

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:08-cv-1227-T-30EAJ

KLEIN & HEUCHAN, INCORPORATED,

Plaintiff,

-vs-

2 March 2010
8:55 a.m.
Courtroom 13A

**COSTAR REALTY INFORMATION,
INCORPORATED, et al.,**

Defendant.

-----/

**TRANSCRIPT OF PROCEEDINGS
(BENCH TRIAL)
BEFORE THE HONORABLE JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE**

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(appearances continued on next page)

STENOGRAPHICALLY REPORTED
COMPUTER-AIDED TRANSCRIPTION

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P R O C E E D I N G S

(8:55 a.m.)

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MR. GIBSON: May it please the Court.

THE COURT: Proceed.

CROSS-EXAMINATION

BY MR. GIBSON:

Q Good morning, Mr. Bell.

A Good morning.

Q What were the dates that you worked at Coldwell Banker?

A When I started, it was 2005, I believe; somewhere between November and December or 2005.

Q Through November of 2006?

A Correct.

Q Throughout that time, did you utilize your own laptop computer?

A Yes.

Q You didn't use a station at the Coldwell Banker office?

A I used my laptop; and then sometimes because they did have CoStar on one -- access on one computer; and on the other was Win2Data, which I believe is something similar to MicroBase.

Q And sometime after you began at Coldwell Banker you were told that Coldwell was providing a subscription to you; is that correct?

A Yes.

Q How long after your arrival did that occur?

1 A Please ask --

2 Q How long after you arrived at Coldwell Banker did they
3 buy you a subscription?

4 A That -- well, I started in November/December of '05,
5 and then they had the meeting, which, I believe, was either
6 in -- I believe it was sometime in -- in or near about
7 August of '06, and that's when John was stepping down as the
8 area manager, and that's when they announced the CoStar.

9 Q And someone from Coldwell Banker came and physically
10 loaded the CoStar on your computer; is that correct?

11 A I don't recall. I don't believe they did. A lot of
12 the IT people -- they would come and sign and set up your
13 e-mail. So, I don't believe they did. I think -- I think I
14 recall it was done through an e-mail and that it -- the
15 certificate was installed by way of accessing the CoStar
16 base.

17 Q Nevertheless, you never had any contact with anyone
18 from CoStar?

19 A No, I didn't.

20 Q No one in the sales team or anyone at CoStar?

21 A No.

22 Q Okay. And it was your understanding that
23 Coldwell Banker was giving you a subscription to CoStar?

24 A Yes.

25 Q You weren't told at that time that this is going to be

1 a six-month subscription, a 12-month subscription. No time
2 limits on it; is that correct?

3 A They did not stipulate any time limit.

4 Q They didn't tell you that it was going to expire at a
5 specific time?

6 A No.

7 Q You just, as I understand it, clicked on the bookmark.
8 It brought up CoStar, and you clicked log in?

9 A Yes.

10 Q You didn't even have to remember to use your name and
11 password?

12 A No.

13 Q You just accepted the terms of service and logged in?

14 A Correct.

15 Q And you could access CoStar from your laptop wherever
16 there was an Internet connection?

17 A Correct.

18 Q You accessed it at Coldwell Banker; correct?

19 A Yes.

20 Q You accessed it at home?

21 A Yes.

22 Q And you could access it at Starbucks if you wanted to;
23 is that correct?

24 A I would believe that's -- yeah, I would say so, yes.

25 Q And you never read the terms of use?

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1 A I did not.

2 Q In November you decided to leave Coldwell Banker?

3 A Yes.

4 Q Once you ceased being affiliated with Coldwell Banker,
5 did you receive an e-mail telling you that you were you no
6 longer able to access the CoStar system?

7 A I did not.

8 Q That you were no longer authorized to access the
9 system?

10 A No, I didn't.

11 Q Did you receive any telephone call that you were no
12 longer an authorized user of the CoStar database?

13 THE COURT: Back into 20 questions again?

14 MR. GIBSON: No, sir.

15 THE COURT: Did anyone at CoStar ever tell you
16 anything about your use of the system after you left
17 Coldwell Banker?

18 THE WITNESS: No.

19 BY MR. GIBSON:

20 Q When you left, you thought you were an authorized user?

21 A Yes.

22 Q You began Klein & Heuchan in December of 2006; correct?

23 A The latter part of December. I think I might have
24 officially joined in January. There was some holidays, some
25 days in there and things like that. So, I did formally go

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1 in there. I'm not precise the exact day I started, but --
2 yes.

3 Q And you continued to use the CoStar database?

4 A Yes.

5 Q You used the CoStar database at the Klein & Heuchan
6 offices?

7 A Yes.

8 Q And you used the CoStar databases at your home; is that
9 correct?

10 A Yes.

11 Q You did the same thing: You just plugged the ethernet
12 cable into the back of your computer, and you had access; is
13 that correct?

14 A Yes.

15 Q Your first inclination that you were not an authorized
16 user came in April of 2008; is that correct?

17 A (Nods head.) When the letter was sent out to Mark;
18 correct.

19 Q That's when a letter from CoStar came to Mark regarding
20 your access to the database; is that correct?

21 A That's correct.

22 Q And you were surprised by that letter, were you not?

23 A I was.

24 Q You sat in on a telephone call with Mr. Klein and a
25 representative of CoStar; is that correct?

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1 A Yes.

2 Q And you explained to that individual that it was your
3 belief that Coldwell Banker had bought you a subscription;
4 is that correct?

5 A Yes.

6 Q You laid it all out for them; is that correct?

7 A Correct.

8 Q You had nothing to hide; correct?

9 A Correct.

10 Q And Mr. Klein and you both were on that call; is that
11 correct?

12 A Yes.

13 Q Prior to that call, do you believe Mr. Klein had any
14 reason to believe that you were not an authorized user?

15 A He never asked me if I was, no.

16 Q Do you believe that he had any reason to believe that
17 you are not an authorized user?

18 MR. OPPENHEIM: Objection.

19 THE COURT: Basis?

20 MR. OPPENHEIM: He has no basis to know what
21 Mr. Klein knew.

22 THE COURT: The question was does he have any
23 reason to believe, and he may have some reasons. He may
24 not. Overruled.

