

EXHIBIT Q

CERTIFIED COPY

United States District Court
Eastern District of Michigan

****Confidential – Attorneys' Eyes Only****

Deposition

Of

Seth Jacoby

September 15, 2010

The Weather Underground, Inc.

v.

Navigation Catalyst Systems, Inc., et al.

1 A. Yeah, whatever that is. Was it July,
2 maybe, of 2008?

3 Q. I think so.

4 A. Prior to that date, we were able
5 to -- we vetted the domain name after -- more or
6 less, you know, at that date, we vetted the domain
7 name prior to actually -- or after testing a
8 domain name.

9 Q. Okay. So that makes sense to me.

10 So, essentially, once the add grace
11 period went away or that policy got changed
12 substantially --

13 A. Right.

14 Q. -- you started vetting domains prior
15 to registering them?

16 A. Correct, yes.

17 Q. All right. While the add grace
18 period or policy was in place which allowed you
19 the five-day period to either keep or delete the
20 domain without having to pay for it, you would
21 have registered the domain, tested it, vetted it
22 and then decided whether to keep it during that
23 five-day period?

24 A. What would happen was, just to give a
25 little more clarity, we would look at the -- we

1 would test all the domain names, bring out a group
2 of candidates that were eligible for registration,
3 delete and tag those names which were -- became
4 ineligible because of any trademark problems, and
5 then those were deleted, along with the rest of
6 the domain names. And the remaining names that
7 were left were names which had been, you know,
8 clean from trademark -- clean from the trademark
9 process, had cleaned that process, and also had
10 qualified because of profitability.

11 Q. Okay. So there's a couple of
12 different things going on during that four-day add
13 grace period, and so I want to break that down a
14 little bit.

15 A. Sure.

16 Q. And I understand that there may be
17 things that happened after registration, after the
18 five-day period, but let's just focus in on that
19 five-day add grace period vetting.

20 One of the things you would have been
21 vetting for is whether or not it had enough
22 traffic to support positive monetization?

23 A. Yes.

24 Q. Okay. And, in general, you're
25 basically trying to see whether or not you're

1 going to be able to show and monetize, meaning
2 people clicking on enough ads over the course of
3 the year, in order to cover the registry cost?

4 A. So, let me just break it down very
5 simply. If a name had, you know, a certain amount
6 of traffic, then it was kept. If a name had a
7 certain amount of dollars that it generated in
8 that period, it was kept. It wasn't a very
9 complicated system.

10 Q. Okay. And there was some sort of
11 prediction or logic as to whether or not that was
12 going to be profitable over the course of a year?

13 A. Yeah, it wasn't very high tech, but
14 it existed.

15 Q. And what was the -- in general, was
16 the number you were trying to beat the registry
17 cost or the registry cost plus employees, or what
18 was the number you were trying to beat out there
19 in order to make it profitable?

20 A. That really wasn't part of the
21 equation.

22 Q. Okay. And then, in addition to that,
23 are you saying that, during the add grace period,
24 at least for certain periods, you would have also
25 done some sort of trademark vetting during that

1 period, or no?

2 A. It would have been during the add
3 grace period, yes. So, again, during that
4 five-day period, or we would treat it as maybe a
5 four-and-a-half-day period, we would look at the
6 domain names that were eligible during that
7 period, and during that period, those names that
8 were eligible were vetted for trademarks, and
9 those names that were, you know, flagged as, you
10 know, ineligible would be deleted along with the
11 nonmonetizable domain names, and the remaining
12 names would be the clean domain names, which also
13 we believed would be profitable.

14 Q. Okay. And would it be true that
15 during all periods of your employment with
16 Firstlook or its prior incarnations, that there
17 would have been trademark vetting during the add
18 grace period or did that come in at some point
19 during the years?

20 A. So, let's see, while we were using
21 the add grace period, there was always trademark
22 vetting during that period.

23 Q. During the four-and-a-half-day
24 period?

25 A. Yes, while we were using the add

1 grace period as a tool to acquire domain names.

