

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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**PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE  
TO PLAINTIFF'S STATEMENT OF FACTS IN SUPPORT OF  
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT  
AND STATEMENT OF FACTS IN OPPOSITION THERETO**

NOW COMES Plaintiff, The Weather Underground, Inc. ("Plaintiff"), by and through its counsel, Traverse Legal, PLC, and replies to Defendants' Response to Plaintiff's Motion for Partial Summary Judgment on ACPA Claims against Defendants. Plaintiff specifically replies to Defendants' evidentiary objections to Plaintiff's numbered paragraphs in its Motion as follows:

**PART ONE: REPLY TO DEFENDANT'S EVIDENTIARY OBJECTIONS  
AND RESPONSES TO MOTION**

1. Defendants have offered no challenge to Plaintiff's registered trademarks or use through the years as testified by various witnesses. Defendants have no evidence or witness to challenge said trademark registrations. For the purposes of this motion, the Court can take judicial notice of Plaintiff's trademark registrations. *Metro Pub., Ltd. v. San Jose Mercury News*, 987 F.2d 637 (9th Cir. 1993), on remand 1993 WL 266786 (holding that a Court may take judicial notice of trademark registrations from the principal register); *Puerto Rico Corp. v. Torres-Caraballo*, 672 F. Supp. 2d 252 (D. Puerto Rico 2009) (taking judicial notice of fact that Plaintiff had registered trademarks in a trademark infringement suit, under the Lanham Act, where fact that franchisor had registered trademarks was capable of accurate and ready determination by resort to sources, including the Patent and Trademark Office's (PTO) website, whose accuracy could not reasonably be questioned); *Island Software and Computer Service, Inc. v. Microsoft Corp.*, 413 F.3d 257 (2d Cir. 2005), on remand 2006 WL 1025915 (finding that the District Court was entitled to take judicial notice of copyright infringement plaintiff's federal copyright registr, as published in Copyright Office's

registry); *Feathercombs, Inc. v. Solo Products Corp.*, 306 F.2d 251 (2d Cir. 1962), certiorari denied 83 S.Ct. 253, 371 U.S. 910, 9 L.Ed.2d 170, 135 U.S.P.Q. 503 (United States patent may be judicially noticed in discretion of court and may be noticed on appeal though not introduced in evidence and passed on by court below). Plaintiff's trademark registrations as well as Section 8, 9 and 15 maintenance filings related thereto are attached to Plaintiff's First Amended Complaint as Exhibits G-R. If necessary, Plaintiff is happy to provide original self-authenticated copies of the trademark registrations.

2. Defendants' frivolous objections are unfounded. Plaintiff's trademarks are incontestable pursuant to statute, 15 U.S.C. § 1065.

3. Newspaper articles are self-authenticating under F.R.E. § 902(6). Moreover, said articles are not being offered for the truth of the matter stated in those articles but for the fact that Plaintiff has been written about in major publications. Thus, the evidence is not considered hearsay under F.R.E. § 801. With regards to website statistics, said information is admissible under F.R.E. § 803(17), market report and commercial publications used or relied upon by the public or persons of particular occupations. In fact, such statistical information is not being offered to prove the exact number of visitors to the Plaintiff's website but as included in the listing of popular websites in general and thus is not hearsay. To the extent there is any doubt, Jeff Ferguson testified that tally information collected by Plaintiff are accurate. (Exhibit OO; Ferguson Deposition, pp. 22, 33-37, 51-53.)

4. Defendants' distinction is without substance. Plaintiff's trademarks have been in use since 1995, even according to Defendants.

5. See response to Paragraph 3.

6. Defendants failed to timely respond to Plaintiff's First Amended Complaint, including Paragraph 33, which affirmatively set forth the general uncontested proposition that hundreds of thousands of internet users go to Weather Underground's websites each day. For Further information on Plaintiff's traffic, see Exhibit PP, Schwerzler Deposition, at pages 44-48, 56-57, and 73-77.

7. Issues related to Defendants' prior notice of Plaintiff's trademarks, as well as prior adverse proceedings, goes to Defendants' notice of Plaintiff's trademarks and Defendants' supposed defense of good faith. Recall, Defendants continued to register domain names incorporating Plaintiff's trademarks even after the UDRP arbitration was filed and decided.