25 THE WITNESS: Answer?

1 THE COURT: Yes.

2 THE WITNESS: I'm not sure if he did or not.

3 THE COURT: No, that's not the question. He's not
4 asking you if Mr. Klein knew. He's asking you if you know
5 of any reasons how he would know.

6 THE WITNESS: I guess potentially he had been
7 exposed to sales associates over the years.

8 BY MR. GIBSON:

9 Q You do remember your deposition being taken in this
10 matter; correct?

11 A Yes.

12 Q That was on August 20th of 2009?

13 A Okay.

14 Q Correct?

15 A Yes.

16 Q And at that time, you were put under oath; is that
17 correct?

18 A Yep.

19 Q And do you recall at pages 134, lines 8 through 11,
20 specifically being asked, "Do you have any reason to believe
21 that Mark Klein had any reason to believe that you didn't
22 have access to the CoStar database?" And your answer was
23 "No." Do you recall that?

24 A Yes.

25 Q After you had this telephone call with a representative

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1 from CoStar, did you continue to use the CoStar database?

2 A I did not, no.

3 Q So, from the moment you knew you were not authorized,
4 you ceased using the database?

5 A Correct.

6 Q We've talked -- we've heard some testimony at length
7 about CoStar and its products and its services. There were
8 other tools at your disposal that you used while at Klein &
9 Heuchan in the real-estate practice; is that correct?

10 A Yes.

11 Q Are you familiar with a product called "Catalyst"?

12 A Yes.

13 Q What is that?

14 A That's the search engine that the Florida Gulf Coast
15 Association of Realtors uses. It's a -- it's a database
16 that has -- where we input our listings; and from time to
17 time there may be information about sold properties. I
18 don't recall if there was anything like leasing to that
19 effect, but it -- it had -- it was a -- that's what I can
20 remember at this time.

21 Q And you needed a user name and password to access the
22 data in Catalyst; correct?

23 A Yes.

24 Q And individuals could be subscribers to Catalyst;
25 right?

1 A Yes.

2 Q The entire office did not need to be a subscriber to
3 Catalyst?

4 A I don't believe so, no.

5 Q What is IRIS?

6 A IRIS is a -- it is -- it's -- I guess it would be more
7 like a GIS mapping system you could click and drag; and on a
8 specific -- like a section, township, range you might be
9 able to draw a box around something. It would pinpoint
10 maybe a property -- you could input an address, and it would
11 pinpoint the property, and then it would bring up like the
12 public-record data, maybe if there was sold information, the
13 square footage, and things to that nature.

14 Q So, you could obtain specific information on a specific
15 property from this product?

16 A Yes.

17 Q Now, a premium service of IRIS is IMAPP; is that
18 correct?

19 A I believe so.

20 Q So, now IMAPP requires a user name and password to
21 access the data within its database; is that correct?

22 A Yeah.

23 Q And with IMAPP, individual real-estate agents could
24 become members, could pay for that premium service; is that
25 correct?

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1 A I recall that being the case, yes (nodding head).

2 Q And not everyone in the office had to be a member of
3 IMAPP in order to access the IMAPP premium service; is that
4 correct?

5 A Yes.

6 Q LoopNet -- what is LoopNet?

7 A LoopNet is -- I would -- that's CoStar's competitor.
8 They are a -- it's kind of similar -- it's -- I guess it
9 would be a little bit dissimilar when you compare it to
10 CoStar. With LoopNet you input all your data and
11 information in there just like you might do a flier in the
12 office, and then it would upload it, and then it would
13 become available through their service.

14 Q You also could do searches for property; is that
15 correct?

16 A Yes.

17 Q You could do public-records information; is that
18 correct?

19 A I believe so.

20 Q And LoopNet offered a free basic service; is that
21 correct?

22 A Yes.

23 Q Anyone in the world can sign up for it?

24 A Yes.

25 Q They also offered a premium service, did they not?

1 A Yes.

2 Q And that required an individual to pay for that premium
3 service; is that correct?

4 A Yes.

5 Q You paid for it; correct?

6 A For a period of time, I did.

7 Q During a period of time that you were an agent at Klein
8 & Heuchan, you paid for the premium service; is that
9 correct?

10 A Yes.

11 Q Not everyone in the Klein & Heuchan office paid for it;
12 is that correct?

13 A No.

14 Q The entire office did not need to be signed up to pay
15 for the premium service in order for an individual agent to
16 access that database; is that correct?

17 A Correct.

18 Q So, you would agree with me that Catalyst, IMAPP, and
19 LoopNet were three specific and separate Internet-based
20 utilities that you could use that didn't require the entire
21 office to be signed up in order for you as an individual to
22 use it?

23 A Correct.

24 Q I would like to go over some of the exhibits that
25 Mr. Oppenheim questioned you about.

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1 A Okay.

2 Q If you can get the first book, the book with 15 --
3 Exhibit 15 in it.

4 Do you recall this document (changing overhead
5 exhibit)?

6 A Yes.

7 Q This is a document regarding mini storage facilities in
8 Pasco County; is that correct?

9 A Correct.

10 Q Can you tell us for certain, have you downloaded that
11 data from CoStar?

12 A Okay. I need just to browse through and be sure.
13 (Pause.) Based on what I see, I would -- I would
14 say -- I would say yes.

15 Q It could have come from IMAPP, could it not?

16 A Well, the reason I'm not -- I'm not exactly sure is
17 because it has a Comps I.D. and a Comps number and --

18 Q That's really what I'm getting at. You're not sure?

19 A I'm not sure.

20 Q Okay. You can't tell me when you downloaded that data,
21 can you?

22 A I can't remember, no.

23 Q You can't tell me where you downloaded that data from,
24 can you?

25 A I don't recall, no.

1 Q We do know that while you were -- your entire tenure at
2 Klein & Heuchan, you closed no deals involving mini storage
3 facilities in Pasco County; correct?

