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

Defendants.

Enrico Schaefer (P43506)
Brian A. Hall (P70865)
TRAVERSE LEGAL, PLC
810 Cottageview Drive, Unit G-20
Traverse City, MI 49686
231-932-0411
enrico.schaefer@traverselegal.com
brianhall@traverselegal.com
Lead Attorneys for Plaintiff

Anthony P. Patti (P43729)
HOOPER HATHAWAY, PC
126 South Main Street
Ann Arbor, MI 48104
734-662-4426
apatti@hooperhathaway.com
Attorneys for Plaintiff

William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

Nicholas J. Stasevich (P41896)
Benjamin K. Steffans (P69712)
BUTZEL LONG, P.C.
150 West Jefferson, Suite 100
Detroit, MI 48226
(313) 225-7000
stasevich@butzel.com
steffans@butzel.com
Local Counsel for Defendants

EPIC MEDIA GROUP, INC.S' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

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

PLEASE TAKE NOTICE THAT, pursuant to Fed. R. Civ. P. 56, Defendant Epic Media Group, Inc. ("Epic Media") hereby moves this Court for summary judgment on all Counts in the First Amended Complaint and for entry of an Order dismissing Plaintiff's claims against Epic Media.

This Motion is based on the facts and arguments set forth in the accompanying Memorandum of Points and Authorities; to wit, that Epic Media may not be held liable for the alleged unlawful acts of its subsidiaries, Connexus Corporation, Firstlook, Inc., and Navigation Catalyst Systems, Inc. (collectively "Connexus"), because Epic Media did not assume the liabilities of Connexus when it acquired Connexus as a subsidiary through a reverse triangular merger in 2010. In addition, any attempt to pierce the corporate veil of Connexus to impose liability on Epic Media must be rejected because a parent corporation may not be held responsible by veil piercing for the alleged acts of a subsidiary that occurred before the parent acquired the subsidiary, and, in any event, the elements necessary to pierce the corporate veil do not exist. Similarly, any attempt to impose successor liability on Epic Media based on a de facto merger theory must be rejected because, among other reasons, Epic Media is not a successor to Connexus, and Connexus has continued its ordinary business operations as a separate entity following the reverse triangular merger.

This Motion is supported by the attached Memorandum of Points and Authorities, the Declarations of David Graff and William A. Delgado, the case file, and the arguments of counsel that the Court would entertain at a hearing on this Motion.

On July 5, 2011, there was a conference between William A. Delgado, counsel for Epic Media, and Enrico Schaefer, counsel for Plaintiff, in which Epic Media explained the nature of this Motion for Summary Judgment and its legal basis and requested, but did not obtain, concurrence in the relief sought.

RESPECTFULLY SUBMITTED this 15th day of July, 2011.

/s/William A. Delgado
William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

STATEMENT OF THE ISSUES PRESENTED

The issues presented in this Motion are:

(1) Whether Epic Media assumed the liabilities of Connexus when it acquired Connexus as a subsidiary in 2010 through a reverse triangular merger;

(2) Whether Epic Media was or is the alter ego of Connexus, such that the Court is justified in piercing the corporate veil to impose liability on Epic Media for the alleged unlawful acts of Connexus; and

(3) Whether the transaction by which Epic Media acquired Connexus as a subsidiary in 2010 amounts to a de facto merger that confers successor liability on Epic Media.

Epic Media respectfully submits that the answer to each of these issues is "no."

CONTROLLING AUTHORITY

A. Governing Law

Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928 (7th Cir. 1996)

Chrysler Corp. v. Ford Motor Co., 972 F. Supp. 1097 (E.D. Mich. 1997)

B. Reverse Triangular Mergers

Saginaw Property, LLC v. Value City Dep't Stores, LLC, 2009 WL 3536616 (E.D. Mich. Oct. 30, 2009)

In re Welding Fume Prods. Liab. Litig., 2010 WL 2403355 (N.D. Ohio June 11, 2010)

Binder v. Bristol-Myers Squibb, Co., 184 F. Supp. 2d 762 (N.D. Ill. 2001)

C. Piercing The Corporate Veil

Wallace ex rel. Cencom Cable Income Partners II,, L.P. v. Wood, 752 A.2d 1175 (Del. Ch. 1999)

First Presbyterian Church of Ypsilanti v. H.A. Howell Pipe Organs, Inc., 2010 WL 419972 (E.D. Mich. Feb. 1, 2010)

Nogueras v. Maisel & Assocs. of Mich., 369 N.W.2d 492 (Mich. App. 1985)

D. Successor Liability Through A De Facto Merger

Hariton v. Arco Elecs., Inc., 182 A.2d 22 (Del. Ch. 1962).

