E.D. Mich. 1997). Thus, had the former Epic Advertising merely merged with Connexus, the newly formed company would have taken on the liabilities of Connexus. Instead, Epic Media Group was created to shield the former assets of Epic Advertising from the liabilities of Connexus and has the same ownership and operations structure of the merged Connexus and Epic Advertising. Thus, Epic Media Group constitutes the product of a *de facto* merger of Epic Media Group with the merged Connexus and Epic Advertising entity under Michigan law. The requirements for *de facto* merger under Michigan law are:

1. Continuation of the enterprise of the seller corporation, with continuity of management, personnel, physical location, assets, and general business operations;

2. Continuity of shareholders, resulting from the purchasing corporation's use of its own stock to purchase acquired assets;
3. The seller corporation must cease ordinary business operations, liquidate and dissolve as soon as legally and practically possible; and
4. The purchasing corporation must assume the liabilities and obligations of the seller necessary for the uninterrupted continuation of normal business operations of the seller.

Id. at 1111. Epic Media Group has continued the enterprise of the merged Epic Advertising and Connexus, and has the same management, personnel, physical location, assets, and general business operations. Discovery would no doubtedly reveal that Epic Media Group has the same continuity of shareholders as the merged Epic Advertising/Connexus and that the merged Epic Advertising/Connexus has, for all intents and purposes, ceased ordinary business operations.

Even assuming, *arguendo*, Epic Media Group has not merged with the merged Epic Advertising and Connexus, Epic Media Group, as the parent corporation of the merged Epic Advertising and Connexus, is the alter ego of that merged entity and, as such, the actions of the merged Epic Advertising and Connexus may be attributed to Epic Media Group for the purposes of personal jurisdiction. Under Michigan law, "the actions of one defendant may be attributed to another where one is the 'alter ego' of the other, for example, in a subsidiary-parent corporation relationship." *Children's Orchard, Inc. v. Children's Orchard Store No. 142, Inc.*, 10-10143, 2010 WL 2232440 (E.D. Mich. May 28, 2010). "Proof of a corporate alter ego relationship requires that the two enterprises 'have substantially identical management, business, purpose, operation, equipment, customers, supervision, and ownership." *Id*. (citing *Laborers' Pension Trust Fund v. Lange*, 825 F. Supp. 171, 176 (E.D. Mich. 1993)).

As stated above, Epic Media Group and the merged Epic Advertising and Connexus have substantially identical management, business, purpose, operation, equipment, customers, supervision, and ownership. Epic Media Group now has the same management that a reasonable individual would have expected to see in a merged Epic Advertising and Connexus entity, namely, a combination of the management of Connexus with the management of Epic Advertising. Consequently, Epic Media Group, as the alter ego of the merged Epic Advertising and Connexus, can be held liable for the actions of Connexus for the purposes of personal jurisdiction.

b. Specific jurisdiction is proper over Connexus, FirstLook, and Epic Media under the *Zippo* test because the websites created, operated, and maintained by FirstLook, supervised Connexus employees, and owned by Epic Media are interactive and commercial in nature.

Specific jurisdiction is proper over Connexus, FirstLook, and Epic Media under the Zippo test because the websites created by FirstLook under the direction and control of Connexus employees are both interactive and commercial in nature. Since Epic Media Group has merged in fact with the merged Connexus and Epic Advertising or, alternatively, because Epic Media Group is the alter ego of the merged Connexus and Epic Advertising, the actions and liability of the merged Connexus and Epic Advertising may be imputed to Epic Media Group for the purposes of personal jurisdiction. Consequently, this Court may exercise personal jurisdiction over Connexus, FirstLook, and Epic Media under the *Zippo* test.

Zippo applies a "sliding scale" approach to determine whether the exercise of personal jurisdiction over a party is appropriate. Under *Zippo*'s reasoning,

> [a]t one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. 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 of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Zippo at1124. Thus, a court must decide whether the Defendant is merely maintaining a passive website, which, "in and of itself, does not constitute the purposeful availment of the privilege of acting in Michigan," *Neogen Corp. v. Neo Gen Screening, Inc.* 282 F.3d 883, 890 (6th Cir. 2002), or whether the Defendant's website falls within the "middle ground" or involves the "knowing and repeated transmission of computer files over the Internet," *Zippo* at 1142.