4 A Correct.

5 Q While at Klein & Heuchan, you or Klein & Heuchan made
6 no commissions on the sale or lease of any mini storage
7 facilities because of that data?

8 A We did not.

9 Q If you could go to 16, please.

10 A Okay.

11 Q This is a listing of office buildings in the
12 metropolitan area with mailing addresses; is that correct?

13 A Yes.

14 Q Isn't it true that you would use this report to target
15 and follow up with particular properties?

16 A I believe so, yes.

17 Q You would use this report to target such properties,
18 because each of the properties listed there are already
19 represented by large national firms?

20 A Correct.

21 Q And it's true that while you were employed at Klein &
22 Heuchan you wouldn't serve a market like that?

23 A That's correct.

24 Q You had no intention of serving a market like that?

25 A Correct.

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1 Q You would agree with me that while you were at Klein &
2 Heuchan you closed no deals because of the data contained
3 within Exhibit 16?

4 A Correct.

5 Q And you have no knowledge that Klein & Heuchan closed
6 any deals because of any data on that document?

7 A I do not. No, I don't.

8 Q If you could go to Exhibit 17, please.

9 A Okay.

10 Q (Changes overhead exhibit.) This document provides
11 information pertaining to developers and property managers
12 and some brokers; is that correct?

13 A Yes.

14 Q And it provides contact information for particular
15 properties; is that correct?

16 A Correct.

17 Q Isn't it true that you would not have likely contacted
18 any of the individuals listed on that list?

19 A That's correct.

20 Q You would agree with me while you were at Klein &
21 Heuchan you closed no deal because of any data that's on
22 that list?

23 A Correct.

24 Q And you have no knowledge that Klein & Heuchan closed
25 any deals, made any commissions whatsoever, because of the

1 data on that list?

2 A Okay, no (shaking head).

3 Q If you could go to 22, please.

4 A (Complies.)

5 Q E-mail --

6 A Excuse me, please. Did you say 22?

7 Q Yes, sir.

8 A Okay. It was in the same book I was in. I didn't --
9 okay. It is the last one.

10 Q 22?

11 A I thought you said 25. I'm sorry. Okay.

12 Q E-mail 22 is an e-mail dated April 4th from you to
13 Steven Klein; is that correct?

14 A Correct.

15 Q And it contains an attachment, which is this 2006
16 CoStar report; is that correct?

17 A Correct.

18 Q Mr. Klein never asked you for that report; is that
19 correct?

20 A I don't believe so, no.

21 Q Can you tell me where you -- strike that.

22 Do you know when you downloaded that report?

23 A I do not.

24 Q Can you tell me where you physically were when you
25 downloaded that report?

1 A I cannot.

2 Q You could have been at home; correct?

3 A Possibly, yes.

4 Q You could have been anywhere there was an Internet
5 connection?

6 A Yeah.

7 Q You sent that report to Mr. Klein on your own
8 initiative; is that correct?

9 A Yes.

10 Q You have no idea if he opened it; correct?

11 A I do not.

12 Q You had no discussions with him about the contents of
13 that report?

14 A No.

15 Q And if you turn to Exhibit 18 -- 18, we see Mr. Klein
16 responded to your e-mail a simple thanks; is that correct?

17 A Is that referring back to the previous one we just
18 looked at, the market report?

19 Q Take a look at it.

20 A Well, what number was that?

21 Q The one we were just at was 22.

22 A Okay. Is that relating back to this document that
23 we're looking at now?

24 Q Well, take a look so that we can make sure.

25 A 22?

1 Q Yes, sir.

2 A Okay. They were out of order. Okay.

3 Q In the middle of the -- in the middle of Exhibit 18 is
4 the response to 18, correct, Exhibit 18, the response to
5 your e-mail where Mr. Klein is saying thanks? His e-mail
6 generally goes from the bottom to the top; okay?

7 A Okay. Office report document and then -- okay, he did
8 say thanks; right.

9 Q And then you followed up the next day with an e-mail
10 with another attachment; correct?

11 A Right.

12 Q And that attachment is an e-mail with a spreadsheet of
13 proposed and existing office buildings in Hillsborough
14 County; is that correct?

15 A Correct.

16 Q You would again agree with me that Mr. Klein didn't ask
17 for that data?

18 A I don't recall if he did or not.

19 Q And, again, you don't know where you physically were
20 when you downloaded that data?

21 A I do not.

22 Q You don't know if you were there when you downloaded
23 that data?

24 A I do not.

25 THE COURT: You think I forgot his previous

1 answers?

2 MR. GIBSON: I'm sorry.

3 THE COURT: You think I forgot his previous
4 answers and you need to repeat?

5 MR. GIBSON: Yes, sir.

6 BY MR. GIBSON:

7 Q You downloaded -- you sent again that spreadsheet to
8 Mr. Klein on your own initiative?

9 THE COURT: You do not need to repeat. Asked and
10 answered.

11 BY MR. GIBSON:

12 Q While you were at Klein & Heuchan, did you close any
13 deals based on the data that's contained within Exhibit 18,
14 the Hillsborough County properties?

15 A No, I did not.

16 Q And you have no information that Klein & Heuchan closed
17 any such deal; correct?

18 A I do not.

19 Q Can we turn to Exhibit 19?

20 A Okay.

21 Q This is a printout regarding a mini storage facility in
22 Pasco County; is that correct?

23 A That's correct.

24 Q You pulled this property because you got a telephone
25 call, a cold call, from someone who might be interested in

1 listing this property; is that correct?

2 A I wouldn't classify it as a "cold call." It was a
3 response to a letter mail-out we did, so -- a warm call.
4 That's all salesman jargon. I'm sorry.

