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.

Enrico Schaefer (P43506)
Brian A. Hall (P70865)
TRAVERSE LEGAL, PLC
810 Cottageview Drive, Unit G-20
Traverse City, MI 49686
231-932-0411
enrico.schaefer@traverselegal.com
brianhall@traverselegal.com
Lead Attorneys for Plaintiff

Anthony P. Patti (P43729)
HOOPER HATHAWAY, PC
126 South Main Street
Ann Arbor, MI 48104
734-662-4426
apatti@hooperhathaway.com
Attorneys for Plaintiff

William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

Nicholas J. Stasevich (P41896)
Benjamin K. Steffans (P69712)
BUTZEL LONG, P.C.
150 West Jefferson, Suite 100
Detroit, MI 48226
(313) 225-7000
stasevich@butzel.com
steffans@butzel.com
Local Counsel for Defendants

DEFENDANTS CONNEXUS CORPORATION, FIRSTLOOK, INC., AND NAVIGATION CATALYST SYSTEMS, INC.'S MOTION IN *LIMINE* NO. 2

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 the "Defendants") hereby move this court in *limine* for an order excluding any reference, insinuation, questioning, argument, or evidence (testimony or documents) regarding the prior National Arbitration Forum UDRP proceeding between Plaintiff and Navigation Catalyst Systems, Inc.

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 Nos. 402, 801, and 802. 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 No. 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

William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

With this motion in *limine*, Defendants seek to exclude any argument and/or evidence related to the prior Uniform Dispute Resolution Policy ("UDRP") proceeding between Plaintiff and Navigation Catalyst Systems, Inc. This Court is not bound by the UDRP panel's decision, nor are the parties here obligated to present the same evidence or arguments to this Court that they did to the UDRP panel. A lawsuit in federal court is substantially and procedurally different from an arbitration dispute – otherwise it would be a needless waste of time (and likely prohibited) to proceed with both.

This is a lawsuit about whether Defendants' registration of various domain names violated Plaintiff's trademark rights. It is not a lawsuit about the merits of prior decisions, nor is this a trial of the UDRP panel. What the panel decided—based on the prima facie elements of a UDRP and not the ACPA—is irrelevant. In addition, the panel's decision and statements are hearsay. Introducing them would accomplish nothing but to inflame the jury.

II. ARGUMENT

A. EVIDENCE OF THE UDRP PROCEEDING IS IRRELEVANT 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 the prior UDRP proceeding between Plaintiff and Navigation Catalyst Systems, Inc. is patently irrelevant to this lawsuit. The UDRP proceeding evidences nothing except what a panel of arbitrators concluded regarding this dispute under the guiding principles of a UDRP, ***not*** the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) ("ACPA"). The instant lawsuit is a separate, unique proceeding governed by different substantive law (the ACPA not the UDRP) and different rules of evidence (i.e., the Federal Rules of Evidence). It must be treated as such.

Notably, this Court is not bound by the UDRP decision, and in fact does not even owe the decision deference with regards to the merits of this case. *See e.g., Eurotech, Inc. v. Cosmos European Travels Aktieng-Esellschaft*, 213 F. Supp. 2d 612, 618 n.10 (E.D. Va. 2002) ("Worth noting here is that the result reached in the WIPO proceeding is neither admissible nor entitled to any deference, with respect to the merits present in this suit."); *Dynamis, Inc. v. Dynamis.com*, 780 F. Supp. 2d 465, 472 (E.D. Va. 2011) ("[I]t is well settled that 'any decision made by a panel under the UDRP is no more than an agreed-upon administration that is not given any deference under the ACPA.'"). Nothing about the existence or conclusion of the UDRP proceeding proves or disproves any disputed fact of consequence in this case. As such, it is inadmissible.

B. EVIDENCE OF THE UDRP PROCEEDING IS INADMISSIBLE AS HEARSAY.

Evidence of the UDRP proceeding should also be excluded as 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." Proceedings that took place outside of this Court would fall under this definition. *Dynamis, Inc.*, 780 F. Supp. 2d at 473 ("[G]enerally speaking, the UDRP panel's conclusion is inadmissible as hearsay that cannot be considered in resolving this case."). They must therefore be excluded under Federal Rule of Evidence 802.

C. EVEN IF RELEVANT, EVIDENCE OF THE UDRP PROCEEDING 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"). Where, as here, 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 the UDRP proceeding. This is particularly true given that Navigation Catalyst elected not to mount a defense to the UDRP proceeding but, rather, stipulated to the transfer of the domain names. *See* Exhibit A hereto. The findings by the arbitration panel were, therefore, made on the basis of submitted documents (not live testimony), without applying the rules of evidence that govern in federal court, and in the

absence of any evidence or argument submitted by Navigation Catalyst. That is a far cry from this case where Defendants intend to mount a vigorous defense against the claims levied against them.

On the other hand, the danger that such evidence would unfairly prejudice the jury is substantial. Plaintiff will undoubtedly seek to introduce evidence of the UDRP proceeding to show the jury that a prior panel resolved this dispute in Plaintiff's favor, and that the jury should do the same, irrespective of their own determinations of credibility or the instructions of law from the Court. And, as if the prejudicial danger to Defendants was not sufficient, evidence of the UDRP proceeding is likely to consume a vast amount of time and result in a "trial within a trial" as the parties begin to evaluate the merits of the UDRP's decision, the similarities to the lawsuit at hand, etc. This is a needless distraction which will take up an undue amount of time and confuse the jury.

//

//

III. CONCLUSION

The existence of the UDRP proceeding is irrelevant to this trial, which is unique and separate from the UDRP proceeding. 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 the UDRP proceeding.

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

/s/William A. Delgado
William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

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:

Enrico Schaefer (P43506)
Brian A. Hall (P70865)
TRAVERSE LEGAL, PLC
810 Cottageview Drive, Unit G-20
Traverse City, MI 49686
231-932-0411
enrico.schaefer@traverselegal.com
brianhall@traverselegal.com
Lead Attorneys for Plaintiff

Nicholas J. Stasevich (P41896)
Benjamin K. Steffans (P69712)
BUTZEL LONG, P.C.
150 West Jefferson, Suite 100
Detroit, MI 48226
(313) 225-7000
stasevich@butzel.com
steffans@butzel.com
Local Counsel for Defendants

Anthony P. Patti (P43729)
HOOPER HATHAWAY, PC
126 South Main Street
Ann Arbor, MI 48104
734-662-4426
apatti@hooperhathaway.com
Attorneys for Plaintiff

William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants

/s/William A. Delgado
William A. Delgado
WILLENKEN WILSON LOH & LIEB LLP
707 Wilshire Boulevard, Suite 3850
Los Angeles, CA 90017
(213) 955-9240
williamdelgado@willenken.com
Lead Counsel for Defendants