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 FOR PROTECTIVE ORDER

NOTICE OF MOTION AND MOTION

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

Connexus, Inc., Firstlook, Inc., and Navigation Catalyst Systems, Inc. (collectively the "Defendants") hereby move this court for a protective order quashing the subpoena to Seth Jacoby issued by Plaintiff on February 21, 2012 and asking that a second deposition of Seth Jacoby be prohibited.

The bases for this Motion are set forth in the Memorandum of Points and Authorities; to wit, that Plaintiff failed to obtain leave of this Court as required by the Federal Rules of Civil Procedure before issuing the subpoena and that any request for such leave should be denied as untimely and prejudicial to Defendants' ability to prepare for trial.

On February 26, 2012, Defendants informed Plaintiff's counsel of this motion by e-mail and the basis for this motion. Defendants did not obtain Plaintiff's concurrence for the relief requested.

RESPECTFULLY SUBMITTED this 27th day of February, 2012 (Pacific Time).

/s/William A. Delgado

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STATEMENT OF THE ISSUE PRESENTED

Whether the Court should issue an order to protect Defendants from a second deposition of Seth Jacoby, on the eve of trial, for which Plaintiff did not seek leave of Court? Defendants respectfully submit that the answer is "Yes."

CONTROLLING AUTHORITY

Fed. R. Civ. P. 26(c) provides that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (A) forbidding the disclosure or discovery."

Fed. R. Civ. P. 30(a)(2) requires a party obtain leave of Court to depose a deponent more than once.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In an adversarial judicial system, the rules of that system ensure fairness. When a party fails to abide by those rules, the resulting prejudice to its opponent is significant. That is particularly true as the parties approach trial.

Here, it is the eve of trial, and Plaintiff is not following the rules. Plaintiff intends to proceed with the second deposition of a witness named Seth Jacoby, but Plaintiff did not seek leave of Court for a second deposition as required by Fed. R. Civ. P. 30(a)(2).

Notably, Plaintiff *could* have followed the rules; it simply chose not to. The activity in this case since September 2011 (at which time the case was set for trial in March 2012) has been *de minimis*. At any point in time since September 2011, Plaintiff could have sought leave for a second deposition. Had Plaintiff obtained such leave, the deposition could have proceeded on a date and at a time that was mutually convenient for the parties and the witness. Most importantly, it would have taken place weeks if not months prior to the trial date. Nevertheless, Plaintiff chose to wait until February 21, 2012 to unilaterally issue the subpoena to Mr. Jacoby, without the required leave of Court. Plaintiff unilaterally set the deposition for March 1, 2012 in New York City, a scant 11 days prior to trial, without consulting Defendants on the date and time.

This Court should protect Defendants from what is an obvious and unreasonable burden. Plaintiff never sought leave as required. And, even if it does so now, leave should be denied. Mr. Jacoby was already deposed for seven hours on the same topics rendering a second deposition a duplicative and unnecessary exercise. Most importantly, though, this unnecessary

exercise would be taking place literally days before trial, depriving Defendants of crucial time necessary to prepare for a trial in which Plaintiff will be seeking upwards of $27 million.

II. STATEMENT OF FACTS

This case was filed in the Eastern District of Michigan in February 2009. Plaintiff deposed Seth Jacoby, the former president of Firstlook, for a full day in September 2010 in New York City where he resided and worked at the time. Declaration of William A. Delgado, dated February 27, 2012, at ¶ 2. Discovery closed in December 10, 2010. Order, Docket No. 118.[1]

In September 2011, this case was set for trial in March 2012. Order, Docket No. 223. With the exception of a motion for reconsideration related to Plaintiff's witness, Chris Schwerzler, there has been no motion practice or discovery in this matter since September 2011. Delgado Decl. at ¶ 3. These facts lead to several inescapable conclusions:

1. Having filed its lawsuit in this venue, Plaintiff has known since the inception of this case the subpoena power of this Court would not extend to witnesses in other states.
2. Therefore, when Plaintiff took the video-taped deposition of Mr. Jacoby in September 2010, it knew that it lacked the power to compel Mr. Jacoby's deposition at trial. Unsurprisingly (and likely cognizant of that fact), Plaintiff interrogated Mr. Jacoby at length for a full day as permitted by the Federal Rules. Plaintiff can use the videotape of that deposition at trial as it sees fit.

[1] Additional discovery on the issue of The Epic Media Group's acquisition of Connexus was permitted between January-June, 2011 (*see* Docket Entry on 4/8/2011). That discovery is irrelevant to the issue discussed herein.

3. If it believed that the September 2010 deposition was insufficient, Plaintiff had since September 2010 to seek leave to depose Mr. Jacoby a second time either to obtain further discovery or for purposes of trial. It never did so.[2]

4. Since September 2011, the parties have had months where the activity in this case has been *de minimis*, leaving plenty of time for a second deposition of Mr. Jacoby. At no point in time did Plaintiff seek leave of Court to depose Mr. Jaboby a second time.

