

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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**CONNEXUS, FIRSTLOOK, AND NCS'S EVIDENTIARY OBJECTIONS AND
RESPONSE TO PLAINTIFF'S MOTION TO EXCLUDE EVIDENCE OF PLAINTIFF'S
ACTUAL DAMAGES AND DEFENDANTS' ACTUAL PROFITS**

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Defendants' Motion in *Limine* No. 6 addresses the same issue as Plaintiff's Motion on Actual Damages; to wit, the admissibility of Plaintiff's actual harm/damages and Defendants' actual profits. For that reason, and in the interest of judicial efficiency, this response to Plaintiff's Motion will incorporate Defendants' own Motion. However, Plaintiff's Motion advances a handful of arguments which merit their own response, and those arguments are addressed below.

II. ARGUMENT.

A. THE COURT SHOULD IGNORE PLAINTIFF'S STRAWMAN ARGUMENTS.

In support of its motion, Plaintiff offers various strawman arguments that are, quite simply, inapposite. For example, Plaintiff argues that "proof of actual damages is unnecessary" because the ACPA allows Plaintiff to elect statutory damages. No one contests that. Defendants are not arguing (and do not intend to argue) that proof of actual damages is *necessary*. As explained, *infra*, however, that does not mean that actual damages are *irrelevant*.

Plaintiff also argues that proving actual damages is "often" extremely difficult. Perhaps that is true in many other cases. Defendants express no opinions as to other cases. Nevertheless, that is not true in this case. Plaintiff's method of revenue generation is straightforward: it makes money when visitors to its websites click on the advertisements on the websites. One method of calculating the lost revenue from "misdirected visitors" (as Plaintiff alleges) is easy and simply requires the multiplication of three numbers. First, Defendants have produced documents and information which show the number of visitors to the domain names at issue in this case.

Second, Plaintiff likely knows the conversion rate for their own website (i.e., how many visitors to their website click on one of their advertisements) (or, if they do not know, can certainly figure it out). Third, they certainly know (or can figure out) the average revenue per click. From there, figuring out lost revenue is just a matter of multiplying these three numbers:

Number of Defendants' visitors¹ x Conversion Rate x Average Revenue Per Click.

Clearly, determining lost revenue is not nearly as difficult as Plaintiff would have the Court believe. Indeed, it would likely take less than 1 hour to assemble this information and perform the calculation.

The reality, though, is that Plaintiff never so much as made an effort to quantify its actual damages, and Plaintiff's own motion makes it clear why. Plaintiff purposefully avoiding calculating its own actual damages—*not* because it was difficult—but because Defendants' alleged actions result in “only a few cents per click on each domain” rendering Plaintiff's actual damages “*de minimous* [sic].” Mot. at 1. As Plaintiff readily admits, “only a large group of plaintiffs banding together... would be able to successfully demonstrate substantial damages.” Mot. 2. Plaintiff's argument as to the difficulty of determining actual damages is simply not true, but it serves as a nice distraction from the truth that Plaintiff never calculated its actual damages because it does not want the jury to hear that it has suffered “only a few cents” worth of harm.

But, most importantly, Plaintiff's argument about “difficult” is merely that: an argument.

¹ Assuming that *all* of Defendants' visitors meant to go to Plaintiff's websites is actually a very generous assumption, and it is untrue. But, since the question is how *Plaintiff* might have calculated its own actual damages, it is safe to say that Plaintiff would have made this assumption.

It is not a basis to exclude relevant evidence. Based on this argument, Congress provided ACPA plaintiffs with opportunity to elect statutory damages. It did not, however, render actual damages inadmissible or altogether irrelevant.

