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. 4

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 prohibiting Plaintiff from making any reference, insinuation, or argument, or requesting a jury instruction, regarding an alleged spoliation of evidence based on Defendants' "lack of regularly kept business records."

The bases for this Motion are set forth in the Memorandum of Points and Authorities; to wit, that a spoliation argument or jury instruction must be based on evidence that Defendants had a duty to preserve business records; that Defendants willfully destroyed such records; and that the destroyed records were relevant to the instant lawsuit. As Plaintiff has not produced any evidence of the above conditions, Plaintiff must not be permitted even to *insinuate* spoliation, as it would prejudice and inflame the jury, despite the lack of legal merit.

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 prohibit the request for any jury instruction, related to Defendants' purported spoliation of evidence based on their lack of regularly kept business records. As this Court is aware, Defendants are in the business of bulk domain name registration and monetization. This enterprise generates immense quantities of data and documents (both electronic and paper) that cannot possibly be retained in anticipation of every possible kind of litigation to which Defendants could potentially be exposed.

To argue *spoliation of evidence*, however, Plaintiff must make a three-pronged showing that: (1) Defendants had a duty to preserve evidence; (2) Defendants destroyed the evidence with a culpable state of mind; and (3) the destroyed evidence was relevant to the instant lawsuit. *See, e.g.*, *Beaven v. United States Dep't of Justice*, 622 F.3d 540, 553-54 (6th Cir. 2010). Plaintiff cannot establish any of these three elements, let alone all three. Defendants expect that Plaintiff will nonetheless make the argument to inflame the jury and create the inference that Defendants destroyed records that would have harmed their case.

In truth, Plaintiff does not really argue that Defendants destroyed documents relevant to this litigation after a duty to retain such documents arose. Rather, Plaintiff takes issue with Defendant's historic document creation and retention policies in general, irrespective of what the document is, when it was created, or what information it contained. Plaintiff's position can essentially be boiled down to (without exaggeration): Defendants should have retained every single document (paper and electronic) it ever created. Not only is that position legally

untenable, it is practically impossible. It costs money to store data and documents (both hard copy and electronic). As a result, like every other company in America, Defendants retained some documents and discarded others. What is crucial to this motion, however, is that Defendants never willfully destroyed a document relevant to this litigation after a duty to preserve such a document arose.

Because Plaintiff's position has no legal merit, the Court should prohibit any reference to spoliation.

II. ARGUMENT[1]

A. DEFENDANTS DID NOT HAVE A DUTY TO PRESERVE DOCUMENTS UNTIL THE INSTANT LITIGATION COMMENCED.

It is well-established in the Sixth Circuit (and other federal circuits) that the duty to preserve documents arises when a party knew or should have known that the documents may be relevant to litigation. *See, e.g., Beaven*, 622 F.3d at 553-54. In Plaintiff's Motion in Limine Requesting a Jury Instruction on Spoliation ("Mot."), Plaintiff emphasizes the volume of Defendants' business and corresponding quantity of records, including those pertaining to

[1] For the sake of judicial efficiency, Defendants will not rehash discovery disputes that are, at this point, years old and completely irrelevant as Plaintiff has in its Motion in *Limine* on this topic. That said, it is clear that Plaintiff's recitation of the May 2010 discovery dispute offers nothing more than its own revisionist history.

Defendants are confident that the record accurately evidences what really happened: (i) Plaintiff issued vastly overbroad discovery requests to which NCS properly objected; (ii) Plaintiff sought to compel responses to its requests without a true meet and confer process; (iii) on May 12, 2010, Magistrate Judge Morgan forced Plaintiff to meet and confer with Defendants in her courtroom; (iv) a vast majority of the issues were resolved through the meet and confer process and the parties jointly drafted the order ultimately issued by the Court; (v) as to the handful of issues that remained unresolved, Plaintiff asked the Court for additional documents; and (v) for the most part, the Court sided with Defendants and denied Plaintiff's request, finding many of the requests vague and overbroad.

disputes with other parties that predate *this* dispute by years. In fact, Plaintiff's Motion seems to rest on the presumption that because Defendants were on notice of *other* disputes, including actual and potential lawsuits, they must have been on notice of the instant one and hence had a duty to preserve evidence. This presumption is patently false.