5 Q No problem. He called inquiring potentially listing
6 the property?

7 A Yes.

8 Q He never listed the property?

9 A Did not.

10 Q Never sold the property?

11 A No.

12 Q Neither did Klein & Heuchan?

13 A No.

14 Q Exhibit 20, please (changing overhead exhibit). This
15 is an e-mail to Mr. Tracy McMurray; correct?

16 A Yes.

17 Q You knew Mr. McMurray for some time?

18 A Yes.

19 Q A long-time client of yours?

20 A Yes.

21 Q And he called you because he had located a specific
22 warehouse he was interested in and wanted to see it?

23 A Yes.

24 Q And you showed him that warehouse?

25 A I did.

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1 Q After you showed him that warehouse, you went to
2 several different sites to pull data on that warehouse; is
3 that correct?

4 A I believe so, yes.

5 Q And this is you sending him that data?

6 A Right.

7 Q CoStar wasn't involved in locating the warehouse
8 because he had already selected the one he wanted to see;
9 correct?

10 A Correct.

11 Q You never sold this warehouse?

12 A Did not, no.

13 Q You have no idea if Klein & Heuchan ever sold that
14 warehouse?

15 A I don't know if they did.

16 Q You had testified that Mr. Klein was working on a
17 project involving downtown lease rates?

18 A Yes.

19 Q And at some point Mr. Klein asked you what your opinion
20 was with respect to downtown Tampa lease rates; is that
21 correct?

22 A Correct.

23 Q He never asked you to look any specific data up in
24 CoStar; is that correct?

25 A I don't believe so, no.

1 Q He never said, "What does the CoStar database say about
2 downtown lease rates?"

3 A No.

4 Q If you can turn to Exhibit 21. This is an e-mail you
5 sent to Mr. Klein -- Mark Klein on August 16th; is that
6 correct?

7 A Yes.

8 Q And attached to the e-mail was a spreadsheet of
9 downtown properties?

10 A Correct.

11 Q This was after your conversation with Mr. Klein wherein
12 he asked your opinion of downtown lease rates; correct?

13 A Correct.

14 Q And you just sent that to him of your own volition; is
15 that correct?

16 A Correct.

17 Q You have no idea whether Mr. Klein closed any deals at
18 this timeframe regarding downtown properties; correct?

19 A Not to my knowledge, no.

20 Q If you can turn to 23.

21 A Okay.

22 Q This is an e-mail dated June 14th, 2007, to Gus;
23 correct?

24 A Correct.

25 Q Gus was a cold call; correct?

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1 A Gus was cold.

2 Q Not a warm -- a cold?

3 A Gus was ice cold.

4 Q And the attachment contains data on the office market;
5 is that correct?

6 A Yes.

7 Q You have no idea who Gus is; is that correct?

8 A No, I don't.

9 Q After this e-mail, you had no further contact with Gus?

10 A No.

11 Q Made no calls involving Gus?

12 A No.

13 Q Finally on this line you were asked questions about an
14 old Eckerd building?

15 A Yes.

16 Q That I believe you testified you were in the office on
17 a Saturday and you and Mr. Klein, Mark Klein, got into a
18 conversation about the Eckerd building. You don't really
19 remember what --

20 MR. OPPENHEIM: Objection, misstates the
21 testimony.

22 BY MR. GIBSON:

23 Q Do you recall your discussion about --

24 THE COURT: Rephrase the question, please.

25 BY MR. GIBSON:

1 Q Do you recall a discussion with Mr. Klein regarding an
2 old Eckerd building?

3 A I do.

4 Q What was the discussion about?

5 A Lynn Levin was looking for a -- he had been out
6 cruising around, and he had -- he had driven by the
7 property, and it's located at Trouble Creek and Little Road,
8 and it had a -- I believe it had a Colliers Arnold sign on
9 it, and Mark wasn't able to determine who the listing agent
10 was, so he'd asked me if I could look it up and find out who
11 it was with my CoStar.

12 Q Could it have been Mr. Dimmitt?

13 A I don't know. I thought it might have been Lynn,
14 because Lynn had been out looking. Lynn was doing
15 exchanges, always buying things. I don't recall exactly who
16 it was, but I thought it was Lynn.

17 Q And Mr. Klein asked you if you could determine who the
18 agent was?

19 A Right.

20 Q He didn't ask you to look up anything particularly in
21 CoStar?

22 A He asked me if I could find the agent and if I could
23 look in CoStar because he couldn't find it in LoopNet or
24 anything else. I guess the listing didn't appear anywhere
25 else.

1 Q He specifically said, "Look in CoStar"?

2 A That's what I recall, yes.

3 Q Okay. Do you have any knowledge that Klein & Heuchan
4 made a sale regarding an old Eckerd building?

5 A I don't believe they ever did, no.

6 Q You don't think they did?

7 A No.

8 Q Let's talk about the deals you did make while you were
9 at CoStar -- I'm sorry, while you were at Klein & Heuchan.
10 You made one sale; correct?

11 A One sale, correct.

12 Q You were involved as the agent of record in one sale of
13 a property; correct?

14 A Well, I would say Mark and I were both the agents of
15 record. We shared the listing. It was his listing, but he
16 brought me in as a means to --

17 Q You closed the deal? You helped close the deal?

18 A I would have -- I guess you could say that. Mark
19 closed the deal. I really didn't. I just happened to be
20 there.

21 Q This is a property located at 1250 Rogers Street?

22 A Yes.

23 Q CoStar was in no way involved in the listing or sale of
24 that property?

25 A No, they weren't.

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1 Q After that sale, you then leased two spaces in that
2 same property; is that correct?