2 Q. Okay. And would you have also --
3 from the time you started employment, would you
4 have always used that add grace period?

5 A. No.

6 Q. Okay. What years would you have
7 tasted domains during the add grace period, if you
8 recall?

9 A. So, I believe we started acquiring
10 domains in the add grace period -- it was probably
11 late 2006. I'd have to look back and see when,
12 you know, that was, but I think it was probably
13 late 2006.

14 Q. Okay. And Donnie Misino, I think he
15 testified that there was a transition sometime in
16 late 2006, early 2007 where it went from a purely
17 human process to an automated software-driven
18 registration process.

19 Would that have been the period --

20 A. That sounds about right. I think we
21 started with a very human process and then we
22 realized we needed to build software around it.

23 Q. Okay. And so the software allowed
24 you the potential of vetting domains during the
25 AGP?

1 A. It helped automate that process of
2 the registration, the vetting and -- well, I don't
3 know, at that point, it wasn't really -- it was --
4 at that point, it was more -- there's many
5 iterations of that software. It started with the
6 add and delete and then it became a larger
7 automated trademark process, yes.

8 Q. Okay.

9 A. Part of that trademark software
10 already existed.

11 Q. Okay. And so I think you testified
12 that there was always trademark vetting during the
13 AGP?

14 A. Yes.

15 Q. Was it true that when the software
16 first launched in late 2006 or early 2007,
17 whenever that date is, in that first iteration,
18 was there some sort of automated trademark
19 flagging or trademark vetting process built into
20 the software?

21 A. I can't tell you. I didn't write the
22 software and I wasn't the one, you know,
23 personally looking at the list of domain names
24 every day, but I can tell you that there was
25 always -- you know, there was always a service

1 process, in terms of trademark vetting, was, as I
2 understand it, a human process?

3 A. Yes.

4 Q. Where real people would go, take a
5 look at the domain that was being considered for
6 registration or that had been registered during
7 the AGP and trying to see if there's a trademark
8 issue with that domain, true?

9 A. That is correct, yeah, vetting has
10 always existed.

11 Q. Okay. So as far as you know, at
12 least from the time you were first employed, there
13 has always been a human trademark vetting process
14 of some sort?

15 A. Yes, ever since I've been employed at
16 the firm, there's always been a human element to
17 the trademark vetting process.

18 Q. And back before Mr. Misino developed
19 this registration software, were you still -- were
20 humans involved in looking at domains during the
21 add grace period to see if there might be a
22 trademark issue or did that come after the
23 five-day period; do you know?

24 A. So, humans have always been involved
25 during the -- when we were using the add grace

1 period, humans were always involved in looking at
2 the domain names during the add grace period to
3 exclude problematic names.

4 Q. Okay. And when do you recall first
5 using the add grace period to take a look at
6 domains?

7 A. I think I answered that, which was in
8 late -- sort of late 2006, I believe.

9 Q. Prior to late 2006, what was the
10 process for registering domains?

11 A. Prior to 2006, we would -- in the
12 morning, there would be a list of eligible domain
13 candidates that would be processed against the
14 USPTO database and against the blacklist.

15 Those names -- and there's also --
16 well, there's a blacklist that excludes terms and
17 domain names that are flagged, and then there's
18 the Do Not Register list, which names are included
19 in a list of domain names never to be registered
20 again.

21 So, for example, a domain name would
22 first be eligible for registration --

23 (Interruption by the Reporter.)

24 A. A name would be eligible for
25 registration. It would be looked at against the

1 blacklist -- I'm sorry, first, there was a
2 blacklist of terms, second was a list of domain
3 names that should never be registered again. So,
4 for example, if a domain name we looked at
5 yesterday was a trademark problem, it was included
6 in a list of names that never should be ever
7 included again in the system, just common sense.