Defendant FirstLook's websites are both interactive and commercial in nature. Even Defendant refers to its websites as "dynamic." Despite Defendants' contention, Defendants' websites in fact do not "simply provide informational hyperlinks." Defendant FirstLook's "keyword optimizers" purposefully select the keywords to be displayed on the parking pages at Defendant NCS's typosquatted websites. (See Exhibit E, Deposition of Dennis Rhee, pgs. 150, 166.) Defendant's "keyword optimizers" select these key words by typing the domain name, such as watherunderground.com, into a search engine to determine keywords that relate to the domain name. (See Exhibit E,

Deposition of Dennis Rhee, pgs. 27-28.) The more relevant the keywords, the more likely Internet users will stay at Defendant's typosquatted domain name and utilize the links displayed on the parking page located at Defendants' domain name website. (See Exhibit F, Printout of parking page.) If an Internet user clicks on one of these relevant results, that user will then be forwarded to a second, internal, webpage of results that displays links to third party websites. (See Exhibit G, Printout of internal link page.) If a user then clicks on any of these links, Defendant receives a commission for referring that user to a third party website. (See Exhibit H, Deposition of Mavi Llamas, pgs. 219-225 (filed under seal).) In short, Defendant purposefully and intentionally selects relevant keywords to be displayed on its parking pages, keywords such as "weather," "pizza," "furniture," "Dominos," or "Meijer," so that Internet users that attempted and intended to reach weatherunderground.com, dominos.com, artvan.com, or meijer.com, all Michigan companies, and, instead, arrived at watherunderground.com, doinos.com, wwwartvan.com, or mrijer.com, stay on the parked page and click on relevant a link to a third-party competitor, which results in the payment of a commission to Defendant FirstLook. (See Exhibit I, Printout of Dominos Parking Page.) Based on this interactivity and direction, Defendant FirstLook's websites are wholly commercial and cannot be said to be passive in nature as their whole cybersquatting business model is purposefully designed, engineered, and directed at trademarked companies in Michigan for the purpose of profiting from those activites.

Connexus' employees in turn, undertake Defendant FirstLook's actions. Connexus provides FirstLook's payroll services, staffing services, search services, and

recruitment services. (See Exhibit J, Deposition of Jacoby p. 320.) Connexus drafts the domain name purchase agreements utilized by FirstLook in its buying and selling of domain names. (See Exhibit J, Deposition of Jacoby p. 320.) Connexus employees provide advice and counsel as to whether FirstLook or NCS should purchase certain domains. (See Exhibit J, Deposition of Jacoby p. 34.) All "employees of FirstLook" execute employment agreements with Connexus, not FirstLook. (See Exhibit J, Deposition of Jacoby pp. 329-330.) Connexus writes the payroll checks for all FirstLook employees. (See Exhibit J, Deposition of Jacoby pp. 329-330.) And, most importantly, Connexus employees reviewed the domain names registered by Navigation Catalyst Systems and monetized by FirstLook for "potential trademark infringement." (See Exhibit H, Deposition of Llamas pp. 21-22.) Thus, Connexus, for the purposes of personal jurisdiction under the *Zippo* test, operates the interactive websites that, according to Defendant, are owned, operated, and maintained by FirstLook. From its provision of employees, to its veto over trademark infringing keywords and domain names, Connexus, *is* FirstLook for the purposes of personal jurisdiction under the *Zippo* test.

For the purposes of personal jurisdiction, Epic Media Group is also FirstLook. Epic Media Group is a *de facto* merger of the merged Connexus/Epic Advertising entity, which in turn provided employees to FirstLook, paid those employees, and served as a veto over trademark infringing keywords and domain names. As stated above, where "two companies merge in effect, if not formally, the resulting corporation takes on the liabilities of both." *Chrysler Corp.* at 1110. The resulting Epic Media Group has assumed

the liabilities of the merged Connexus/Epic Advertising entity, which itself assumed the liabilities of Connexus through its merger. Epic Media Group, for the purposes of personal jurisdiction, provided the employees that created FirstLook's interactive and commercial web pages.

