

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; BASIC FUSION, INC.,
a Delaware corporation; CONNEXUS CORP.,
a Delaware corporation; and FIRSTLOOK, INC.,
a Delaware corporation,

Defendants.

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PLAINTIFF'S ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES

NOW COMES Plaintiff, The Weather Underground, Inc. ("Plaintiff"), by and through it's counsel, Traverse Legal, PLC, and answers Defendant's First Set of Interrogatories as follows:

GENERAL OBJECTIONS

1. Plaintiff objects to Defendant's "Instructions" and "Definitions" to the extent they purport to impose discovery obligations that differ from or exceed the discovery obligations imposed by the Federal Rules of Civil Procedure or the local rules.

2. Plaintiff objects to these Interrogatories to the extent that they seek information protected by the attorney-client privilege, the work-product privilege, or any other privilege, protection, or immunity applicable under the governing law.

3. To the extent Defendants seek user information, such as emails, logins, user data or other information subject to privacy terms or laws, Plaintiff will produce responsive information subject to a separate appropriate agreement which will protect that highly sensitive and private information.

4. These General Objections are made, to the extent applicable, in response to each of the Requests for Production as if the objections were fully set forth therein. Plaintiff responds to each of the Requests for Production based upon information and documentation available as of the date hereof and reserves the right to supplement and amend their responses.

INTERROGATORIES

Interrogatory No. 1.: With regard to each Person whom You contend to have been confused, deceived, or misled as a result of any statement, act, or omission on the

part of NCS, please Identify that Person and state all facts upon which You base Your contention that such Person was confused, deceived, or misled.

Response: See Plaintiff's Complaint Paragraphs 44-100, as well as the Exhibits referenced therein. By way of further response, people who type a web address into the address bar of a web browser engage in something called "direct navigation." Instead of doing a search for a web site, they type the URL directly into the browser address bar. In a percentage of instances, people accidentally mistype the URL or enter a typographical variation of Plaintiff's trademarks/domain names in the browser address bar. So, for instance, a person may accidentally type <swunderground.com> (note the "s" key is right below the "w" key on the keyboard) instead of <wunderground.com>. It cannot seriously be argued that these people are not looking for Plaintiff's web site. As a result of their own error in keystrokes, they land on a typo variation of Plaintiff's web site owned and operated by Defendant. Defendant designs the web pages on these typo-domains with little or no logo or brand identification indicating "Navigation Catalyst Systems." Defendant offers no legitimate product or service on these domains. In fact, Defendant uses software which shows text and hyperlinks for Plaintiff's competitors, making the site appear as a 'weather web site.' There is nothing on these hyperlinks which tell a user they are clicking on an advertisement. Defendant has designed software to register the typo-variations of high traffic domains such as at issue in this case, knowing that (a) people will mistype the legitimate trademark protected domain in a percentage of cases, and (b) they can display and monetize advertisements to people who mistype the domain of a legitimate business such as Plaintiff. Defendant can offer

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no other explanation for registering typo variations of Plaintiff's trademarks, except to confuse consumers. The web visitor identity information for the typographical variations of Plaintiff's trademarks, including emails from web site visitors, is exclusively in the possession and control of Defendant. To date, Defendant has not produced that information in discovery. See also Responses to Defendant's First Request for Production Numbers 19, 20 and 26, as well as the documents produced in response to same. Plaintiff reserves the right to supplement this response as discovery continues.

Interrogatory No. 2.: Please state when and how You first discovered the existence of NCS.

Response: It is believed that NCS was first identified through its counsel to Plaintiff in or about June, 2008, as part of its efforts to protect its trademarks on-line. Plaintiff objects to providing further information in response to this Interrogatory as protected by the attorney-client privilege and work-product doctrine.

Interrogatory No. 3.: Please state all facts that support Your claim that there is a likelihood of confusion as to source, origin, sponsorship, endorsement, or affiliation as between You and NCS.

Response: See response to Interrogatory No 1, which is incorporated herein by reference.