Saginaw Property, LLC v. Value City Dep't Stores, LLC, 2009 WL 3536616 (E.D. Mich. Oct. 30, 2009)

Bestfoods v. AeroJet Gen. Corp., 173 F. Supp. 2d 729 (W.D. Mich. 2001)

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

As the Court will recall, this is an action under the Anti-Cybersquatting Consumer Protection Act ("ACPA"). Plaintiff has alleged that, between 2004 and 2009, Connexus Corporation ("Connexus") and its subsidiaries registered, used, and/or trafficked in domain names that are confusingly similar to Plaintiff's trademarks, THE WEATHER UNDERGROUND and WUNDERGROUND. While this lawsuit was pending, in 2010, Connexus (and its subsidiaries) entered into a transaction with Azoogle.com, Inc.. ("Azoogle.com"). Azoogle.com subsequently changed its name to The Epic Media Group, Inc. ("Epic Media") and is the defendant bringing this motion. The question now before this Court is whether Epic Media is liable for the actions of Connexus, now its subsidiary, which occurred prior to the acquisition. The answer is no.

It is an established principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries. That is particularly true when, as here, the actions of the subsidiary occurred before the parent-subsidiary relationship came into existence. To date, Plaintiff's only argument to impose liability on Epic Media has been that Epic Media can be held liable because it "merged with Connexus" and "has accepted the liabilities" of Connexus. FAC ¶¶ 5, 9. The facts do not support this argument.

Rather, the undisputed facts establish that Epic Media and Connexus never merged and that Epic Media never assumed the liabilities of Connexus. Instead, Epic Media acquired Connexus as a subsidiary through a reverse triangular merger in which a newly-formed subsidiary of Epic Media was merged into Connexus. Because case law makes clear that a

reverse triangular merger does not result in the parent corporation taking on the liabilities of the target corporation, Epic Media acquired Connexus as a subsidiary **without assuming its liabilities**.

In addition, any attempt to pierce the corporate veil of Connexus must fail because the alleged wrongful conduct of Connexus occurred before Epic Media acquired Connexus as a subsidiary. Thus, Plaintiff cannot show that, during the relevant time period (i.e., between 2004-2009), Connexus was a mere instrumentality of Epic Media or that the corporate form was used to subvert justice or commit fraud. Similarly, any attempt to argue that the reverse triangular merger amounts to a de facto merger must fail because (i) the transaction was not a sale of assets and (ii) even if the transaction was analyzed as a sale of assets, Plaintiff cannot establish each of the four requirements for a de facto merger.

In the end, Plaintiff's attempts to reach the assets of Epic Media for the alleged unlawful acts of its subsidiary are futile, and its claims against Epic Media should therefore be dismissed.

STATEMENT OF FACTS

Epic Media*'s Acquisition of Connexus*. Azoogle.com created Emerald Acquisition Group One ("Emerald") on March 17, 2010 as a wholly-owned subsidiary for the specific purpose of acquiring Connexus Corporation through a reverse triangular merger. Declaration of David Graff, dated July 9, 2011 ("Graff Decl.") at ¶ 4 & Ex. A; Deposition of David Graff taken on June 24, 2011 ("Graff Dep.") at 104:23-105:21. Connexus merged into Emerald on May 4, 2010, with Connexus remaining as the surviving entity. Graff Decl. at ¶ 5 & Ex. B (Section 2.2 of the Merger Agreement and Certificate); Graff Dep. at 105:22-106:5. As a result of the merger between Emerald and Connexus, the outstanding capital shares of Emerald were converted into a

capital share of Connexus. Graff Decl. at ¶ 6. Then, the capital shares of Connexus stock outstanding immediately before the effective time of the transaction with Emerald were converted into capital shares of Epic Media. Id. at ¶ 6; Graff Dep. at 107:3-7 and 57:10-21.

The Business of Epic. Prior to the acquisition described above, Azoogle.com, a Delaware corporation with its principal place of business at 512 Seventh Avenue, New York, New York, was doing business as Epic Advertising. Graff Decl. at ¶ 7. Immediately prior to the acquisition, Azoogle.com had three subsidiaries: AzoogleAds, U.S., Inc., Epic Advertising Limited, and Online Intelligence, LLC (collectively the "Epic-Side Subsidiaries"). Id. at ¶ 8; Graff Depo. at 17:3-15 and 19:17-20:7.. After acquiring Connexus as a fourth subsidiary, Azoogle.com changed its name to The Epic Media Group, Inc. the defendant in this case. Id. at ¶ 9.

However, the operations of the Epic-Side Subsidiaries have not changed post-acquisition. The operating expenses for Epic Media and the Epic-Side Subsidiaries are paid out of bank accounts at RBC Bank which were owned by Azoogle.com. Id. at ¶ 10; Graff Dep. at 80:21-81:9. The payroll for Epic Media and the Epic-Side Subsidiaries is processed by ADP and paid under the Employer Identification Number ("EIN") used by Azoogle.com prior to the acquisition. Id. at ¶ 11 & Ex. C; Graff Dep. at 79:8-80:7. The Epic-Side Subsidiaries have their own (consolidated) general ledger in the company's Oracle financial system. Graff Decl. at ¶ 12; Graff Dep. at 111:4-112:7. Revenue and expenses associated with contracts for Epic Media and the Epic-Side Subsidiaries are recorded in their general ledger. Id. at ¶ 13. Epic Media and the Epic-Side Subsidiaries have their own set of assets (e.g., furniture, computer equipment, etc.). Id. at ¶ 14.

