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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REPLY BRIEF OF EPIC, CONNEXUS, AND FIRSTLOOK IN SUPPORT OF MOTION TO DISMISS

REPLY MEMORANDUM

I. THE CASES CITED BY PLAINTIFF SUPPORT DEFENDANTS' POSITION.

As this Court knows, Defendants' position is straightforward: since the Court has utilized the jurisdictional test of *Calder v. Jones* in this matter, it must determine where a corporation such as Plaintiff suffers harm? It is Defendants' position that a corporation suffers harm at its principal place of business, and Plaintiff's principal place of business is in California not Michigan.

Now, even Plaintiff has provided the Court with a case that supports Defendants' argument.[1] On page 15 of its Opposition, Plaintiff cites to *Dole Food Co. v. Watts*, 303 F.3d 1104 (9th Cir. 2002), a case in which the Ninth Circuit "face[d] the somewhat metaphysical question of where a corporation suffers economic harm." *Id*. at 1113. That question is identical to the question this Court is presently considering. Ultimately, the *Dole* Court noted that "[i]n a variety of contexts, other circuit courts have also relied in significant part on the principal place of business in determining the location of a corporation's place of economic injury." *Id*. at 1113-14 (citing cases) and found "this line of cases applicable here." *Id*. at 1114.

Perhaps realizing that it cannot escape case law recognizing that corporations suffer harm at their principal place of business, Plaintiff continues to advance the fallback argument that its principal place of business is in Michigan and not California. For all the reasons noted in the MSJ brought by NCS, that is simply not the case. Plaintiff's California office is much larger, contains many more employees, more equipment, and more executive officers. In addition, California hosts the company's annual meeting of shareholders and Board of Director meetings.

[1] NCS earlier brought *Dole* to the Court's attention in connection with its Motion for Summary Judgment. What is notable about the *Dole* case now is that Plaintiff presently relies on *Dole* in its Opposition instead of attempting to explain it away.

Under *Hertz* (or the 6th Circuit test which preceded *Hertz*), Plaintiff's principal place of business is undoubtedly San Francisco, California.

Perhaps realizing that this, too, is the case, Plaintiff may attempt to argue that this is a special situation where the "brunt of the harm" is not felt at the company's principal place of business at all but, rather, in Michigan because of consumer confusion in Michigan. Using Quantcast data (Opposition Exhibit L), Plaintiff is quick to point out that 553,915 visitors to Plaintiff's websites originated in Michigan. Notably, Plaintiff is also quick to ignore that the state of Michigan is ***Number 12*** on the list of locations from where traffic originates. From which state does the most traffic originate? California, home to 2,226,676 visitors to Plaintiff's websites. Put a different way, ***four times*** as many visitors visit Plaintiff's websites from California than Michigan. So, to the extent that Plaintiff alleges "consumer confusion" as the harm which it suffers, then isn't the "brunt of the harm" felt where the most consumers originate?

Lastly, Plaintiff seemingly attempts to advance the proposition that NCS's registration of domain names that are allegedly similar to the domain names of other Michigan companies is sufficient for purposes of jurisdiction. That proposition, for which Plaintiff has no support, is a non-starter. *Calder* is focused on the actions vis-à-vis Plaintiff and Defendant…not Defendant and some third party unrelated to the litigation.

II. PLAINTIFF CANNOT SHOW THE ELEMENTS OF A *DE FACTO* MERGER.

Together with its original Motion, Defendants submitted a Declaration by Charles Nowaczek, under penalty of perjury, in which it was explained that Connexus is a wholly-owned subsidiary of Epic and continues to operate as the parent company of Firstlook. Nowhere in its Opposition does Plaintiff adequately address that declaration. The Court should bear in mind that the Epic-Connexus transaction occurred in May 2010 but discovery in this matter did not

close until December 2010. In short, Plaintiff had over six months during which it could have explored the precise financial arrangement between Epic and Connexus. It simply chose not to.

Instead, Plaintiff attempts to rely on press releases that were crafted with an eye towards brand positioning and marketing and not legal formality. It should come as a surprise to no one that, in fact, the press release from March 24, 2010 did not accurately capture the final transaction that was consummated in May 2010. Moreover, testimony from employees who do not have any personal knowledge of the transaction who are simply opining on a personal level is plainly irrelevant.