3 A I believe it was by -- I leased the suites prior to the
4 sale.

5 Q Okay. So, the leases happened before the sale?

6 A Correct.

7 Q But it was two leases?

8 A Correct.

9 Q One was a Home Helpers?

10 A Home Helpers And Mary Kay Cosmetics salesperson or like
11 one of the pink ladies, I guess you call them.

12 Q Okay. The Home Helpers lease came from another agent
13 in the office; correct?

14 A Tom Duncan.

15 Q It was an old client of theirs that needed lease space?

16 A Correct.

17 Q And the Mary Kay contact came from a sign in the yard,
18 is that correct, of the property?

19 A They called off the sign in the yard; that's right.

20 Q Those two leases had no involvement -- CoStar had no
21 involvement in those leases?

22 A They did not.

23 Q And then your final property that you closed the deal
24 on involved a friend of yours looking at office space; is
25 that correct?

1 A That's right.

2 Q He was looking to move from Pinellas County over to
3 this side of the bay; is that correct?

4 A That's correct.

5 Q And you showed him a variety of properties; is that
6 correct?

7 A We had.

8 Q In the end, he selected a property that you had no
9 involvement in him finding; correct?

10 A That's correct.

11 Q He selected a property that he found; correct?

12 A Correct.

13 Q But he still used you as the agent; is that correct?

14 A Yes.

15 Q And he used you, in essence, to help you; is that
16 correct?

17 A Yes. He knew I was (nodding head) --

18 Q He did all the negotiating?

19 A He did, yes.

20 Q But he just kept you, and you earned a commission on
21 that?

22 A Correct.

23 Q CoStar had nothing to do with him selecting and leasing
24 out that space; is that correct?

25 A No.

1 Q You have no knowledge of any commissions that you made
2 while at Klein & Heuchan that can be linked to CoStar?

3 A Correct.

4 Q You have no knowledge of any deals K&H made that can be
5 linked to any data from CoStar?

6 A I do not, no.

7 Q While you were at CoStar in 2007, you made
8 approximately \$1,000 of commissions; is that correct?

9 A Did you say "CoStar"?

10 Q I did. Klein & Heuchan, thank you. While at Klein &
11 Heuchan, in 2007 you made approximately \$1,000 in
12 commissions?

13 A The two leases total about -- right at a thousand.

14 Q And then in 2008, you made just over \$15,000; is that
15 correct?

16 A Correct.

17 Q Now, you were sued by CoStar; correct?

18 A Yes.

19 Q You were sued by CoStar in Maryland first, weren't you?

20 A Correct.

21 Q And you had to hire an attorney to represent you?

22 A Correct.

23 Q And that suit was eventually moved and joined with this
24 suit; is that correct?

25 A Yes.

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1 Q You had to hire an attorney down here?

2 A Yes.

3 Q You have since reached a settlement with CoStar;
4 correct?

5 A Correct.

6 Q You have agreed to pay the CoStar monetary amount; is
7 that correct?

8 A Correct.

9 Q And in exchange for that monetary amount that you have
10 paid, you have been released; is that correct?

11 A Correct.

12 Q The agreement releases you from any liability for
13 copyright infringement that they've alleged in this case; is
14 that correct?

15 A Could you restate that, please?

16 Q The agreement releases you from any liability for the
17 claims asserted against you in this litigation?

18 A I -- I believe that's how it's read, yes.

19 Q They can't sue you again?

20 A I guess they could if they --

21 MR. OPPENHEIM: Objection, calls for a legal
22 conclusion, and it's hearsay anyway.

23 THE COURT: Sustained as to legal conclusion.
24 Overruled as to hearsay.

25 MR. GIBSON: I don't have any other questions,

1 Your Honor.

2 Thank you, Mr. Bell.

3 THE COURT: Any redirect?

4 MR. OPPENHEIM: Just a few questions, Your Honor.

5 *REDIRECT EXAMINATION*

6 Q Good morning, Mr. Bell.

7 A Good morning.

8 Q You were asked questions about a service called
9 "Catalyst"?

10 A Correct.

11 Q And IRIS -- you were asked about a service called
12 "IRIS"?

13 A Correct.

14 Q A service called "IMAPP"?

15 A Correct.

16 Q And a service called "LoopNet"?

17 A Correct.

18 Q Those are four different services that provide
19 information that is either from public records or posted by
20 brokers; isn't that correct?

21 A I believe so, yes (nodding head).

22 Q And none of those services have any type of
23 verification process for the information contained in them,
24 do they?

25 A I'm not entirely sure about that, because if it came

1 from a public record, it may be a government agency, and
2 maybe they record the data. So, that's -- that would be --
3 that could be plausible that maybe it was verified.

4 Q Other than the fact that the data came from the public
5 records, which to the extent the public record's verified --
6 there was no third party at LoopNet, IRIS, or Catalyst who
7 collected and analyzed and verified that information. Those
8 services had information on them which was culled from
9 public records or simply posted by brokers; isn't that
10 correct?

11 A That would -- that would be my assumption, yes.

12 Q In that respect, they were qualitatively different than
13 CoStar?

14 A What?

15 Q Those services were different than CoStar because of
16 that?

17 A I would -- the verification would be a different, sure.

18 Q You weren't at Klein for a particularly long period of
19 time, were you?

20 A About a year and a half.

21 Q When you joined Klein & Heuchan, you expected to be
22 successful over time, didn't you?

23 A Yes.

24 Q And you hoped that you would earn significant
25 commissions over time, didn't you?

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1 A I think everybody would hope to do that.

2 Q And one of the things that you were trying to do as you
3 were learning to be a broker was to gather information about
4 the market; right?

5 A Yes.

6 Q And you used CoStar as one of the tools to do that,
7 didn't you?

8 A I did, yes.

9 Q Mr. Gibson asked you about the commissions that you
10 earned while you -- for that short period of time you were
11 at Klein & Heuchan. You recall that?

12 A Yes.

13 Q And what you gained in commissions was the same as what
14 Klein & Heuchan gained off those commissions as well; isn't
15 that right?