In addition, as a general matter, the Epic-Side Subsidiaries continue to engage in the same business in which they were engaged prior to the acquisition, and they are run by individuals that had been employees of Azoogle.com prior to the acquisition. Id. at ¶ 15. AzoogleAds, U.S., Inc. is an advertising network that is overseen by Donald Mathis. Id. Epic Advertising Limited is also an advertising network based in the United Kingdom run by Adam Alter. Id.. Online Intelligence, LLC is a fraud and detection service run by EJ Hilbert. Id.

Background of Connexus. Prior to its acquisition, Connexus Corporation, a Delaware corporation, had its principle place of business in El Segundo, California with an ancillary office for members of Firstlook at 335 Madison Ave., Suite 840, New York, New York. Id. at ¶ 16. At the time of the acquisition, Connexus had three subsidiaries: Firstlook, Traffic Marketplace, and Netblue Vietnam Ltd. (the "Connexus-Side Subsidiaries"). Id. at ¶ 17. Following the acquisition, Connexus is an active corporation, in good standing, which continues to have the same subsidiaries. Id. at ¶ 18 and Ex. E.

The acquisition has not dramatically changed the operation of the Connexus business.[1] The operating expenses of Connexus and the Connexus-Side Subsidiaries are paid out of bank accounts at Wells Fargo which belonged to Connexus and its subsidiaries prior to the acquisition. Id. at ¶ 20; Graff Dep. at 80:21-81:9. Connexus has maintained its own employees and its payroll is processed by ADP and paid under Connexus's original EIN. Graff Decl. at ¶ 21 & Ex. F; Graff Dep. at 79:8-80:7. Connexus and its subsidiaries maintain their own (consolidated) general ledger in the Oracle financial system. Graff Decl. at ¶ 22 & Ex. G; Graff Dep. at 111:4-112:7. The Connexus-Side Subsidiaries continue to generate revenue. Graff Decl. at ¶ 23 &

[1] Consistent with acquisitions of this sort, it should be noted that some employees were laid off as the legal and financial departments of the two companies were integrated, and redundancy was eliminated. Graff Decl. at ¶ 19.

Exhibit H; Graff Dep. at 91:11-16. Revenue and expenses associated with contracts for Connexus are recorded in Connexus's general ledger. Graff Decl. at ¶ 24. Connexus and the Connexus-Side Subsidiaries have their own set of assets (e.g., furniture, computer equipment, etc.). Id. at ¶ 25. And, notably, Connexus's assets have **not** been transferred or sold to Epic Media or any other entity since the acquisition. Id. at ¶ 26; Graff Dep. at 103:13-104:7.

In addition, the Connexus-Side Subsidiaries continue to engage in the same business in which they were engaged prior to the acquisition, and they are operated by individuals who were employees of Connexus prior to the acquisition. Graff Decl. at ¶ 29. Firstlook continues to be a domain name monetization platform that is overseen by Seth Jacoby who ran the business prior to the acquisition. Id. Traffic Marketplace is a web-based, display advertising network that is overseen by Chris Pirrone, who was the Connexus General Counsel prior to the acquisition. Id. Netblue Vietnam Ltd. is a foreign based technology support business that is run by Frank Nguyen who ran the company prior to the acquisition. Id.

Plaintiff's First Amended Complaint. In the FAC, Plaintiff has alleged counts against Epic Media, Connexus, and other defendants for: (1) direct and contributory cybersquatting under the ACPA; (2)-(4) direct and contributory trademark infringement, false designation of origin, and dilution under the Lanham Act; (5) unfair competition and trademark infringement under state common law; (6) vicarious trademark infringement, dilution, and cybersquatting; (7) civil conspiracy; and (8) declaratory judgment. See generally FAC at 27-39. Plaintiff's claims against Epic Media are based solely on the alleged unlawful actions of Connexus and other related defendants, which occurred between 2004 and 2009. See generally id. at 18-27; id. ¶ 72

(noting earliest registration of allegedly infringing domain around July 7, 2004); id. Exs. T & U (showing latest registration date of allegedly infringing domain as 3/26/09).

ARGUMENT

I. EPIC MEDIA DID NOT ASSUME LIABILITIES OF CONNEXUS WHEN IT ACQUIRED CONNEXUS THROUGH A REVERSE TRIANGULAR MERGER.

A. Governing Law

As Epic Media and Connexus are Delaware corporations, having no relationship to Michigan, Delaware law should control issues of successor liability and piercing the corporate veil. See, e.g., Stromberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 933 (7th Cir. 1996) ("Efforts to 'pierce the corporate veil' are governed by the law of the state of incorporation…") but see Chrysler Corp. v. Ford Motor Co., 972 F. Supp. 1097, 1102-04 (E.D. Mich. 1997) (applying Michigan law in a CERCLA case because site of cleanup was in Michigan). Nevertheless, as Epic Media is entitled to summary judgment under either Delaware or Michigan law, Epic Media cites to the laws of both jurisdictions throughout.

