

EXHIBIT C

1 MICHAEL G. KING (SBN 145477)
 mking@hgla.com
 2 JANICE M. KROLL (SBN 189975)
 jmkroll@hgla.com
 3 HENNELLY & GROSSFELD LLP
 4 4640 Admiralty Way, Suite 850
 Marina del Rey, CA 90292
 5 Tel: (310) 305-2100; Fax: (310) 305-2116

6 Brett E. Lewis, Pro Hac Vice
 Brett@LewisHand.com
 7 LEWIS & HAND, LLP
 45 Main Street, Suite 818
 8 Brooklyn, NY 11201
 9 Tel: (718) 243-9325; Fax: (718) 243-9326

10 Attorneys for Defendants
 NAVIGATION CATALYST SYSTEMS, INC., and
 11 BASIC FUSION, INC.,

12 **UNITED STATES DISTRICT COURT**
 13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
 14 **WESTERN DIVISION**

16 VERIZON CALIFORNIA INC.;
 VERIZON TRADEMARK SERVICES
 17 LLC; and VERIZON LICENSING
 18 COMPANY,

Plaintiffs,

19 vs.

20 NAVIGATION CATALYST
 SYSTEMS, INC.; and BASIC FUSION,
 21 INC.,

Defendants.

Case No. 2:08-CV-02463 ABC (Ex)

Assigned to Judge Audrey B. Collins
 Magistrate Judge Charles Eick
 Courtroom 680

**AFFIDAVIT OF SETH JACOBY IN
 SUPPORT OF DEFENDANT'S
 OPPOSITION TO PLAINTIFF'S
 MOTION FOR PRELIMINARY
 INJUNCTION**

23 **AFFIDAVIT OF SETH JACOBY**

24
 25 STATE OF NEW YORK)
 26) ss:
 27 COUNTY OF NEW YORK)
 28

1 I, SETH JACOBY, being duly sworn, depose and state under penalty of perjury:

2
3 1. I am President of Firstlook, Inc. a wholly-owned subsidiary of
4 Connexus Corporation. Firstlook, Inc. (formerly known as New.net) is the parent
5 corporation of both Navigation Catalyst Systems, Inc. ("Navigation") and Basic
6 Fusion Inc. ("Basic Fusion"). I have served in this capacity since April 2008. I
7 previously served in various capacities with Connexus Corporation through its
8 predecessor, The Vendare Group (together, "Connexus"), since March 2005. In my
9 positions with Firstlook, Inc. and Connexus, I have been responsible for various
10 aspects of their online business, including the business associated with domain
11 names. As of June 16, 2008, Connexus had 192 full time employees, interns and
12 contractors, not including corporate support staff. My knowledge of the matters
13 herein is based on personal knowledge and a review of business records, except
14 where stated upon information and belief.

15 2. Basic Fusion is a wholly owned subsidiary of Firstlook, Inc. Basic
16 Fusion has been an ICANN accredited registrar since 2004 that offers bulk domain
17 name registration services to customers. Basic Fusion has registered Verizon
18 formative domain names since its inception in 2004. Basic Fusion does not in any
19 way select or control the selection of domain names registered by Navigation, which
20 is a separate legal entity from Basic Fusion. Rather, Basic Fusion processes the
21 registration requests made by Navigation. Basic Fusion has its principal offices in El
22 Segundo, California.

23 3. Navigation also offers fully managed and customized domain navigation
24 solutions to registrars, registrants, and resellers. Basic Fusion currently has a number
25 of third party customers with a total in excess of 100,000 domain names under
26 registration. Navigation owns, or represents owners, of website domains on which it
27 provides information to consumers and advertising revenue to advertisers, as well as
28 Internet directory and search capabilities in numerous different verticals. For

1 purposes of this proceeding, the most relevant aspect of Navigation's business is
2 providing information to consumers and advertising revenue to its customers via its
3 portfolio of approximately 766,087 websites.

4 4. Navigation uses a proprietary automated tool to add un-owned domain
5 names during the ICANN Add Grace Period.¹ The ICANN Add Grace Period is a 5
6 day period where a registrant has the ability to elect to keep or return a domain name
7 to the registry without being charged for the domain name. Upon the completion of
8 the Add Grace Period, Navigation is charged for the domain name if it elects to
9 register the domain, or is not charged if Navigation elects to return the domain name
10 to the registry.