8 Q. Literally, that domain --

9 A. That domain name, correct.

10 And after that, it would be scored
11 against a USPTO database and they would match the
12 terms in the USPTO database with the domain name.
13 That would come in a spreadsheet in the morning
14 and that would be vetted against, you know, always
15 two, sometimes three people, and then the names
16 would be registered at Go Daddy, at the
17 godaddy.com registrar.

18 Q. Okay. So this would have been prior
19 to becoming a Basic Fusion registrar?

20 A. Well, we had been a registrar for a
21 while, but prior to using the registrar.

22 Q. Right, having the software in order
23 to make it happen?

24 A. Correct, yes.

25 Q. Okay. And the USPTO database that

1 (Exhibit 128 is received and marked
2 for identification.)

3 Q. Okay. So let's say that there was
4 DNS error data that said a number of people were
5 typing in Kide Rock, K-I-D-E-R-O-C-K.com, and,
6 therefore, it became subject to the vetting
7 process, back in 2005, what would be that vetting
8 process?

9 A. This would be run against the USPTO
10 database. If it was not a previously registered
11 or previously qualified domain name, it would
12 have -- I'm sorry, if it was not previously looked
13 at and excluded, it would have gone through that
14 list and it would have gone through a blacklist.
15 So, for example, if Rock, R-O-C-K, was listed in
16 the blacklist, it would have shown as a blacklist
17 term that, you know, this is not a name that
18 should be registered unless it's been looked at
19 carefully. And then a human review process would
20 look at the domain name to determine, sort of, on
21 a human basis, whether or not it could be
22 registered or not.

23 Q. Okay. And so there's these three
24 components that you've now indicated a couple of
25 times. One is that it wasn't previously added as

1 a Do Not Register. Is there a term for that or is
2 there a name for that list, a Do Not Register
3 list?

4 A. I don't know, but it's hundreds and
5 hundreds of thousands of domain names long.
6 It's -- I think it's probably -- I don't think we
7 have a name for it. I think it's probably just
8 called the exclude list, maybe.

9 Q. Exclude list?

10 A. Yeah, previously-excluded list. But,
11 yeah, it's hundreds of thousands of domain names
12 long, or many hundreds of thousands.

13 Q. In 2005, would it have been hundreds
14 of thousands of names long --

15 A. It's grown --
16 (Interruption by the Reporter.)

17 Q. One at a time.
18 In 2005, would it have been hundreds
19 of thousands of names long?

20 A. No -- well, I -- so, let me just give
21 you an example of how it's grown. Every day, a
22 certain number of domain names are excluded, so it
23 grows linearly. It's a linear growth from the
24 time we started excluding names until now. So if
25 today the list is more -- I'm guessing here, but

1 let's just say it's a half million names long, or
2 400,000 names long, back in 2005, it was probably,
3 I don't know, 50,000 names long. I can't say for
4 sure, but it's a linear growth, of course, because
5 over time, more and more names get added to the
6 list.

7 Q. Okay. Let's tell the jury, how does
8 a name, in 2005, end up on the exclude list?

9 A. Again --

10 Q. Is it a threat letter?

11 A. No, no, no, again, it's a domain name
12 that, you know, any time before, the trademark
13 vetting process said, this domain name is not
14 eligible, put it on that list.

15 Q. Okay. So let's talk about how that
16 might occur.

17 A. Okay, so let me give you a very
18 simple example. Let's say that cup.com, while it
19 would never be included in that list, went through
20 a vetting process and we said, we cannot register
21 cup.com, because from a trademark perspective, it
22 violates someone's trademark, remove it. That
23 cup.com name will go into a master list of names
24 that every day previous to the -- prior to the
25 list of names actually coming to an operator or

1 coming through the process, would be excluded.
2 It's -- you know, it works in two ways, if you
3 think about it. Why would we repeat our work
4 twice? We've already excluded cup.com and said,
5 this is not a name that's eligible to be
6 registered, so we wouldn't want to ever look at it
7 again, so it's added to that list and it never
8 comes up again as an eligible name for
9 registration.