B. Epic Media Acquired Connexus As A Subsidiary.

Plaintiff alleges in the FAC that Epic Media "merged with Connexus," relying on "public statements [that] have portrayed the combination as a merger" and press releases describing the transaction as a "merger." But "a casual remark in the popular media will not serve to establish a legal conclusion." Bennett v. America Online, Inc., 2007 WL 2178317, at *5 (E.D. Mich. July 27, 2007).[2] Moreover, Epic Media's press releases do not alter the undisputed facts that demonstrate that Epic Media never merged with Connexus but rather acquired Connexus as a

[2] Indeed, a press release by the Stripes Group, an investor in Azoogle.com, labeled the transaction as an "acquisition." Declaration of William A. Delgado, dated July 15, 2011 at ¶ 4, Ex. K.

subsidiary through a "reverse triangular merger." See id. (finding that paperwork submitted by parent corporation to SEC, which referenced transaction as a "merger," "[did] not diminish the hard facts determined by [the Magistrate Judge] as to the history of the combination of the two entities and the resulting subsidiary enterprises" and that no merger took place).

In a triangular merger, the parent or acquiring company forms a wholly-owned, interim subsidiary that merges with the target company, with the wholly-owned subsidiary surviving, and "the outstanding shares of the target are exchanged for shares of the acquiring company or some other consideration." Saginaw Property, LLC v. Value City Dep't Stores, LLC, 2009 WL 3536616, at *3 (E.D. Mich. Oct. 30, 2009). In a reverse triangular merger, the same transaction occurs except the target company "survive[s] as a separate entity with its assets and liabilities intact, and distinct from its new shareholder-owner," the acquiring company. Id.

Here, Epic Media was the acquiring company, Emerald was the "interim" subsidiary formed by Epic Media to be merged with the target company, and Connexus was the target company. On May 4 2010, Emerald merged with Connexus, with Connexus surviving with its assets and liabilities intact. Through the conversion of the outstanding shares of capital stock of Emerald into a capital share of stock of Connexus and the subsequent conversion of the shares of capital stock of Connexus outstanding immediately before the effective time of the merger into shares of capital stock of Epic Media, Connexus became a wholly-owned subsidiary of Epic Media. Thus, the undisputed facts establish that Epic Media did not merge with Connexus but, rather, acquired Connexus as a wholly-owned subsidiary through a reverse triangular merger.

C. Epic Media Did Not Assume The Liabilities Of Connexus Through The Reverse Triangular Merger.

Courts have consistently recognized that the reverse triangular merger "does not result in the parent [or acquiring] company . . . assuming the liabilities of the acquired [or target] company." In re Welding Fume Prods. Liab. Litig., 2010 WL 2403355, at *7 (N.D. Ohio June 11, 2010) (emphasis added). Indeed, the advantage of a reverse triangular merger is that "T [the target company] will become a wholly-owned subsidiary of A [the acquiring company] without any change in its corporate existence. Thus, the rights and obligations of T, the acquired corporation, are not transferred, assumed or affected." Binder v. Bristol-Myers Squibb, Co., 184 F. Supp. 2d 762, 772 (N.D. Ill. 2001) (citations omitted). As explained by another court in this District, "[t]he reverse triangular merger is popular precisely because it allows the acquiring company . . . to gain control of the target . . . without actually merging with the target or risking its own assets on the targets liabilities." Saginaw Property, 2009 WL 3536616, at *8 (emphasis added); cf. Baldwin Enters., Inc. v. Retail Ventures, Inc., 2010 WL 624261, at *6 (S.D. Ill. Feb. 18, 2010) ("[A] triangular merger allows an acquiring company to avoid successor liability by leaving a surviving subsidiary intact, thereby not taking on the target corporation's obligations."). Thus, Epic Media did not assume the liabilities of Connexus when it acquired Connexus as a subsidiary through the reverse triangular merger described above.

Plaintiff will undoubtedly protest the legitimacy of the reverse triangular merger mechanism and argue that Epic Media used the vehicle of a reverse triangular merger to avoid assuming Connexus's liabilities. But, this argument ignores the abundance of legal authority that recognizes reverse triangular mergers as legitimate and routine acquisition transactions. See, e.g., Baldwin Enters., 2010 WL 624261, at *5 ("Although this maneuvering may appear improper at first blush, caselaw reveals that triangular mergers and reverse triangular mergers . . .

are recognized, accepted, and fairly routine."); Saginaw Property, 2009 WL 3536616, at *1 (noting that reverse triangular mergers are "common in acquisitions"); Morgan v. Powe Timber, Co., 367 F. Supp. 2d 1032, 1037 (S.D. Miss. 2005) (noting that triangular mergers are "a standard method of acquisition in which a target corporation . . . becomes a wholly-owned subsidiary of a parent corporation . . . without any change in its corporate existence" and "'common and have a myriad of legitimate justifications'") (citations omitted); Lewis v. Ward, 852 A.2d 896, 906 (Del. 2004) (affirming Chancery Court's finding that "triangular mergers are common and have a myriad of legitimate justification").