Undoubtedly aware that it cannot show that Epic and Connexus *actually* merged, Plaintiff instead argues that Epic and Connexus entered into a *de facto* merger. That argument also fails because Plaintiff cannot establish all four of the elements of a *de facto* merger. The easiest example to show is this: Plaintiff admits that it must show that the seller corporation (Connexus) ceased ordinary business operations, liquidated assets, and dissolved. Opp. at 8 *citing Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1111 (E.D. Mich. 1997). In fact, however, and as the California Secretary of State confirms, Connexus is still an ***active*** corporation that has not ceased ordinary business operations or dissolved but continues to operate as the parent of Firstlook. *See* Exhibit A hereto; *Chrysler*, 972 F. Supp. at 1111 ("Far from dissolving after it sold its assets to KMC, KFC survived as a holding company with substantial assets until its formal dissolution in 1977."). Absent the cessation of business by the seller, there can be no merger. Period.[2]

III. ALTER EGO LIABILITY DOES NOT EXIST.

[2] Plaintiff is similarly unable to establish other elements but as this is a five page reply brief on the Motion to Dismiss for Lack of Personal Jurisdiction and not the opening brief on a Motion for Summary Judgment on the issue of successor liability, Defendants are somewhat limited in their ability to explain these other elements.

In a last-ditch effort, Plaintiff argues that if Epic did not merge with Connexus, and if the transaction between Epic and Connexus was not a *de facto* merger, then Epic can still be liable because it is the "alter ego" of Connexus. That argument fails as a matter of fact and law. First, Plaintiff does not cite to any admissible evidence for its argument that Epic and Connexus "have substantially identical management, business, purpose, operation, equipment, customers, supervision, and ownership." Opp. at 9. Again, Plaintiff had months where it could have explored such issues but chose not to. In fact, Epic can show that is ***not*** the case. In fact, if the Court finds that Epic is subject to jurisdiction in Michigan, the Court should nevertheless consider holding an evidentiary hearing on the related issue of successor liability in advance of further litigation. There is no sense in forcing Epic to incur costs and expenses in litigating the merits of a litigation to which it is not properly a party.

Second, "[t]he Sixth Circuit has recently stated that in addition to the existence of 'such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist,' some form of culpable conduct is required: '[T]he circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.'" *Chrysler*, 972 F. Supp. at 1105. But, neither in its First Amended Complaint nor in its Opposition does Plaintiff set forth the "culpable conduct" which would be required to impose alter ego liability. Opp. at 9. *At best*, Plaintiff seems to argue that alter ego liability is proper because, otherwise, the assets of Epic would be protected. Opp. at 6. But, "the lawful use of the corporate form to avoid personal liability is not cause for piercing the corporate veil. 'Organization of a corporation for the avowed purpose of avoiding personal responsibility does not itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form.'" *Chrysler*, 972 F. Supp. at 1107.

IV. *ZIPPO* REQUIRES INTERACTIVITY BETWEEN WEBSITE VISITOR AND WEBSITE.

Defendants are fully aware that, in the paragraphs that follow, a dead horse will be beaten and apologize in advance to the Court for that. Nevertheless, Plaintiff's continued misrepresentation of the holding of *Zippo* requires it. To wit, Plaintiff continues to argue that jurisdiction under *Zippo* is proper because the websites are "commercial" in nature and because they are optimized by Firstlook employees so that the information presented on the websites is the type of information which users seek. Opp. at 10-11. **That does not matter**.

The sliding scale of *Zippo* focuses on the commercial interactivity between website ***visitor*** and the website, not the interactivity between the website ***designer*** and the website. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (noting that in evaluating "interactive Web sites where a **user** can exchange information with the host computer . . . , 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.") (emphasis added). Plaintiff has now had numerous opportunities to show that commercial activity occurs as between website ***visitor*** and the Firstlook websites but has been unable to because visitors do not conduct any business with Firstlook's websites.

RESPECTFULLY SUBMITTED this 18th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 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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