10 Q. Okay. So let me ask it this way: Is
11 one way that something can end up on the exclude
12 list is because you get a threat letter from a
13 company or attorney saying, we've got trademark
14 rights?

15 A. Yeah, that's another way it would end
16 up on the exclude list as well, so, yes, yes,
17 that's exactly how it would end up, but the
18 majority, of course, the majority of domain names
19 in that list, the vast majority, are names that
20 were excluded manually from our trademark process.

21 Q. Okay. So the vast majority of
22 domains on that list would have been added as a
23 result of your own vetting process --

24 A. Yes.

25 Q. -- and your own flagging process

1 A. Correct, yeah.

2 Q. Okay. Who do you recall as being the
3 operators back in 2005?

4 A. So, one of the operators would
5 probably be Mavi Llamas, who currently is still
6 with the firm.

7 Q. And could you spell that for us?

8 A. M-A-V-I. Llamas is L-L-A-M-A-S.

9 The other employees at the time, I
10 don't remember their names.

11 Q. Do you think that the other people
12 who were there in 2005 are no longer with the
13 company?

14 A. Say that again.

15 Q. Do you believe the other people are
16 no longer with the company?

17 A. Categorically, they're not with the
18 company, yeah.

19 Q. Okay. So the first step is -- in
20 this trademark review process, is to see if the
21 domain had already been added to the exclude list?

22 A. That was a part of the process, yes.

23 Q. Okay. And that would have been done
24 by one of these operators?

25 A. Uh-huh.

1 Q. Yes?

2 A. Yes.

3 Q. Okay. The second item is that there
4 would have been a blacklist?

5 A. Right.

6 Q. Let's talk a little bit about what
7 this blacklist is and how it was generated.

8 What is the blacklist?

9 A. The blacklist is slightly different.
10 It included domain names where -- not just domain
11 names, but terms and domain names where either we
12 believe -- we know we wanted to exclude, so, you
13 know, certain terms we're going to exclude, and
14 also whether it be profane or whatever, and other
15 terms where we had received notice that, you know,
16 please don't -- you know, be careful of what
17 you're doing here and stay away from any domain
18 name that includes something like this, and we
19 would add that to the blacklist as part of our
20 process.

21 Q. Okay. And as I understood from
22 Misino, the blacklist was more related to words
23 where you had received some form of third-party
24 notice of trademark rights; is that fair?

25 A. More or less, yes. Yeah, there were

1 is -- I don't want to use this domain name,
2 because I think it's a poor example, but
3 mcdonalds.com, we all know is the website of a
4 well-known restaurant. McDonald's would be on the
5 blacklist, M-C-D-O would be on the blacklist. We
6 kind of generate terms that may be included within
7 that includes, and also we may think are common
8 interpretations of that particular term. In the
9 blacklist, though, the fuzzy matching that you're
10 talking about, that's more of an automated fuzzy
11 match system, was against the USPTO database, not
12 the blacklist database.

13 Q. Fair enough.

14 And when did that fuzzy matching on
15 the trademark database come into place?

16 A. That was after Donnie started to
17 develop our registration.

18 Q. 2007 sometime?

19 A. Yes, sometime in 2007.

20 Q. Okay. Now, the third step, let's
21 just assume the domain is not on the exclude list,
22 it's not on the blacklist, then there's this human
23 review process, so let's talk about the human
24 review process in 2005.

25 A. Okay.

1 blacklist, on the exclude list, which we talked
2 about before, never even made it into the tasting
3 period, okay?

4 Q. Right.

5 A. So names that were in the tasting
6 period, and which had qualified, would then be
7 matched against the blacklist, which we previously
8 spoke about, and through the USPTO database.
9 Now, during this period of time,
10 there were iterations to that USPTO matching
11 service which enhanced our ability to actually
12 look at trademarks more closely against the USPTO,
13 and that was sort of a major change in the
14 trademark part of the whole registration,
15 monetization process.