In the end, the undisputed facts demonstrate that Connexus was legitimately acquired by Epic Media as a subsidiary through a reverse triangular merger, and Epic Media did not assume Connexus's liabilities through the acquisition.

II. CORPORATE VEIL PIERCING PRINCIPLES ARE NOT APPLICABLE HERE NOR CAN PLAINTIFF ESTABLISH THE ELEMENTS NECESSARY TO PIERCE THE CORPORATE VEIL IN ANY EVENT

As noted by the United States Supreme Court, "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." United States v. Bestfoods, 524 U.S. 51, 61 (1998) (citations omitted). The foregoing principle is particularly true where, as here, the parent corporation's liability is sought to be predicated solely upon the alleged unlawful conduct of its subsidiary that occurred before the existence of any relationship between the parent corporation and subsidiary.

Although the corporate veil "may be pierced in some circumstances," the doctrine allowing such piercing "is the **rare exception**, applied in the case of fraud or certain other

exceptional circumstances." Dole Food Co. v. Patrickson, 538 U.S. 468, 475 (2003) (emphasis added); see also Wallace ex rel. Cencom Cable Income Partners II, L.P. v. Wood, 752 A.2d 1175, 1183 (Del. Ch. 1999) ("'Persuading a Delaware court to disregard the corporate entity is a difficult task.'") (citations omitted). Here, the corporate veil may not be pierced for two reasons. First, the elements necessary to pierce the corporate veil must be examined at the time of the alleged wrongdoing by Connexus, i.e., between 2004 and 2009. Because Epic Media and Connexus did not have any relationship during that time period, principles of veil piercing are not applicable. Second, even if the Court were to conduct an alter ego analysis as of the present date, Plaintiff cannot establish that Connexus is a mere instrumentality of Epic Media or that Connexus was used to commit a fraud or wrongdoing.

A. Principles Of Corporate Veil Piercing Are Not Applicable Here.

In determining whether to pierce the corporate veil, the Court should examine the relationship between the parent corporation and its subsidiary **during the time period in which the alleged unlawful conduct giving rise to liability occurred**. See, e.g., Ziegler v. Delaware County Daily Times, 128 F. Supp. 2d 790, 798-99 (E.D. Pa. 2001) (noting that "in looking for connections between the two entities that would justify taking the substantial step of piercing the corporate veil . . . , we must look not to the relationship that has come to exist between [the two entities] between July 1998 and now, but rather the relationship as it existed" at the time of the alleged unlawful conduct); Scott v. NG U.S. 1, Inc., 881 N.E.2d 1125, 1134 (Mass. 2008) ("In determining whether one entity exercised 'pervasive control' over another, and whether 'confused intermingling' exists sufficient to disregard the corporate formalities, we focus on the events giving rise to liability. . . ."). Such an approach is consistent with the bedrock principle

that a parent corporation is not liable for the acts of its subsidiaries. It is only when the parent corporation has used the subsidiary as a "mere instrumentality" to commit a fraud or wrong that the corporate veil may be pierced to impose liability on the parent corporation for the acts of its subsidiary. See, e.g., First Presbyterian Church of Ypsilanti v. H.A. Howell Pipe Organs, Inc., , 2010 WL 419972, at *8 (E.D. Mich. Feb. 1, 2010).

Here, Plaintiff's claims against Epic Media are premised on the alleged unlawful conduct of Connexus in registering certain domain names between July 2004 and March 2009. FAC Exs. T & U. The undisputed facts establish, however, that Epic Media and Connexus did not have a parent-subsidiary relationship until May 2010 and did not begin to consider forging any relationship with each other until the end of 2009, at the earliest. Deposition of Arthur V. Shaw taken on June 8, 2011 at 36:16-37:4; Graff Dep. at 33:11-25. Thus, during the relevant time period between July 2004 and March 2009, Epic Media and Connexus did not have any relationship and piercing principles therefore have no application here. See, e.g., CM Corp. v. Oberer Dev. Co., 631 F.2d 536, 539-41 (7th Cir. 1980) (noting that defendant subsidiary did not become a subsidiary of parent corporation until after the construction projects giving rise to liability were finished and refusing to pierce corporate veil because there was "no evidence that [subsidiary] or its predecessors were shells or sham corporations during the period" when plaintiffs were dealing with them); Scott, 881 N.E.2d at 1135 (concluding that "where the parent corporation lacked any interest in, and did not control, the subsidiary or its facility at the time of the acts giving rise to . . . liability, there [was] no occasion to disregard its corporate form").

For this reason, any evidence that Plaintiff may present regarding the relationship that developed between Epic Media and Connexus after March 2009, and, specifically after Epic

Media's acquisition of Connexus as a subsidiary in May 2010, is irrelevant in determining the propriety of piercing the corporate veil of Connexus. See, e.g., Ziegler, 128 F. Supp. 2d at 799 (finding that plaintiff's evidence regarding current contacts and interrelations between parent and subsidiary were "all irrelevant and inapposite" because the relevant question was "the extent to which there was in fact interrelation" between the entities at the time of the alleged wrong, "not whether there was a potential for it to happen in the future").

