

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.

---

Enrico Schaefer (P43506)  
Brian A. Hall (P70865)  
TRAVERSE LEGAL, PLC  
810 Cottageview Drive, Unit G-20  
Traverse City, MI 49686  
231-932-0411  
[enrico.schaefer@traverselegal.com](mailto:enrico.schaefer@traverselegal.com)  
[brianhall@traverselegal.com](mailto:brianhall@traverselegal.com)  
Lead Attorneys for Plaintiff

Anthony P. Patti (P43729)  
HOOPER HATHAWAY, PC  
126 South Main Street  
Ann Arbor, MI 48104  
734-662-4426  
[apatti@hooperhathaway.com](mailto:apatti@hooperhathaway.com)  
Attorneys for Plaintiff

Nicholas J. Stasevich (P41896)  
Benjamin K. Steffans (P69712)  
J. Michael Huget (P39150)  
BUTZEL LONG, PC  
150 West Jefferson, Suite 100  
Detroit, MI 48226  
(313) 225-7000  
[stasevich@butzel.com](mailto:stasevich@butzel.com)  
[steffans@butzel.com](mailto:steffans@butzel.com)  
Local Counsel for Defendants

William A. Delgado (admitted pro hac vice)  
WILLENKEN WILSON LOH & LIEB LLP  
707 Wilshire Boulevard, Suite 3850  
Los Angeles, CA 90017  
(213) 955-9240  
[williamdelgado@willenken.com](mailto:williamdelgado@willenken.com)  
Lead Counsel for Defendants

---

**PLAINTIFF'S RESPONSE TO NAVIGATION CATALYST SYSTEMS, INC.'S MOTION  
TO COMPEL FURTHER RESPONSES AND PRODUCTION OF DOCUMENTS**

NOW COMES Plaintiff, The Weather Underground, Inc. (hereafter “Plaintiff”), by and through its counsel, Traverse Legal, PLC, and responds to Navigation Catalyst Systems, Inc’s (hereafter “NCS”) Motion to Compel Further Responses and Production of Documents as follows:

**STATEMENT OF ISSUES PRESENTED**

NCS has presented four questions, which follow:

1. Whether Plaintiff is permitted to respond to a Request for Production by stating that it will produce “relevant” documents and proceed to make a unilateral decision as to relevancy?

*Plaintiff’s Position:* NCS never conducted a “meet and confer” prior to filing this Motion. If they had, they would have learned that Plaintiff has no objection to removing the word “relevant” from the specific discovery requests mentioned in the Motion. The issue has been resolved.

2. Whether Plaintiff should be compelled to produce documents it originally stated it would produce but, to date, has not yet produced?

*Plaintiff’s Position:* Plaintiff sent documents out for professional scanning, Bates numbering, OCRing and production, making them easily identifiable and searchable by both parties (Note: NCS refuses to do the same). The documents have been produced in a timely fashion. This issue is moot.

3. Whether Plaintiff should be compelled to produce documents that are legible and in the manner they are kept in the ordinary course of business?

*Plaintiff's Position:* Plaintiff began processing of re-scanning each document identified by NCS as "illegible." Those documents have already been reproduced. At no point has Plaintiff suggested that it was unwilling to provide new copies of any documents requested by NCS. With regards to documents kept "in the ordinary course of business", NCS has never requested to see documents as they are kept in the ordinary course of business nor has NCS produced any documents as they are kept in the ordinary course of business itself. Regardless, Plaintiff has no objection to NCS's review of any particular original documents they wish to review at a mutually agreeable location.

4. Whether Plaintiff should be compelled to produce relevant, non-privileged documents despite its unmerited objections?

*Plaintiff's Position:* See specific responses below.

### **INTRODUCTION**

Unfortunately, NCS never requested nor conducted a meet and confer on the issues raised in this Motion. Most of them have already been resolved. The issues that remain unresolved are below. For a more detailed chronology of events, see the Declaration of Enrico Schaefer included as *Attachment A*.