8. See response to Paragraph 7.

9. Defendants apparently contest the fact that they registered the domains listed in Exhibit G, despite the fact that all parties have agreed to the admissibility of Domain Tools WhoIS information listing Defendants as the registrant of those domains. *(See Exhibit QQ, WhoIS information for domains listed in Exhibit G and Exhibit RR, Affidavit of Chris Schwerzler.)*

10. For the purposes of this motion, Plaintiff simply relies on the Court's ability to take judicial notice under FRE 201(b) that the Michigan companies identified, such as Dow Chemical, DTE Energy, etc., are well known Michigan brands. See *Garner v.*

*State of La.*, 368 U.S. 157, 82 S.Ct. 248, (1961)(court can take judicial notice of well known facts). See FRE 201(b) (A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned).

a. See above.

b. Alexa information is being offered not for the exact traffic data or ranking contained therein but to note that these are all websites listed as some of the top websites in the world. Moreover, such information is self-authenticating under F.R.E. § 902(7). Finally, the Court should take judicial notice of these websites which can found online and the commonly known brands thereunder.

c. The Court is entitled to take judicial notice of other complaints filed against Defendants as found in PACER. Moreover, Defendants did not timely respond to Plaintiff's First Amended Complaint, thereby establishing the allegations as true.

d. Defendants "Document Retention Policy" speaks for itself and is a party admission.

e. See response to *Daubert* motion regarding Chris Schwerzler.

f. See response to *Daubert* motion regarding Chris Schwerzler.

g. See response to *Daubert* motion regarding Chris Schwerzler.

11. See Declaration of Enrico Schaefer dated August 30, 2011, Exhibit SS.

12. Cease and desist letters are not hearsay to the extent they are used to show notice of trademark issues. *Compana, LLC. v. Aetna, Inc.*, 2006 WL 829111

(W.D.Wash. 2006) (Wipo and NAF arbitration decisions admissible under residual hearsay exception to show notice and bad faith under ACPA). Defendants have testified repeatedly that they turn over all domains for which they believe there is a meritorious trademark issue. Defendant's spreadsheet tally of trademark infringement threat letters indicate domains that were in fact turned over to trademark owners and will be provided to the court digitally as Exhibit TT.

13. No response required.

14. No response required.

15. No response required.

16. No response required.

17. *See attached as Exhibit UU, Seth Jacoby Deposition, p. 30.*

18. No response required.

19. Defendants have admitted that Basic Fusion is the registrar for the subject domains and third party trademark domains as included in their response at Paragraph 53 to Plaintiff's initial Complaint dated January 22, 2010.

20. No response required.

21. See Declaration of Enrico Schaefer dated August 30, 2011, Exhibit SS.

22. No response required.

23. The deposition testimony included in this paragraph and attached exhibits speak for themselves and are admissible.

24. Defendants are objecting to the admission of their own employment contracts? Defendants produced these documents in discovery in response to specific

discovery requests concerning their employees. These documents are self-authenticating, and the deposition testimony of Mr. Jacoby speaks for itself.

25. No response required.

26. No response required.

27. No response required.

28. Irrespective of whether default was entered, Defendants' failure to timely respond to the First Amended Complaint results in an admission of those paragraphs. However, such admissions are not required in order for the Court to find in Plaintiff's favor on its Motion for Summary Judgment under the ACPA.

29. Defendants can articulate their defenses, to the extent they are different than those noted below, to the Court at the hearing if necessary.

30. No response required.

31. No response required.

32. No response required.

33. Mr. Jacoby's testimony speaks for itself.

34. The Defendants' countersuit against *Verizon* in California is highly relevant, as all of the allegations in that countersuit are admissions. The *Verizon* complaint against Navigation Catalyst Systems goes to notice and the bad faith factors under the ACPA.

35. See response to Paragraph 34.

36. See response to Paragraph 34.

37. No response required.

38. No response required.

39. It is interesting that Ms. Llamas would, after her deposition, argue that Defendants had fuzzy matching system in place as of fall 2004; however, Plaintiff will stipulate to this fact for the purpose of the Motion. The fact that Defendants supposedly had a fuzzy matching system in place and still registered the domain names which are the subject of this lawsuit further supports Plaintiff's allegation that (a) Defendants reviewed Plaintiff's trademarks prior to registering the subject domain names and (b) thus acted in bad faith in registering those domain names.