16 A It was 50-50, yes.

17 MR. OPPENHEIM: No further questions. Thank you,
18 Your Honor.

19 THE COURT: Thank you. You may step down.
20 Call your next witness.

21 MR. OPPENHEIM: We would could call Mr. Mark
22 Klein, please.

23 (The witness was duly sworn or affirmed and
24 responded as follows:)

25 THE WITNESS: I do.

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1 THE CLERK: Thank you. Please be seated.

2 THE WITNESS: (Seated.)

3 THE CLERK: Sir, would you please state your name
4 and spell your first and last name for the record.

5 THE WITNESS: Mark Klein, M-A-R-K K-L-E-I-N.

6 THE CLERK: Thank you.

7 **MARK KLEIN,**

8 the witness, being sworn or affirmed, testified as follows:

9 *DIRECT EXAMINATION*

10 BY MR. OPPENHEIM:

11 Q Good morning, Mr. Klein.

12 A Good morning, Mr. Oppenheim.

13 Q Mr. Klein, you established the firm of Klein & Heuchan
14 in 1983 with a partner; isn't that correct?

15 A That is correct.

16 Q And you are currently the president and the CEO of
17 Klein & Heuchan?

18 A That is correct.

19 Q And have been for quite some time?

20 A Yes.

21 Q Including through the period at issue in this case,
22 late 2006 through mid 2008?

23 A Yes.

24 Q And you've been in the real-estate business for over 35
25 years?

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1 A (Nods head.) Thirty-seven years.

2 Q And you began at Merrill, Lynch before you were at
3 Klein & Heuchan; is that correct?

4 A That's correct.

5 Q You received your broker's license in 1974, 1975?

6 A I did.

7 Q And you currently own a hundred percent of Klein &
8 Heuchan?

9 A That is correct.

10 Q You market Klein & Heuchan as Tampa Bay -- the
11 Tampa Bay area's premier regional commercial real-estate
12 firm; right?

13 A Yes.

14 Q And you also tell the public that Klein & Heuchan is a
15 highly professional commercial brokerage that has been built
16 on its practice of integrity, service, and ethics?

17 A Yes.

18 Q And you handle a wide range of commercial real-estate
19 services?

20 A Yes.

21 Q Including commercial brokerage, real estate
22 acquisition, real estate investment, landlord
23 representation, and tenant representation?

24 A Yes.

25 Q And within the brokerage services, you work with

1 providing office space, industrial property, retail
2 business, vacant property, multi-family property, and
3 investment properties; correct?

4 A That is correct.

5 Q And you also provide property management services?

6 A Yes.

7 Q Klein & Heuchan also is involved in the development
8 side of the business; is that correct?

9 A Not Klein & Heuchan.

10 Q You personally?

11 A Yes.

12 Q And you do so as a principal, as an investor, and as a
13 merchant developer; correct?

14 A Yes.

15 Q You met Scott Bell while he was working for Coldwell
16 Banker; is that correct?

17 A That is correct.

18 Q And you hired him in December 2006 as a sales
19 associate?

20 A I believe that's correct.

21 Q And you hired him because you hoped he would make money
22 for Klein & Heuchan?

23 A Yes.

24 Q You maintain an office which is properly equipped and
25 staffed to function as a real-estate broker to serve the

1 public; correct?

2 A Yes.

3 Q And that properly equipped and staffed office is one of
4 the two things that you promise to provide to your sales
5 people; isn't that right?

6 A I don't understand the question.

7 Q Among the things that you agree to provide to your
8 salesmen is a properly equipped office and staffed office?

9 A That's correct.

10 Q And you provided Bell with office space?

11 A Yes.

12 Q And you provided him with office equipment?

13 A I didn't give him any office equipment.

14 Q Well, within the office there was equipment that he
15 was --

16 A He would have used the office equipment; that's
17 correct.

18 Q And Internet access as well?

19 A Yes.

20 Q You provided him with an e-mail address?

21 A Yes.

22 Q A Klein & Heuchan e-mail address?

23 A Yes.

24 Q And you provided him with a telephone?

25 A Yes.

1 Q And long-distance service?

2 A Yes.

3 Q And even though you provided him with a telephone and
4 long-distance service, you made clear that he was not
5 allowed to use those other than company business; isn't that
6 correct?

7 A That's correct.

8 Q And you were responsible for overseeing his work at
9 Klein & Heuchan?

10 A Yes, I was.

11 Q And your son, Mr. Steven Klein, also provided sales
12 management oversight of Mr. Bell?

13 A Yes, he did.

14 Q And do you recall in March of 2009 you responded to
15 interrogatories in this case?

16 A Yes.

17 Q And you recall that you signed and verified those
18 interrogatories under oath, didn't you?

19 A Yes, I did.

20 Q I would ask you to look at Exhibit 55 -- excuse me,
21 53 -- exhibit 53. Mr. Klein, there should be some binders
22 at your feet, and one of those binders should include an
23 Exhibit 53 (changing overhead exhibit).

24 A I have it.

25 Q And if you turn -- these are the interrogatories that

1 you just referenced; is that correct?

2 A Okay, yes.

3 Q And if you turn to the last page of that exhibit,
4 there's a certification page; isn't that correct?

5 A There is.

6 Q And there's a signature at the top of that
7 certification page. Is that your --

8 A That is my signature (nodding head).

9 Q Would you please look -- we would move into evidence
10 Exhibit 53.

11 MR. GIBSON: No objection.

12 THE COURT: I don't generally take interrogatories
13 into evidence. You can publish them, and the portion you
14 publish is in the record as evidence.

15 MR. OPPENHEIM: The -- the conduct, Your Honor, of
16 the Defendants during the course of the case is a factor to
17 be considered during -- in the determination of statutory
18 damages. So, we'd seek to have the responses to the
19 interrogatories, which go to the issue of the litigation
20 conduct, admitted into evidence; and I'd cite to the Court
21 the *In Re: Sony and Press* case out of the Southern District
22 of New York and Judge Middlebrooks' decision in *Global Arts*
23 *Production* out of the Southern District of Florida.

