

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.

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**DECLARATION OF WILLIAM A. DELGADO IN OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION**

I, William A. Delgado, declare as follows:

1. I am over the age of eighteen and am lead counsel for Defendants in this matter. I have personal knowledge of the facts stated herein except where stated on information and belief, and, as to those matters, I believe them to be true.

2. Attached as Exhibit K is a true and correct copy of a printout from the USPTO database at <http://www.uspto.gov> which shows that Plaintiff started using THE WEATHER UNDERGROUND in 1995.

3. Attached as Exhibit L is a true and correct copy of a printout from the USPTO database at <http://www.uspto.gov> which shows that Plaintiff started using WUNDERGROUND.COM in 1995.

4. As lead counsel in this matter, I was responsible for overseeing NCS's responses and document production throughout the discovery process. Although NCS initially believed that it had not retained the cease-and-desist letters it had received over the years, Lily Stevenson had, in fact, retained them. She provided me with various cease-and-desist letters and UDRP complaints that were produced. The sum total of pages produced for that particular set of documents exceeded 20,000 pages.

5. I attended the deposition of Seth Jacoby as well as all other depositions in this matter. Attached as Exhibit M is a true and correct copy of page 30 from the deposition of Seth Jacoby.

6. During the course of discovery, I was informed by Mavi Llamas that she discovered an old, out-of-commission laptop that she had in her house from her early days (2004-2005) at the predecessor company of Connexus Corporation. The contents of that laptop

were reviewed for responsiveness to Plaintiff's requests for production, and responsive documents, which included e-mails and registration spreadsheets from that time frame, were produced.

7. Attached as Exhibit N are true and correct copies of relevant excerpts from the deposition transcript of John Berryhill, taken January 11, 2011.

8. Attached as Exhibit O are true and correct copies of relevant excerpts from the deposition transcript of Mavi Llamas, taken September 27, 2010.

9. Attached as Exhibit P are true and correct copies of relevant excerpts from the deposition transcript of Donnie Misino, taken November 30, 2010.

10. Attached as Exhibit Q are true and correct copies of relevant excerpts from the deposition transcript of Seth Jacoby, taken September 15, 2010.

11. Attached as Exhibit R are true and correct copies of relevant excerpts from the deposition transcript of Chris Pirrone, taken May 3, 2011.

12. During the discovery process, NCS provided me with a spreadsheet containing each and every domain names that was deleted as a result of the 2008 scrub. That document was produced as NCS89277-89963 and contained over 25,400 entries.

13. Attached as Exhibit S are true and correct copies of relevant excerpts from the deposition transcript of Richard Korf, taken December 8, 2010.

14. Attached as Exhibit T are true and correct copies of relevant excerpts from the deposition transcript of Jeffrey Masters, taken August 3, 2010.

15. Attached as Exhibit U are true and correct copies of relevant excerpts from the deposition transcript of Chris Schwerzler, taken April 29, 2010.

16. Attached as Exhibit V is Exhibit 58 to the Deposition Transcript of Jeff Ferguson and the relevant excerpts from the Ferguson Transcript authenticating the exhibit.

17. In its First Set of Requests for Production (“First Request”), Plaintiff defined “Domain Names at Issue” as including the domain names in the complaint *and* any other domain name “registered now or at any time by NCS incorporating all or some of Plaintiff’s trademarks.” The First Request also asked for numerous documents related to the “Domain Names at Issue.”

18. In short, as Plaintiff’s counsel made clear at the May 19, 2010 hearing before Magistrate Judge Morgan regarding this issue, Plaintiff was asking NCS to identify “the other domain names that infringe [Plaintiff’s] marks.” A true and correct copy of the relevant excerpts from the Hearing Transcript from May 19, 2010 is attached as Exhibit W. Mr. Schaefer’s statement appears at 33:9-13.

19. NCS’s Responses to the First Set of Requests for Production contained various general and specific objections. The problems with responding to Plaintiff’s request for “other infringing domain names” were self-evident: (i) any answer would implicitly concede that NCS had, in fact, registered a domain name that infringed Plaintiff’s marks, (ii) even if NCS was willing to make that concession, it could not know what *Plaintiff* considered to be an “infringing” domain since the parties clearly disagreed on that point, and (iii) to the extent I was involved in analyzing the request and the response thereto, any response would have waived the attorney work product privilege because it would reveal my mental impressions as to what I believed was an infringing domain.

20. As a result, NCS stood on its objections and offered to conduct an unlimited number of character string searches (e.g., “eather”, “wund,” etc.) against its domain name portfolio so that Plaintiff could see what the results were and select domain names at issue from those results. In fact, that offer was repeated in open court. *See* Hearing Transcript at 34:10-35:16.

21. Ultimately, the parties’ disagreement on this issue became irrelevant because the Connexus Defendants were able to provide a database of all past and present domain names which Plaintiff could examine and select the domain names it wanted to put at issue.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 15th day of August 2011 at Los Angeles, California.

/s/William A. Delgado

William A. Delgado

CERTIFICATE OF SERVICE

I hereby certify that on August 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:

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