In fact, Plaintiff did not broach the subject of trial witnesses until November 11, 2011. Delgado Decl. Ex. B. On November 29, 2011, Defendants informed Plaintiff that various witnesses were no longer employed by Defendants; that Mr. Jacoby would not be appearing at trial in this matter; that Plaintiff should plan on proceeding with the testimony from his deposition. Delgado Decl. Ex. C. Notably, Plaintiff did ***not*** immediately seek leave of this Court for a second deposition (presumably, on the basis that the first deposition was insufficient for purposes of trial). In fact, Plaintiff did not respond to Defendants' letter at all for weeks.

Plaintiff's next communication did not arrive until February 3, 2012, at which time Plaintiff noted that it intended to proceed with a *de bene esse* deposition of Mr. Jacoby. Delgado Decl. Ex. D. Plaintiff's February 3, 2012 letter is particularly telling because it requests Defendant to reply "no later than December 12, 2011." Obviously, the letter was written ***before*** December 12, 2011 (at which time the parties were still months away from trial), but Plaintiff

[2] Clearly, Plaintiff did ***not*** believe that a second deposition of Mr. Jacoby was necessary in July 2011 because Plaintiff brought a Motion for Partial Summary Judgment based on the evidence as it is existed at that point in time. In support of that Motion, Plaintiff relied on the Jacoby deposition transcript from September 2010. *See* Docket No. 189, Ex. J. Plaintiff did not suggest that a second deposition would be necessary.

delayed in sending it until the beginning of February. So, clearly, Plaintiff recognized that various pretrial issues needed to be resolved as early as possible but nevertheless made the conscious decision to delay in raising these issues until a month before trial.

On February 7, 2012, Defendants responded by noting that Plaintiff had not sought leave to depose Mr. Jaboby a second time and that, given the imminent nature of trial, Defendants would oppose such a motion at this juncture. Delgado Decl. Ex. E. Plaintiff did not respond to that letter and did not seek leave of Court.

Instead, Plaintiff unilaterally issued and served a subpoena from the Southern District of New York to Mr. Jacoby, ordering him to appear for deposition on March 1, 2012 in New York City. Delgado Decl. Ex. A.

III. ARGUMENT

A. Plaintiff Failed to Obtain Leave of Court to Issue a Subpoena to Seth Jacoby Which Would Require His Attendance at a Second Deposition.

Fed. R. Civ. P. 30(a)(2)(A)(ii) states that a party "must" obtain leave of court for a deposition if "the deponent has already been deposed in the case." Mr. Jacoby was deposed in September 2010. Therefore, Plaintiff had to obtain leave of Court to depose Mr. Jacoby a second time but failed to obtain such leave. *Landis v. Galarneau*, 2010 WL 446445 *3 (E.D. Mich. January 28, 2010) ("The Court does, however, note than any deposition of McCarthy would require the defendant to apply for an order of the Court permitting such a deposition because McCarthy has already been deposed in this matter. *See* Fed. R. Civ. P. 30(a)(2)(A)(ii).").

Given the straightforward nature of the rule and its application here, there is not much more to say. The subpoena must be quashed in light of Plaintiff's failure to obtain leave of Court for a second deposition.

B. Leave of Court Should Not Be Granted Now.

In opposition to this motion, Plaintiff is likely to request leave of Court for conducting Mr. Jacoby's deposition and an *ex post facto* approval of the subpoena already issued so that the deposition can proceed on March 1, 2012. Both requests should be denied.

First, Plaintiff has never made any showing as to why Mr. Jacoby's *second* deposition is needed at all. Mr. Jacoby was already deposed, on video tape, for a full day in New York City. Delgado Decl. at ¶ 2. Neither Plaintiff's claims and theories nor Defendants' defenses and theories have changed since then. This has always been a case under the ACPA, and it continues to be such a case today. In fact, in July 2011, Plaintiff submitted the Jacoby deposition transcript into evidence in support of its Motion for Partial Summary Judgment, proof-positive that the Plaintiff believes it *already* has testimony from Mr. Jacoby that is relevant, admissible, and (presumably) supportive of its case. Correspondingly, Plaintiff cannot show this second deposition would be anything other than a duplicative exercise intended merely to distract Defendants from preparing for trial. *Blackwell v. City & County of San Francisco*, 2010 WL 2608330 * 2 (N.D. Cal. June 25, 2010) ("[S]econd depositions have been allowed where there is new evidence since the first deposition or new theories added to the complaint. [Citations]. Here, it is clear that Plaintiff had an opportunity to obtain the information now sought through the first deposition.").

Second, Plaintiff cannot justify its lack of diligence in seeking this second deposition earlier. Plaintiff has had since September 2010 to ask this Court for a second deposition. Assuming, *arguendo*, that it wanted to wait until a firm trial date had been set before seeking a second deposition, it still had since September 2011 to ask for a second deposition.

