

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
District Judge Marianne O. Battani
Magistrate Judge Virginia M. Morgan

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 MOTION AND BRIEF TO EXTEND DISCOVERY CUTOFF DEADLINE

NOW COMES Plaintiff, The Weather Underground, Inc. ("Plaintiff"), by and through its primary counsel, Traverse Legal, PLC, and moves to extend the Discovery Cutoff and, in support, sets forth the following:

1. On April 20, 2010 Plaintiff's counsel contacted Defendant's counsel and sought, pursuant to Paragraph 8 of Judge Battani's Scheduling Order, a stipulation for an extension of discovery. (Exhibit A). Although NCS indicated in a letter dated April 22, 2010 that it would like to meet and confer between the hearings scheduled for May 12, 2010 (Exhibit B), a concurrence was not obtained, thus necessitating this Court's intervention.

2. This Court's January 13, 2010 Scheduling Order set forth a Discovery Cutoff date of July 12, 2010 (Docket #31).

3. The six month timeframe was based, in part, upon Plaintiff's estimation that all discovery could be concluded within such a timeframe, as set forth in the Joint Report Under Fed. R. Civ. P. 26(f) (#25).

4. Defendant, Navigation Catalyst Systems, Inc.'s ("NCS") Proposed Discovery Plan (#27) had originally requested "that the Court allow a period of twelve (12) months for fact discovery." Plaintiff opposed such a duration because it feared that NCS would unnecessarily prolong this litigation.

5. Although this Court set a six month Discovery Cutoff, this Court's Scheduling Order (#31) set a Status Conference for May 12, 2010 in order to revisit what discovery has been requested, understand what has been produced, and identify outstanding issues. In fact, at the January 11, 2010 Scheduling Conference Judge

Battani stated: “We’ll do a status conference in four months to check on your progress, and at that point we will set the remainder of the schedule.” (Exhibit C, Transcript, p.10 and 11, line 24 through line 2).

6. It is now clear that, despite Plaintiff’s efforts to comply with the Court’s allotted timeframe for discovery, NCS’s dilatory and incomplete discovery responses and production of documents necessitate an extension. The following facts are identified as good cause as to why discovery in this matter should be extended:

- a. On January 4, 2010, Defendant NCS made its initial disclosures identifying a single witness and two documents. (Exhibit D, NCS Initial Disclosures).
- b. On January 11, 2010, Plaintiff was forced to file a Motion for an Order Compelling Disclosure and For Sanctions for Defendant’s Failure to File Adequate Initial Disclosures as Required Under F.R.C.P. 26(a) (#29). NCS opposed the Motion.
- c. On February 11, 2010, a hearing was conducted before Magistrate Virginia M. Morgan on Plaintiff’s Motion for an Order Compelling Disclosure and For Sanctions for Defendant’s Failure to File Adequate Initial Disclosures as Required Under F.R.C.P. 26(a) (#29). At that hearing, NCS’s counsel stated that “Navigation Catalysts does not have any employees.” (Exhibit E, p. 6, lines 15-16). Magistrate Morgan, in her Order Granting in Part Plaintiff’s Motion to Compel Disclosure and for Sanctions (#40), ruled that “I find that your Rule 26(a)(1) disclosures are

wholly inadequate and inconsistent with previous filings under oath in federal court...And if you do not produce – and all of those documents and all of those witnesses, at least a substantial subset of those documents so that they can be not just listing categories, but producing at least exemplars of the categories so that they can be assessed by the Court and by Mr. Patti to determine whether or not they are appropriate, that I will recommend sanctions to Judge Battani, up to and including a default judgment.”

- d. On February 26, 2010, NCS filed Supplemental Rule 26(a) Initial Disclosures, which still only identified four witnesses and three categories of documents. (Exhibit F; NCS Supplemental Initial Disclosures). NCS’s limited disclosure were foretelling of its lack of production in the months that followed.
- e. Plaintiff served Defendant Navigation Catalyst Systems (NCS) with its First Interrogatories and First Request for Production on January 19, 2010.
- f. On January 19, 2010, Plaintiff sent a Notice of Request to Allow Inspection of the offices at 2141 Rosecrans Avenue, Suite 2020, El Segundo, California. NCS made it clear that it would not allow such an inspection.
- g. On February 15, 2010, the day before NCS’s responses to Plaintiff’s First Interrogatories and First Request for Production were due, counsel for

NCS contacted counsel for Plaintiff requesting a two week extension to respond to discovery. Plaintiff's counsel granted the extension request until February 26, 2010 on the express condition that boilerplate responses were not permitted and the documents would be produced on that date as well.

- h. Directly contrary to representation from counsel, NCS provided boilerplate responses to discovery on February 26, listing virtually every known objection to every request and producing virtually none of the key and most relevant documents requested. Nine documents were produced with a total file size of less than 10 Megabytes.
- i. On March 26, 2010, Plaintiff's filed a Motion for an Order Compelling Responses to Plaintiff's First Request for Production and Interrogatories to Defendant (#46) detailing the substantive issues which have necessitated this current Motion, including a detailed explanation regarding NCS's pattern of hiding relevant documents and engaging in discovery gamesmanship specifically designed for obstruction. While Plaintiff expects to prevail on said Motion, any relief ordered by this Court will not erase the time and further discovery opportunities already lost due to NCS's dilatory and incomplete discovery responses.
- j. The hearing for Plaintiff's Motion for an Order Compelling Responses to Plaintiff's First Request for Production is set for the morning of May 12,

2010, prior to the previously scheduled Status Conference set forth in the Scheduling Order.

