

Settlement • May 30, 2012

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 THE WEATHER UNDERGROUND, INC.,
5 a Michigan corporation,

6 Plaintiff,

Case No. 09-10756

7 vs.

Hon. Marianne O. Battani

8 NAVIGATION CATALYST SYSTEMS,
9 INC., a Delaware corporation;
10 BASIC FUSION, INC., a Delaware
11 corporation; CONNEXUS CORP., a
12 Delaware corporation; and
13 FIRSTLOOK, INC., a Delaware
14 corporation,

15 Defendants.

16 _____/

17 SETTLEMENT

18 BEFORE THE HONORABLE MARIANNE O. BATTANI
19 United States District Judge
20 Theodore Levin United States Courthouse
21 231 West Lafayette Boulevard
22 Detroit, Michigan
23 Wednesday, May 30, 2012

24 APPEARANCES:

25 For the Plaintiff: ANTHONY P. PATTI (P43729)
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1 APPEARANCES: (Continued)

2

3 For the Defendants: WILLIAM A. DELGADO
4 Willenken, Wilson, Loh, Lieb &
5 Delgado, L.L.P.
6 707 Wilshire Boulevard, Suite 3850
7 Los Angeles, CA 90017
8 (213) 955-9240

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10 Also present:
11 Al Steremberg
12 Chris Swizzler
13 Jeff Ferguson
14 David Graft

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1 Detroit, Michigan

2 Wednesday, May 30, 2012

3 at about 12:45 p.m.

4

- - -

5 (Court, Counsel and parties present.)

6 THE CASE MANAGER: All rise.

7 The United States District Court for the Eastern

8 District of Michigan is now in session, the Honorable

9 Marianne O. Battani presiding.

10 You may be seated.

11 THE COURT: Okay. All right. Counsel, I

12 understand that you have reached a resolution; is that

13 correct?

14 MR. DELGADO: Yes, Your Honor.

15 MR. SCHAEFER: That's correct, Your Honor.

16 THE COURT: Okay. I'm going to ask, Mr. Schaefer

17 and Mr. Delgado, are you both putting it on the record?

18 MR. SCHAEFER: I will let Mr. Delgado go ahead and

19 read, and to the extent that I have any comments I will make

20 them when he's done.

21 THE COURT: All right. Why don't you approach the

22 podium?

23 MR. DELGADO: Okay.

24 THE COURT: Before you put that on the record, you

25 have your client representative here by way of Mr. Graft?

1 MR. DELGADO: I do, yes, David Graft is here.

2 THE COURT: And plaintiffs --

3 MR. SCHAEFER: Yes, we have three board members,
4 Al Steremberg, Chris Swizzler and Jeff Ferguson.

5 THE COURT: You want to pick one?

6 MR. SCHAEFER: Jeff Ferguson, Your Honor.

7 THE COURT: I ask that you all listen but I will be
8 asking if you agree with the settlement and have you come to
9 the podium and put that on, so please listen to what's being
10 said.

11 MR. DELGADO: The parties in this matter hereby
12 reach an agreement on the following bases.

13 Number one: The parties, Plaintiff Weather
14 Underground, Inc. and Defendants Connexus Corporation,
15 Firstlook, Incorporated, Navigation Catalyst Systems,
16 Incorporated, agree to the entry of final judgment in the
17 amount of \$3.5 million within ten days of today's date in
18 favor of plaintiff and against all existing defendants
19 jointly and severally.

20 Number two: Entry of judgment in favor of the
21 Epic Media Group on Epic's motion for summary judgment.

22 Number three: All parties waive their right to
23 appeal and waive any stay of enforcement.

24 Number four: Plaintiff agrees to forego collection
25 of the judgement subject to defendants' strict compliance

1 with the agreed-upon payment schedule. Plaintiff retains the
2 right to immediate execution enforcement and collection upon
3 the judgment should defendants fail to timely meet the
4 payment obligations, breach the agreement or in the event of
5 any defendant's bankruptcy.