Interrogatory No. 4.: Describe in as much detail as possible when, how, and to what extent You have been damaged by any statement, act, or omission of NCS, particularly the registration of the Domains At Issue.

Response: Plaintiff has not computed its damages at this time. Nor has Defendant provided any discovery responses to date. By way of example only, Defendant has provided no information as to how much web traffic was diverted from Plaintiff's web site to typo-domains at issue as a result of its cybersquatting and trademark infringement. Plaintiff will supplement this Response as discovery continues and damages become capable of calculation.

Interrogatory No. 5.: If You contend that any alleged infringement by NCS was intentional, state all facts which would support or tend to support that contention.

Response: Defendant has provided no discovery to date. By way of example, Defendant has not provided its registration or parking page software for review and analysis. Without waiving the right to supplement, Defendant designed software to specifically target high traffic web sites and register typographical variations of those domains which they know will be trademark protected in many instances. Given the large volume of cybersquatted domains which have already been identified and disclosed in pleadings of other third party trademark holders, it is clear that the registration and monetization scheme to register typographical variations of trademark protected domains is intentional. See also the allegations in the pleadings to date, all discovery responses concerning Defendant's business model and supporting documentation.

Interrogatory No. 6.: For purposes of analyzing likelihood of confusion in this Action, describe in as much detail as possible what You contend to be the characteristics of the relevant consumer.

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Response: Plaintiff objects to this request to the extent it calls for information protected by the attorney-client privilege and/or attorney work product doctrine. Plaintiff further objects to the extent it calls for a legal conclusion. Finally, Plaintiff objects to this request in that it is vague and undefined. Notwithstanding this objection, any consumer attempting to navigate to Plaintiff's websites, for whatever reason, would be relevant. If Defendant will state with more particularity what it is seeking, and without waiving these objections, Plaintiff will attempt to further respond.

Interrogatory No. 7.: Please state in detail the nature of the business, operations, services provided, and activities conducted by Weather Underground in connection with the Weather Underground Marks, identifying the dates on which You first began such use(s) of the marks and the geographic areas in which such use(s) occurred.

Response: This information is being assembled in response to Defendant's First Request For Production of Documents. Plaintiff refer Defendant to its Responses and anticipated production to Request Nos. 1, 2, 3, 6, 7, 8, 9, 10, among others.

Interrogatory No. 8.: Describe in as much detail as possible all enforcement efforts undertaken by Weather Underground in regard to the Weather Underground Marks including, but not limited to, the result(s) of said enforcement efforts.

Response: This information is being assembled in response to Defendant's First Request for Production of Documents. Plaintiff refers Defendant to its Responses and anticipated production to Request Nos. 35, 26, 39, 42, 43, among others.

Interrogatory No. 9.: Identify, with particularity, all actions taken by You to mitigate any alleged damage You have allegedly suffered.

Response: Plaintiff brought an ACPA action under the Uniform Domain Dispute Resolution Policy against Defendant to recover many of the domains at issue in this lawsuit, provide disincentives against any further cybersquatting by Defendant. Plaintiff brought this lawsuit to stop the illegal activity of cybersquatting/Typosquatting by Defendant against its trademarks, as well as the trademarks of other innocent third parties.

Interrogatory No. 10.: Identify all Persons who participated in any way in the search or investigation for, and the preparation of, the answers or responses to this set of interrogatories, stating specifically with reference to the interrogatory numbers, the participation of each such person in such activities.

Response: Jeff Ferguson has provided information since retaining counsel concerning Plaintiffs trademarks, business model and related background information. Information provided in these Responses was also coordinated between Plaintiff's various attorneys, identified in the caption, over time. Plaintiff objects to providing further information as protected by the attorney-client privilege and attorney work product doctrine.

Dated: _____

By: _____
Jeff Ferguson

Respectfully submitted this 22nd day of February, 2010.




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Dated: 3.5.10

By: 
Jeff Ferguson

Respectfully submitted this 22nd day of February, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2010, I served the foregoing to the following by U.S. Mail, postage prepaid:

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