

## Defendants' Additional Proposed Instructions

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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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

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**DEFENDANTS' PROPOSED JURY INSTRUCTIONS**

**INSTRUCTION NO. 8**  
**ELECTION OF A FOREPERSON**  
**EXPLANATION OF VERDICT FORM(S)**

When you go to the jury room, you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

**EXPLAIN VERDICT FORM**

You will take the verdict form to the jury room. **The verdict form contains various questions and instructions which you should follow. When answering a question, you should read each question, discuss amongst yourselves, and then answer the question as a group. Your answer to each question must be unanimous. That is, every one of you must answer the question with the same answer. Your foreperson should fill in your unanimous answer to the question on the verdict form. When you have reached unanimous agreement on a question and have indicated as such on the verdict form, you may then move to the next question or section on the verdict form as instructed by the form. When you have reached the end of the verdict form, your foreperson will date and sign it and inform the bailiff that you are finished.**

If you should desire to communicate with me at any time, then please write down your message or question and pass the note to the marshal, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the

courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

**Authority:**

Defendants' proposed Instruction No. 8 is very similar to Plaintiff's proposed Instruction No. 8 but provides a more comprehensive explanation of the verdict form (the bold language), including the importance of reaching unanimity as to each question on the verdict form.

**INSTRUCTION NO. 9**  
**VICARIOUS LIABILITY FOR CORPORATE EMPLOYER**

Employers are vicariously liable for acts of their officers, employees and agents. The employer is liable for ~~both negligent and~~ intentional torts committed by an officer, employees, or agent within the scope of his or her employment.

**Authority:**

Defendants' proposed instruction is similar to Plaintiff's but would strike the phrase "both negligent and" as indicated above. This Court has already held that "willful blindness" is insufficient to trigger liability under the ACPA. Order Denying Motions for Partial Summary Judgment, Docket No. 232.

By extension, "negligence" (which is a lower level of culpability than "willful blindness") would also be insufficient to trigger liability under the ACPA so it would be improper to instruct the jury that a corporation can be liable under the ACPA if its employees acted "negligently." Only an intentional act by its employees would suffice.

**INSTRUCTION NO. 10**  
**SPOILIATION/DESTRUCTION OF EVIDENCE**  
**(DEPENDING ON HOW EVIDENCE COMES IN AT TRIAL)**

**Authority:**

Defendants do not believe that any instruction on spoliation/destruction of evidence would be appropriate as indicated in their motion *in limine* on this topic. Defendants reserve the right to propose an instruction in the event the Court elects to give one.

**INSTRUCTION NO. 11**  
**THE PARTIES AND CLAIMS**

I will now explain the claims that the Plaintiff has made against the Defendants. Plaintiff The Weather Underground, Inc. is a Michigan corporation. Plaintiff owns various trademarks including THE WEATHER UNDERGROUND and WUNDERGROUND. It also operates various websites include <weatherunderground.com> and <wunderground.com> on which it provides online weather information. Plaintiff has sued the defendants in this matter claiming that the defendants in this matter have registered, used, or trafficked in Internet domain names that are confusingly similar to its trademarks with the bad faith intent to profit therefrom. It seeks to hold Defendants liable for cybersquatting for the registration, use or trafficking of such domain names. Plaintiff seeks statutory damages between \$1,000 and \$100,000 for each domain that violates the anti-cybersquatting law.

**Defendants Connexus Corporation, Firstlook, Inc., and Navigation Catalyst Systems are Delaware corporations having their principal place of business in California.**

**Connexus is the parent corporation of Firstlook which is the parent corporation of Navigation Catalyst. Defendants maintain that while they registered and monetized Internet domain names in bulk, they never registered, used, or trafficked in any domain names that were confusingly similar to Plaintiff's trademarks with the bad faith intent to profit therefrom.**

**Authority:**

Defendants instruction differs from Plaintiff's proposal in that it adds a section on Defendants' position thus making it consistent with the jointly prepared theory of the case.

## INSTRUCTION NO. 12 TRADEMARKS IN GENERAL

The first issue governing Plaintiff's claims concerns Plaintiff's trademarks. It is important that you know something about what a trademark is. For the purposes of these instructions, I will use the terms "trademark" and "mark" interchangeably. The term trademark includes any word, name, symbol, device, or any combination thereof used to identify and distinguish a company's goods from those made or sold by other companies, even if the specific source is unknown. Slogans, designs, and logos can serve as trademarks.