k. Granted, subsequent to Plaintiff's filing of the aforementioned Motion to Compel Production, NCS supplemented its discovery responses, namely its production of documents. However, in total, to date, NCS has produced a mere twenty-seven¹ documents, which include the following:

i. Initial Responses Received March 1, 2010

1. Spreadsheet listing the 41 domains referenced in the Complaint along with such information as registration, deletion, and/or transfer date, page statistics, and revenue.
2. Spreadsheet showing terms "blacklisted" by NCS
3. Certificate of Incorporation for NCS
4. Connexus Document Retention Policy
5. Trademark Review Instructions
6. USPTO trademark database order forms, receipts, and an email associated therewith (4)
7. NCS's "blacklist" database code

ii. Supplemented Responses Received April 5, 2010

1. Purchasing system diagram
2. Trademark system diagram
3. IP statistics for 41 domains listed in Complaint
4. NCS Code
5. NCS Cease and Desist Tracking spreadsheet

iii. Supplemented Responses Received April 12, 2010

1. NCS Bylaws
2. Written Consent documents for NCS (3)
3. Email from Pirrone (2)
4. Basic Fusion Registration Services Agreement template
5. Firstlook, Inc. Domain Parking Agreement template

¹ This number is generous since there are multiple instances where a particular responsive document is divided into two documents with each relating to a different timeframe.

6. Spreadsheet showing terms “blacklisted” by NCS with dates
- iv. Supplemented Responses Received April 19, 2010
 1. Spreadsheet listing 7 additional domains registered by, at some point in time, Plaintiff. It is important to note that these were only produced after Plaintiff had identified them to NCS in its Motion to Compel Production.
 - l. What NCS has produced has been incomplete, incorrectly Bates stamped, or otherwise inadequate, as evidenced by several letters from Plaintiff’s counsel to NCS’s counsel.
 - m. Despite the above listed production, NCS has failed to produce documents that include the relevant time period at issue in this litigation, which is from 2004, or the time when the first typosquatted domain was registered, until present.
 - n. NCS has also taken the unsupported position that it does not have to produce any documents from its sister companies, Connexus, Basic Fusion, or Firstlook, even though it has selectively provided some of the same, 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 (5) emails from Chris Pirrone acting

for Connexus Corporation on behalf of NCS related to the UDRP that preceded this current action.

- o. In addition, NCS has itself specifically created several of the documents responsive to a request in lieu of providing the actual documents that contain the underlying information that NCS has used to populate its apparent summarizations. For example, instead of providing actual receipts for revenue earned from a particular domain along with costs so as to allow Plaintiff to understand the net revenue, and be able to cross-examine on the same, NCS simply provides the net revenue.
- p. Most importantly, by way of example only, to date NCS has failed to produce any documents or responses related to the following:
 - i. All domains it has registered, transferred, and deleted. NCS's domain portfolio currently includes 320,772 domains, although NCS has admitted to registering approximately 1.5 million domain names, per Seth Jacoby's Affidavit (#52, ¶4). Mr. Jacoby has further admitted that it possesses this information but it would "take many weeks" to produce (#52, ¶5).
 - ii. Domains it owns yet hides from public view via privacy services.
 - iii. Financial information related to the above referenced domains.
 - iv. Business start-up and investment documents which detail NCS's, along with its sister companies, domain registration and monetization business plan and capitalization.

- v. The name, positions and wages of employees or independent contractors doing work for or on behalf of NCS, including those who wrote the code at issue.
 - vi. The business relationship with Connexus, Basic Fusion, and Firstlook.
 - vii. Cease and desist letters or other communications related to NCS's domains.
 - viii. Internal and external emails concerning a variety of issues related to the NCS Group's domain registration and monetization business plan and capitalization.
 - ix. Domain analyses/reports.
 - x. Communications with prospective domain purchasers.
- q. NCS has even failed to produce documents, despite Plaintiff's requests for the same, it produced in previous litigation, namely Verizon California Inc. et al v. Navigation Catalyst Systems, Inc et al., Case No: 2:08-cv-02463-ABC-E (C.D. Cal.), including, for example, the names and corresponding job descriptions for its employees/independent contractors, a list of domains rejected by human screeners, and Brandweek's 2007 Superbrands Report that were allegedly added to NCS's "blacklist".

7. Without additional information or documents, Plaintiff can not effectively identify possible deponents, let alone question them on the limited information and documents provided to date.

8. Without additional information or documents, Plaintiff's can not identify and retain necessary experts, whose reports would be due on May 17, 2010, since the subject matter of the expertise is yet to be determined.

9. As such, Plaintiff requests a 60-day extension for the Discovery Cutoff deadline along with all dates that derive therefrom pursuant to the Court's Standing Order.

10. Plaintiff has attached, as Exhibit F, a draft order granting this motion.

WHEREFORE, Plaintiff respectfully requests that this court enter an Order setting a deadline of September 12, 2010 for the completion of discovery allowed in this Court.

Respectfully submitted this 22nd day of April, 2010.

/s/Enrico Schaefer

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd 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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**ORDER GRANTING PLAINTIFF'S MOTION
TO EXTEND DISCOVERY CUTOFF DEADLINE**

Having considered the foregoing Motion and Order to Extend Discovery Cutoff
Deadline filed on behalf of Plaintiff,

IT IS HEREBY ORDERED THAT the discovery allowed under this Court's
previous Scheduling Order be completed on or before September 12, 2010.

Virginia M. Morgan
United States Magistrate Judge

Dated: _____

PROOF OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of
record via the Court's ECF System and/or U.S. Mail on _____, 2010.