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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DEFENDANTS THE EPIC MEDIA GROUP, INC. CONNEXUS CORPORATION, FIRSTLOOK, INC., AND NAVIGATION CATALYST SYSTEMS, INC.'S MOTION TO CONTINUE PRETRIAL CONFERENCE AND TRIAL

NOTICE OF MOTION AND MOTION

TO THIS HONORABLE COURT, PLAINTIFF, AND ITS ATTORNEYS OF RECORD:

The Epic Media Group, Inc., Connexus, Inc., Firstlook, Inc., and Navigation Catalyst Systems, Inc. (collectively the "Defendants") hereby move this court for an order continuing the pretrial conference and trial date in this matter.

The bases for this Motion are set forth in the Memorandum of Points and Authorities; to wit, because of the pending Motions for Summary Judgment and the numerous procedural and substantive issues which are to be heard on September 15, 2011, it is presently impossible for the parties to adequately and efficiently prepare for a trial in this matter.

On July 22, 2011, William A. Delgado and Bruce Sendek, counsel for Connexus, telephonically met and conferred with Enrico Schaefer, counsel for Plaintiff, and explained the nature of this Motion and its legal basis and requested, but did not obtain, concurrence in the relief sought.

RESPECTFULLY SUBMITTED this 15th day of August, 2011 (Pacific Time).

/s/William A. Delgado

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STATEMENT OF THE ISSUE PRESENTED

Whether judicial economy is best served by continuing the pretrial conference and trial in this matter.

CONTROLLING AUTHORITY

The Court has the inherent power to control its own schedule to promote fair and efficient adjudication. *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1077 (3d Cir. 1983).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants respectfully request that the pretrial conference and trial date in this matter be reset to future dates, after the scope of this trial is known. There are two primary reasons.

First, under the present schedule, the parties must commence preparing for trial and exchange pretrial disclosures on September 2, 2011, **before** the Court has even had oral argument on four pending motions, three of which are dispositive and one of which is a *Daubert* motion which seeks to preclude testimony at trial. It is nearly impossible to adequately and efficiently commence preparing for a trial where: (i) the evidence to be presented is in question, (ii) the claims to be presented are in question, (iii) the witnesses to be presented are in question, (iv) the parties that will participate in that trial are in question.

Second, under the present schedule, it would be nearly impossible to prepare for and submit the necessary pretrial documents between September 15, 2011 (the date of the hearing of the pending motions) and September 22, 2011 (the date by which the pretrial order is likely to be lodged). Indeed, the present schedule would require the Court to rule on the four different pending motions from the bench on September 15, 2011. The parties would then have approximately one week to craft their respective pretrial strategies (since trial will be shaped one way or the other by the Court's rulings on these motions), prepare and lodge the pretrial order, prepare the Bench Book, and prepare their motions *in limine* in advance of the pretrial conference on September 26, 2011.

II. STATEMENT OF FACTS

On July 15, 2011, Plaintiff filed a Motion for Summary Adjudication on its Anti-Cybersquatting Consumer Protection Act ("ACPA") Claim ("Plaintiff's MSA"). Docket No. 189. Connexus Corporation, Firstlook, Inc. and Navigation Catalyst Systems (the "Connexus Defendants") also filed a Motion for Summary Adjudication on Plaintiff's ACPA Claim ("Connexus Defendants' MSA"). Docket No. 87. The Epic Media Group ("Epic Media") filed a Motion for Summary Judgment on all of Plaintiff's claims ("Epic Media MSJ"). Docket No. 178.

On August 15, 2011, Plaintiff filed an Opposition to Epic Media's Motion. The Connexus Defendants filed a Response to Plaintiff's Motion consisting of: (i) twenty pages of evidentiary objections and responses to Plaintiff's "evidence", (ii) twenty pages of facts in dispute, and (ii) a twenty page memorandum of law. Epic Media and the Connexus Defendants also filed an objection/motion pursuant to *Daubert* to strike the "expert" testimony of Chris Schwerzler ("*Daubert* Motion") and prevent any "expert" testimony or evidence by Schwerzler at the trial in this matter. The parties will file their respective reply briefs on August 30, 2011.

The three Motions for Summary Adjudication/Judgment are set for hearing on September 15, 2011. In connection with Plaintiff's Motion, the Court must necessarily decide the *Daubert* Motion. The pretrial conference is set for September 26, 2011, and trial is scheduled to commence on October 3, 2011. Although there is no established deadline yet, consistent with the practice in this District, the pretrial order would have to be lodged in advance of the pretrial conference on September 26, 2011.

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III. ARGUMENT

A. Judicial Economy and the Parties' Resources Are Not Well-Served by Preparing for a Trial Whose Boundaries Are Not Yet Known

There are two primary reasons why the present trial date creates a significant difficulty for the parties. Standing alone, either reason would constitute "good cause" for continuing the pretrial and trial dates. Together, they lead to the conclusion that the "fair and efficient" administration of justice requires a continuance of these dates.

