Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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THE WEATHER UNDERGROUND, INC., a Michigan corporation,

Plaintiff,

vs.

Case No. 09-10756

Hon. Marianne O. Battani

NAVIGATION CATALYST SYSTEMS, INC., a Delaware corporation; BASIC FUSION, INC., a Delaware corporation; CONNEXUS CORP., a Delaware corporation; and FIRSTLOOK, INC., a Delaware corporation,

Defendants.
_____/

MOTION HEARING

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Thursday, September 15, 2011

APPEARANCES:

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is not just there for the biggest companies in the world, it is there for everybody. It is -- it was a non-system system.

THE COURT: Okay. Thank you.

How about going to -- I know these are going to overlap, Connexus, Firstlook and NCS's motion? Do you want to argue that separate?

MR. DELGADO: I will give a thirty second. I mean, that motion, you're right, Your Honor, there is a big overlap. It is essentially the flip side of Plaintiff's motion.

THE COURT: Okay. You don't have to argue anything.

MR. DELGADO: Okay. I would just clarify our position is if the Court reaches the conclusion that the ACPA requires either actual knowledge or willful blindness or I would say even reckless disregard these are levels of culpability that we have submitted sufficient evidence that we would be entitled to summary judgment on the ACPA claim. That's the gist of that motion.

THE COURT: Thank you.

The next one I have listed is Connexus, Firstlook and NCS's Daubert motion to strike.

MR. DELGADO: Thank you, Your Honor.

So this is obviously by the title a Daubert motion as to Plaintiff's expert Chris Schwerzler. And here I just

want to make three points that we put in our papers that I really want to highlight.

Now, Mr. Schwerzler's report was submitted as part of the motion for summary judgment so I think this Daubert motion effects not just whether it would be admissible for purposes of summary judgment but also whether he would be allowed to testify at trial. Now, I did hear Plaintiff's counsel say that they didn't need to rely on Mr. Schwerzler's expert report for purposes of their motion for summary judgment but that still leaves open the question of whether or not it would be admissible at trial.

So here are the three things. Number one, Mr. Schwerzler is not qualified to give the opinions that he would like to give or at least that were contained in the expert report. In opposition to this motion and earlier today, Plaintiff characterized Mr. Schwerzler's task as opening up the Defendants' database and examining it and drawing out some conclusions. In fact, when one reads his expert report, his expert opinions, which is a term that I will use loosely throughout, are for more than that. They are things that he has absolutely no knowledge of or qualifications. And, in fact, in the Plaintiff's opposition they don't even make an attempt to argue that he has qualifications.

Some of those examples are giving an opinion on the

purpose of the ACPA or whether or not it was violated. Earlier today Plaintiff's counsel freely stipulated they were not going to rely on that, but nevertheless it is in his expert report.

THE COURT: The report does not come in, it is the expert, right?

MR. DELGADO: That's right, but the report sets forth what the Plaintiff is going -- what type of testimony the Plaintiff is going to elicit. I mean, that's what it is for, to give you a heads up what this person is intended --

THE COURT: But Plaintiff has said he's not going to have him testify as to that.

MR. DELGADO: But that's only one thing. I mean, he also talks about -- he forms an opinion and gives an opinion as to the Defendants' document retention policies and whether they were appropriate. He talks about brand protection even though he has absolutely no work experience or education in the field of marketing or advertising. And many of his conclusions are nothing more than rhetoric and disguised as an expert opinion. So one line in his expert report is that the Defendants represent the worst cybersquatting of all times or in modern history. That's just rhetoric, that's just argument, dressed up in the clothing of an expert's opinion.

And that leads me to my second point, which is

Mr. Schwerzler's extreme bias, which is a recognized reason for excluding an expert witness. He is an officer, director and major shareholder of the Plaintiff. He made the decision to file the lawsuit, and if there is an award he will make the decision -- or he will be one of the people that makes the decision as to how it will be distributed including the decision as to whether or not to distribute it to himself as a shareholder.

He freely admitted at deposition that he had preconceived notions about the Defendants and their business practices, and that those preconceived notions were what led him and his other board members to file the lawsuit and that he was now confirming those preconceived notions through the expert report. That is not what an expert does. An expert approaches things with a blank slate and draws conclusions not with preconceived notions.

His bias is so bad that he admitted at deposition that his own attorneys had to edit his report because it sounded too hostile and that the draft that I got was a less hostile version. Again, experts are not hostile. Advocates are hostile, and that's all he is, an advocate for their position.

THE COURT: Okay.

