

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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**DECLARATION OF ENRICO SCHAEFER**

Enrico Schaefer, being first duly sworn, deposes and states as follows:

1. I am an attorney licensed to practice law in the state of Michigan with the law firm of Traverse Legal, PLC, counsel for The Weather Underground, Inc.

2. I have knowledge of the facts set forth herein and, if called to testify as a witness hereto, could do so competently under oath.

3. On or about March 2010, in working on the third party subpoenas Plaintiff will be sending out in this matter, it was discovered that some of the cybersquatting previously identified as being with NCS had been transferred to a registrant by the name of Name Admin, c/o ND Invest, Ltd.

4. ND Invest, Ltd., is allegedly located in Port Vila, Vanuatu, an island off the east coast of Australia. NCS denies that ND Invest, Ltd., is a company set up by NCS and its sister companies to hold clearly cybersquatted domain names previously registered by NCS in hope of hiding identify and moving domains/assets offshore beyond the reach of US jurisdiction. A Google search for "ND Invest, Ltd Port Vila, Vanuatu" essentially returns no results.

5. In doing research on third party typosquats to send out a third party subpoena to be served on HI5 Networks, Inc., a famous and massive social networking website similar to Facebook, the following was discovered:

a. On our about December 27, 2007, NCS was listed as the Registrant for hyi5.com, a clear typo-squat of the hi5.com brand (note the proximity of the 'y' to both the 'h' and the 'i' on the keyboard).

b. On or about January 29, 2010, the listed Registrant for hyi5.com was Domain Name Proxy, LLC (a service which allows domain registrants to hide their

true identity); however, the Registrar remained Basic Fusion and the server remained with Firstlook, Inc.

c. On or about March 17, 2010, the listed Registrant for hyi5.com became Name Admin, ND Invest, Ltd. It is possible that NCS might have allowed the domain to expire or drop, and the ND Invest simply picked up this and many other NCS domains as an unrelated subsequent registrant. However, the Registrar remained Basic Fusion and the server remained with Firstlook, Inc.

d. The last WhoIS history for hyi5.com is on or about April 15, 2010, and the Registrant remains Name Admin, ND Invest, Ltd. (See Exhibit A.)

6. In doing research on third party typosquats to send out a third party subpoena to be served on YouTube, Inc., the following was discovered:

a. On our about November 17, 2007, NCS was listed as the Registrant for youbutube.com.

b. On or about January 20, 2010, the listed Registrant for youbutube.com was Domain Name Proxy, LLC (a service which allows domain registrants to hide their true identity); however, the Registrar remained Basic Fusion and the server remained with Firstlook, Inc.

c. On or about March 19, 2010, the listed Registrant for youbutube.com was Name Admin, ND Invest, Ltd.; however, the Registrar remained Basic Fusion and the server remained with Firstlook, Inc.

d. The last WhoIS history for youbutube.com is on or about April 14, 2010, and the Registrant remains Name Admin, ND Invest, Ltd. (See Exhibit B.)

7. It is beyond the possibility of coincidence that a new registrant would continue to use NCS' sister company Basic Fusion (which has no public offering of registration services on the web) as its registrant and Firstlook for its servers, parking services and hosting absent some relationship or contract between the NCS companies and ND Invest.

8. Note that if NCS sold (by contract between one of its sister companies and ND Invest) a block of trademark infringing domains, this would be a specific violation of the ACPA which defines 'trafficking' as 'selling' trademark protected domains. NCS refuses to provide contracts between its sister companies and third parties related to domain names owned by NCS, including any agreements, emails or other documents related to the transfer of domain names from NCS to ND Invest.

9. Because NCS refuses to produce its list of domain names, or identify domain names which are privacy protected, Plaintiff is unable to identify but a small fraction of 1% of the total cybersquatted domain names through its own searching of typos of high traffic web sites. Allowing NCS to argue that it registers domain names in good faith without any knowledge that it is cybersquatting, while deny Plaintiff the ability to see the list of domains during the relevant period puts Plaintiff in a position where it is unable to impeach NCS' primary defenses.

