

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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**DEFENDANT NAVIGATION CATALYST SYSTEM'S LIMITED OPPOSITION TO
PLAINTIFF'S MOTION FOR DISCOVERY EXTENSION**

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

It's entirely unclear to NCS why this motion was filed. On Tuesday, April 20, 2010, counsel for Plaintiff sent a letter to Defendant Navigation Catalyst Systems ("NCS") advising NCS that Plaintiff was "preparing a motion to extend discovery dates" based on Plaintiff's assumption that it would prevail in its motion to compel discovery.¹ See Exhibit A. On Wednesday, counsel for NCS (who was out of the office that day) e-mailed Plaintiff that it would respond to its request the following day. See Exhibit B. On Thursday, April 22, 2010, NCS e-mailed a letter stating that it would be amenable to a stipulation to extend the deadline and that the parties should confer on the topic after the May 12, 2010 hearing on Plaintiff's discovery motion and prior to the status conference that afternoon when they would have a better sense of what discovery would remain and how much additional time was merited. See Exhibit C. Less than one hour after NCS sent that letter, Plaintiff filed its motion seeking an order extending the discovery cutoff by sixty days, from July 12, 2010 to September 12, 2010. Once again, Plaintiff refused to engage in any sort of meaningful meet and confer before resorting to motion practice.

While NCS would be amenable to a reasonable discovery extension, it is best to first see how the Court resolves the parties' respective motions to compel. If the Court denies both

¹ Both Plaintiff and NCS have filed motions to compel discovery, which are now pending before the Court. In its brief to extend the discovery deadline, Plaintiff makes numerous statements regarding the parties' conduct and obligations in discovery. While NCS disputes those statements, as well as the assumptions Plaintiff makes regarding the merits of its arguments, it does not address them here because (i) the parties' discovery disputes are fully described in the motions to compel now pending before the Court and (ii) they are irrelevant for purposes of deciding this motion.

parties' motions, for example, then the parties would not need an additional 60 days as a smaller extension might suffice.

Notably, though, Plaintiff's actual contentions² as to why it needs more time to conduct discovery are simply wrong. Plaintiff first contends that it needs more time to depose as yet undetermined witnesses. Even if such witnesses exist, the discovery cutoff is not until the middle of July. Plaintiff also argues that it needs more time to identify and retain necessary experts, whose reports would be due on May 17, 2010. The subject matter of this litigation has not changed since it began and Plaintiff does not explain why or how, if the Court compels further responses from NCS, such responses would necessitate an altogether different *type* of expert than would be appropriate as of this date. NCS does not know exactly what kinds of expert Plaintiff is considering, but Plaintiff already has everything it needs to engage a computer software expert or a damages expert.

In any case, the Court has scheduled this motion for hearing on May 12, 2010 together with the pending motions to compel. Thus, the parties will have a better sense of what extension, if any, is appropriate at that time and can discuss the extension with the Court at that point.

II. Argument

A. Plaintiff Failed to Comply with Local Rule 7.1(a).

Local Rule 7.1(a) requires litigants to seek concurrence from other parties before filing motions for a reason. If a concurrence is not obtained, the moving party must state affirmatively

² After ten pages of reciting the purported bases for its pending motion to compel, Plaintiff states on the last two pages of its motion to extend the discovery deadline that "[w]ithout additional information or documents . . . Plaintiff can not [sic] effectively identify possible deponents [or] 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."

in the motion that (i) “there was a conference between attorneys or unrepresented parties and other persons entitled to be heard on the motion in which the movant explained the nature of the motion or request and its legal basis and requested but did not obtain concurrence in the relief sought” or (ii) “despite reasonable efforts specified in the motion or request, the movant was unable to conduct a conference.” The meet-and-confer requirement is rooted in basic notions of professionalism. It is designed to limit the burden on increasingly limited judicial resources. Indeed, the Court’s Civility Principles provide that attorneys must “be considerate of the time constraints and pressures on the Court and Court staff inherent in their efforts to administer justice.” *See Civility Principles, Administrative Order No. 08-AO-009 (January 23, 2008).*

Plaintiff’s motion, prepared and filed without any meaningful conference whatsoever, flouts this Court’s rules. *See Rutledge v. Continental Cas. Co.*, 96 F.R.D. 186, 187-88 (E.D. Mich. 1982) (denying motion for failure to comply with meet-and-confer requirement); *see also Brown v. United States*, 187 F. Supp. 2d 887, 891 (E.D. Mich. 2002) (observing that the Court could strike a party’s motion for failure to comply with L.R. 7.1(a)); L. R. 11.1 (authorizing the Court to impose sanctions for violation of local rules). In fact, there was no “conference” at all. In its April 20, 2010 letter, Plaintiff essentially told NCS that it would be filing a motion it was already in the midst of preparing, without ever engaging NCS in a meaningful exchange about the nature and basis of the motion. To the extent that the April 20, 2010 and April 22, 2010 letters could be construed as a conference for purposes of the Local Rules, Plaintiff also failed to state in its motion that it explained the grounds for its planned motion to NCS. This was not simply a technical oversight, as Plaintiff *never* advised NCS of the grounds for its motion in advance of filing the motion – indeed, NCS did not know until the motion was filed that one of

the purported bases for the motion was that Plaintiff needed more time to designate an expert. The Local Rules “are binding rules of court, promulgated by judges of the Eastern District of Michigan [which] are to be adhered to strictly by all parties and attorneys to whom they apply, and this court will not hesitate to impose sanctions for noncompliance.” *See Rutledge*, 9 F.R.D. at 187-88. Because Plaintiff failed to meaningfully confer with NCS as required by the Local Rules, it would be proper for the Court to deny or strike the motion. *See Rutledge*, 9 F.R.D. at 187-88 (denying motion for failure to confer); *see also Brown*, 187 F. Supp. 2d at 891 (declining to hold a *pro se* litigant accountable for failure to comply with L.R. 7.1(a) but noting that striking the motion on that basis is a “measure that the Court would not hesitate to take in a typical situation”).

B. Plaintiff’s Motion Is Premised on a Hypothetical Outcome Regarding Its Motion to Compel.

Plaintiff asks this Court to extend the discovery deadline based on an as-yet hypothetical scenario: that the Court grants Plaintiff “significant relief” on its motion to compel further discovery from NCS. NCS agrees that more time to conduct discovery may be necessary if the Court does, in fact, order further discovery with respect to *either* party’s motion. Counsel for NCS so indicated in the April 22, 2010 letter to Plaintiff. However, the *amount* of extension cannot constructively be determined without knowing what additional discovery, if any, will even be permitted by the Court. For that reason, NCS suggested that the parties meet and confer after the hearing on Plaintiff’s Motion to Compel and apprise Judge Battani that same day at the status conference on the issue.

Since this motion has now been referred and set for hearing together with the Motions to Compel, the issue of an extension can be taken up after the discovery motions are resolved. At that point, the parties and the Court will be in a better position to determine the propriety of the request for an extension.

C. In Any Case Plaintiff's Purported Rationales for a Discovery Extension Fail.

Setting aside Plaintiff's failure to confer with NCS before filing its motion and that the motion is not ripe, Plaintiff does not raise any legitimate argument in support of granting a discovery extension at this time. Under Rule 16(b)(4) of the Federal Rules of Civil Procedure, a scheduling order may be modified only for good cause and with the judge's consent. Plaintiff contends that it needs more time to conduct discovery for two purported reasons: (i) it needs more time to depose witnesses that it does not know about (although it is not even established that such witnesses exist) and (ii) it needs more time to designate an expert witness.

Plaintiff's argument that it needs more time to depose as-yet unidentified witnesses fails on its face. First, it is not established that such witnesses even exist. Second, even assuming NCS is ordered to produce more information and that information includes the names of additional witnesses, Plaintiff would have time to depose such witnesses before the July 12, 2010 discovery cutoff in this case.

Plaintiff's contention that it needs more time to identify expert witnesses also falls flat. This is a trademark infringement action, in which Plaintiff alleges that NCS registered domain names that were similar to Plaintiff's trademarks, WEATHER UNDERGROUND and WUNDER, with the bad-faith intent to profit from those domain names. Nothing in discovery to date has altered the nature and substance of this litigation such that the type of expert necessary

would change accordingly. In what looks more like a coda to its motion to compel, Plaintiff takes a substantial portion of its motion for a discovery extension to recite several document categories to which it believes it is entitled. However, assuming Plaintiff is successful in its motion to compel, discovery of *any* such documents would not alter the gravamen of this dispute. NCS does not know exactly what kind of experts Plaintiff is considering, but Plaintiff already has everything it needs to engage a computer software expert or a damages expert. NCS has produced the software code that registers the domain names, as well as the “blacklist” (which works with the software code to ensure that trademarks are not registered), which are the documents that a computer software expert would need. If Plaintiff intends to engage a damages expert, NCS has produced the relevant revenue figures and offered to stipulate that revenues equal profits for purposes of assessing damages.

III. Conclusion

Plaintiff’s motion suffers from various technical deficiencies which would merit denial. Nevertheless, NCS is cognizant that additional time may be warranted depending on the outcome of the discovery motions. Once the discovery motions are resolved, NCS can better address the amount of extension, if any, that would be merited.

RESPECTFULLY SUBMITTED this 6th day of May, 2010.

/s/William A. Delgado

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 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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