24 THE COURT: I didn't say they weren't relevant. I
25 said you could publish whatever portion you wish and that

1 would be in evidence in the record, but the document itself
2 does not come in evidence.

3 MR. OPPENHEIM: Very well. Thank you, Your Honor.

4 BY MR. OPPENHEIM:

5 Q I ask you, Mr. Klein, to please look at your response
6 to Number 5 (changing overhead exhibit). This is on page 3.
7 Do you see the question there? You were asked, "Identify
8 all persons who supervised, oversaw, reviewed the work of or
9 managed Scott Bell during his affiliation with Klein &
10 Heuchan." Is that the question you were asked?

11 A That is correct.

12 Q And your response was, "Scott Bell is an independent
13 contractor and is to perform his duties and responsibilities
14 without any supervision or control by Klein & Heuchan.
15 However, Klein & Heuchan does oversee its independent
16 contractors to the extent necessary to Klein & Heuchan to be
17 in compliance with the provisions of Chapter 475 of the
18 Florida Statutes." Is that correct?

19 A That is correct.

20 Q Mr. Klein, you talked -- you -- among the supervision
21 duties that you engaged in with Mr. Bell was to provide him
22 with constructive feedback on what he was doing; right?

23 A Yes.

24 Q And you talked to him about what he was doing, how he
25 was progressing, how he was working on getting listings and

1 making sales; right?

2 A Yes.

3 Q You and Steven Klein -- Mr. Steven Klein discussed with
4 Mr. Bell how he was going to go about marketing listings?

5 A Yes.

6 Q And you even assigned listings to him from time to
7 time?

8 A Yes.

9 Q And you had the authority to reassign those listings
10 that you had given him, if you wanted to?

11 A Yes.

12 Q And all the listings that Mr. Bell sought had to be
13 approved by either you or Mr. Steven Klein; is that correct?

14 A Yes.

15 Q And, in fact, Klein & Heuchan's office policy required
16 that Mr. Bell submit any listings he had on a very specific
17 form for approval by you or Mr. Steven Klein?

18 A That's correct.

19 Q And Klein & Heuchan does -- is in compliance with
20 Chapter 475 of the Florida Statutes?

21 A Yes.

22 Q And the Klein & Heuchan office policy describes how
23 Mr. Bell had to draft any offers for a property, how
24 contracts should be communicated to clients, that keys for
25 properties are kept in the office and carefully signed in

1 and out, among other things?

2 A Yes.

3 Q You wouldn't permit Mr. Bell to render any statements
4 for billings or fees, would you?

5 A That is correct.

6 Q And any flyers or mailings or advertising that Mr. Bell
7 prepared, he had to have approved by -- by management at
8 Klein & Heuchan?

9 A That is correct.

10 Q When Mr. Bell was working for Klein & Heuchan, he was
11 expected to represent the company; isn't that right?

12 A That is correct.

13 Q And he was also expected to help other sales associates
14 at Klein & Heuchan?

15 A Yes.

16 Q And he was expected to share information with others at
17 Klein & Heuchan?

18 A Yes.

19 Q And he was mandated to attend sales meetings, including
20 a meeting every Monday morning at 8 a.m.?

21 A "Mandated" is a funny word. We told -- we tell all of
22 our associates that we have these two meetings, and we
23 require them to be there. It's not mandated; because if
24 they don't show up, we'll make a decision as to whether we
25 will sever our relationship with them or not.

1 Q Do you recall your deposition in this case?

2 A I do.

3 Q And that deposition was August 27th; 2009; is that
4 correct?

5 A That's correct.

6 Q And do you recall on page -- on page 26 of your
7 deposition you were asked who else attended the meetings in
8 reference to the salespeople. You answered, "All the
9 associates attend most of the meetings."

10 "QUESTION: Were associates required to attend those
11 meetings?"

12 You answered, "We make it a provision that they -- when
13 we hire them, they have to be -- we require that they be at
14 the meetings. It's not mandatory that they're there; but if
15 they don't participate, then we'll sever the relationship."
16 Was that your testimony?

17 A That was my testimony and is my testimony.

18 Q In addition to -- that Monday meeting was an update
19 meeting in which the needs and wants of the company were
20 discussed, and you would review ongoing activities and floor
21 calls; is that correct?

22 A That is correct.

23 Q In addition to the Monday meeting, the sales associates
24 were also required to attend a Wednesday morning meeting;
25 isn't that right?

1 A That is correct.

2 Q And at the Wednesday meeting, you would review listings
3 and have a rap session about properties; is that correct?

4 A That is correct.

5 Q And beyond those two meetings, Klein & Heuchan would
6 have other meetings as needed?

7 A Yes.

8 Q At the meetings, among the issues discussed were what
9 was happening with the industry?

10 A Yes.

11 Q And it was also discussed what was happening in the
12 marketplace so that you had a better idea, together with the
13 associates, as to whether or not the market was improving or
14 not?

15 A Yes.

16 Q Mr. Bell split with Klein & Heuchan the commissions
17 that he earned on a 50-50 basis; is that correct?

18 A Yes.

19 Q By the way, does Klein & Heuchan earn commissions when
20 it closes a deal for a client? That's how it earns
21 commissions?

22 A That's how we making a living, yes.

23 Q And as Mr. Bell testified, it doesn't necessarily
24 depend on whether or not Klein & Heuchan actually assists in
25 the closing of the deal; if they're the agent and they close

1 the deal, they will get the commission?

2 A I'm not sure -- I'm not sure I understand that
3 question.

4 Q Mr. Bell -- you heard Mr. Bell's testimony?

5 A I did.

6 Q And he was asked questions -- a question about a deal
7 that he closed in which he responded that he hadn't actually
8 participated in assisting and closing the deal and yet he
9 collected the commission? Do you recall that testimony?