B. Even If The Court Conducted An Alter Ego Analysis Now, Plaintiff Cannot Establish the Requisite Elements of Alter Ego Liability

Even if the Court were to conduct an analysis of the corporate structure at present to determine whether Epic Media and Connexus are alter egos at present, Epic Media would still prevail. Under Delaware law, "[p]iercing the corporate veil under the alter ego theory requires that the corporate structure cause fraud or similar injustice. Effectively, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud." Wallace, 752 A.2d at 1184 (footnote and internal quotations omitted). Similarly, under Michigan law, "the general rule is that 'separate corporate identities will be respected, and thus corporate veils will be pierced only to prevent fraud or injustice.'" First Presbyterian, 2010 WL 419972, at *8 (citations omitted). To succeed on an alter ego claim and pierce the corporate veil, a plaintiff must establish the existence of each of the three required elements: '"First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff.'" Id. (citing Nogueras v. Maisel & Assocs. of Mich., 369 N.W.2d 492, 498 (Mich. App. 1985)).

1. Connexus is not a mere instrumentality of Epic Media.

In determining whether a corporate entity is used as a mere instrumentality, the court considers various factors, including undercapitalization of the corporation, maintenance of separate books, separation of finances, use of the corporation to support fraud or illegality, honoring of corporate formalities, and whether the corporation is merely a sham. See, e.g., U.S. v. Golden Acres, Inc., 702 F. Supp. 1097, 1104 (D. Del. 1988); First Presbyterian Church, 2010 WL 419972, at *8. Here, the undisputed facts demonstrate that Connexus is not a mere instrumentality of Epic Media.

As detailed in the Statement of Facts, the Connexus companies and the Epic Media companies operate as separate entities: (a) they maintain separate bank accounts, (b) they pay for their own operating expenses out of these separate bank accounts, (c) they have separate payrolls under separate EINs, (d) they maintain separate general ledgers, (e) they operate separate business lines, and (f) they are run by different individuals who were historically associated with their respective companies. See supra pp. 3-5. Most importantly, the undisputed facts show that Connexus is not merely a sham corporation: it continues to operate, its subsidiaries continue to generate revenue, and none of Connexus's assets have been transferred to Epic Media following the acquisition. Id.

At best, Plaintiff may argue that Epic Media and Connexus share overlapping officers (Donald Matthis and David Graff) and an overlapping director (Donald Matthis). That said, "[t]here is nothing inherently suspect in a parent and subsidiary having overlapping officers and directors." ITT Corp. v. Borgwarner Inc., 2009 WL 2242904, at *7 (W.D. Mich. July 22, 2009). Indeed, "'it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not serve to expose the parent corporation to liability for its

subsidiary's acts.'" Bestfoods, 524 U.S. at 69 (citations omitted). Thus, Plaintiff cannot satisfy the first element required to pierce the corporate veil.

2. Epic Media did not use Connexus to commit a fraud or wrong.

"The Sixth Circuit has [] 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 (citations omitted).

To date, Plaintiff has failed to identify how it is that Epic Media used Connexus to commit a "fraud" or "injustice," leaving it wholly unable to satisfy this prong of the alter ego analysis. Certainly, some "cross-pollination" of corporate functions--like a shared legal team or finance team--is insufficient to evidence fraud. See, e.g., United States v. Cordova Chem. Co. of Mich., 113 F.3d 572, 581 (6th Cir. 1997), vacated on other grounds sub nom United States v. Bestfoods, 524 U.S. 51 (1998) (finding that factors such as parent corporation's participation on subsidiary's board of directors, a cross-pollination of officers involved in decision-making and daily operations, and parent corporation's financial control of subsidiary through approval of budgets and capital expenditures "[did] not indicate such a degree of control that the separate personalities of the two corporations ceased to exist and that [the parent corporation] utilized the corporate form to perpetrate the kind of fraud or other culpable conduct required before a court [could] pierce the veil"); Chrysler, 972 F. Supp. at 1105 (noting that "claimed functional integration of [the subsidiary and parent corporation], through interlocking boards of directors

and common managers and employees, could not be sufficient to pierce the corporate veil unless there was an additional showing that this was done for a wrongful purpose").

Plaintiff will likely attempt to argue that alter ego liability is proper because the merger between Connexus and Emerald was used to wrongfully protect the assets of Epic Media from the liabilities of Connexus. But, the Sixth Circuit has specifically recognized that the"[o]rganization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form." Cordova Chem., 113 F.3d at 580. So, because Plaintiff' cannot establish the "culpable conduct" required to pierce the corporate veil, there is no basis to hold Epic Media liable for the alleged unlawful conduct of Connexus. See, e.g. Chrysler, 972 F. Supp. at 1105-08 (finding "no basis to hold [parent corporation] responsible for pollution released by [subsidiary]" where evidence did not support a finding of fraud or wrongdoing or use of the corporate form to circumvent overriding public policy).