### **ARGUMENT**

The only remaining issue which requires response concerns the following requests:

**a. Request Nos. 6 and 28:**

Request for Production No. 6: All Documents that refer or relate to or constitute any application(s) to register the Weather Underground Marks, or any of them, as a trademark, service mark, Internet domain name, or fictitious business name.

Response: Plaintiff objects to the phrase “that refer or relate to” as vague and ambiguous. Plaintiff further objects to the extent trademark registrations are publicly available through the <www.USPTO.gov> web site and, apparently, through Defendant’s own internal U.S. trademark database. Subject to these objections, Plaintiff has identified, has sent out for bates stamping and will produce documents responsive to this Request. Confidential documents will be marked in accordance with the Stipulated Protective Order. Once bates stamping is completed and documents covered by the Protective Order are identified, Plaintiff will supplement this response indicating which documents produced, or categories of documents produced, are primarily responsive to this Request. Plaintiff will be available to discuss the scope of production, in view of the above objections, and whether any further supplementation is appropriate, at that time.

Request for Production No. 28: All Documents evidencing or reflecting any written or oral communication between You and the United States Patent and Trademark Office regarding the Weather Underground Marks.

Response: Plaintiff objects to this request in that such documents are publicly available through the USPTO.gov web site. Without waiving this objection, Plaintiff restates and incorporates by reference its response to Request 6.

**Plaintiff's Position**: Plaintiff has provided a list of all its trademarks, a copy of all registration certificates, declarations and renewals. Plaintiff has also provided status information for all pending applications. All office action materials are available on-line through the USPTO.gov web site. Plaintiff will amend its responses to reflect this production. Any other materials would be subject to the attorney-client privilege and/or work product doctrine.

**b. Request Nos. 12 and 27:**

Request for Production No. 12: Your financial or accounting records from 2006 to the present, including but not limited to, all (i) income statements, (ii) balance sheets, (iii) cash flow statements, (iv) accounting notes, (v) periodic reports (e.g. monthly, quarterly, and annual financial statements and reports), (vi) planning reports, (vii) cost estimates, (viii) budgets, and (ix) projections and forecasts.

Response: Plaintiff objects to this Request in that it is overly-broad and seeks Plaintiff's financial information which is neither relevant nor reasonably calculated to lead to the discovery of relevant information. Plaintiff has elected not to seek its own lost profits as part of its damages in this case, and hereby waives any claim to its own lost profits as damages. Plaintiff may seek disgorgement of Defendant's profits, statutory damages under 28 U.S.C. § 1117 and other relief allowed under law and equity. Subject to these objections, Plaintiff has identified, has sent out for bates stamping and will

produce relevant documents responsive to this Request. Confidential documents will be marked in accordance with the Stipulated Protective Order. Once bates stamping is completed and documents covered by the Protective Order are identified, Plaintiff will supplement this response indicating which documents produced, or categories of documents produced, are primarily responsive to this Request. Plaintiff will be available to discuss the scope of production, in view of the above objections, and whether any further supplementation is appropriate, at that time.

Request for Production No.27: Your general ledger, including all data therein, for each year from 2006 to the present. (If this exists in electronic form, the request is for production of it in that form.)

Response: Plaintiff incorporates by reference its response to Request 12.

**Plaintiff's Position:** Plaintiff has already provided gross revenue derived from advertisements for the advertisers requested by NCS. Plaintiff has provided gross revenue information for Plaintiff at the deposition of Chris Schwerzler. NCS now argues that it is entitled to advertising expenses as relevant to Plaintiff's claim of a famous mark under 15 U.S.C. 1125(c)(2)(A). The above requests ask for much broader information. If NCS is willing to limit this request to advertising expenses, Plaintiff is happy to amend and supplement its response. Any further information or detail is irrelevant to any issue in this case.

**c. Request No. 22:**

Request for Production No.22: Documents sufficient to identify the investors and/or owners of The Weather Underground.