Case law makes clear that Defendants' duty arose once it knew about *this* lawsuit. In *Beaven*, the Sixth Circuit noted that "an adverse inference for evidence spoliation is appropriate if the Defendants 'knew the evidence was relevant to some issue at trial.'" 622 F.3d at 553 (quoting *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004)). By "some issue at trial," the Sixth Circuit could not possibly have meant *any* issue that could arise at *any* trial but clearly an issue specific to the *instant* action. Indeed, the Second Circuit made this explicitly clear in *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), stating that the obligation to preserve evidence "arises when the party has notice that the evidence is relevant to litigation – most commonly when suit has already been filed, providing the party responsible for destruction with express notice." *Id*. at 126.

In its Motion, Plaintiff argues that Defendants' obligation to preserve evidence began at the latest in April 2007, when it had already been receiving cease and desist letters from third parties. Mot. at 12. But, Plaintiff does not explain why Defendants should have known in April 2007 (or, astoundingly, *before* then) that Plaintiff in this case would argue that these cease and desist letters from third parties (regarding other trademarks) would be relevant to this litigation.[2] Indeed, absent access to the Oracle at Delphi, Defendants could not have known about the

[2] Indeed, as Defendants explain in a contemporaneously filed motion in *limine*, they are not relevant.

initiation of this lawsuit years later, much less the specific claims to be asserted or the requests for production that would be made.

Put differently, the instant litigation concerns a specific, limited set of domain names and causes of action related to purported trademark infringement of Plaintiff's specific trademarks. Defendants could not have anticipated, prior to the initiation of this lawsuit, that they would be sued for the particular reasons that Plaintiff now brings suit. As such, they were not responsible for preserving documents until this action was filed in 2009.[3]

Moreover, as noted by Plaintiff, when Defendants receive cease and desist letters, they "transfer the domains back to the complaining third party owners" while "hoping, *most of the time correctly*, that the domain owner will go away without filing suit under the ACPA." Mot. at 4 n. 5 (emphasis added). Thus, even Plaintiff acknowledges that the majority of cease and desist letters received by Defendants do *not* result in litigation and, thus, would not necessarily trigger a duty to preserve documents. Once a particular matter is resolved, what duty could possibly exist to retain documents related to that matter?

Put most simply, there is no duty which requires a company to retain all of its business records because of a hypothetical future lawsuit of unknown claims.

[3] To the extent that Plaintiff claims that a duty arose in 2008 when Plaintiff filed a UDRP proceeding, that argument fails. Once the UDRP was resolved and the domain names at issue were transferred, Defendants had no reason to believe that they would then be sued—again—for the same exact domain names in federal court. Overwhelmingly, litigants file either a UDRP **or** an ACPA lawsuit. This suit–an ACPA lawsuit that follows a UDRP proceeding—is an aberration.

Ultimately, the issue is academic. There is no evidence that any relevant documents were destroyed between the time that the UDRP concluded and the date that this lawsuit was filed.

B. THERE IS NO EVIDENCE OF A CULPABLE STATE OF MIND.

To argue spoliation, Plaintiff must also show that Defendants acted willfully to destroy evidence. Plaintiff has made no such showing. In fact, Plaintiff alleges that "Defendants have made it difficult to demonstrate the full scope of either their knowledge or their practices, both of which are obviously important for showing bad faith in an ACPA case." Mot. at 12. If Plaintiff does not know what Defendants' mindset was, then how can it argue – much less produce *evidence* of – the culpability required under the three-prong test for spoliation?

