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 CONNEXUS CORPORATION, FIRSTLOOK, INC. AND NAVIGATION CATALYST SYSTEMS, INC.'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

REPLY MEMORANDUM OF POINTS AND AUTHORITIES

As the Court is undoubtedly aware, the Motion for Summary Adjudication filed by Connexus Corporation, Firstlook, Inc., and Navigation Catalyst Systems, Inc. (the "Connexus Defendants") (Docket No. 187) and the Motion for Summary Adjudication filed by Plaintiff The Weather Underground, Inc. (Docket No. 189) are simply mirror opposites of each other. Rather that inundate the Court with repetitive arguments, for their reply in support of the Connexus Defendants' MSA, the Connexus Defendants will simply incorporate the evidence and arguments set forth in its Opposition Brief to Plaintiff's MSA. (Docket No. 193).

That said, the Connexus Defendants do want to highlight some points:

- In its present Opposition to the Connexus Defendants' MSA (Docket No. 203), Plaintiff argues that the term "bad faith intent" as used in the ACPA is defined by the statute itself. (Opp. at 4). In fact, that is **not** true. "Bad faith intent" is not defined by the statute. Instead, the statute merely provides non-exclusive factors that may—but do not need to—be considered. 15 U.S.C. § 1125(d)(1)(B)(i); *Lucas Nursery & Landscaping, Inc. v. Grosse*, 359 F.3d 806, 811 (6th Cir. 2004) ("The factors are given to courts as a guide, not as a substitute for careful thinking about whether the conduct at issue is motivated by a bad faith intent to profit."). Thus, this Court must determine the requisite level of liability necessary to trigger a finding of "bad faith intent," and, as the Connexus Defendants have noted, mere negligence is not sufficient.

- In its opening brief, the Connexus Defendants cited to various cases that all stand for a straightforward proposition: that Congress intended the ACPA to be a narrow statute and that, to make certain that Congress' intent was realized, Courts have interpreted and will

continue to interpret it narrowly. *See Solid Host, NL v. Namecheap, Inc.*, 652 F. Supp. 2d 1092, 1101 (C.D. Cal. 2009) ("In considering these [novel] issues, the court is mindful that the statute's scope is narrow."); *Harrods Ltd. v. Sixty Internet Domain Names,* 110 F. Supp. 2d 420, 426 (E.D. Va. 2000) ("Our statutory interpretation is consistent with the legislative history of the ACPA, which makes clear that the statute's scope is narrow."). In response, Plaintiff would have the Court ignore the cases (and Congress's legislative intent) that are specific to the ACPA and, instead, focus on other aspects of Section 1125 of the Trademark Act. (Opp. at pp. 6-7). Obviously, that would be a mistake. Congress's intent with respect to other statutes is irrelevant because, as courts have noted, the ACPA is a very different statute with a very different *prima facie* requirement. *See, e.g., Lahoti v. VeriCheck, Inc.,* 586 F.3d 1190, 1202 (9th Cir. 2009) ("A finding of bad faith is an essential prerequisite to finding an ACPA violation, though it is not required for general trademark liability.").

- Contrary to what Plaintiff writes in its brief, the undisputed evidence submitted by the Connexus Defendants in support of this Motion shows that the human reviewers did not know of Plaintiff's marks. That human reviewers looked at every domain name (Opp. at p. 7) says nothing about whether or not they also had knowledge of Plaintiff's marks.

- For the reasons set forth in the Opposition to Plaintiff's MSA, "constructive notice" is not applicable to ACPA actions. Applying the concept of "constructive notice" to an ACPA action would essentially turn a violation of the ACPA into a strict liability offense and write the words "bad faith intent" right out of the statute.

- For the reasons set forth in the Opposition to Plaintiff's MSA, the Court should not import the "willful blindness" test into the ACPA context. But, even if it did, the Connexus

Defendants would not be liable under a "willful blindness" standard for the reasons set forth in the Opposition to Plaintiff's MSA (i.e., the steps they took to avoid registering domain names that might correspond to trademarks).

RESPECTFULLY SUBMITTED this 30th day of August, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 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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