First, it would be impossible to efficiently prepare for trial given the pending dates. Because trial is scheduled to commence on October 3, 2011, pursuant to Rule 26(a)(3)(B), the parties must exchange witness lists and exhibit lists by September 2, 2011. Nevertheless, the parties' respective Motions are not scheduled to be heard until September 15, 2011. Immediately, a conundrum arises because the parties must exchange witness and exhibit lists without knowing what parties and claims are going to proceed to trial in this matter.

Notably, the Motions to be heard on September 15, 2011 are not minor. They have the ability to significantly alter the landscape of the trial in this matter. For example, if the Court grants Epic Media's MSJ, Epic Media will be dismissed from this matter altogether which means that the trial in this matter would ***not*** include Epic Media's witnesses or the issues of whether Epic Media and Connexus Corporation merged or whether Epic Media is an alter ego of Connexus. If the Court grants Plaintiff's MSA, Plaintiff intends to dismiss all of its remaining claims for relief, and the trial in this matter would consist of a single issue: the amount of statutory damages, if any, to be awarded to Plaintiff pursuant to the ACPA. If, on the other hand,

the Court granted the Connexus' Defendants MSA, then a significant amount of evidence and witnesses that the parties intend to produce at trial would not be needed.[1]

As a result, commencing trial preparation in accordance with Rule 26 prior to September 15, 2011 simply results in gross inefficiency. To say that the parties can simply start preparing for trial as though the Court will deny all the Motions and trial will consist of all issues, claims and witnesses is no solution. First, it would be inefficient and extremely expensive. The parties should not be forced to undertake that burden and cost until, in fact, the Court ruled on the Motions definitively. Moreover, even if the Court *were* to deny all the motions for summary judgment/adjudication on September 15, 2011, there are still evidentiary rulings that the Court is obligated to make in connection with the Motions that would affect how the parties prepare for trial and what witnesses and evidence they choose to present.

For example, if the Court ruled that Plaintiff's "expert," Chris Schwerzler, could not testify at trial, that would, obviously, affect the evidence that Plaintiff put on this respect as well as Defendants' strategy for Schwerzler's cross-examination. Similarly, if the Court sustained the Connexus Defendants' various objections to the documents submitted by Plaintiff's counsel in connection with Plaintiff's MSA, Plaintiff's exhibit and witness lists would look significantly different than if the Court overruled those objections (e.g., it may choose to present witnesses to authenticate documents that were not authenticated in connection with the filing of Plaintiff's MSA).

Second, even if the September 2, 2011 deadline did not present any obstacle to trial preparation, the short time period between September 15, 2011 and the pre-trial conference of

[1] Indeed, Defendants suspect that it is highly unlikely that this matter would even proceed to trial if Plaintiff lost on its ACPA claim.

September 26, 2011 does. Local Rule 16.1(f) requires that all pending dispositive motions must be resolved at least seven (7) days before the pretrial order is submitted to the Court. As noted, above, the Connexus Defendants do not believe that the Court has issued a date for submitting the pretrial order, but, since the pretrial conference is scheduled for Monday, September 26, 2011, the latest date for submission of the pretrial order would necessarily be Friday, September 23, 2011. Of course, that would not provide the Court any time to *review* the proposed order prior to the pretrial conference (unless the Court was inclined to spend the preceding weekend doing so). As a result, it is more likely that the pretrial order would need to be submitted, at the latest, on Thursday, September 22, 2011 so that the Court could review the order on Friday, September 23, 2011.

Once again, the procedural conundrum is apparent. In order to comply with Rule 16.1(f), the Court must be ready to rule on ***all four*** pending Motions and ***all*** the evidentiary objections submitted by the parties in connection with those Motions from the bench on September 15, 2011. The parties must be ready to absorb all of the Court's rulings in this regard and, within a week, prepare and lodge the pretrial order ***and*** the Bench Book required by the Court's Order of April 14, 2011 which consists of, *inter alia,*: (i) a theory of the case, (ii) proposed *voir dire*, (iii) witness lists, (iv) exhibit lists, (v) final jury instructions, and (vi) a list of remaining evidentiary issues. Simultaneously, that same week, the parties would be preparing all of their motions *in limine* which also need to be filed on September 26, 2011.[2]

[2] It would not be efficient or even possible to prepare all motions *in limine* prior to September 15, 2011 since many of the motions may be affected by the Court's rulings on the evidentiary objections in connections with the Motions or the Court's rulings on the Motions themselves.

Of course, if the Court must be ready to rule from the bench on September 15th, it leads one to wonder whether the Court would have the time to properly consider the oral argument on the Motions that would be presented that same day and incorporate those arguments, if necessary, into its ruling.

In short, adhering to the current schedule would place a significant burden on both the Court and the parties. Since the scope of the trial would not be known until September 15, 2011, *at the earliest*, the parties would essentially have one week between September 15, 2011 and September 22, 2011 to adequately prepare their pretrial submissions in this matter, and a few short weeks to prepare for trial itself. That is simply not sufficient time, particularly in a case where Plaintiff intends to ask for tens of millions of dollars.