Perhaps Plaintiff simply assumed that Mr. Jacoby would appear at trial and that such a request was unnecessary. Putting aside that "incorrect assumptions regarding trial strategy" do not constitute good cause, Plaintiff was aware since November 2011 that Mr. Jacoby was not going to appear for trial. Delgado Decl. Ex. E. Plaintiff had all of December 2011, all of January 2012, and all of February 2012 to seek leave for a second deposition and, if leave had been obtained, to proceed with that deposition sufficiently in advance of trial on a date that was mutually convenient for all parties and the witness.

Notably, Plaintiff agrees with Defendants that it needed to act more diligently because its February 3, 2012 letter was clearly written in early December 2011. Instead of sending that letter in December 2011, though, Plaintiff waited until February 3, 2012 to send it and then waited until February 21, 2012 to issue a subpoena to Mr. Jacoby. That subpoena commands his attendance at a deposition on Plaintiff's unilaterally selected date of March 1, 2012, literally days before trial in this matter. Delgado Decl. Ex. A. The unfairness to Defendants' counsel and the burden on Defendants' counsel to prepare for and attend such a deposition is significant.

Consider Defendants' counsel's recent schedule as it relates to this case ***only*** (i.e., putting aside all of his other cases, including three class actions, and any of his administrative responsibilities as a partner at his law firm, which include overseeing a major hardware and software upgrade of his firm's computer system taking place the weekend of February 24-26):

- **February 20-24, 2012**: finalize and file Defendants' motions in *limine*; prepare and file responses to Plaintiff's first two motions in *limine*; work with Plaintiff's counsel to prepare final pretrial order; finalize all trial exhibits; work with Plaintiff's counsel to finalize and assemble Bench Book for pretrial conference, including drafting Administrative Section, Theory of the Case, Defendants' Proposed Jury Instructions, Defendants' Verdict Form, Exhibit List, and Witness List and incorporating all of its Plaintiff's respective portions;
- **Weekend of February 25th and 26th:** prepare this motion; prepare responses to Plaintiff's second two motions in *limine*.
- **February 27th:** spend day flying to Detroit for pretrial conference.
- **February 28th:** prepare for and attend pretrial conference; fly back to Los Angeles.

Delgado Decl. at ¶ 9.

Plaintiff's unilaterally selected deposition date of March 1, 2012 would, essentially, require Defendants' counsel to arrive in Los Angeles on February 28th, turn around and fly to NYC on February 29th, and attend the deposition on March 1, 2012…but without any opportunity whatsoever to prepare for that deposition. And, of course, there would be the exorbitant cost of last-minute airfare and a hotel room in New York City. Most importantly, Defendants would be prohibited from start preparing its trial preparation until March 2, 2012, at the earliest. *Graebner v. James River Corp.*, 130 F.R.D. 440, 441 (N.D. Cal. 1989) (denying second deposition of Plaintiff because "[w]ith trial **less than two months** away, it would be unjust to require *Graebner* to set aside her own pre-trial preparation to accommodate James

River.") (emphasis added). Here, any request for leave would be even more egregious than in *Graebner* since the parties are days—not months—away from trial.

Indeed, the Jacoby deposition would deprive Defendants of a full three days of trial preparation (1 day to prepare for the deposition, 1 day for Defendants' counsel to travel from Los Angeles to New York, and 1 day to attend the deposition and fly back to Los Angeles). Delgado Decl. at ¶ 10. Put differently, there are eight business days between the pretrial conference on February 28th and the start of trial on March 12th. Plaintiff's eleventh hour request threatens to deprive Defendants of nearly ***half*** of its trial preparation time.

C. Plaintiff's Tardy Subpoena May Be Quashed Anyway.

Plaintiff's eleventh hour subpoena faces a different hurdle: it is issued to a third party resident of New York City who has his own set of rights and can interpose his own objections through a motion to quash in the Southern District of New York. If that happens, and even assuming (i) there is a process in the S.D.N.Y. to expedite a hearing on the motion and (ii) the subpoena is not quashed, then the Jacoby deposition will either take place the week *before* trial or during trial itself. The burden on Defendants' trial preparation and trial practice would be significant.

IV. CONCLUSION

Plaintiff did not seek leave of Court as required before issuing a subpoena to Seth Jacoby commanding his attendance at a second deposition, scheduled 11 days before trial. Even if Plaintiff now seeks that leave, the burden and prejudice to Defendants' trial preparation would be too significant for such leave to be granted. On the other hand, the prejudice to Plaintiff—who has already deposed Mr. Jacoby for seven hours and has that deposition testimony on

videotape—is non-existent. Plaintiff has already relied on existing testimony in support of its Motion for Partial Summary Judgment and can rely on that same testimony at trial (subject, of course, to evidentiary objections).

RESPECTFULLY SUBMITTED this 27th day of February, 2012 (Pacific time).

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 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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