B. ACTUAL DAMAGES CAN AND SHOULD BE CONSIDERED IN DETERMINING STATUTORY DAMAGES.

Plaintiff's motion makes its fatal leap of logic when it concludes that because actual damages are not necessary, they are irrelevant, or otherwise should be excluded as prejudicial. That is simply not the case. As explained in Plaintiff's own motion *in limine*, the factfinder can and should consider actual damages in making a statutory damages award. The ACPA's statutory damages provision is broad, ranging from \$1,000 to \$100,000, yet it provides no real guidance as to how to make an award within that range. Clearly, as other courts have held with respect to statutory damages provision similar to the ACPA's, a Plaintiff's actual damages (or a Defendant's actual profit) can be one factor to consider in awarding statutory damages. *See, e.g., Charter Communications Entertainment I, LLC v. Burdulis*, 367 F. Supp. 2d 16 (D. Mass. 2005) (analyzing various methods of awarding statutory damages under 47 U.S.C. § 553(c)(3), which is similar to 15 U.S.C. § 1117(d), and settling on an award of statutory damages that most closely estimates actual damages) .

More importantly, as Defendants explain in their own Motion in *Limine* No. 6, consideration of actual damages is not just proper, it is constitutionally necessary. Statutory damages are constrained by due process. *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919) (announcing the test as whether the "prescribed penalty is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable."). So, while Plaintiff

may posit that the ACPA does not contain a “no harm, no foul” provision, the Constitution does contain a “no disproportionate damages” provision.² But, in order to determine whether a statutory damages award is “disproportionate,” the Court must have evidence of actual harm. Otherwise, it cannot adequately conduct an analysis on proportionality. For that reason, both Fed. R. Evid. 402 and 403 are inapplicable. Presentation of Plaintiff’s actual damages and Defendant’s actual profit are not irrelevant; they are constitutionally required.

C. PLAINTIFF’S LAST DITCH ARGUMENT ABOUT THE PRODUCTION OF DOCUMENTS HIGHLIGHTS ITS DESPARATION.

In a last ditch effort to have relevance damages evidence excluded, Plaintiff argues that Defendants provided incomplete information (i.e., only limited information for the first 35 domain names) and that this information is inadmissible because it is a “summary.” The flaws in this argument are numerous.

First, it is patently untrue. Defendants provided a full spreadsheet with all traffic and revenue information for all identified domains. Its Bates number is NCS124632-NCS124640. Second, it represents a fundamental misunderstanding of the rules of evidence. Because the spreadsheet is a query of the Firstlook database (which is, itself, maintained in the ordinary course of business), the spreadsheet is admissible. *U-Haul Intern., Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1045-46 (9th Cir. 2009) (explaining admissibility of computer

² Plaintiff’s focus on the “punitive” and “deterrence” aspect of the ACPA only strengthens Defendants’ position. The more “punitive” a statute, the more likely that a damages award pursuant to that statute will be viewed as “punitive damage” which are constrained to a greater degree than statutory damages. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

generated documents); *Health Alliance Network, Inc. v. Continental Cas. Co.*, 245 F.R.D. 121, 129-30 (S.D.N.Y. 2007) (explaining admissibility of database queries). Lastly, as this Court well knows, Defendants produced a 2 TB hard drive containing Firstlook's entire database. Indeed, Plaintiff has vociferously argued for the admissibility of queries run on the hard drive by Chris Schwerzler. Just as Chris Schwerzler ran queries that benefitted Plaintiff's case, he had the ability to run queries on the traffic and financial information contained in the database; apparently, he simply did not. However, Plaintiff cannot now complain that it was not *provided* the data. It was given the data in a spreadsheet *and* in a database, (which was produced more than one year ago so Plaintiff has had plenty of time to run its queries).

III. CONCLUSION.

Plaintiff's arguments are fatally flawed. The jury in this case should be allowed to consider Plaintiff's actual damages (or lack thereof) and Defendants' actual profits as part of any statutory damages calculation. Plaintiff is certainly free to argue to the jury that they should not pay these numbers any mind, but that Plaintiff's argument does not render this evidence inadmissible. In fact, this evidence is necessary as a benchmark for any damages award to determine whether or not an award in this case passes constitutional muster.

Dated: February 24, 2012

Respectfully Submitted,

/s/William A. Delgado

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2012, 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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