Response: Plaintiff objects to this request as seeking information which is not relevant to this proceeding. If Defendant will articulate why such information is relevant, Plaintiff will attempt to further respond. Without waiving this objection, Plaintiff would refer Defendant to its web site [www.wunderground.com/about/background.asp](http://www.wunderground.com/about/background.asp) which contains background information concerning the company.

**Plaintiff's Position:** All owner information was provided at the deposition of Chris Schwerzler. Plaintiffs provided all director information in discovery. The issue is now moot.

**d. Request No. 33:**

Request for Production No. 33: All Documents evidencing, referring, or relating to Search Engine Optimization efforts for all domain names You own or control.

Response: Plaintiff objects to this request in that it seeks information which is not relevant to the issues in this lawsuit. Plaintiff further objects to the term "Search Engine Optimization efforts" as vague and undefined.

**Plaintiff's Position:** Plaintiff has provided all web traffic and visitor information from May 1, 2003. Moreover, Plaintiff has provided all statistical information about its web traffic through Quantcast. Finally, Plaintiffs web site is on-line and available for NCS to see, including the back-end HTML. NCS has failed to provide any relevance to Plaintiff's SEO activities and, as importantly, what it believes falls within this ambiguous term.





Respectfully submitted this 5<sup>th</sup> day of May, 2010.

/s/Enrico Schaefer

Enrico Schaefer (P43506)

Brian A. Hall (P70865)

TRAVERSE LEGAL, PLC

810 Cottageview Drive, Unit G-20

Traverse City, MI 49686

231-932-0411

[enrico.schaefer@traverselegal.com](mailto:enrico.schaefer@traverselegal.com)

Lead Counsel for Plaintiff

Anthony P. Patti (P43729)

HOOPER HATHAWAY, PC

126 South Main Street

Ann Arbor, MI 48104

734-662-4426

[apatti@hooperhathaway.com](mailto:apatti@hooperhathaway.com)

Attorneys for Plaintiff

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 5<sup>th</sup> day of May, 2010, I electronically filed the foregoing paper with the Court using the ECF system which will send notification of such filing to the following:

Enrico Schaefer (P43506)  
Brian A. Hall (P70865)  
TRAVERSE LEGAL, PLC  
810 Cottageview Drive, Unit G-20  
Traverse City, MI 49686  
231-932-0411  
[enrico.schaefer@traverselegal.com](mailto:enrico.schaefer@traverselegal.com)  
[brianhall@traverselegal.com](mailto:brianhall@traverselegal.com)  
Lead Attorneys for Plaintiff

Anthony P. Patti (P43729)  
HOOPER HATHAWAY, PC  
126 South Main Street  
Ann Arbor, MI 48104  
734-662-4426  
[apatti@hooperhathaway.com](mailto:apatti@hooperhathaway.com)  
Attorneys for Plaintiff

William A. Delgado (admitted pro hac)  
WILLENKEN WILSON LOH & LIEB LLP  
707 Wilshire Boulevard, Suite 3850  
Los Angeles, CA 90017  
(213) 955-9240  
[williamdelgado@willenken.com](mailto:williamdelgado@willenken.com)  
Lead Counsel for Defendants

Nicholas J. Stasevich (P41896)  
Benjamin K. Steffans (P69712)  
J. Michael Huget (P39150)  
BUTZEL LONG, PC  
150 West Jefferson, Suite 100  
Detroit, MI 48226  
(313) 225-7000  
[stasevich@butzel.com](mailto:stasevich@butzel.com)  
[steffans@butzel.com](mailto:steffans@butzel.com)  
[huget@butzel.com](mailto:huget@butzel.com)  
Local Counsel for Defendants

/s/Enrico Schaefer  
\_\_\_\_\_  
Enrico Schaefer (P43506)  
Brian A. Hall (P70865)  
TRAVERSE LEGAL, PLC  
810 Cottageview Drive, Unit G-20  
Traverse City, MI 49686  
231-932-0411  
[enrico.schaefer@traverselegal.com](mailto:enrico.schaefer@traverselegal.com)  
Lead Counsel for Plaintiff