16 Q. Okay. And so the add grace period,
17 one of the things that changed is, as long as it
18 wasn't on the exclude list and it met your other
19 thresholds, it would be registered immediately,
20 prior to human review?

21 A. Yes.

22 Q. And then in that four-and-a-half-day
23 period, the human review process would come into
24 play?

25 A. Yes.

1 somewhere in the 300 mark or so.

2 Q. And I understand that part of the
3 reason that the portfolio has probably atrophied
4 is because it's harder and harder to make money
5 off of a landing -- a lander page because of
6 changes upstream with Yahoo?

7 A. That's one of the elements.

8 Q. That's one of the elements, right.

9 And what are some of the other elements as to why
10 the portfolio has reduced?

11 A. Well, we got rid of a lot of domain
12 names that we felt we shouldn't have in the
13 portfolio, so we cleaned the portfolio.

14 Q. And "cleaned" from a trademark sense,
15 right?

16 A. Yes. And we -- and also just being
17 able to taste the domain names, it's a lot easier
18 to find good domain names. So if you just look at
19 mathematically, your number of ads is always
20 greater than your number of deletes, because it
21 was sort of easier to find good names, and today
22 it's not as easy to find good names because you
23 don't have as much data.

24 The number of names registered is
25 less than the number of names you delete at the

1 portfolio, but I want to ask you a little bit
2 about that.

3 A. Sure.

4 Q. I think what he discussed too was, it
5 was discussed through the years, but it was a hard
6 thing to do?

7 A. No, we definitely did it.

8 Q. You definitely did it. Okay.

9 A. Yes, we built a tool, a software and
10 we actually -- we stopped everything and had
11 everyone focus on identifying domain names that
12 were problematic, and they were disposed of.

13 Q. Okay. When would that have been?

14 A. I'd have to look back, you know, at a
15 calendar and try and put my hat around the date,
16 but I would say it probably was, you know -- when
17 was Verizon?

18 Q. 2008, early.

19 A. Probably sometime in 2008. I can't
20 say for sure.

21 Q. Okay. But probably, to the best of
22 your recollection, sometime in 2008, there would
23 have been a decision to go back to the domains
24 that you had already registered --

25 A. Yes.

1 Q. -- and take a trademark look at those
2 domains?

3 A. Yes.

4 Q. And I understand that your process
5 before that was to take a look at that issue
6 either ahead of time or during the add grace
7 period when that was in process, but now you're
8 making this shift and say, okay, we're going to go
9 back and look at what we've got?

10 A. So what we did is, we looked back at
11 our process and said it's good, but it's not good
12 enough, so let's go back and go through our whole
13 portfolio and identify domain names that we should
14 have known.

15 And we stopped everything. We did
16 that. We improved our trademark vetting process,
17 I think, around the same time. So I guess we made
18 a transition and said more resources on the front
19 end, of making sure that no trademark names
20 slipped through the cracks, and at the same time,
21 let's go through and make sure we clean out
22 everything that did slip through the cracks, and
23 we, you know, disposed of a significant amount of
24 margin and revenue to the business.

25 Q. Okay. Let's talk about what was the

1 Q. -- and take a trademark look at those
2 domains?

3 A. Yes.

4 Q. And I understand that your process
5 before that was to take a look at that issue
6 either ahead of time or during the add grace
7 period when that was in process, but now you're
8 making this shift and say, okay, we're going to go
9 back and look at what we've got?

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20 slipped through the cracks, and at the same time,
21 let's go through and make sure we clean out
22 everything that did slip through the cracks, and
23 we, you know, disposed of a significant amount of
24 margin and revenue to the business.

25 Q. Okay. Let's talk about what was the

1 process for cleansing the portfolio.

2 A. Well, we created a piece of software
3 that actually took every single domain name. You
4 know, I wouldn't say it was the most sophisticated
5 piece of software on earth, but it was -- you
6 know, it took all the domain names in. Again, it
7 ran it against the USPTO database. It allowed the
8 operator to see where there were matches very
9 similar to the vetting process. They made a
10 pretty similar decision as they made before, and
11 they would score the domain name based on sort of
12 where they thought the domain name's risk level
13 was, but not necessarily risk level, but
14 interference level, I guess.