6 Number five: The parties agree that the judgment
7 shall be satisfied by the defendants' payment in the amount
8 of \$2 million to be paid in accordance with the following
9 schedule: A, \$200,000 within five business days of
10 July 30th, 2012; B, \$150,000 or 50 percent of payment
11 received on the note dated August 8th, 2011, hereinafter
12 referred to as the note, whichever is greater, within five
13 business days of October 30th, 2012; C, \$150,000 or
14 50 percent of payment received on the note, whichever is
15 greater, within five business days of January 30th, 2013;
16 D, \$300,000 or 50 percent of payment received on the note,
17 whichever is greater, within five business days of
18 April 30th, 2013; E, \$200,000 or 50 percent of payment
19 received on the note, whichever is greater, within five
20 business days of July 30th, 2013; F, \$150,000 or 50 percent
21 of payment received on the note, whichever is greater, within
22 five business days of October 30, 2013; G, \$150,000 or
23 50 percent of payment received on the note, whichever is
24 greater, within five business days of January 30th, 2014;
25 H, the remaining payment owed within five business days of

1 April 30th, 2014.

2 Point 6: In the event that defendants pay
3 \$1.2 million by April 30th, 2013, the total amount of payment
4 required to satisfy the judgment shall be \$1.8 million.

5 Seven: In the event that plaintiff collects on the
6 \$3.5 million judgment defendants shall be entitled to credit
7 for any amount paid.

8 Eight: Defendants shall transfer any domain name
9 at issue to plaintiff that is in their possession, custody or
10 control.

11 Nine: Plaintiff shall be entitled to request and
12 receive the same information that defendants receive from the
13 payor on the note dated August 8th, 2011.

14 Ten: Defendants represents that there are no
15 current threats of nonpayment on the note dated August 8th,
16 2011.

17 Eleven: Defendants shall provide to plaintiff a
18 signed copy of the asset purchase agreement dated August 8th,
19 2011 and the schedules thereto by close of business Eastern
20 Standard Time on June 4th, 2012.

21 Point 12: The parties to negotiate a mechanism by
22 which plaintiff can pursue a breach by payor of the note or
23 create an obligation by which defendants would pursue such a
24 breach.

25 Thirteen: Plaintiff's rights under this agreement

1 and/or the judgment are assignable.

2 Fourteen: The parties shall formalize this
3 agreement and submit a final judgment for entry to the Court
4 within ten days. The Court shall retain jurisdiction over
5 the finalizing of the settlement agreement language to the
6 extent that the parties cannot agree on final drafting and to
7 resolve any disputes thereunder.

8 Fifteen: Each party to bear its own attorney fees
9 and costs.

10 THE COURT: I want to go back on Number 11. The
11 defendant shall provide to plaintiff a signed copy?

12 MR. DELGADO: Signed.

13 THE COURT: A signed, not assigned?

14 MR. DELGADO: Right, signed as with somebody's
15 signature on it.

16 THE COURT: Okay. Number 13?

17 MR. DELGADO: Yes.

18 THE COURT: What is that again, the agreement --

19 MR. DELGADO: Plaintiff's rights under the
20 agreement and/or the judgment are assignable.

21 THE COURT: Okay. All right. Let me ask
22 Mr. Schaefer, any corrections to that or additions?

23 MR. SCHAEFER: No. Just by way of context, the one
24 provision here that is a little bit open-ended is Number 12,
25 which says the parties to negotiate a mechanism by which

1 plaintiff can pursue a breach by payor of the note or create
2 an obligation which defendants would pursue such a breach.
3 Just for the record, Your Honor, the issue there is the
4 promissory note with Seth Jacoby's companies includes a
5 provision which allows it to be assigned if those companies
6 breach their obligations, but -- and so we had talked about
7 whether or not we would take an assignment of the rights
8 under the contract subject to that breach or contingent on
9 that breach, but we are potentially worried about potential
10 consequences upstream and so we are trying to see if we can
11 find another way to ensure that if Mr. Jacoby's companies
12 don't pay that Connexus either has an obligation to pursue
13 that breach and that if they don't do that that we can step
14 in and pursue that breach because otherwise no one might be
15 seeking to collect, so we are going to work on that, Your
16 Honor, but that's the context of that provision.