11 5. A domain is only officially registered and owned if Navigation elects to
12 keep and register the domain at the conclusion of the Add-Grace Period. When a
13 domain is registered by Navigation its ownership is publicly available via ICANN's
14 "WHOIS." WHOIS (who is) is the aptly named Internet function that allows one to
15 query the official ICANN database for domain registration information. Any domain
16 registered by Navigation clearly identifies Navigation as the registrant with the
17 following accurate information: Navigation Catalyst Systems, Inc., 2141 Rosecrans
18 Ave., Suite 2020, El Segundo, CA 90245, Email:
19 domainadmin@navigationcatalyst.com, Phone: 310.647.1592, Fax: 310.647.6001.

20 Navigation has not changed its standard WHOIS information or hindered access to its
21 WHOIS records since the filing of this action. Navigation's WHOIS server has, to
22 my knowledge, been online and functional since the filing of the Complaint.

23 6. Navigation uses the Add Grace Period to determine if a domain
24 generates revenue and to manually screen each domain for potential trademark
25 conflicts. When a domain is identified by our human screeners as a potential
26 trademark conflict it is immediately returned to the registry. Navigation does not and
27 has not engaged in a practice of perpetually adding and dropping domain names to
28

¹ This activity is sometimes referred to as "domain tasting."

1 collect advertising fees, while avoiding registration costs. This practice is known in
2 the industry as kiting.

3 7. Navigation has always attempted to use due diligence to screen potential
4 trademarks from registration.² Attached as Exhibit C are printouts of Navigation
5 Catalyst Systems job descriptions for six compliance personnel. Attached as Exhibit
6 K is a receipt for purchase of trademark database from the PTO dated May 17, 2006.
7 Although Navigation's intent was to identify available dictionary words and generic
8 domain names and typos, automated registration systems do on default, differentiate
9 between trademark and other types of domain names. Even before this litigation was
10 filed, Navigation had undertaken an internal compliance review process and had
11 retained outside counsel to advise it on ways to improve its standard operating
12 procedures. Beginning in late 2007 Navigation escalated its efforts to screen out
13 potential trademarks. Navigation increased the size of its existing "blacklist"
14 database of (i) character-strings that represent non-generic and descriptive brands and
15 trademarks, and (ii) domains which represent non-generic and descriptive brands and
16 trademarks. Our domain registration engine uses this blacklist to reject from our
17 automated registration process any domain which contains the exact domain or
18 character-string on the blacklist. The blacklist actively removes dashes and "www"
19 in the character-string so the root characters are still recognized and screened out.
20 This blacklist is regularly added to and updated by our compliance staff. In 2006
21 Navigation also added a second human screener to re-review the first screener's
22 review of all added domains during the Add Grace Period for potential trademarks.
23 Any domain that passes the blacklist and is auto-registered is reviewed by our
24 compliance screeners on a daily basis. Screeners attempt to identify domains that
25 may be deemed to be close derivations of reasonably known, non-generic, or
26 descriptive trademarks or famous brands, including clear typos and clear
27 misspellings, and mark those domains for non-registration. Screeners reject domain

28 _____
² Navigation has had a "blacklist" in place since at least as early as 2005.

1 names because of their potential trademark significance, not, as Verizon states,
2 because they do not generate revenue.

3 8. In June 2008 an internal automated tool will be completed that
4 integrates the USPTO trademark database with our review process to assist screeners
5 by identifying domains that may be registered trademarks. The screener-identified
6 names are flagged for rejection and are returned to the registry before the end of the
7 Add Grace Period. The screener-rejected domains are also added to our blacklist that
8 prevents us from adding or registering that domain in the future.

9 9. Verizon contends that Navigation has registered tens or hundreds of
10 thousands of domain names containing terms similar to third party trademarks.
11 Although Navigation did not have enough time to analyze all of the domain names
12 cited by Verizon in its various papers, that violate third party trademarks, attached as
13 Exhibit 7 to Verizon's complaint is a list of 21,133 domains allegedly owned by
14 Navigation that violate third party trademarks, however, Navigation owns only 1,506
15 of the identified domains, which it is currently in the process of divesting from its
16 portfolio. Attached as Exhibit J is a list of the 1,506 domains registered to
17 Navigation.