15 Q. Okay. And who would have been
16 involved in designing that piece of software;
17 would it have been Misino?

18 A. Misino was the engineer, yes, and
19 that was with conversations with me and Matt Rock
20 and Misino.

21 Q. Okay. Was it similar to what you
22 were doing on the front end, except you kind of
23 carved out that logic and put it into software
24 that would actually look at your current
25 portfolio?

1 surprised it's delivered weather advertisements,
2 you're asking me one domain name out of, at a
3 time, 800,000. I don't know exactly what ads are
4 being delivered on that page.

5 VIDEOGRAPHER: Counsel, I need to
6 change the tape.

7 MR. SCHAEFER: Sure.

8 VIDEOGRAPHER: This marks the end of
9 Tape 3 in the videotape deposition of Seth Jacoby.
10 The time is 2:51 p.m. on September 15, 2010.

11 (Recess.)

12 VIDEOGRAPHER: This marks the
13 beginning of Videotape No. 4 in the videotape
14 deposition of Seth Jacoby. The time is 2:59 p.m.
15 on September 15, 2010.

16 You may proceed.

17 BY MR. SCHAEFER:

18 Q. Okay. This process by which you went
19 back and looked at your portfolio, again, for
20 trademark issues in we think 2008, I know there
21 was software. Tell me about the human side of
22 that process, how did that work?

23 A. The process was not unlike the
24 initial registration process. The user would look
25 at the names against the USPTO database. I think

1 that we -- I can't remember, but I think that we
2 also took, like, a catalog of common -- I don't
3 remember.

4 There was some other type of list
5 that we included in the review process. But, in
6 general, it was a very human-touch process. Names
7 would flow through this piece of software. The
8 software would identify where there was a match to
9 the USPTO specifically. The user would make a
10 judgment call whether that was good or bad.

11 I think that actually after that
12 process, it went through a second-level review,
13 and that second-level review kind of vetted
14 exclusions, I guess. If I recall, it sort of -- I
15 think, it was a first-level review, humans sort of
16 graded the domain name, and then it went to the
17 third level -- or the second level, where the
18 grader would grade it.

19 Q. Okay. And who did this? I take it,
20 the first-level review was with the operators, the
21 same folks who do that as part of their core
22 business?

23 A. Yes.

24 Q. Who were the second-level reviewers?

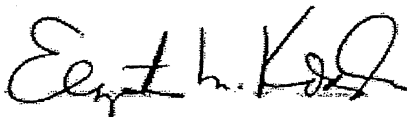
25 A. I believe one of the core

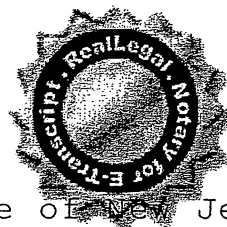
1 C E R T I F I C A T E

2 I, ELIZABETH M. KONDOR, a Certified Court
3 Reporter, No. 30XI00117200, Certified LiveNote
4 Reporter, No. 060907-14 and Notary Public, do
5 hereby certify that prior to the commencement of
6 the examination, SETH JACOBY was duly sworn by me
7 to testify the truth, the whole truth and nothing
8 but the truth.

9 I DO FURTHER CERTIFY that the foregoing
10 is a true and accurate transcript of the testimony
11 as taken stenographically by and before me at the
12 time, place and on the date hereinbefore set
13 forth.

14 I DO FURTHER CERTIFY that I am neither a
15 relative nor employee nor attorney nor counsel of
16 any of the parties to this action, and that I am
17 neither a relative nor employee of such attorney
18 or counsel, and that I am not financially
19 interested in the action.

20 



21
22 Notary Public of the State of New Jersey

23 My Commission expires June 6, 2015.

24

25 Dated: Tuesday, September 21, 2010