A single product or service can have more than one trademark (including an accompanying slogan such as "FORD" and "TAURUS" for automobiles, "CAPITAL ONE" and "WHAT'S IN YOUR WALLET" for credit cards, and "AOL" and "AMERICA ONLINE" for Internet services). The main function of a trademark is to designate goods as a particular company's product and to protect that company's goodwill. A trademark is also a merchandising shortcut that allows a prospective purchaser to select what he or she wants. Put another way, a trademark identifies a given good as the product of a particular company and allows people to select the particular brand they want to purchase. Trademarks serve a public interest by avoiding public confusion as to the source of products.

When a company has established a trademark right before anyone else, the company's right to use that mark **for a particular set of goods or services** becomes an exclusive right and the mark is the property of only that company. No other person can use the same or a similar mark in any manner that would be likely to cause confusion, mistake, or deception. **So, for example, the company APPLE could prevent others from selling computers that are**



marketed as APPLE but could not prevent farmers from marketing the fruit called “apple” for sale.

In this case, Plaintiff claims it owns trademark rights in the following marks:

WUNDER

THE WEATHER UNDERGROUND

WUNDERGROUND.COM

WUNDERSEARCH WUNDERMAP

WUNDERRADIO

WUNDERPHOTOS

WUNDERBLOG

WUNDERGROUND

WEATHER UNDERGROUND

**Authority:**

Defendants proposed Instruction No. 12 is very similar to Plaintiff’s proposed instruction but would add the language highlighted in bold. The rights to the exclusive use of a trademark are inherently limited by the particular class of goods and services (e.g., the class that appears in the trademark registration), and the jury instruction requires this language to be a complete and accurate recitation of law. *See* 15 U.S.C. § 1115(a) (referring to registrant’s exclusive right to use the registered mark in commerce “on or in connection **with the goods or services specified in the registration** subject to any conditions or limitations stated therein.”) (emphasis added).

The additional language involving “Apple” provides a practical example which highlights when a trademark owner can restrict use and when it cannot.

### **INSTRUCTION NO. 13 REGISTERED TRADEMARKS**

If a mark is registered, then the registration constitutes “prima facie” evidence of the validity of the mark, the registrant's ownership of the mark, and the registrant's exclusive right to use the mark throughout the United States **for a particular set of goods and services**.

Registration of a mark entitles the owner to sue for **trademark** infringement and bestows upon the mark a presumption of validity in that suit. ~~Trademark registration with the US Trademark Office puts all would be users of the mark on constructive notice of the mark under 15 U.S.C. § 1072.~~

The following trademarks owned by Plaintiff are registered with the United States Patent and Trademark office:

- THE WEATHER UNDERGROUND (Reg. No. 2,297,683)  
(First Use in Commerce 3-16-1995)
- WUNDERGROUND.COM (Reg. No. 2,324,272)  
(First Use in Commerce 3-16-1995)
- WUNDERSEARCH (Reg. No. 3,647,301)  
(First Use in Commerce 2-0-1999)
- WUNDERPHOTOS (Reg. No. 3,739,351)  
(First Use in Commerce 8-12-2002)
- WUNDERBLOG (Reg. No. 3,742,092)  
(First Use in Commerce 6-7-2005)
- WUNDERMAP (Reg. No. 3,527,030)

(First Use in Commerce 2-21-2008)

- WUNDERRADIO (Reg. No. 3,647,301)

(First Use in Commerce 9/25/2008)

**Authority:**

Defendants' changes to Plaintiff's proposed instruction are three-fold:

1. It adds a phrase regarding "a particular set of goods and services" for the reasons noted with respect to Instruction No. 12.
2. It adds the word "trademark" before infringement to make the language more clear.
3. It strikes the sentence involving constructive notice. The concept of "constructive notice" is relevant in traditional Lanham Act claims. It is **not** relevant nor should it be applied in ACPA cases where the test is one for "bad faith intent."

Indeed, as this Court noted in its previous Order, Docket No. 232, the Sixth Circuit's case of *Lucas Nursery and Landscaping v. Grosse*, 359 F.3d 806, 810 (6<sup>th</sup> Cir. 2004) quoted from the Senate Report accompanying the ACPA. That report defined cybersquatters as those who registered "well-known" marks and brand names in the hopes of extortion. It did not define cybersquatters as those who registered domain names that might be similar to one of the tens of thousands of rarely-known trademarks that just happen to be registered with the Trademark Office.

Lastly, Plaintiff's "constructive notice" argument is part-and-parcel of its argument that Defendants' acted with "willful blindness." Given that the "willful blindness" argument has already been rejected by the Court, so, too, should the "constructive notice" argument be rejected.