MR. DELGADO: One last thing is the other problem is unreliable methodology. This case is about the intent,

the Defendants' intent. Mr. Schwerzler freely admits that he did not look at many parts of what kind of informs out intent like the black list or the exclusion list. What he did, in addition to coming up with all of these other conclusions, is create an alternative piece of software that went out and compared domain names that my client had registered to other domain names that existed on the Internet. That's, number one, meaningless because it tells us nothing about the Defendants' intent. Number two, he didn't compare their domain names to trademarks. That's what the ACPA protects against, it protects trademarks, not domain names that are visited or highly trafficked.

And then within that error of comparing domain name to domain name, as opposed to domain name to trademark, is the other issue, which is he assumes without any basis that these domain names that are out there in the world are trademark protected just because they are highly trafficked. That's just an assumption or a hypothesis with no basis and he didn't do anything to research whether or not that was, in fact, the case.

And, again, he talks about how this script that he came up with was prepared exclusively for this litigation essentially to show the jury some alternate method of doing it, but, again, this is not that product liability case where we are talking about a feasible alternative design, we are

talking about the Defendants' intent and how they did it.

And then as part of his methodology he also failed to keep documents that he looked at and produced them so we can cross-examine him about those documents.

Any one of these things that I just mentioned standing alone would be sufficient to exclude someone under Daubert. Taken together it almost compels the need to exclude him from trial in this matter and for the Court not to rely on his report as part of the motion for summary judgment.

THE COURT: Thank you.

MR. SCHAEFER: Your Honor --

THE COURT: So this expert witness of yours being a shareholder and having a financial interest in the outcome does create bias. How do you get around that?

MR. SCHAEFER: Well, it goes to his credibility. The issue here is that you've got --

THE COURT: No.

MR. SCHAEFER: -- five percent of the testimony as opinion testimony and 95 percent, which they don't contest, is pulling data from their database which otherwise the jury can't see.

So for instance all their domain names are in this terabyte drive which has to be accessed, and so 95 percent of what he did was simply write queries, you know, pull domain

names from the database, simple stuff. So that's not even an expert testimony, it is just simply lay witness testimony. So most of his testimony is that.

What they are complaining about is about five percent of his testimony where he says things like I think they are bad-faith cybersquatters. I stipulate, we are not going to put that in evidence. The problem here is there was no meet and confer before this motion because when he decided that he needed to file it because of our motion I was on vacation. If we were to sit and go through the report I think we would agree on --

THE COURT: So you're offering this fellow as a fact witness as opposed to a -- or you could offer him as a fact witness --

MR. SCHAEFER: I could.

THE COURT: -- as opposed to an expert witness?

MR. SCHAEFER: I think a lot of the things that he did were really just based on his own personal observation in writing a simple script so that we can see what is in it.

A middle piece is perhaps a little bit more complex, which is he ran their software, so part of this N-Gram matching thing, they provided us their software, they provided us their database, he could run their software to say here is a list of domains that they registered, how did their own software score that in terms of how close it is to

a trademark? And then did they, in fact, go and register those domain names anyway? So that middle piece is perhaps a little bit more complex, it is still probably lay witness testimony because there is nothing really super specialized about it, any computer person could do it.

The third piece is him evangelizing about their intent, which I will stipulate we are not going to be offering him, we will redact the parts of the report and testimony where he says I think they intended to register trademarks, and so a lot of this just goes away.

The last piece, which is probably the only piece that is really in contest here in this Daubert motion, which they specifically identify, he has got 50 things that are his opinions in his report and many of them fall in the first two categories. My opinion is I did a script and these are the domain names. They don't contest any of that. They don't contest his conclusions or anything. The last is this script that he wrote to do a trademark matching. When we took their people's deposition we found it interesting that what we said, well, how does the trademark matching work -- willful blindness -- they said we don't know, we have no idea. He in ten minutes wrote a simple script which he provided to them for review which was an alternative trademark matching system, which if you look at their trademark matching output and you look at -- and how it scored it, and you look at his

little script, things like wwwwunderground, no dot, in their script didn't score a high trademark match. Well, why would you have a script that can't even identify when somebody is literally identical except for the dot why would you leave this in? So he ran some alternative tests to show how the two systems would score it and how simple it would have been with a little bit of effort with a script to be able to generate a better output in terms of whether these really were trademark matches. That's the piece they are talking. They say, well, he's not qualified to do that. Well, why? They haven't even said why. He's the top computer guy for Weather Underground in charge of their hardware and software systems. He's got his degree in computer science, his B.S. in computer engineering, '96 from U of M, he has developed --

THE COURT: Counsel, the why is because he's an officer, director and major shareholder.