17 THE COURT: Do you agree with that, Mr. Delgado?

18 MR. DELGADO: I agree that's the context. One of
19 the issues is that assigning that note is problematic so we
20 are going to try to figure out some other mechanism by which
21 we can do that. I think we are pretty close to a different
22 solution so I'm not concerned about.

23 THE COURT: It was, I believe, your representation
24 that your client is wanting to get the monies from that note
25 and needs -- more than wants --

1 MR. DELGADO: My client very much --

2 THE COURT: -- needs the money from the note in
3 order to pay other debts in addition to what you are just
4 agreeing to?

5 MR. DELGADO: That is very much true.

6 THE COURT: All right. Let me ask plaintiff first,
7 Mr. Schaefer, if you want to come up here with your client.

8 MR. SCHAEFER: Yes, Your Honor, and
9 Jeff Ferguson --

10 THE COURT: Okay. Mr. Ferguson --

11 MR. SCHAEFER: -- the representative.

12 THE COURT: -- approach the podium with your
13 attorney.

14 All right. I want to just be very clear that you
15 understand today is -- well, I guess yesterday really was the
16 date to start trial and we are ready to start trial, and
17 obviously your attorneys are ready, which in this case is
18 quite visible by the boxes in the courtroom. So there has
19 been a lot of discussion and there has been a lot of time put
20 into this resolution but there's also been a lot of time in
21 Court and expense with juries and time set aside for this
22 trial so I need to make sure you understand that this is a
23 final and binding settlement on you. Do you understand that,
24 sir?

25 MR. FERGUSON: Yes, I understand that.

1 THE COURT: All right. So I know you have been
2 doing this for two days and you probably don't want to think
3 about it any more, but even if you should go home and think
4 about this settlement you would not be able to come back
5 tomorrow and say, oh, you know, I thought about that and I
6 don't think I should have taken it. Do you understand that?

7 MR. FERGUSON: Yes, I understand.

8 THE COURT: Okay. Do you understand that this case
9 is prepared to go to a jury trial and when it goes to a jury
10 nobody knows what a jury might do? Your counsel may say,
11 well, I think this is what we can do or the chances are
12 whatever, but I don't think there is any attorney in here,
13 myself included, who has not been surprised at one time or
14 another with what a jury does, so a jury may give you more
15 than this, less than this or nothing. Do you understand
16 that?

17 MR. FERGUSON: Yes, I understand that.

18 THE COURT: Do you further understand, of course,
19 that if this were to go to a jury trial the jury could in no
20 way work out this kind of a settlement, that you would then
21 have -- if you got a judgment in a jury trial then you would
22 have your own collection proceedings to figure out; do you
23 understand that?

24 MR. FERGUSON: Yes.

25 THE COURT: Okay. But you're waiving your right to

1 a trial and you are accepting this settlement, correct?

2 MR. FERGUSON: Correct.

3 THE COURT: Okay. The Court is familiar with what
4 has gone on in this case through these last couple years, and
5 I do find that the settlement is a fair and reasonable
6 settlement of this litigation. Do you believe that it is a
7 fair and reasonable settlement?

8 MR. FERGUSON: Yes.

9 THE COURT: No settlement is whatever one party
10 wants in total or the other party, that's just the nature of
11 what a settlement is. You understand that?

12 MR. FERGUSON: Yes, I do.

13 THE COURT: Okay. Do you have any questions at all
14 either of your attorney or of me regarding this settlement
15 that has just been placed on the record?

16 MR. FERGUSON: No, I do not.

17 THE COURT: Do you have any questions,
18 Mr. Schaefer, for your client?

19 MR. SCHAEFER: I do not, Your Honor.

20 THE COURT: Okay. You may be seated. Thank you.
21 Mr. Graft, if you would come up with Mr. Delgado.
22 Mr. Graft, you are in-house counsel; is that correct?