For the foregoing reasons, the Defendants respectfully request that the pretrial conference and trial dates be vacated and continued until a future point in time, to be decided after the Court has ruled on the pending Motions.

B. The Court Should Be Mindful That the Present Trial Schedule Can Be Exploited in a Request for Attorneys Fees.

15 U.S.C. § 1117(a) provides that the prevailing party in this matter may seek reasonable attorneys' fees upon a showing of "exceptional" circumstances. While the Defendants take no position as to whether this party is "exceptional," it is evident that Plaintiff *does* believe this to be an "exceptional" case and *will* seek attorneys' fees in the event it prevails.

Unfortunately, the present trial schedule can be exploited to inflate such a request. Since the boundaries of the trial are not known, and, at present, ***all*** claims, issues, and witnesses are to be presented at trial, Plaintiff can spend hundreds of hours preparing for a trial of broad scope.

However, if the Court's decisions on the pending Motions significantly alter the scope of the trial or the witnesses and evidence to be presented at trial, such that the actual trial is narrower in scope, much of Plaintiff's trial preparation will have been needless. Nevertheless, Defendants fully expect that, in the event it prevails, Plaintiff will seek to recover such fees.

Put simply, there is no need for the parties to begin preparing for a trial which might ultimately be much narrower in scope than is presently imagined. That is true irrespective of whose client ultimately pays the bill, but it is even more true when a fee-shifting provision exists and can be exploited to drive up attorneys' fees.

C. There Is No Prejudice to the Parties in Continuing This Matter While the Court Considers Serious Issues of Fact and Law.

As explained, above, the parties are presently in the process of preparing for a trial that may or may not look very differently, depending on how the Court rules on the pending Motions. As a result, a significant amount of money may be spent on ultimately unnecessary issues. In addition, even if the Court rules on all pending Motions on September 15th, the parties will essentially have one week to prepare numerous pretrial documents and to prepare for the actual trial (i.e., a trial whose scope would then be known). Clearly, there is significant prejudice in permitting the trial schedule to remain as is.

In addition, this Court should not be in a position where it is forced to race to a conclusion on the Motions by September 15th. The cross-motions on the ACPA claim raise serious issues, including some issues of first impression which may be dispositive of the most important claim in this lawsuit (e.g., whether the "willful blindness" test from a traditional Lanham Act claim can be imported into an ACPA claim and, if so, what would constitute

"willful blindness" in the ACPA context).[3] The Connexus Defendants' also have numerous evidentiary objections including a *Daubert* Motion that seeks to exclude Plaintiff's only expert witness in this matter. To the extent that the Court has questions for the parties or wishes to actually consider the arguments made at the hearing on September 15th, it would be nearly impossible to rule from the bench on that day as would be required by Local Rule 16.1(f).

On the other hand, there is no prejudice to the parties in continuing the trial date. The parties can wait for the Court's ruling on the pending Motions and, when the rulings are issued, prepare for a trial whose scope is known with the full knowledge of the evidentiary rulings made by the Court in connection with the pending Motions. Clearly, that alternative represents a more efficient administration of this matter.

D. Plaintiff's Suggested Scheduling Violates the Local Rules and Is Patently Unfair.

Plaintiff does not join in this request, but Plaintiff's Opposition to Epic Media's MSJ creates a scheduling difficulty of its own. Plaintiff proposes that the Court essentially "punt' on Epic Media's pending MSJ until ***after*** the trial in this matter. As will be explained more fully in Epic Media's reply brief, that proposal would run afoul of Rule 56.

Separate and apart from that, though, and pertinent to the issue raised in this motion, Plaintiff's proposed scheduling would run afoul of Local Rule 16.1(f). Pursuant to Local Rule 16.1(f), there can be no pretrial conference or trial in this matter until after all pending dispositive motions have been resolved. Plaintiff's proposed schedule—trial first, then resolution of a pending, dispositive motion for summary judgment later—would violate that rule

[3] Indeed, Plaintiff's MSA asks that the Court consider and rule on whether 288 different domain names registered by NCS over the course of 5 years are confusingly similar to Plaintiff's marks and whether NCS had the bad faith intent to profit from the goodwill of Plaintiff's marks when it registered those 288 different names.

and turn the trial process on its head. Epic Media is entitled to know whether or not it is going to be a defendant in this matter *prior* to trial, and Plaintiff's proposed schedule presents an untenable and unfair proposition.

IV. CONCLUSION

It is in the best interest of the Court, the parties, and judicial economy to continue the pretrial conference and the trial date to a future point in time so that there is a reasonable amount of time between the time that the Court rules on the pending Motions and the date by which the parties must submit the pretrial order. For the reasons stated forth in this Motion, the Defendants respectfully request that the Court continue the pretrial conference and the trial in this matter.

RESPECTFULLY SUBMITTED this 15th day of August, 2011 (Pacific time).

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, Pacific Time, 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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