**INSTRUCTION NO. 16**  
**ANTI-CYBERSQUATTING CONSUMER PROTECTION ACT**  
**INTRODUCTORY INSTRUCTION AND DEFINITIONS**

Plaintiff seeks damages from defendants for violation of the federal law known as the Anti-Cybersquatting Consumer Protection Act, which will be referred to as the “ACPA.” ~~The purpose of the ACPA is to protect marks against certain confusing uses of those marks in Internet domain names.~~ **Congress enacted the ACPA to prohibit “cybersquatting” which occurs when a person other than the trademark holder registers the domain name of a well known trademark and then attempts to profit from this by either ransoming the domain name back to the trademark holder or by using the domain name to divert business from the trademark holder to the domain name holder.**

A “domain name” is an alphanumeric designation that forms at least part of an address on the Internet, such as www.cnn.com (“cnn” for the CNN television network), that has been registered with or assigned by any domain-name authority. The term “mark,” for purposes of the ACPA, means any trademark, service mark, collective mark, or certification mark, whether registered or unregistered, as well as a personal name that may be protected as a mark.

Plaintiff has the burden to prove by a preponderance of the evidence that Defendants violated the Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. 1125(d). To prove its claim, Plaintiff must prove that each of the following essential elements is more probably true than not true:

- (a) Plaintiff has a valid trademark or trademarks entitled to protection. ~~In this case Plaintiff’s trademarks are not contested by Defendant.~~

- (b) Plaintiff's trademarks are distinctive or famous. ~~In this case, Defendants do not contest that Plaintiff's trademarks are distinctive.~~
- (c) One or more of defendants' domain names listed on Exhibit \_\_\_\_ were identical or confusingly similar to that trademark;
- (d) Defendants registered, used or trafficked in one or more of the domain names listed on Exhibit \_\_\_\_\_. ~~Defendants do not contest that they registered and used the domain names listed on Exhibit A.~~
- (e) Defendants did so with a bad faith intent to profit.

~~In this case, Plaintiff's registered trademarks are distinctive as a matter of law.~~

**Authority:**

Defendants' changes to Plaintiff's proposed instruction are as follows:

1. Plaintiff's recitation of the "purpose" of the Act has been replaced by language from the Court's Order (Docket No. 232) which more accurately tracks caselaw as to the purpose of the ACPA. Order, Docket No. 232, at p. 3 *citing Sporty's Farm LLC v. Sportsman's Market, Inc.*, 202 F.3d 489, 493 (2d Cir. 2000).
2. Defendants have deleted Plaintiff's language that certain elements are not contested by Defendants. Defendants contest all elements.
3. Defendants have deleted Plaintiff's language that the marks are distinctive as a matter of law and offer a specific instruction on that issue in Instruction No. 17.

**INSTRUCTION NO. 17**  
**DISTINCTIVE OR FAMOUS**

I will now instruct you on how to determine whether Plaintiff's trademarks are distinctive or famous. Trademarks can be distinctive in one of two ways. They can be "inherently distinctive" or they can have "acquired distinctiveness."

An inherently distinctive trademark is one that almost automatically tells a consumer that it refers to a brand or a source for a product. A trademark is inherently distinctive if it is a "fanciful," "arbitrary," or "suggestive" term. A "fanciful" term is a newly created word or parts of common words that are used in a fictitious, unfamiliar, or fanciful way. For example, "Exxon" for gasoline is a fanciful mark. An "arbitrary" term is a common term used in an unfamiliar way. For example, "Apple" for computers is an arbitrary mark. A "suggestive" term implies some characteristic or quality of the product. If the consumer must use imagination, reflection, or additional reasoning to understand the meaning of the mark as used with the product, then the mark is suggestive. For example, "Coppertone" for suntan lotion is a suggestive mark because it is suggestive of suntanned skin.

Another type of valid trademark is a "descriptive" term that has "acquired distinctiveness." A "descriptive" term directly identifies or describes some characteristic or quality of the product in a straightforward way that requires no imagination or reasoning to understand the meaning of the trademark. For example, "All Bran" for cereal is a descriptive trademark because it describes a characteristic of the cereal. A descriptive trademark can be valid only if it has "acquired distinctiveness." To determine whether a descriptive trademark has acquired distinctiveness, you may consider the following factors: (1) direct consumer testimony, (2) consumer surveys, (3) exclusivity, length, and manner of use, (4) amount and manner of

advertising, (5) amount of sales and number of customers, (6) established place in the market, and (7) proof of intentional copying.

A “famous” mark is a mark that has become a household name such as BUICK, KODAK or TYLENOL. In determining whether Plaintiff’s trademarks are famous, you may consider the following factors:

1. The duration, extent, geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
2. The amount, volume, and geographic extent of sales of goods or services offered under the mark.
3. The extent of actual recognition of the mark.
4. The nature and extent of use of the same or similar trademark by third parties.