18 10. Since our domain portfolio was built over many years it contains legacy
19 domains that may be potential trademarks. In May 2008 Navigation hired additional
20 human screeners to begin the process of screening the entire Navigation portfolio for
21 domains that might be close derivations of non-generic or descriptive trademarks or
22 famous brands, or that became non-generic or descriptive trademarks or famous
23 brands after our registration of the domain. Navigation has eliminated and deleted
24 thousands of close derivations of trademarks each month by proactive human
25 screening, including adding the screener rejected names to our blacklist to prevent re-
26 registration by our automated system. Attached as Exhibit F is a partial list of the
27 55,794 domains rejected by human screeners since January 2007.

1 11. In some cases we may own a generic domain that may be a close match
2 to a known trademark. In these cases, we seek to optimize the name to the generic
3 use of the word or to a category which does not conflict with the trademarked use.
4 For example, if we owned <time.com> we would optimize the domain name towards
5 clocks and timepieces, not magazine subscriptions based on Time Warner's
6 ownership of the "Time" trademark as it relates to news periodicals.

7 12. In May and June 2008 Navigation added over 6,000 new character-
8 string terms containing brand names and typos of such brands to the blacklist, more
9 than quadrupling its size to over 8,500 terms. In June 2008 Navigation expects to
10 add at least another 10,000 additional terms to the blacklist derived from a list of
11 brands that was purchased from a third party, including all typos and misspellings of
12 such brands. Attached as Exhibit D is a printout of an email dated June 3, 2008 from
13 Business Media Marketplace indicating purchase of Brandweek's 2007 Superbrands
14 Report.

15 13. These compliance efforts have increased our diligence on trademarks
16 and resulted in us avoiding added or registering thousands of potential trademarked
17 domains. Attached as Exhibit E are 10 of 261 pages of an Excel spreadsheet used to
18 calculate revenues generated from domains deleted daily by human review from Jan.
19 2008 – May 31, 2008. These are names that are deleted on a daily basis within the
20 Add Grace Period by human screening. In total, these names made \$12,271 during
21 that period. This dollar amount is only for the period of time between adding and
22 possible registration (approximately 4 days per name). If we had kept those names
23 for a period of a year, they would have potentially earned somewhere in the vicinity
24 of \$350,000 – \$800,000 over a twelve month period based on our current model for
25 profitability. Attached as Exhibit Q is a list of domains that were deleted by NCS in
26 human screens in March and April 2008 during the Add Grace Period.

27 14. Verizon's papers allegedly identify 37 domains that Navigation
28 registered since April 23, 2008. Of these, 4 domain names are owned by customers

1 of Basic Fusion and not by Navigation. Among the other 33 domain names, 10 were
2 registered before Navigation was served with the Complaint. Of the 23 domain
3 names remaining on the list, 22 were screened and deleted by Navigation's human
4 screeners during the Add Grace Period. Only 1 of these domains is presently owned
5 by Navigation, <vzwwireles.com>. That domain name was registered on May 3,
6 2008, three days before the terms "vz" and "vzw" were added to Navigation's
7 blacklist. Attached as Exhibit L to my Affidavit is a list of these domain names and
8 their whois status. Attached as Exhibits M, N, O and P are individual whois records
9 for domain names registered by Basic Fusion's customers.


10 15. On May 6, 2008, as an additional compliance measure, Navigation
11 added the following terms to its blacklist to prevent any domains from being added
12 that contain the following character strings: fio, vz, vzw, ver, vir, zeri, and eriz. On
13 June 12, 2008, Navigation added the following term to its blacklist to prevent any
14 domains from being added that contain the following character strings: zon. These
15 over-inclusive blacklist additions are meant to stop any auto-additions by our tool of
16 Verizon related trademarks. They also serve to prohibit the tool from registering any
17 generic domains which may contain character-strings that are unrelated to
18 trademarks.

