

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 ITS MOTION AND MEMORANDUM FOR
RECONSIDERATION OR, IN THE ALTERNATIVE, CLARIFICATION OF ORDER
REGARDING DEFENDANT'S MOTION TO STRIKE REPORT OF CHRISTOPHER
SCHWERZLER AND PROHIBIT HIS TESTIMONY ON SAME AT TRIAL**

NOW COMES Plaintiff, The Weather Underground, Inc. ("Plaintiff"), by and through its counsel, Traverse Legal, PLC, and replies to its Motion for Reconsideration or, in the Alternative, Clarification of the Court's September 21, 2011, Order Regarding Defendant's Motion to Strike Report of Christopher Schwerzler and Prohibit His Testimony of Same at Trial as follows:

The primary piece of evidence in this case is a terabyte drive¹ produced by Defendants after a motion to compel, several hearings, multiple denials by Defendant that the information on the terabyte drive existed and a May 25, 2010 Order entered by the Magistrate Judge. Paragraph 21 of the May 25, 2010 Order (attached as Exhibit A to this Reply) states:

21. With regard to RFP #36, NCS shall produce a list of all domain names registered by NCS for January 1, 2004, July 1, 2004 and each year thereafter on those same dates through 2009. NCS does not need to produce any domains registered and then dropped during the 5 day Add Grace Period (AGP). To the extent NCS alleges that prior registrations are not available or cannot reasonably be produced, NCS is ordered to provide an affidavit stating in detail the specific reasons as to why it cannot produce any such list of domain names. NCS will further provide a Rule 30(b)(6) deponent concerning its assertion that information cannot be reasonably produced.

¹ The terabyte drive contains evidence that the jury cannot see or access. Special software needs to be licensed and installed on a computer in order to access the database, or otherwise is only accessible at Defendants' place of business in California.

The terabyte drive was first produced at the deposition of their 30(b)(6) witness regarding production, Donnie Misino, on August 20, 2010. (Exhibit B, Misino Dep. at pgs. 13-14, 130-133).

Plaintiff's Motion identifies a number of objective and verifiable attributes of the database, file names, and data in the files as pulled by Chris Schwerzler through simple queries, or Defendants' own trademark matching query, run on the database. (Motion ¶11, Dkt. #225). Defendant did not challenge Mr. Schwerzler's expertise to run such queries and pull such data and in fact conceded it in their Motion to Strike.

"Schwerzler is simply not qualified to offer all of the opinions he wants to offer." (Defendant's Reply Brief at Page 3 (Dkt #221).)

"There's **nothing** in Plaintiff's opposition which even attempts to argue that Schwerzler is even qualified to opine anything other than his ability to extract files from a database and run a query on those files." (Defendant's Reply Brief at Page 4 (Dkt #221).)

"Perhaps it would be one thing if Mr. Schwerzler had been retained to simply discuss how he extracted information from a database."
(Defendant's Reply Brief at Page 5 (Dkt #221).)

Most telling, Defendants have not pointed in deposition, motion, brief, witness, hearing or otherwise a single inaccuracy related to any of the objective information included in Mr. Schwerzler's report and testimony. Instead, Defendant's Motion focused specifically on Schwerzler's subjective conclusions on issues of intent and trademarks on certain third party domains.

Mr. Schwerzler should be allowed to offer objective testimony (a) about all objective data in the database (either the data is there or it is not); (b) the numerical values Defendants' trademark matching software also included on the drive scores typo-domains registered by Defendants; and (c) Mr. Schwerzler's own trademark matching algorithm which took 10 minutes to code and the results of that simple query. Such objective, and subject to confirmation, testimony is in stark contrast to the holding cited by NCS, *In re Commercial Money Center, Inc.*, where the court struck the expert witness testimony because it related to subjective determinations regarding claims handling procedures and servicing.. 737 F. Supp. 2d 815, 845 (N.D. Ohio 2010).

There could be no prejudice or harm by allowing Mr. Schwerzler to identify the data on the terabyte drive, show the results of Defendant's trademark query or show the jury how a trademark query works by explaining lines of code. If the data is not there, Defendant can easily show that. Bias is a non-issue with regard to contents of the terabyte drive.

If all party witnesses offering expert testimony were to be stricken, the court rules and case law would so provide. If the chasm between the objective information relied upon (the contents of the terabyte drive) and the opinion itself is wide (intent, bad faith), then reliability could support precluding opinions.

Defendants make the argument that Plaintiff has offered a “new” expert report. Again, this is simply untrue. Defendant filed a motion to strike attaching an unsigned draft version of Mr. Schwerzler’s expert report. As Defendants are aware, Plaintiff’s produced in discovery both draft and final versions of the report. The signed final version was the subject cross-examination of Mr. Schwerzler at his deposition and marked by Defense counsel as Schwerzler depo Exhibit 214. Despite repeatedly making Defendant aware of its error, defense counsel continues to suggest that Mr. Schwerzler’s signed report is somehow ‘new.’

CONCLUSION

Striking Mr. Schwerzler’s entire report and his objective testimony about the contents of the terabyte drive produced in this case is unsupported. Defendant’s have failed to identify in all their pleadings and arguments to date even in single error made by Mr. Schwerzler in his final report identifying the contents of the terabyte drive. Alternatively, precluding Mr. Schwerzler from offering such testimony would create extreme prejudice to Plaintiff whose alternatives for having that evidence available to the jury are limited to methods that are inefficient and waste judicial resources.

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Respectfully submitted this 3rd day of November, 2011.

/s/Enrico Schaefer

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of November, 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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