40. No response required.

41. No response required.

42. No response required. Again, the fact that Defendants now state that they were reviewing trademarks, including Plaintiff's trademarks, as early as the fall 2004 simply supports Plaintiff's allegation of bad faith. Defendants have offered literally no explanation as to how they could have registered the subject domain names as early as 2004 if they also had a trademark matching system in place as of that date. The only reasonable conclusion based on Defendants own rendition of undisputed facts is that Defendant was aware or willfully blind to Plaintiff's trademarks at the time of registration, use and trafficking.

43. No response required.

44. Mr. Jacoby's testimony speaks for itself.

45. Mr. Jacoby's statement speaks for itself.

46. No response required.



47. No response required.

48. No response required.

49. No response required.

50. Mr. Berryhill's deposition speaks for itself.

51. No response required.

52. No response required.

53. Mr. Berryhill's deposition speaks for itself.

54. Mr. Jacoby's deposition speaks for itself.

55. Mr. Jacoby's deposition speaks for itself.

56. No response required.

57. Mr. Rhee's deposition speaks for itself, and Ms. Llamas' deposition speaks for itself. Exhibit CC and Exhibit EE are authenticated in the Declaration of Enrico Schaefer attached as Exhibit SS.

58. Mr. Jacoby's deposition speaks for itself.

59. Ms. Llamas' deposition speaks for itself. The CAT Training document was, in fact, produced by Defendants and speaks for itself as an admission.

60. Ms. Stevenson's deposition speaks for itself. Proof that the "real websites" will often be trademark protected is clear from the massive number of typosquatted domains identified in this case on Plaintiff's trademarks and clear violations of third party trademarks.

61. Mr. Jacoby's deposition speaks for itself.

62. See Declaration of Enrico Schaefer dated August 30, 2011, Exhibit SS.

63. Because the ACPA specifically includes as one of its bad faith factors the registration of third party trademarks, it is hard to understand Defendants' objection to such evidence as "irrelevant".

64. Mr. Jacoby's deposition speaks for itself.

65. No response required.

66. No response required.

67. No response required.

68. No response required.

69. No response required.

70. Mr. Jacoby's deposition speaks for itself.

71. See Affidavit of Chris Schwerzler, Exhibit RR.

72. Mr. Berryhill's deposition speaks for itself.

73. Mr. Berryhill's deposition speaks for itself.

74. Mr. Berryhill's deposition speaks for itself.

75. No response required.

76. Mr. Berryhill's deposition speaks for itself.

77. Mr. Berryhill's deposition speaks for itself. Also, see Declaration of Enrico Schaefer dated August 30, 2011 for authentication of Exhibit LL [sic], Exhibit SS.

78. Prior written statements of Mr. Berryhill are appropriate for impeachment and not hearsay.

79. The issue of typosquatting is the fundamental issue in this case and thus relevant.

80. The issue of typosquatting is the fundamental issue in this case and thus relevant.

81. The issue of typosquatting is the fundamental issue in this case and thus relevant.

82. Mr. Berryhill's deposition speaks for itself.

83. It is unclear why Defendants are objecting to this paragraph. Apparently they are unaware that registration of third party trademarks is directly relevant under the bad faith analysis of the ACPA.

84. Mr. Berryhill's deposition speaks for itself.

85. Mr. Berryhill's deposition speaks for itself.

86. No response required.

87. See Declaration of Enrico Schaefer dated August 30, 2011, Exhibit RR.

88. The parties originally stipulated that Domain Tools WhoIS information would be admissible in this case.

89. No response required.

**PART TWO: DEFENDANTS' OPPOSITION TO DEFENDANTS'**

**STATEMENT OF FACTS IN OPPOSITION TO PLAINTIFF'S MSA**

For its reply to Defendants' Statement of Facts in Opposition to Plaintiff's MSA, Plaintiff states as follows:

1. Plaintiff objects to Defendants' statement that "The ACPA was enacted in 1999 to address issues that had arisen during the 1990s." The ACPA is a statute which only the Court is empowered to interpret. Mr. Berryhill's attempt to tell the Court what

the ACPA means and does not mean it is inadmissible. Mr. Berryhill's attempt to tell the Court what behavior the ACPA is meant to address and whether or not certain activity is considered "bad faith" under the statute is further inadmissible as a conclusion of law. As noted in *Basketball Marketing Co., Inc. v. Steve and Barry's University Sportswear*, WL 5586141 (E.D.Pa. 2008), where an expert attempted to testify in a trademark and copyright case how the facts applied to the trademark and copyright statutes:

Pursuant to Federal Rules of Evidence 702 and 704, "[t]he Court of Appeals for the Third Circuit has explicitly held that 'it is not permissible for a witness to testify as to the governing law,' ... or as to legal conclusions." *Pfizer, Inc. v. Teva Pharm. USA, Inc.*, Civ. A. No. 04-754, 2006 WL 3041097, at \*2 (D.N.J. Oct. 26, 2006) ( quoting *United States v. Leo*, 941 F.2d 181, 196 (3d Cir.1991) and citing *Berkeley Inv. Group Ltd. v. Colkitt*, 455 F.3d 195, 218 (3d Cir.2006)). Here, Defendant's expert is expected to testify about copyright and trademark law as it applies to the facts of this case, including, for example, whether Plaintiff has standing to bring its copyright infringement claims. Since such matters are legal conclusions for the Court to determine at trial, Mr. Pokotilow's testimony is inadmissible. See, e.g., *Proctor & Gamble Co. v. Teva Pharm. USA, Inc.*, Civ. A. No. 04-940, 2006 WL 2241018, at \* 1 (D.Del. Aug. 4, 2006) (precluding expert testimony on "legal conclusions or substantive issues of patent law"); *Earle M. Jorgensen Co. v. T.I.U.S. Ltd.*, Civ. A. No. 90-2024, 1992 WL 331466, at \*1 (E.D.Pa. Nov.3, 1992) (precluding expert testimony because "the conclusions of law invade the province of the court and the applications of law to facts invade the province of the jury")."

2. Plaintiff objects to Mr. Berryhill's supposed effort to instruct the Court on the plain meaning of the ACPA, without any showing of foundation. The fact that he practices domain dispute law under the Uniform Domain Name Dispute Resolution Policy does not qualify him as an expert as to the meaning of a statute which is otherwise plain on its face and for the Court to instruct and apply.

3. The law is for the Court to decide, as is the application of any previously decided decision to this case. Plaintiff objects to any attempt by Mr. Berryhill to tell the Court what the law is.

4. Id.

5. Plaintiff agrees with the allegation contained within Paragraph 5 which supports Plaintiff's Motion for Summary Judgment under the ACPA. Defendants admit that people navigating to the domain names which are the subject of this litigation would not do so by using a search engine, but instead go directly to the navigation bar to engage in activity called "direct navigation". The fact that consumers are looking for a specific website is a harsh admission against Defendants' business model and in favor of a finding of bad faith cybersquatting.

6. Plaintiff agrees with the allegations contained in Paragraph 6 which describe part of the monetization effort by Defendants and supporting a finding of bad faith cybersquatting under the ACPA.

7. Plaintiff agrees with the allegations contained in Paragraph 7 which describe part of the monetization effort by Defendants and supporting a finding of bad faith cybersquatting under the ACPA.

8. Plaintiff agrees with the allegations contained in Paragraph 8 which describe part of the monetization effort by Defendants and supporting a finding of bad faith cybersquatting under the ACPA.

9. Plaintiff agrees with the allegations contained in Paragraph 9 which describe part of the monetization effort by Defendants and supporting a finding of bad faith cybersquatting under the ACPA.

10. Plaintiff agrees with the allegations contained in Paragraph 10 which describe part of the monetization effort by Defendants and supporting a finding of bad faith cybersquatting under the ACPA.

11. Plaintiff agrees with the allegations contained in Paragraph 11 which describe part of the monetization effort by Defendants and supporting a finding of bad faith cybersquatting under the ACPA.

12. Plaintiff notes that this Paragraph is an admission that Defendants know that the advertising platform they are using will generate advertisements that will often be in direct competition with trademark holders. Defendants' attempt to try and place the "blame" of placing trademark infringing advertisements on their advertising vendor is disingenuous. No one made Defendants park these domains, put advertisements on these domains, or register these domains.