### **Authority**

For explanation of inherent and acquired distinctiveness: *See Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 212 (2000) (“a product’s color is unlike a ‘fanciful,’ ‘arbitrary,’ or ‘suggestive’ mark, since it does not ‘almost *automatically* tell a customer that [it] refers to a brand.’”) (emphasis in original; *quoting Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 163 (1995)); *Bliss Salon Day Spa v. Bliss World LLC*, 268 F.3d 494, 496 (7th Cir. 2001) (“Suggestive (‘Tide’ laundry detergent), arbitrary (‘Apple’ computers), and fanciful (‘Exxon’ gasoline) marks collectively are distinctive in the sense that secondary meaning is likely to develop, as a result of which any duplicate use of the name is likely to breed confusion about the product’s source. Generic marks, on the other hand, designate the products themselves rather than any particular maker, and descriptive marks might (but usually won’t) acquire distinctiveness.”).

For acquired distinctiveness: *Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 636 (6<sup>th</sup> Cir. 2002) (“A non-inherently distinctive mark or dress can have acquired distinctiveness through attachment of secondary meaning...”); *General Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405, 418 (6<sup>th</sup> Cir. 2006) (listing factors for secondary meaning).

For famousness: *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1012 (9<sup>th</sup> Cir. 2004); *Friesland Brands, B.V. v. Vietnam Nat. Milk Co.*, 228 F. Supp. 2d 399, 412; 15 U.S.C. § 1125(c)(1).



For instruction in general: Even if Plaintiff's trademarks are deemed to be "distinctive" as a matter of law as Plaintiff requests, the ACPA specifically provides that the jury can consider "the **extent** to which the mark...is or is not distinctive and famous within the meaning of subsection (c)." 15 U.S.C. 1125(d)(1)(B)(IX) (emphasis added). In order for the jury to determine the "extent" to which Plaintiff's marks are distinctive and or famous, they must know about distinctiveness, the spectrum of distinctive marks, and the factors for famousness.

**INSTRUCTION NO. 18**  
**“REGISTERS,” “TRAFFICS IN” OR “USES”**

The terms “registers” means taking the action to register a domain name through a Registrar, such as Basic Fusion or GoDaddy, to become the registrant or owner of the domain name **for the entirety of the registration period.**

The term “traffics in” means to engage in a transaction including, but not limited to sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration. ~~The term “uses” means operates a website on that domain name such as a “parking” page or “landing” page.~~

**A person may be liable for using a domain name only if that person is the registrant of the domain name or the authorized licensee of the registrant.**

~~In this case, Defendants do not contest that they registered and used the domain names listed on Exhibit \*\*.~~

**Authority:**

Defendants’ changes from Plaintiff’s proposed instructions are as follows and for the following reasons:

1. An addition to the definition of “registers” (which is not defined in the ACPA) to make clear that “registration” requires an intent to keep the domain name for the entirety of the registration period. This particular issue will likely require further briefing and hearing.
2. Striking Plaintiff’s definition of “use” which does not comport with the language of the ACPA and replacing it with the language of the ACPA. 15 U.S.C. § 1125(d)(1)(D).
3. Striking the suggestion that Defendants are not contesting registration and/or use.

**INSTRUCTION NO. 19**  
**“CONFUSINGLY SIMILAR”**

To determine whether the domain names at issue are confusingly similar to Plaintiff’s trademarks, you should consider whether the domain names are similar to Plaintiff’s trademarks in ~~spelling, characters,~~ sight, sound, or meaning such that that the domain name and trademark being compared could be confused. ~~Unless words or letters added to the Plaintiff’s marks within the domain names clearly distinguish them from the Plaintiff’s usage, allegations that a domain name incorporates a protected mark generally will suffice to satisfy the “identical or confusingly similar to” requirement.~~

~~The addition of descriptive or generic terms to a domain name, such as the addition of the descriptive term “search” does not affect confusing similarity.~~

**Authority:**

Plaintiff’s cited authority does not support the statements that Defendants have struck. The law does not contemplate a test like the one proposed by Plaintiff (i.e., that words or letters added to the Plaintiff’s mark “clearly distinguish” them from Plaintiff’s usage). The addition of letters or words or the substitution of even a single letter might be sufficient to overcome “confusing similarity” (e.g., consider the domain names “niceshoes.com” and “nikeshoes.com” which differ by only one letter but are unlikely to be confused).