3. <u>Plaintiff has not suffered an unjust loss or injury.</u>

The third element under Michigan law required to pierce the corporate veil is an unjust loss or injury – that is, "a loss that is appropriately remedied by piercing a corporate veil." Johnson Controls, Inc. v. J.F. Dunn Enters., Inc., 2009 WL 415706, at *4 (E.D. Mich. Feb. 19, 2009). Here, Plaintiff's alleged injury is premised on the alleged unlawful conduct of Connexus which took place before Epic Media acquired Connexus as a subsidiary or had any relationship with Connexus. Plaintiff's injury is therefore the same, regardless of whether Connexus became a mere instrumentality of Epic Media after Epic Media acquired it as a subsidiary. Thus, Plaintiff cannot show an unjust loss or injury. See, e.g., id. at *4 (finding that complaint lacked

allegations of "unjust" loss where alleged "intermingling of corporate identities did nothing to make Plaintiffs' alleged losses in this case more or less 'unjust'").

In the end, Plaintiff cannot meet any of the requirements necessary to pierce the corporate veil, and Plaintiff's claims against Epic Media based on alter ego liability must fail.

III. THE REVERSE TRIANGULAR MERGER DID NOT CONSTITUTE A DE FACTO MERGER CONFERRING SUCCESSOR LIABILITY ON EPIC.

"The purpose of successor liability is to ensure that claimants are not left without recourse against an entity simply because the entity sells all of its assets or changes its corporate form." Welding Fume Prods., 2010 WL 2403355, at *7. Of course, as noted by the Michigan Supreme Court, "the availability of a predecessor is **fatal** to actions for successor liability." Foster v. Cone-Blanchard Mach. Co., 597 N.W.2d 506, 510 n.7, 511 (Mich. 1999) (emphasis added). In other words, "if the original entity still exists, there is no successor-and no successor liability." Welding Fume Prods., 2010 WL 2403355, at *7; see also Poole v. Sofamor Danek Group, Inc., 1998 WL 1041328, at *2 (E.D. Mich. Dec. 9, 1998).

A. Successor Liability Is Not Proper Here Because Connexus Still Exists.

Here, the undisputed facts establish that Connexus **survived** following the reverse triangular merger and continues to operate as the parent company of Firstlook and as a subsidiary of Epic Media. See Graff Decl. Exs. D & E (Certificates of Good Standing for Connexus and Firstlook). Because Connexus has not ceased ordinary business operations nor dissolved, there can be no successor liability here. See Welding Fume Prods., 2010 WL 2403355, at *7 ("There can be no successor liability in these MDL cases because Hobart and Miller Electric still exist and continue to operate separately as subsidiaries of ITW."). Allegations of shared management between Epic Media and Connexus would not change the analysis. See id. ("Even if plaintiffs

are correct that [parent and subsidiary corporations] have overlapping operations (e.g., employee participation in a single pension plan, use of the same vendor for payroll services, and sharing of executive personnel), this does not mean that [the subsidiaries] ceased to exist.").

Epic Media is therefore entitled to summary judgment on Plaintiff's claims that it is liable for the alleged unlawful conduct of Connexus. See id. at *8 ("[B]ecause there can be no successor liability on the undisputed facts, ITW is entitled to summary judgment on plaintiffs' claims that it is vicariously liable for the alleged torts of [its subsidiaries].").

B. Plaintiff Cannot Establish Successor Liability Under The De Facto Merger Doctrine.

The "de facto merger" doctrine is recognized under Delaware law when there has been a failure to comply with the statute governing a sale of assets. See Hariton v. Arco Elecs, Inc., 182 A.2d 22, 25 (Del. Ch. 1962).

Under Michigan law, "a de facto merger will lead to successor liability" when each of the following four requirements is satisfied: (1) continuation of the enterprise of the seller corporation, (2) continuity of shareholders, (3) cessation of business operations, liquidation and dissolution of the seller corporation, and (4) purchaser's assumption of liabilities and obligations necessary for the uninterrupted continuation of normal business operations of the seller corporation. Saginaw Property, 2009 WL 3536616, at **8-9 (quoting Craig v. Oakwood Hosp., 684 N.W.2d 296, 314-15 (Mich. 2004)). "**All four factors must be present** to find a de facto merger under Michigan law." Bestfoods v. AeroJet Gen. Corp., 173 F. Supp. 2d 729, 757-58 (W.D. Mich. 2001) (holding that government failed to establish a de facto merger where first and fourth elements were not met) (emphasis added).

In Plaintiff's Response to Epic Media's Motion to Dismiss for Lack of Personal Jurisdiction, Plaintiff suggested that liability could be imposed on Epic Media as a successor to Connexus under the de facto merger exception to successor liability. Pl.'s MTD Resp. at 7-8. But that doctrine is not applicable since the Epic Media-Connexus transaction was a reverse triangular merger not a sale of assets. See Chrysler, 972 F. Supp. at 1111; Hariton, 182 A.2d at 25 . Even assuming, arguendo, that the reverse triangular merger by which Epic Media acquired Connexus as a subsidiary could be considered an asset sale and further assuming, arguendo, that principles of successor liability apply here, Plaintiff cannot establish at least three of the four elements necessary for a de facto merger.

