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 MOTION *IN LIMINE* NO. 1

NOTICE OF MOTION AND MOTION

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

Connexus Corporation, Firstlook, Inc., and Navigation Catalyst Systems, Inc. (collectively, "Defendants") hereby move this court *in limine* for an order excluding any reference, insinuation, questioning, argument, or evidence (testimony or documents) regarding the existence and/or condition of other lawsuits or disputes between Defendants and other parties.

The bases for this Motion are set forth in the Memorandum of Points and Authorities; to wit, that such argument and testimony are irrelevant to this matter pursuant to Federal Rule of Evidence 402. Even if such evidence was relevant and admissible, the prejudicial effect of such evidence substantially outweighs its probative value, and, therefore, the Court should exercise its discretion to exclude such argument and testimony under Federal Rule of Evidence 403.

Counsel for Defendants have explained the nature of this Motion and its legal basis and requested, but did not obtain, concurrence in the relief sought.

RESPECTFULLY SUBMITTED this 24th day of February, 2012 (Pacific Time).

/s/William A. Delgado

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

With this motion *in limine*, Defendants seek to exclude any argument and/or evidence related to other lawsuits or disputes between other parties and Defendants regarding domain names, cybersquatting allegations, or trademark infringement.

This is a lawsuit about **one** unique set of allegations, specifically whether Defendants' registration of various domain names violated Plaintiff's purported rights in its trademarks. It is not a lawsuit about Defendants' business practices, in general, or what disputes other parties have had over domain names. Nor is this a lawsuit about Defendants' "character" or behavior patterns. Defendants are in the business of registering domain names in bulk, and consequently have had disputes with other parties over these names. But, Plaintiff has a unique set of allegations against Defendants, and evidence of other parties' disputes is patently irrelevant to this particular lawsuit.

In addition, the presentation of evidence as to other disputes would result in a needless waste of time, accomplishing nothing but to confuse the issues and inflame the jury. Perhaps Plaintiff hopes to succeed at trial by painting Defendants as "serial cybersquatters" hoping that the jury will punish Defendants as such. Nevertheless, an unnecessary and prejudicial detour into the irrelevant would be a disservice to this Court, the parties, and, ultimately, the jury.

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II. ARGUMENT

A. THE EXISTENCE OF OTHER DISPUTES IS NOT RELEVANT TO THIS LAWSUIT.

Federal Rule of Evidence 402 specifically provides that "[e]vidence which is not relevant is not admissible." Rule 402 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Here, the existence of other disputes with Defendants is patently irrelevant to this lawsuit. Defendants have been sued by other parties. This is true of almost every major company. The allegations in other lawsuits are not facts – they are allegations. And, in fact, these allegations are hearsay and, therefore, inadmissible under Fed. R. Evid. 802. *Insignia Sys. Inc. v. News America Marketing In-Store, Inc.*, 2011 WL 382964 *2 (D. Minn. Feb. 3, 2011) ("Allegations in prior lawsuits are clearly hearsay, and should be excluded if offered to prove the truth of the matter asserted."). They should therefore not be used to prove *anything*, let alone that Defendants have a pattern of cybersquatting or trademark infringement. *See, e.g., Ritten v. Lapeer Regional Med. Ctr.*, 2010 WL 374163 *8-9 (E.D. Mich. 2010) (granting motion in *limine* excluding evidence of plaintiff's prior lawsuits). The existence of other lawsuits—including the *Verizon* lawsuit which Plaintiff will seek to introduce into evidence—does not even indicate a pattern, yet it would likely confuse the jury and prejudice them against Defendants' business.

Even if the lawsuits were relevant, their probative value -- based on speculations, not facts -- is far outweighed by their inflammatory effect on the jury. Fed. R. Evid. 403. This case is not a class action. It is about one particular set of domain names. Thus, the evidence should

focus on that. Put simply, nothing about the existence of other lawsuits proves or disproves any disputed fact of consequence in this case.