Similarly, the addition of a descriptive or generic term *might* affect confusing similarity as is evidenced by gripe sites (e.g., consider “disney.com” and “disney-sucks.com”).

**INSTRUCTION NO. 20**  
**TYPOSQUATTING**

**Authority:**

Defendants do not believe an instruction on “Typosquatting” is necessary. The ACPA does not mention “typosquatting” such that a definition must be given nor do the five *prima facie* elements of an ACPA claim require the court to define “typosquatting” for the jury. Plaintiff is free to argue that the domain names at issue are typographical variations of Plaintiff’s trademarks without requiring the need for an instruction on a specialized term.

**INSTRUCTION NO. 21**  
**BAD FAITH INTENT TO PROFIT**

To help you decide whether defendants had a bad faith intent to profit from Plaintiff's trademarks, you may consider the following factors. These factors are given as a guide, not as a substitute for careful thinking about the ultimate issue in a cybersquatting claim: whether the conduct at issue is motivated by a bad faith intent to profit. You may decide that not every factor applies to this case, and you are not limited to only those factors.

1. The trademark or other intellectual property rights of the Defendants, if any, in the domain names.
2. The extent to which the domain names listed on Exhibit \_\_\_\_ reflect defendants' legal name or a name that is commonly used to identify defendants.
3. The extent of defendants' *prior* use of the domain names listed on Exhibit \_\_\_\_ in connection with good faith offering of goods or services.
4. **Defendants' good faith non-commercial or fair use of the trademarks in a site accessible under the domain name.**
5. Whether defendants intended to divert consumers from plaintiff's own website to a website under the domain names at issue that could harm the goodwill represented by Plaintiff's trademarks either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation or endorsement of the site.
6. Defendants' offer to transfer, sell, or otherwise assign the domain names listed on Exhibit \_\_\_\_ to plaintiff or any other person for financial gain without having used, or having an intent to use, the domain names listed on Exhibit \_\_\_\_ in connection with a good faith

offering of goods or services; or whether defendant has exhibited a pattern of such conduct in the past.

7. Whether defendants: (a) provided material and misleading false information regarding his contact information when applying for the registration of the domain names at issue; (b) intentionally failed to maintain accurate contact information; or (c) has established a pattern of such conduct in the past. This factor should not weigh against defendant if you find that defendants had some legitimate reason to hide his identity.

8. Whether defendants has registered or otherwise acquired multiple domain names in addition to the domain names at issue that defendants know are identical to ~~or~~, confusingly similar to, marks of other third parties that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and.

9. The extent to which Plaintiff's trademarks are, or are not, distinctive or famous.

~~In this case, Plaintiff's registered trademarks are distinctive as a matter of law.~~

**Authority:**

Defendants' proposed instruction:

1. Adds Factor No. 4 which is missing in Plaintiff's proposed instruction. 15 U.S.C. § 1125(d)(1)(B)(i)(IV).
2. Fixes a typographical error in Factor 8.
3. Deletes the language about Plaintiff's marks being distinctive as a matter of law. The relevant inquiry is not whether they are distinctive but the extent to which they are distinctive.

**INSTRUCTION NO. 22**  
**ANTICYBERSQUATTING CONSUMER PROTECTION ACT DAMAGES**

**[SUBJECT TO THE PARTIES STIPULATING, RULING OR AN AGREEMENT AS TO  
WHETHER STATUTORY DAMAGES ARE AWARDED BY THE JURY OR JUDGE]**

If you find Defendants liable under the ACPA, then you should award Plaintiff damages under that law as well. Plaintiff has elected statutory damages as its monetary remedy. You may award not less than \$1,000 and not more than \$100,000 for each of the domain names registered, trafficked in and/or used by Defendants with a bad faith intent to profit that you find are confusingly similar to any of Plaintiff's trade name or trademarks. Those domain names are listed on Exhibit \_\_\_\_.

You should decide the just amount to award Plaintiff, keeping in mind that the purpose of the ACPA is to both deter wrongful conduct and provide adequate remedies for trademark owners who seek to enforce their rights in court.

Statutory damages are provided as an alternative to actual damages under the ACPA, and Plaintiff need not show actual damages to establish cybersquatting or to recover statutory damages. **However, in considering what is a just damages award under the ACPA, you may consider the actual damage or harm to Plaintiff, if any, as well as the actual profit realized by Defendant.**

**Authority:**

Defendants' proposed instruction specifically instructs the jury that they can consider Plaintiff's harm/damages as well as Defendants' actual profit in determining statutory damages. Defendants' arguments and authority for this proposition is set forth in Defendants' Motion *in Limine* No. 6.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of February 2012.

/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