

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 REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR AN  
ORDER COMPELLING RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR  
PRODUCTION AND INTERROGATORIES TO DEFENDANT**

NOW COMES Plaintiff The Weather Underground, Inc. (hereafter "Plaintiff"), by and through its attorneys, Traverse Legal, PLC, and replies to Defendant's Opposition to Motion for an Order Compelling Responses to Plaintiff's First Request for Production and Interrogatories to Defendant as follows:

**I. General Observations.**

The substance of Plaintiff's Motion to Compel is found in a point-by-point review of the specific Requests and Responses in Exhibits F and G attached to Plaintiff's Brief in Support of Motion to Compel. However, some general comments about NCS' Response is appropriate. First, NCS appears to take the position that it can unilaterally choose what documents will and will not be produced. Second, NCS appears to argue that if it produces one document which is responsive, it does not have to search for and produce others which are responsive. Third, NCS has in several instances pulled responsive documents and created Excel spreadsheets<sup>1</sup> summarizing them by date, sender, etc. in order to avoid producing the underlying documents themselves. Fourth, NCS completely ignored the relevant time frame at issue in this matter for much of the requested discovery ranging from NCS's first registration of one of Plaintiff's trademark protected domains in 2004 through present. NCS's approach to discovery, responses and arguments are inconsistent with law, contrived and in many cases without any good faith basis.

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<sup>1</sup> NCS's ridiculous assertion that these documents are helpful must be addressed. They are documents produced as defense exhibits. By refusing to produce the underlying documents, impeachment is impossible.

**I. The Relevant Time Period For Production Is all Documents and Versions of Documents From 2004 to Present.**

NCS continually argues that Plaintiff is required to establish that NCS had a “bad faith intent to profit” at the time it registered each of the subject domain names.<sup>2</sup> The infringing domain names were registered from 2004 through 2009, with most of the domain names registered in 2004 and 2005. Clearly, the relevant time period for most responsive documents is 2004-present. For formation and investor documents, the relevant time period would be since inception.

**II. Production by NCS of Documents held by Connexus, Firstlook and Basic Fusion Is Appropriate.**

NCS has provided no evidence to counter the allegation and supporting documents provided by Plaintiff that NCS has the ability to access and produce documents from its sister companies, Connexus, FirstLook, Basic Fusion. Interestingly, NCS has already selectively produced documents from those companies, including: (1) a document retention policy for Connexus Corporation; (2) a Written Consent in Lieu of Annual Meeting of the Sole Stockholder of Navigation Catalyst Systems, Inc. signed by “Sole Stockholder Connexus Corporation” Arthur Shaw, CEO; (3) USPTO database order paid by Seth Jacoby on behalf of Firstlook; (4) USPTO database orders, along with correspondence, paid by and from Donnie J. Misino on behalf of Basic Fusion; and

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<sup>2</sup> Plaintiff does not agree that bad faith intent profit has to be shown at the time of registration of the domains. It is Plaintiff’s position that the Anti-Cybersquatting Consumer Protection Act requires proof that Plaintiff had trademarks at the time of registration of the domains. Bad faith intent can be shown by documents during any part of the relevant period, from the date of domain registration to the present date. Irrespective of who is right, the relevant period in this lawsuit clearly spans from the date of domain registration through present.

(5) emails from Chris Pirrone acting for Connexus Corporation on behalf of NCS related to the UDRP that preceded this current action. NCS also fails to refute that these companies all share employees and operate under the same roof at 2141 Rosecrans Avenue, #2020, El Segundo, California. NCS ignores the fact that each company has a direct stake in this litigation which exposes their joint efforts to register domain names, develop software, develop web sites and monetize domain names, including the infringing domains at issue in this case. Moreover, the key case cited by NCS in its response brief actually ordered defendant to produce documents of related companies since the company had the ability to easily access those documents. See *Steele Software Corp v. Dataquick Information System, Inc.*, 237 F.R.D. 561 (D. Md. 2006) (Reviewing key factors of control, including (1) the corporate structure of the party/nonparty, (2) the nonparty's connection to the transaction at issue in the litigation, and (3) the degree that the nonparty will benefit from the outcome of the case, court granted motion to compel and awarded sanctions for failure to produce).

**III. NCS's Incomplete, Altered, or Otherwise Deficient Production is Prejudicing Plaintiff and will Prejudice the Jury**

Other troublesome holes in the information already provided continue to persist. By way of example only, NCS created the previously noted spreadsheet for the purposes of this litigation only detailing cease and desist requests from third parties alleging bad faith cybersquatting. Again, they refuse to provide any of the underlying documentation to support the spreadsheet, which is clearly designed as a defense exhibit. The list conspicuously is missing the very UDRP action filed by Plaintiff against NCS in this case, despite showing others such as Happy's Pizza Company's May 2007

UDRP. Finally, the fact that other spreadsheets only contain data after 2006, such as the one identifying when terms were blacklisted, is wholly inadequate.

While NCS denies that ND Invest, Ltd., is controlled or operated by them, they fail to explain how this new registrant continues to use Basic Fusion as the Registrar and has kept the domains housed on the same Firstlook servers as those currently owned by and registered to "Navigation Catalyst Systems, Inc." (See Attached April 16, 2010, Declaration of Enrico Schaefer).

NCS does do not even purport to deny that they recently began to "privacy protect" huge numbers of domain names which clearly infringe third party trademarks. The jury will be entitled to compare NCS's prior affidavits which purport to establish their lack of "bad faith" on the basis that they never try to hide their identity with privacy protect or proxy services as part of the WhoIS data (Exhibit H of Brief in Support of Motion to Compel: Affidavit of Seth Jacoby No. 5) with the list of tens, or perhaps hundreds, of thousands of domains for which the Registrant NCS has now hidden from public view.

While NCS indicates that its document retention policy to destroy emails after 30 days and most other business records within one year would have been abrogated by litigation, NCS refuses to offer any assurances or affirmation that the document destruction was suspended from the date of notice by Plaintiff in this case and during the periods of litigation in which NCS has previously been involved.

Respectfully submitted this 16<sup>th</sup> day of April, 2010.

/s/Enrico Schaefer

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## **CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of April, 2010, 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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