B. CEASE AND DESIST LETTERS FROM THIRD PARTIES ARE INADMISSIBLE AS HEARSAY.

Defendants have also received cease and desist letters from third parties that evidence disputes with those parties. As with lawsuits, such letters contain allegations—not facts—which may or may not be true and which are certainly not relevant. Fed. R. Evid. 402.

In addition, these letters should be excluded under the rule against hearsay. Federal Rule of Evidence 801 defines hearsay as a statement that "the declarant does not make while testifying at the current trial or hearing; and a party offers into evidence to prove the truth of the matter asserted in the statement." Cease and desist letters would fall under this definition. They must therefore be excluded under Federal Rule of Evidence 802. *See also Clark Engineering & Const. Co. v. United Broth. of Carpenters and Joiners of America, Four Rivers Dist. Council*, 510 F.2d 1075, 1082 (6th Cir. 1975) (letters deemed "pure hearsay" and introduction of letters into evidence, *inter alia*, resulted in reversal); *Cook v Caruso*, 2010 WL 5887814 at *3 (E.D. Mich. Dec. 20, 2010) ("The Court cannot consider either the letters or 'declarations.' '[A]n unnotarized statement…constitutes nothing more than unsworn hearsay that may not be considered on a motion for summary judgment.") (citation omitted), *report and recommendation accepted by* 2011 WL 768076 (E.D. Mich. Feb. 28, 2011) ("The Court agrees with the Magistrate Judge that the unnotarized declarations and letters cannot be considered as evidence on a motion for summary judgment.").

C. EVEN IF RELEVANT, EVIDENCE OF OTHER DISPUTES SHOULD BE EXCLUDED FROM TRIAL AS PREJUDICIAL AND A WASTE OF TIME.

Pursuant to Federal Rule of Evidence 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Sixth Circuit has granted trial courts broad discretion to exclude evidence whose prejudicial effect outweighs its probative value. *See, e.g., U.S. v. Fisher*, 648 F.3d 442, 449 (6th Cir. 2011) (upholding district court's decision to exclude documentary evidence that would have "a high likelihood of misleading and confusing the jury"). Thus, even if the evidence is only marginally – if at all – relevant, the trial judge has wide latitude to restrict or completely exclude it. *U.S. v. Mack*, 258 F.3d 548, 555 (6th Cir. 2001) (concluding that the district court erred in admitting evidence of prior acts, where the evidence had little probative value and would prejudice the jury as to defendant's "bad character") .

Here, there is nothing probative about the existence of other disputes. The existence of other disputes says nothing about whether Defendants infringed on *Plaintiff's* rights. The existence of other disputes does not speak to the alleged infringements of which Plaintiff complains.

On the other hand, the danger that such evidence would "inflame the jury" is substantial. Plaintiff may seek to introduce evidence of other disputes in an effort to paint Defendants as having violative practices in the hopes that the jury will base their decision on that accusation and not on the facts of this case. And, even if the jury is not particularly "inflamed," there is a

significant danger they will nevertheless be confused, left wondering what the existence of other disputes has to do with this case.

As if the prejudicial danger to Defendants was not sufficient, evidence of other disputes – whose facts are totally different from the instant case – is likely to consume a vast amount of time and result in numerous "trials within a trial" as the parties begin to evaluate the merits of the other lawsuits, the similarities to the one at hand, etc. Given that none of these items have any bearing on what happened to Plaintiff in this case, these "trials within a trial" are nothing more than a needless distraction which will take up an undue amount of time and confuse the jury.

III. CONCLUSION

The existence of other disputes with other parties is irrelevant to this trial, which is not about general business practices. And, even if it could somehow be relevant, the danger of prejudice and confusion, and the unnecessary delay such evidence would cause, mitigates in favor of exclusion. For these reasons, this Court should exclude all arguments, evidence, and references to the existence of such other disputes.

RESPECTFULLY SUBMITTED this 24th day of February, 2012 (Pacific time).

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2012, 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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