Even assuming, *arguendo*, that Epic Media Group is not a *de facto* merger of the merged Epic Advertising and Connexus entity, Epic Media Group is the alter ego of that merged entity. The two enterprises "have substantially identical management, business, purpose, operation, equipment, customers, supervision, and ownership." *Children's Orchard, Inc.* at 6. As such, "the actions of [the merged Connexus/Epic Advertising] may be attributed to [Epic Media Group]." *Id*. Consequently, Defendants Epic Media Group, Connexus, and FirstLook are subject to specific personal jurisdiction in Michigan under the *Zippo* sliding scale test.

c. Specific jurisdiction is proper over Connexus, FirstLook, and Epic Media under the *Calder* test because those entities committed intentionally tortious acts that were expressly aimed towards Michigan, which cased harm to Plaintiff.

Outside of the *Zippo* test, this Court may also examine whether the effects of the defendant's actions caused harm in the state that the defendant knew was likely to be suffered in that state, to determine whether a defendant has purposefully availed itself of the laws of the State of Michigan. *See Calder* at 783. A court may exercise personal jurisdiction under *Calder* if the defendant: "(i) commits intentionally tortious actions; (ii) which are expressly aimed at the forum state; (iii) which cause harm to the plaintiff in the forum state which the defendant knows is likely to be suffered." *Calder* at 790.

Defendants contend that Plaintiff cannot show that the cybersquatting and trademark infringing activities of NCS, FirstLook, Connexus, and Epic Media Group were expressly aimed at Michigan or that the harm caused by those activities was felt in Michigan. In support of their arguments, Defendants argue that Plaintiff's principal place of business is in San Francisco, California and that the "brunt" of the harm felt by Plaintiff was, necessarily, felt in San Francisco. These arguments are rehashed from Defendants' Motion for Summary Judgment, which confused the *Hertz* test for diversity jurisdiction with the *Calder* test, which does not require an analysis of the Plaintiff's principal place of business. Specific personal jurisdiction concerns whether the contesting party has purposely availed itself of the laws of the State of Michigan, not whether the party asserting personal jurisdiction is primarily or solely located in Michigan. In short, Defendant requests that this Court find that it has personal jurisdiction over Plaintiff instead of the relevant *Calder* inquiry, which asks whether the Plaintiff was harmed in the forum state.

The personal jurisdiction inquiry has never primarily questioned whether a Plaintiff is only located within the state, nor whether the Plaintiff's principal place of business is located in the state. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) ("Jurisdiction is proper, however, where the contacts proximately result from actions by the **defendant** *himself* that create a 'substantial connection' connection with the forum State."). Instead, courts have examined the defendant's contacts with the state because personal jurisdiction doctrine seeks to determine whether exercising jurisdiction over the defendant, not the plaintiff, is constitutionally proper and

reasonable. *See Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 200) holding modified by *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1119 (9th Cir. 2006) ("Factors to be taken into consideration [for general jurisdiction] are whether the **defendant** makes sales, solicits, or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there."). Even assuming, *arguendo*, Defendants are correct, and Plaintiff's principal place of business is located in California, courts have recognized that, for the purposes of personal jurisdiction, "in appropriate circumstances a corporation can suffer economic harm both where the bad acts occurred and where the corporation has its principal place of business." *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1113 (9th Cir. 2002).

Even if the personal jurisdiction inquiry required that the Plaintiff's principal place of business feel the brunt of the harm, Plaintiff's principal place of business is located in the State of Michigan. As stated in numerous other briefs, Plaintiff Weather Underground, Inc. is a Michigan corporation, its principal office is in Ann Arbor, Michigan, and its operations arose out of the creation of a real-time weather system at the University of Michigan. See Dkt. No. 19, Plaintiff's Response to Defendant's Motion to Dismiss, Affidavit of Jeff Ferguson; see also Dkt. No. 133, Plaintiff's Response to Defendants' Motion for Summary Judgment. Plaintiff's primary mailing address is located in Ann Arbor, Michigan, and Plaintiff's trademark registrations list Ann Arbor, Michigan as Plaintiff's principal place of business. (See Exhibit K, Printout of Weather Underground Trademark Registrations.) Plaintiff also pulls a significant amount of its

business from Michigan. In the month of January 2011, 553,915 web surfers visited Plaintiff's http://www.weatherunderground.com from the State of Michigan. (See Exhibit L, Printout of Quantcast Results.)