In *Avery v. Taylor*, Judge Hood stated that a spoliation inference was not permitted absent a showing of bad faith. 2011 WL 4576310, at **7-8 (E.D. Mich. Sept. 30, 2011). Similarly in *In re Global Technovations*, Inc., the Court declined defendants' request for sanctions for alleged spoliation of evidence where the defendants had not shown bad faith. 431 B.R. 739, 782 (Bankr. E.D. Mich. 2010). Although a few courts in this District have noted that negligence is sufficient to establish the culpable state of mind, the Sixth Circuit "has required a showing of bad faith to justify an adverse inference from spoliation of evidence." *Avery*, 2011 WL 4576310, at *7.

Here, Plaintiff has not made a showing of bad faith beyond conclusory allegations that Defendants' failure to maintain records "[could] only have been deliberate." Mot. at 10. But even assuming, *arguendo*, that ordinary negligence were sufficient to establish a culpable state of mind, Plaintiff here has not made even that showing. Plaintiff has simply alleged that Defendants failed to maintain adequate historical records. But, a failure to maintain records alone does not constitute negligence – it is black letter law that negligence depends upon a breach of duty. And, as demonstrated in Part A above, Defendants had no duty to preserve

evidence. Thus, irrespective of whether the standard for culpability is willful intent or negligence, Plaintiff cannot establish the second prong of the spoliation test.

C. THE ALLEGEDLY DESTROYED EVIDENCE IS NOT RELEVANT TO THE INSTANT LAWSUIT.

Finally, to make a spoliation argument, Plaintiff must show that the evidence it alleges was destroyed would be relevant to the issues in this lawsuit. *Beaven*, 622 F.3d at 554-55 (requiring that the plaintiff make "some showing indicating that the destroyed evidence would have been relevant to the contested issue . . . such that a reasonable trier of fact could find that it would support that claim") (internal citations omitted). "'[W]hen evidence is destroyed in bad faith (i.e., intentionally or willfully), that fact alone is sufficient to demonstrate relevance. By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions." *Chrysler Realty Co. v. Design Forum Architects, Inc.*, 2009 WL 5217992, at *5 (E.D. Mich. Dec. 31, 2009) (citation omitted).

Here, as demonstrated, *supra*, Defendants' failure to maintain records was not done in bad faith. Assuming negligence suffices, Plaintiff must therefore prove relevance of the documents at issue. But, Plaintiff has not even specified which documents it believes Defendants should have preserved and were not. Documents pertaining to the *millions* of domain names that Defendants have registered are totally irrelevant to the issue of whether Defendants infringed on **Plaintiff's** purported trademark rights in a limited subset of domain

names.[4] Plaintiff has not shown that any documents relating to the domain names at issue in this action were destroyed and thus cannot meet the relevance prong of the spoliation test.

D. PLAINTIFF DISINGENUOUSLY IGNORES THE MOST RELEVANT FACT: THAT DEFENDANTS *DID* PRODUCE HISTORICAL DOCUMENTS WHICH PLAINTIFF CLAIMS WERE DESTROYED.

Perhaps the worst aspect of Plaintiff's motion is its incompleteness. For example, Plaintiff highlights the undersigned's statement from the May 19th hearing as to his belief *at that time* that cease and desist letters had been destroyed after they were logged in a spreadsheet.[5] Plaintiff then argues to the Court that "[b]y throwing all of these previous letters away and merely 'summarizing' them in a log, Plaintiff is deprived of the opportunity to see the content and source of third party complaints…" Mot. at 12.

But, Plaintiff disingenuously omits that—subsequent to the May 19th hearing—Defendants discovered that cease and desist letters, third party communications, and UDRP complaints had *not* been destroyed as initially believed and timely produced *all* of these documents in accordance with its statement to Magistrate Judge Morgan on May 19th that it would continue to look for and produce any cease and desist letters that it found. Declaration of William A. Delgado, dated February 24, 2012 ("Delgado Decl."), at ¶ 2 and Ex. A That

[4] Plaintiff concedes that Defendants have registered over 16 million domain names. Plaintiff also argues (without providing any competent evidence therefor) that millions of these domain names violate the trademarks of others. Defendants dispute this argument but even assuming that is the case (i.e., 2 out of 16 million domain names could be argued to violate a trademark right of a third party), what duty would require retention of data and documents related to the other 14 million names?