MR. SCHAEFER: Your Honor, we have cited a number of cases where -- strike that.

They have cited two cases in support of this proposition, which I have never heard of before, which is officers and directors can't provide expert testimony of the kind that we have here. Okay. And, again, I agree on the issues of they are a bad-faith cybersquatter, he can't say that, that's where bias -- I can see the argument and I agree. Where he says things that are subjective and

dramatic, that's not coming in. The other stuff that he does is completely testable, completely disclosed and isn't it interesting of all the little scripts that he wrote and included in his report, they don't challenge any of those scripts as being wrong or incorrect or anything. So we have to look at what we are doing here. Once we exclude his kind of rhetoric he's doing very simple things that are very reliable and 100 percent testable. The fact that he's an officer or director, what does it matter? If they have an expert who is going to say that script is wrong, they have got people on staff who can do that.

So given the nature of the testimony that will be offered at trial it is -- you know, to the extent that they want to beat him up because he's an officer and director they can but it would go only to his credibility. If they really want to attack him they have to take one of his scripts and say there is something erroneous about that, and they haven't done that at all. So the nature of his testimony is such that -- normally we would be talking about opinion number 22 and we would be talking about specifically what the problem is. This is all general, general stuff. I would just invite the Court to let counsel try to work out what is and is not going to be offered into evidence, and see if there is anything left here at all beyond this trademark matching script which I invite the Court again for a later day.

THE COURT: Reply?

MR. DELGADO: Just briefly, Your Honor, two things. It is precisely the rhetoric that appears in his report that even if it is impossible to say well, we are not going to elicit that type of testimony, it can still come through, and for this Court to stamp this person with the imprimatur of being an expert witness even though he's an officer or director or shareholder, that's exactly the type of things that we see in other cases courts are unwilling to do.

THE COURT: Of course, we don't use that word expert any more, right?

MR. DELGADO: Well, be that as it may, I mean, one of the cases that we cited about this, I mean, the facts were almost identical, a person who was willing to opine on just about anything and everything, the court took a look at the report and said this person cannot come in on anything even if, even if, he was okay to come in on these very limited things his extreme bias precludes him from altogether testifying.

The other thing that I want to talk about is this fourth category, this alternative -- what they call the alternative trademark matching system that this person put together. It is not a trademark matching system, and that's what I tried to make clear. Let me try again to make sure that it is absolutely clear. Our system compares domain

names to trademarks in the U.S. PTO database. The alternative system that Mr. Schwerzler put in place compares our domain names to other domain names that happen to exist on the Internet. They may or may not be trademark protected, they may or -- quite honestly, I think he got them because they were highly trafficked but they may or may not be comprised of generic words. So for example think about delta.com, that's an example that Mr. Schwerzler gave earlier with respect to the first motion. Delta could refer to an airline, a faucet, I think there is a dental insurance company, it is a mathematical computation as the difference between two things. Comparing a domain name that has the word delta in it to the trademark database is a much different exercise than just comparing it to a bunch of other domain names that also have the word delta in it because as it turns out I may be very well within my rights to register a domain name with the word delta in it so long as I'm not infringing on the rights of someone else, and that's a problem with his methodology that again it is not just a function of bias, it is the methodology in what he did that is problematic. And, of course, what they don't talk about is they could have selected somebody else to do all of these things and we wouldn't be here talking about these things, but they didn't.

THE COURT: Let me say on the expert, I agree, this

gentleman is way too far involved in this case -- in this business to be unbiassed which, of course, every expert has a certain bias or he wouldn't be selected as an expert, we all know this, but this person has a bias that is beyond the subject, it is an interest in the outcome of the case, and because he has an interest in the outcome of this case the Court is not going to allow him to testify as an expert. I don't know what he's going to say as a fact witness, I'm not barring his testimony as a fact witness, but we'll have to deal with that at trial, his expert testimony. I would believe that this other development that he had, that he made this other program, would be an area of expertise because it didn't exist at the time that this went on, so therefore he could not be a fact witness as to the facts in the underlying case. So we will see where we go with it at trial.

MR. DELGADO: Thank you, Your Honor.

THE COURT: Okay.

MR. DELGADO: My motion is coming up next. I'm just going to stay up here if you don't mind?

THE COURT: Go ahead.

MR. DELGADO: I think the last motion that we were talking about today is the Epic Media Group's motion for summary judgment as to all claims.

Before I get into my three points with respect to that motion let me just give the Court a 30-second reminder