Defendants expressly aimed their cybersquatting and trademark infringing conduct at the State of Michigan. Defendant NCS registered, used, and trafficked in domain names containing the valuable trademarks of Michigan companies, such as Weather Underground, Dominos, Art Van, and Meijer all well known Michigan companies. (See Exhibit M, List of Michigan Typosquats.) Defendant FirstLook optimized and hand-selected the keywords to be displayed on the parking pages at NCS's domain names, which display the registered trademarks of Michigan companies. (See Exhibit I, Printout of <doinos.com> PPC Ads; see also Exhibit E, Deposition of Dennis Rhee, pgs. 150,166.) Defendant Connexus drafted the domain name purchase agreements, provided FirstLook's employees, payroll, staffing services, and recruiting services, and, most importantly, directed FirstLook and NCS (which, according to Defendants' admission, has no employees) as to whether they should purchase or drop certain domain names based on "potential trademark infringement," including domain names that targeted Michigan companies. (See Exhibit J, Deposition of Jacoby pp. 34, 320, 329, and 330; see also Exhibit H, Deposition of Llamas, pp. 21-22.) And Epic Media Group has accepted the liabilities of Connexus through its *de facto* merger with the merged Connexus/Epic Advertising entity or, alternatively, is the alter ego of the Connexus/Epic Advertising entity, and the actions of that entity may be imputed to Epic Media Group under Michigan law. Epic Advertising (now Epic Media Group) maintained

an office in Detroit, Michigan at the time of its merger with Connexus, which further supports personal jurisdiction in Michigan. (See Exhibit C, Epic Media Group Press Release.)

Defendants have caused harm to the Plaintiff in Michigan, which harm Defendants knew was likely to be suffered in Michigan. Defendants had constructive knowledge of Plaintiff's trademark rights by virtue of Plaintiff's trademark registrations, which list Plaintiff's location of business as Ann Arbor, Michigan. 15 U.S.C. § 1072 states, "Registration of a mark on the principal register… shall be constructive notice of the registrant's claim of ownership thereof." Since Plaintiff is the owner of registered trademarks for THE WEATHER UNDERGROUND and WUNDERGROUND.COM, "defendants had constructive notice of [those marks] through [their] registration." *Wynn Oil Co. v. Am. Way Serv. Corp.*, 943 F.2d 595, 603 (6th Cir. 1991). Defendants' constructive notice of Plaintiff's trademark rights put Defendants on notice that their intentionally tortious acts would cause harm to Plaintiff in the State of Michigan.

Finally, not only have all of the named Epic Media Group shell companies participated in a calculated scheme to infringe upon the trademarks of some of Michigan's largest and most prominent companies, but Epic Media Group, Connexus, FirstLook, and NCS are still registering, using, trafficking in, and monetizing domain names that contain Plaintiff's trademarks, even after those companies had knowledge that Plaintiff is located in Michigan. For example, NCS still owned <wwatherunderground.com> as of March 30, 2009, which was after the filing of Plaintiff's Complaint. (See Exhibit N, WHOIS Archive for <wwatherunderground.com>.)

NCS currently owns <undunderground.com>, which was registered on February 27, 2009 and was registered after the filing of Plaintiff's Complaint. (See Exhibit O, WHOIS Archive for <undunderground.com>.) This domain name is still in use, despite any due diligence that should have preceded the merger of Epic Advertising and Connexus and the creation of Epic Media Group. Defendants continue to cybersquat on Michigan companies, such as Ziebart <ziebarts.com>, the Detroit News <detritnews.com>, and the Detroit Free Press <deroitfreepress.com>. (See Exhibit P, Printout of WHOIS Entries registered under Domain Name Proxy, LLC, another Epic Media Group company.) Consequently, personal jurisdiction is proper over Defendants under the *Calder* test because they committed intentionally tortious acts that were expressly aimed at companies located within the State of Michigan, including Plaintiff, and those acts caused harm to the Plaintiff, which, through constructive and actual knowledge of Plaintiff's trademarks, Defendants knew was likely to be suffered.

V. CONCLUSION

As indicated, all the Defendants are inextricably interrelated. Jurisdiction is proper under the *Zippo* test because the cybersquatting websites are commercial and much more than passive in nature, or under the Calder test because Defendants specifically targeted trademarked businesses in Michigan to cybersquat. For all of the foregoing reasons as provided for in this Brief, Plaintiff requests the Court deny Defendants' Motion to Dismiss.

Respectfully submitted this 3rd day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on March 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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