13. Defendants' attempt to portray themselves as "responsible bulk domain registrants" is fruitless on this record. Defendants' attempt to rely on their obviously defective filtering techniques on this record is also fruitless. Defendants' admission that the DNS Error Data which is spitting out the domains for possible registration presents a "hazard" "that some of the domain names may incidentally correspond to trade or service marks" is catastrophic to their defense. Defendants seem to think they are entitled to register these domains despite their knowledge that they will be in some/most

instances engaging in trademark infringement is somewhat incredible. Defendants have an obligation to abide by US trademark and anti-cybersquatting law. It is as though they are saying their business model incidentally picks up thousands of stolen cars from the parking lot and they do the best they can to return those of any complaining owner. One only need review the list of domains typosquatting Plaintiff's trademarks (Exhibit Q), third party Michigan companies being typosquatted by Defendants (Exhibit H), Defendants self reporting of trademark infringement threat letters, UDRP complaints and lawsuits (Exhibit K and Exhibit TT), and typosquats of third party trademarks of well known brands (Exhibit H to Schwerzler Report included as Exhibit M), such as Facebook, Google, Youtube, Amazon, Wikipedia, BlogSpot, Twitter, Craigslist, Myspace, WordPress, PhotoBucket, Comcast, LinkedIn, Pandora, Flickr, NY Times, Career Builder, Drudge Report, Netflix, Wells Fargo, Accuweather, Best Buy, Weather Bug, LA Times, Expedia, Overstock.com, Edmunds, Lowes, Food Network, Ticket Master, Staples, Auto Trader, Direct TV, Fandango, Perez Hilton, Nick Jr., TV Guide, Borders, Toys R Us, USA Today, Reuters, Gaem Stop, US Bank, Orbitz, Skype, Consumer Reports, Pet Finder, Barack Obama, Dallas News, Cartoon Network, Samsung, Bravo TV and virtually endless others.

14. Defendants' attempt to portray bulk domain registration with the "problems of incidental trademark" issues is simply an admission of bad faith cybersquatting. If there is no reliable way to filter out domain names which violate third party trademarks, then their business model is unlawful in and of itself. One need only look at the 288 typographical variations of Plaintiff's trademarks in this case to understand the full

magnitude of Defendants' knowingly unlawful business model, which clearly involves a callous indifference to trademarks. Defendants seem to think that the ACPA requires only that they turn over infringing domains to complainants. The ACPA clearly precludes "registration, trafficking or use" of infringing domains in the first instance.

15. Plaintiff objects to Defendants' unsupported allegation that PPC ads would be shown on the subject domains if they had remained unregistered in any event through Mozilla Firefox as lacking in foundation. No underlying support for this statement has been provided by Mr. Berryhill or any other witness. Regardless, the suggestion that ISPs or browser companies may be infringing marks, without registering, using or trafficking in domains does not absolve Defendants acts and omissions under the ACPA.

16. Mr. Berryhill's attempt to tell the Court what the ACPA says is inadmissible.

17. Mr. Berryhill's attempt to tell the Court what the ACPA says is inadmissible.

18. Mr. Berryhill's attempt to tell the Court what the ACPA says is inadmissible.

19. Mr. Berryhill's attempt to tell the Court what the ACPA says is inadmissible.

20. Ms. Llamas' testimony regarding Defendants' business model speaks for itself, as do the results.



21. Plaintiff has no objection to Paragraph 21. Whether Defendants' system is designed to vet for trademarks or target trademarks is irrelevant. The simple facts are that Defendants registered 288 variations of a single company's incontestable trademarks, received scores of threat letters every month from trademark owners, optimized their infringing domains to target the business activities from the "real website" and were engaged in institutional bad faith cybersquatting under the undisputed facts.

22. Ms. Llamas' and Mr. Misino's depositions speak for themselves. The proof is in the pudding. Whatever Defendants say that they did in order to eliminate trademarks is completely undermined by the domains they, in fact, registered in this case which are typographically similar, and in many cases nearly identical, to Plaintiff's trademarks.

23. Mr. Jacoby's and Ms. Llamas' depositions speak for themselves.

24. Mr. Jacoby's deposition speaks for itself.

25. Mr. Jacoby's deposition speaks for itself. The fact that Defendants admit that they registered, used, and trafficked in domain names during the existence of the Add Grace Period without doing any initial trademark review is a fact weighing heavily in favor of summary disposition. The fact that Defendants would supposedly delete domains which may have trademark problems after registering, trafficking, and using those domains for four and a half days provides no relief from what is, by their own admission, bad faith typosquatting.

26. Mr. Jacoby's deposition speaks for itself. Defendants' argument that the vetted for trademarks during the Add Grace Period after they registered, trafficked, and used those domains is interesting. The fact that they supposedly deleted domains which matched trademarks is undermined by their own portfolio riddled with third party trademarks.