23 MR. GRAFT: That's correct, Your Honor.

24 THE COURT: Okay. So you understand everything
25 that is going on here, I'm not going to go through the same

1 litany of questions. You understand, of course, that this
2 settlement is final and binding on your clients?

3 MR. GRAFT: Yes, Your Honor, I understand that.

4 THE COURT: There is in the settlement the one
5 provision that the Court would resolve if there is any
6 problems, but that doesn't mean that the settlement itself,
7 the amounts of money, et cetera, aren't exactly what has been
8 put on the record. Do you understand?

9 MR. GRAFT: I do understand that.

10 THE COURT: Okay. And you have the approval of
11 your client to enter into this settlement, correct?

12 MR. GRAFT: I do, Your Honor. They will obviously
13 want to take a look at the final documentation that we put
14 together but, yes, I have the approval from them to do what
15 we have discussed and what we put forth on the record.

16 THE COURT: Counsel, do you have any questions for
17 your counsel -- for your attorney?

18 MR. DELGADO: I do not, Your Honor.

19 THE COURT: Okay. Thank you. You may be seated.

20 MR. GRAFT: Thank you, Your Honor.

21 THE COURT: All right. The Court, as indicated,
22 finds that this is a fair and reasonable settlement, and I
23 certainly believe that the parties to a fault know the ins
24 and outs of what the settlement involves and the various
25 terms. Is there anything else that either side feels is

1 necessary to place on the record?

2 MR. SCHAEFER: Yes, Your Honor. On behalf of my
3 client, The Weather Underground, we would like to thank you,
4 the Court, and the staff, for your help, assistance and
5 patience in this matter and helping to bring this matter to
6 conclusion.

7 THE COURT: Thank you.

8 MR. DELGADO: I will echo Mr. Schaefer's comments
9 and just say I very much enjoyed my experience in this
10 District coming from California here, so thank you.

11 THE COURT: I want you to know that I felt bad that
12 you had to come to Detroit under the circumstances you
13 expressed in your last motion. I guess all I can say is I
14 try and have the time set aside for one case and don't stack
15 them up, so I can't do too much about it when it gets to be
16 exactly that time, but I appreciate all of the efforts that
17 you both have made.

18 I was just telling my staff what I regret is I
19 didn't force you to come in maybe the last couple conferences
20 so we could have done this before you put in all of the extra
21 effort that you have, but then again maybe that wouldn't be
22 enough. You know, sometimes the trial is what finally gets
23 the parties together and gets a resolution.

24 So I thank you. I thank plaintiffs who have been
25 here, I appreciate you coming in and working with your

1 attorneys in an effort to resolve this. And as I said, I
2 don't need to say this to defendant counsel because he knows
3 it, but assuming you don't -- you may not know this, you
4 know, litigation always is very difficult and it would be
5 very difficult to be here for three weeks and, as I said, we
6 don't know what the jury would do.

7 In one way I was looking forward to this because
8 what you do to me is extremely interesting, and I would like
9 to know a little bit more about it, but in the sake of
10 economy I'm very happy that this case is resolved. I thank
11 you all. Thank you, Counsel.

12 Are you going to take all of your boxes out now or
13 come back?

14 MR. SCHAEFER: Yes, we are, Your Honor.

15 MR. DELGADO: My courier won't be here until 2:00.

16 THE COURT: That's fine. We do have an evidentiary
17 hearing in a criminal matter that starts at 2:00.

18 MR. DELGADO: I can move them somewhere else if --

19 THE CASE MANAGER: I'll take care of it.

20 THE COURT: Okay. Thank you.

21 THE CASE MANAGER: All rise. Court is adjourned.

22 (At 1:02 p.m. Court recessed.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of THE WEATHER UNDERGROUND vs. NAVIGATION CATALYST SYSTEMS, INC., et al., Case No. 09-10756, on Wednesday, May 30, 2012.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 06/13/2012

Detroit, Michigan