10. Over the last several months, we have tracked several of the domain registrations where NCS is listed the registrant. The WHOIS archival history for those domain names shows that scores of these domains are now registered through a proxy

service on a server located at Firstlook, thereby concealing NCS' status as the registrant of those domains.

11. NCS has historically made the defense, in affidavits and otherwise, that it is not a bad faith cybersquatter because it does not privacy protect its identity or location as part of its domain registration. In short, NCS argues that use of a proxy service is an indicator of bad faith under the ACPA. It is clear that, as a result of this lawsuit, NCS has now started using proxy services to hide it's identity from public view as the registrant of clearly infringing domains.

12. NCS is attempting to avoid production of its lists of domain registrations and other critical information in order to preclude impeachment of its primary defenses. By obstructing discovery, hiding documents in sister companies, concealing its registrant status on trademark protected domain names, and now apparently transferring domain names to another Connexus controlled company which is located offshore, all are necessary issues which need to be fully explored as relevant to Plaintiff's underlying burden of proof, as well as NCS' defenses.

13. It is unclear that NCS has produced any documents from 2004-2008, and apparently a relative few documents for the time period in 2008 and 2009. Examples of NCS's strategy in this regard include:

- a. Production of its registration software – perhaps one of the most important pieces of evidence in this case – from some unknown date, which is presumably recent. NCS refuses to provide all versions of its registration software from 2004 to present.

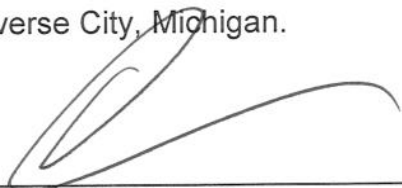
- b. NCS has provided a single version of its supposed "black list" of trademarks without providing any date as to which the black list existed. All versions from 2004-2010 are relevant.
- c. NCS has produced a list of 41 domains which Plaintiff identified in its Complaint, but the spreadsheet in which those domains is listed does not include any registered date prior to 2007. In fact, the word NULL is listed for many of the domains, including ones that Plaintiff has been able to independently verify were registered in 2004. Similarly, the word NULL is listed in the field that denotes when the domain was deleted by NCS.
- d. NCS refuses to provide any trademark infringement threat letters it received from third parties or its responses to those threat letters. Instead, it created for the purposes of this litigation, an Excel spreadsheet dating back only to 2007 indicating threat letters received. Beyond the unjustifiable refusal to provide the actual letters and responses prior to April 2007, NCS's refusal to provide the underlying documents to which it used to create this artificial spreadsheet is without any legal support. The key is not what date an unknown letter is received, it is what a trademark owner said in that letter and what NCS said in response to that letter during the relevant time period.

14. NCS has produced a list of IP addresses representing visitors to each of the 41 domains listed in the Complaint, but the earliest date listed is October 2007. Moreover, despite the fact that at least seven (7) other domains have been independently identified by Plaintiffs as infringement the trademarks identified in the Complaint, no information concerning those seven (7) were included in NCS's production.

15. NCS has already demonstrated that it will use its corporate shell game in order to avoid producing documents which are at the very heart of this case, such as the responses to trademark infringement threat letters sent by third parties to NCS which apparently are all generated by Connexus. In fact, NCS failed to produce the October 10, 2008, email response by Chris Pirrone (email of [Chris.Pirrone@connexuscorp.com](mailto:Chris.Pirrone@connexuscorp.com)) to Plaintiff's UDRP Complaint because it was not an NCS document.<sup>1</sup>

I declare under penalty of perjury under the laws of the State of Michigan that the foregoing statements are true and corrected based on my personal knowledge, information and belief and that if called to testify on the statements set forth above I could and would testify competently thereto.

Executed on April 16, 2010, at Traverse City, Michigan.



Enrico C. Schaefer

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<sup>1</sup> Only after Plaintiff filed this Motion noting that NCS refused to produce the email did NCS supplement its discovery responses.

## CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2010, 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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