1. Plaintiff cannot show continuity of enterprise.

The first requirement for a de facto merger is "continuation of the enterprise of the seller corporation, with continuity of management, personnel, physical location, assets, and general business operations." Chrysler, 972 F. Supp. at 1111. Here, following Epic Media's acquisition of Connexus as a subsidiary, Epic Media (and its subsidiaries) and Connexus (and its subsidiaries) continued to operate as two different groups, running their own businesses, using their own people and assets, and keeping track of their own revenue and expenses. See supra pp. 3-5. Thus, Epic Media's acquisition of Connexus in 2010 did not result in Epic Media assuming Connexus's business operations.

2. Connexus did not cease ordinary business operations, liquidate or dissolve.

The third requirement of a de facto merger is that "the seller corporation cease[] its ordinary business operations, liquidate[] and dissolve[] as soon as legally and practically possible." Bestfoods, 173 F. Supp. 2d at 757. Here, the undisputed facts demonstrate that

Connexus has not ceased ordinary business operations, liquidated, or dissolved, and continues to generate revenue as a corporation in good standing. See Chrysler, 972 F. Supp. at 1111 (holding that asset sale which was part of reorganization did not amount to a de facto merger "[i]n light of the continued maintenance" of the parent and subsidiary "as separate entities after the reorganization").

3. Epic did not assume the obligations and liabilities of Connexus.

The fourth requirement of a de facto merger is that "the purchasing corporation assume[] those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation." Bestfoods, 173 F. Supp. 2d at 757. Here, Epic Media did not assume the liabilities and obligations of Connexus necessary to continue Connexus's business operations because Connexus continued its own operations. See supra pp. 4-5. Plaintiff's conclusory, unsupported allegations in the FAC to the contrary are insufficient to rebut these facts. FAC ¶ 9; see also Nix v. O'Malley, 160 F.3d 343, 347 (6th Cir. 1998) (noting that non-moving party "cannot rely on conclusory allegations to counter a motion for summary judgment").

In the end, Plaintiff cannot establish at least three of the four elements necessary to find a de facto merger. Because "[a]ll four factors must be present to find a de facto merger under Michigan law," successor liability based on the de facto merger exception may not be imposed on Epic. Bestfoods, 173 F. Supp. 2d at 757-58.

IV. PLAINTIFF'S CONSPIRACY CLAIM MUST ALSO BE DISMISSED.

In addition to the foregoing, and assuming arguendo that a civil conspiracy can even exist as a matter of law as between corporate affiliates, there are three further reasons why

Plaintiff's claim for conspiracy against Epic Media must likewise be dismissed. First, because Epic Media is entitled to summary judgment on all the substantive counts in the FAC, this Court should also dismiss Plaintiff's conspiracy count. See Roseville Plaza Ltd. Partnership v. United States Gypsum Co., 811 F. Supp. 1200, 1213 (E.D. Mich. 1992) (holding that "defendant [was] entitled to summary judgment on all other substantive counts" and thus dismissing "plaintiff's conspiracy allegations, which [were] not attached to allegations of a substantive wrong, [and were] not actionable"). Second, civil conspiracy claims must be pled with specificity as to Epic Media and its participation in the alleged conspiracy, but the FAC contains no specific allegations as to who, when, where, or how. See Phoenix Life Ins. Co. v. LaSalle Bank N.A., 2009 WL 877684 *12 (E.D. Mich. Mar. 30, 2009). Lastly, Plaintiff can adduce no evidence (and certainly has not adduced any such evidence during discovery) that Epic Media actually participated in any such conspiracy which is not surprising, given that the acts complained of took place between 2004-2009, but Epic Media did not acquire Connexus until 2010.

CONCLUSION

For the foregoing reasons, Epic Media respectfully requests that the Court grant summary judgment in its favor on all Counts in the First Amended Complaint and dismiss all of Plaintiff's claims against Epic Media.

RESPECTFULLY SUBMITTED this 15th day of July, 2011.

/s/William A. Delgado
William A. Delgado
WILLENKEN WILSON LOH & LIEB, LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I electronically filed the foregoing paper with the Court using the ECF system which will send notification of such filing to the following:

Enrico Schaefer (P43506)
Brian A. Hall (P70865)
TRAVERSE LEGAL, PLC
810 Cottageview Drive, Unit G-20
Traverse City, MI 49686
231-932-0411
enrico.schaefer@traverselegal.com
brianhall@traverselegal.com
Lead Attorneys for Plaintiff

Nicholas J. Stasevich (P41896)
Benjamin K. Steffans (P69712)
BUTZEL LONG, P.C.
150 West Jefferson, Suite 100
Detroit, MI 48226
(313) 225-7000
stasevich@butzel.com
steffans@butzel.com
Local Counsel for Defendants

Anthony P. Patti (P43729)
HOOPER HATHAWAY, PC
126 South Main Street
Ann Arbor, MI 48104
734-662-4426
apatti@hooperhathaway.com
Attorneys for Plaintiff

William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

/s/William A. Delgado
William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants