

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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**NAVIGATION CATALYST SYSTEMS, INC.'S REPLY MEMORANDUM IN SUPPORT
OF MOTION TO COMPEL**

REPLY MEMORANDUM

Because Plaintiff cannot oppose NCS's Motion to Compel on the merits, it instead chooses to sling the proverbial mud at NCS by making untrue and misleading accusations about NCS's production of documents. Suffice it to say that NCS is more than happy to compare its document production (organized, easy to read, documents produced as they are kept in the ordinary course of business) against Plaintiff's production any time.¹ In any case, rather than accept Plaintiff's bait and have this motion de-railed by attempting to correct the record, NCS would prefer to focus on the merits of its motion by addressing the following three issues.

I. ISSUE NO. 1: MANNER OF PRODUCTION.

NCS seeks to have documents produced in the manner they are kept in the ordinary course of business. On this issue, Plaintiff's opposition boils down to "NCS has never requested to see documents as they are kept in the ordinary course of business itself." Opp. at 3. But, the requirement to produce a document in the way it is "ordinarily" kept is inherent in the Federal Rules themselves. Fed. R. Civ. P. 34(b)(2)(E)(i). Plaintiff is not entitled to produce documents in any other way. So, if Plaintiff has a screenshot that it intends to use at trial, and the screenshot is in color and is legible, it should be produced like that. Defendant should not have to toil over a barely legible, black-and-white copy to determine what the document is. The same is true for other documents that exist in color, such as marketing materials.

¹ Statements about Plaintiff's supposed cooperation or NCS's failure to meet and confer are similarly misleading. For example, Plaintiff argues that it never stated it would not re-produce copies of illegible documents. While that might be true, the fact remains that NCS asked Plaintiff to re-produce illegible documents on April 15, 2010 and Plaintiff never stated that it *would* re-produce those documents. In reality, Plaintiff did not respond to NCS's letter at all and did not re-produce those documents until April 26, 2010 *after* NCS was forced to bring the present motion.

That Plaintiff turned over its documents to a third party for Bates-stamping, digitizing, and production does not act as a shield to this requirement.² If, after Bates-stamping and digitizing, the document that is ultimately produced bears no resemblance to the original and cannot be read, then this “professional scanning” should be panned not lauded.

In any case, Plaintiff now appears willing to produce documents as they are kept and does not truly oppose this part of the motion. See Schaefer Declaration at ¶ 7. Thus, the Court should order Plaintiff to produce documents in their “original” format so such that all documents that exist in color are produced in color. Note, though, that Plaintiff’s suggestion that the documents first be reviewed at a “mutually agreeable location” makes no sense. Plaintiff has already produced its documents as black-and-white TIFF file. NCS simply wants a TIFF file (or comparable such as a JPG or PDF, etc.) that is in color. There is no reason that counsel for NCS should have to travel to San Francisco, Traverse City, Ann Arbor, Detroit, or some other location just to look at a document that has already been produced as black-and-white just to say “Yes, I want that in color.”

II. ISSUE NO. 2: REQUEST NOS. 6 AND 28.

Plaintiff’s position is that these documents are publicly available through the USPTO.gov web site. The Court would do well to keep in mind Plaintiff’s position that if a document is publicly available, it need not be produced by a party when considering Plaintiff’s own Motion to Compel.

That said, not all of the information sought by these requests is *not* publicly available. For example, the complete file for U.S. Reg. No. 2,281,088 for Plaintiff’s trademark WEATHER

² Plaintiff also claims that its document production was OCR-ed. That is not the case.

STICKER is not available. See Exhibit J hereto.³ As can be seen from Exhibit J, the contents of the file that are available on-line start with the Registration Certificate of 1999. The original application, office actions, responses to office actions, etc. which predate registration are not available on-line. Thus, the Court should order Plaintiff to produce the trademark file for this mark.

III. ISSUE NO. 3: REQUEST NOS. 12 AND 27.

Plaintiff essentially admits that sales and advertising documents are relevant and states that information has been provided. If this information has been provided in document format, then Plaintiff should provide a Bates Number because NCS has not identified it. As for revenue information provided at the deposition of Chris Schwerzler, Schwerzler *approximated* gross revenue for 2009 based on what he could recall from a profit and loss statement he had seen the previous day. Given the existence of profit and loss statements, Schwerzler's reliance on such financial statements at deposition, and Plaintiff's reliance on that testimony in opposing this Motion, Plaintiff should be compelled to produce the financial statements themselves as those would be responsive to these requests. These financial statements would have the actual numbers not approximations or estimates based on someone's (perhaps erroneous) recollection.

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³ Exhibit J is a printout from the website www.uspto.gov which shows the contents of the file for the Serial No. 75494481, which is the serial number for the WEATHER STICKER mark.

Lastly, Plaintiff argues that other financial information is irrelevant to any issue in this case. Nevertheless, in its original Motion, NCS provided multiple reasons why the financial information sought was relevant. Plaintiff's failure to rebut a single one of these reasons is telling. Thus, NCS will simply rely on what it has already stated in its original Motion as to why financial information is relevant.

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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