19 16. At no time have we ever offered to sell, license or otherwise convey
20 for financial gain any domain names Verizon identified in its complaint to Plaintiffs,
21 Plaintiffs' competitors, nor anyone else, and never contemplated doing so. Attached
22 as Exhibit A is a copy of Navigation Catalyst Systems Domain Name Registration
23 Compliance Standard Operating Procedures. Upon receiving Verizon's complaint
24 alleging that Navigation owned 1,357 domains that violated Verizon trademarks,
25 Navigation conducted a prompt and diligent search of its portfolio and determined
26 that it owned only 126 of the names on Verizon's list.³ Attached as Exhibit G is a
27

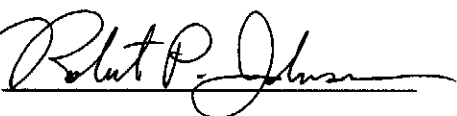
28 ³ Navigation also promptly disabled any advertised links displayed in connection with the disputed domain names.

1 printout of Navigation Catalyst Systems internal document of 126 registered domain
2 names on Verizon's list. Attached as Exhibit B are printouts of whois information
3 from DomainTools.com for representative domains that were not registered to NCS
4 at the time that the complaint was filed. Navigation immediately and voluntarily
5 transferred over those names to Verizon. Of that number, 2 domains that were in
6 tasting and would have been deleted, were registered after this lawsuit was filed out
7 of a legal obligation not to cancel domain names subject to a litigation
8 (VERISONPICPLACE.COM and MYVZWPIXPLACE.COM). Fewer than thirty-
9 five of the currently registered domain names are misspellings of the word
10 VERIZON plus some other word or phrase. Attached as Exhibit H is a list of
11 VERIZON formative typos. Those domain names consist largely of badly misspelled
12 words, such as WERIZONVIRALES.COM, WERIZONVIRELES.COM,
13 WWWVIRIZON.COM, VERIOSION.COM, VERISONNETWORK.COM,
14 VERVZION.COM, and ZERIZONWIRLESS.COM. The remainder are variations on
15 far less well-known VZ and VZW marks, and of those, many (such as, VZWL.COM,
16 VZW3.COM, VZWPUIX.COM, TEXTVZW.COM, VZNTEXT.COM,
17 VZW22.COM, VZWCHAPERON.COM, VZWHUBS.COM and
18 VZWPLACE.COM) are not readily identifiable with Plaintiffs. Attached as Exhibit I
19 is a list of predominately VZ and VZW formative typos. Navigation's search engine
20 system is based on a keyword system that delivers relevant advertisements and search
21 listings to Navigation websites based on certain keywords. Since Navigation is a
22 publisher of Yahoo Search marketing ("Yahoo"), we simply publish the
23 advertisements that advertisers bid on at Yahoo. Navigation does not pick and
24 choose the advertisements that show up on our pages. In fact, Navigation does not
25 have any control over which advertisements are delivered on our pages. For
26 example, if there are Yahoo advertisers who bid on the keywords "Acoustic" and
27 "Guitars," or even just "Guitars," then the Yahoo advertiser's ads would show up on
28 Navigation's websites related to acoustics or guitars.

1 17. Navigation has an established company policy of transferring disputed
2 domain names to complaining parties, where justified. When a third party asserts
3 that a domain name registered by Navigation allegedly infringes on its trademark,
4 and the party can establish the ownership of exclusive trademark rights, Navigation's
5 policy is to transfer the domain to the complaining party. Plaintiffs filed this action
6 without notice, so there was no opportunity to resolve Plaintiffs' concerns outside of
7 litigation. Were the requested injunction granted, it would stop Navigation's entire
8 business and staff layoffs would follow. Navigation has offered to transfer, without
9 charge, any domain names which are similar to the trademarks of others.

10
11
12
13 
14 Seth Jacoby
15 President of Firstlook, Inc.
16
17
18
19
20

21 Sworn to before me on this
22 16th day of June, 2008

23
24 
25 Notary Public
26

27 ROBERT P. JOHNSON
28 NOTARY PUBLIC - STATE OF NEW YORK
NO. 02JO6158220
QUALIFIED IN KINGS COUNTY
MY COMMISSION EXPIRES DEC. 28, 2010