27. Mr. Jacoby's deposition speaks for itself.

28. Mr. Jacoby's and Ms. Llamas' depositions speak for themselves.

29. Mr. Misino's declaration speaks for itself.

30. Mr. Misino's declaration speaks for itself. It is as though Defendants are arguing that after getting thousands of threat letters, multiple UDRP arbitrations, and near endless complaints of trademark infringement through January 2007, they decided to try and "do better". Even assuming that Defendants somehow put better systems in place in 2008 and 2009 is simply an admission of the things they should have been doing back in 2004.

31. Mr. Misino's declaration speaks for itself. The fact that Defendants attempted to reduce their known liability under the ACPA by implementing a "better" trademark system is merely an admission that prior to that date they engaged in bad faith cybersquatting.

32. Mr. Misino's declaration speaks for itself.

33. Mr. Misino's and Mr. Jacoby's depositions speak for themselves.

34. Mr. Misino's deposition speaks for itself.

35. Mr. Misino's and Mr. Jacoby's depositions speak for themselves.

36. Mr. Pirrone's deposition speaks for itself.

37. Mr. Jacoby's, Mr. Misino's, and Mr. Pirrone's depositions speak for themselves.

38. Mr. Jacoby's deposition speaks for itself.

39. Mr. Misino's declaration speaks for itself.

40. Mr. Pirrone's deposition speaks for itself.

41. Mr. Pirrone's deposition speaks for itself. The fact that Defendants, in 2008, deleted over 25,000 domains which constituted by their own determination as infringing third party trademarks is insurmountable evidence and an admission of bad faith cybersquatting.

42. Ms. Llamas' deposition speaks for itself.

43. Mr. Korf's declaration speaks for itself. In fact, Mr. Korf's description of Defendants' business model is, in fact, an admission that their use of DNS Error Data pulls in trademark problems which can or were not adequately vetted for trademarks. Assuming Defendants' efforts to vet trademarks are as testified, this only proves Defendants' entire business model is unlawful.

44. Mr. Korf's deposition speaks for itself. The fact that Defendants admit that they are unable to develop a DNS Error driven bulk registration system which registers the typographically variations of trademarks that we've seen in this case is an admission of a knowingly unlawful business model.

45. Ms. Llamas' deposition speaks for itself.

46. Mr. Pirrone's deposition speaks for itself. In fact, the fact that Mr. Pirrone transfers domains that Defendants acknowledge are violating third party trademarks "with legitimate rights" is an admission that every domain voluntarily transferred as set forth in Defendants' spreadsheets (Exhibit TT) was trademark infringement.

47. Mr. Masters' deposition speaks for itself. Defendants admit that every parking/landing page includes an email link which is to take and negotiate offers to sell each and every domain.

48. Mr. Masters' deposition speaks for itself. Weather Underground did not "take its name from the 1960s radical organization."

49. Mr. Masters' deposition speaks for itself.

50. Mr. Schwerzler's deposition speaks for itself.

51. How a magic store called "Wunderground Magic Store" lacking any overlapping goods or services as those offered by Plaintiff is relevant to the trademarks at issue in this case is unclear. Mr. Schwerzler's deposition speaks for itself.

Respectfully submitted this 30<sup>th</sup> day of August, 2011.

/s/Enrico Schaefer

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## CERTIFICATE OF SERVICE

I hereby certify that on the 30<sup>th</sup> day of August, 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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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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**PLAINTIFF'S REPLY TO DEFENDANTS' MEMORANDUM**  
**OF POINTS AND AUTHORITIES IN OPPOSITION**  
**TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION**

NOW COMES Plaintiff, The Weather Underground, Inc., by and through its counsel and replies to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Adjudication as follows:

Plaintiff relies on its Motion for Partial Summary Judgment (Dkt. #205) and its Reply to Defendants' Response to Plaintiff's Statement of Facts in Support of Plaintiff's Motion for Partial Summary Judgment and Statement of Facts in Opposition Thereto filed contemporaneously with this Reply Memorandum.

Respectfully submitted this 30<sup>th</sup> day of August, 2011.

/s/Enrico Schaefer

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## **CERTIFICATE OF SERVICE**

I hereby certify that on the 30<sup>th</sup> day of August, 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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