[5] Notably, Magistrate Judge Morgan simply ordered the production of the spreadsheet log. *See* Delgado Decl. Ex. A.

production exceeded 20,000 pages. *Id*. Indeed, Defendants have already informed the Court of this fact in a previous filing. *See* Declaration of William A. Delgado, filed August 15, 2011, at ¶ 4 (Docket No. 201). Yet, Plaintiff finds it appropriate to hide this fact from the Court and argue what is, essentially, an inaccuracy.

Similarly, after the May 19th hearing, one of Defendants' witnesses—Mavi Llamas—located an old laptop in her home from which Defendants were able to retrieve company e-mails dating back to **2004-2005**. Delgado Decl. at ¶ 4. Those e-mails were also produced. *Id*. And, again, the Court was already made aware of this fact in a previous filing. See Docket No. 201 at ¶ 6. Why does Plaintiff's motion make no motion of this? Indeed, a broader question becomes obvious: what relevant documents were allegedly destroyed? Plaintiff has no answer for that question either.

Plaintiff's citations to Donnie Misino's testimony do not provide it any aid. Mr. Misino essentially testified that the company does not maintain every single document it creates. That should come as no surprise. No company (and no individual) maintains every single document it creates, particularly those that have a limited purpose, are transient in nature, or become outdated. Mr. Misino also testified that the company only maintained a record of currently owned domain names but not historically owned domain names. Again, that should come as no surprise. Keeping the data associated with 16 million domain names is prohibitively expensive. Nevertheless, Plaintiff makes no effort to even explain the relevance of these facts.

What is particularly troubling about Plaintiff's citation to the Misino transcript, however, relates to the 6th bullet point where Plaintiff argues that Misino "doesn't know why only 1,500 e-mails were produced in this case or what happened to the other 598,500 of them." Clearly,

Plaintiff is trying to insinuate something nefarious to the Court when, all the while, it knows that no impropriety exists.

Mr. Misino was a company engineer, ***not*** outside counsel responsible for reviewing and determining the responsiveness of documents. Plaintiff certainly does know what happened with respect to those 600,000 e-mails because the undersigned explained it to Plaintiff's counsel, Enrico Schaefer, at the deposition. As page 138 of the Misino deposition transcript indicates, the parties went off the record, and the undersigned specifically informed Mr. Schaefer that: (i) NCS had provided the undersigned approximately 600,000 e-mails, (ii) that the undersigned had reviewed each and every one of the e-mails, (iii) that only 1,500 e-mails were responsive, and (iv) that the remaining e-mails were spam e-mails. Delgado Decl., at ¶ 5 and Ex. B.

More importantly, once again, Plaintiff conveniently omits that this testimony refers only to an *initial* production of e-mails that was very limited in scope as the result of Magistrate Judge Morgan's May 2010 order. Eventually (and much after the deposition), Plaintiff identified a broad group of search terms, and Defendants executed a search across multiple e-mail boxes of relevant custodians based on those terms. Responsive, non-privileged e-mails (which included e-mails from 2006-2010) were then produced on January 26, 2011 and that production exceeded 19,000 pages. Delgado Decl. at ¶¶ 6-7. So, again, the question must be asked: can Plaintiff show they were deprived of relevant e-mails? The answer is no.

III. CONCLUSION

The Court should prohibit Plaintiff from making any insinuation of an adverse inference from spoliated evidence and should deny Plaintiff's request for a spoliation jury instruction. Federal case law for establishing spoliation sets out a clear three-pronged test, and Plaintiff is

unable to meet any -- let alone all three -- of the requirements. As any reference to spoliation would inflame the jury without legal merit, the Court should deny Plaintiff's Motion and grant this Motion to exclude all mention of spoliation from the courtroom.

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