10 A I do.

11 Q And that's, in fact, accurate, that a real-estate
12 broker with Klein & Heuchan may, in fact, collect a
13 commission if they're an agent on a deal that closes even if
14 they didn't help close the deal?

15 A Well, that's true. He was the listing agent. As the
16 listing agent, he was -- half the listing agent. I was half
17 the listing agent. So, he didn't have to do everything to
18 complete the transaction, but he got paid.

19 Q Right. You were aware that CoStar was a commercial
20 real-estate service in 2006, were you not?

21 A Yes, I was.

22 Q And for many years, CoStar salespeople had been calling
23 on you to license its service?

24 A That is correct.

25 Q Over the years, CoStar salespeople came and did

1 demonstrations for you, didn't they?

2 A They did.

3 Q And they sent you e-mails?

4 A They did.

5 Q And, in fact, you thought that CoStar did a good job in
6 marketing its service?

7 A I did and still do.

8 Q And you knew that CoStar required a license to be paid
9 in order to access their service?

10 A That is correct.

11 Q You never entered into a license with CoStar, did you?

12 A No, I did not.

13 Q And, in fact, you've not used the CoStar service?

14 A That is correct.

15 Q And you didn't use CoStar's Showcase service between
16 January 2007 and April of 2008, did you?

17 A No, I did not.

18 Q You have, however, attempted to log onto the CoStar
19 service?

20 A Once.

21 Q And to do that, you went to CoStar's home page,
22 www.costar.com?

23 A I don't recall what I had to do to log on.

24 Q And while Mr. Bell was working at CoStar, you knew that
25 he was using -- excuse me, while Mr. Bell was working at --

1 A Is that a lawyer problem?

2 Q No. That's a lawyer -- that's a math problem.

3 While Mr. Bell was working for Klein & Heuchan, you
4 knew that he was working -- using CoStar, didn't you?

5 A Yes, I did.

6 Q And you knew that his access was based on a pass --
7 user name and password that he had obtained while at
8 Coldwell?

9 A That is correct.

10 Q But early on in this case in the interrogatories,
11 that's not what you indicated, was it?

12 A I don't know. I can't remember.

13 Q Could you please look at Interrogatory Number 6 of
14 Exhibit 53.

15 A Did you say Number 6?

16 Q Yes.

17 A Is this all under 53?

18 Q I will pull it out for you and make it a little easier.

19 A I have it.

20 Q (Changes overhead exhibit.) Were you asked in that
21 interrogatory, "Identify all persons affiliated with Klein &
22 Heuchan who have used CoStar's products and services"?

23 A Yes.

24 Q And your response was "unknown"; is that right?

25 A That is correct.

1 Q But you, in fact, knew that Mr. Bell was using the
2 service?

3 A Yes.

4 Q At that point in time that he was using the service,
5 you not only knew that he had access to CoStar, but you had
6 asked him how he had access?

7 A That is correct.

8 Q And you had discussed with Mr. Bell well before the
9 April 16th letter from CoStar how he had access?

10 A Yes, I did.

11 Q And the sole basis for your belief that he was
12 authorized to use the CoStar service was that CoStar hadn't
13 disabled his access?

14 A No, that is not true.

15 Q Do you recall your deposition in March of 2009?

16 A Yes, I do.

17 Q And on page 94 of that deposition, you were asked the
18 following question: "What is the basis for Klein &
19 Heuchan's allegation in Paragraph 12 of its
20 declaratory-judgment complaint that at all material times
21 Scott Bell was an authorized user" --

22 THE COURT: Not too fast. She's trying to take it
23 down.

24 MR. OPPENHEIM: I'm sorry, Your Honor. Let me
25 start over.

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1 THE WITNESS: It's okay.

2 BY MR. OPPENHEIM:

3 Q You were asked on page 94 of that deposition, "What is
4 the basis for Klein & Heuchan's allegation in Paragraph 12
5 of its declaratory-judgment complaint that," quote, "'at all
6 times material, Scott Bell was an authorized user of the
7 CoStar database'?"

8 Your answer was, "He told us he was" and he had access
9 to the database for your client's --

10 MR. GIBSON: Your Honor, this is improper
11 impeachment. It's not the same question.

12 THE COURT: Overruled as to not the same question,
13 but so far it's the same answer. So, it's improper
14 impeachment. Perhaps it goes on and says something
15 different.

16 BY MR. OPPENHEIM:

17 Q When you first found out Mr. Bell was using CoStar, you
18 didn't ask him whether he called Coldwell to find out if he
19 was authorized?

20 A No, I did not.

21 Q Similarly, you didn't ask him whether he called CoStar?

22 A No, I did not.

23 Q While Mr. Bell was working at Klein & Heuchan, he would
24 from time to time provide you with material from CoStar;
25 correct?

1 A Unsolicited.

2 Q But he would provide you with information from CoStar;
3 correct?

4 A He may have.

5 Q He may have or he did?

6 A I don't know -- I don't recall any specific information
7 that he provided me from CoStar.

8 Q You don't recall Mr. Bell ever providing you
9 information from --

10 A That's correct.

11 Q Could you please turn to Exhibit 21.

12 A Is that a different book?

13 Q It may, in fact, be a different book. This is an
14 e-mail from Mr. Bell to MSK. Do you know who MSK is in
15 this --

16 A That's my -- that's my I.D. number. My -- my e-mail
17 address. That's the first three initials of my e-mail
18 address.

19 Q This e-mail is sent to you; is that correct?

20 A Yes, that's correct.

21 Q And you received the e-mail, didn't you?

22 A Yes, I did.

23 Q Do you recall in your deposition on page 37, Mr. Klein,
24 that you were asked the question: "Did you receive
25 CoStar-related information from Mr. Bell?" And your answer

1 was, "No, I did not." Is that correct?

2 A That is correct.

3 Q But your testimony now is you did receive this e-mail?

4 A But I don't know what that e-mail was. I know what
5 that says, but I don't know what it was.

6 Q You recall in your deposition on page 42 you were
7 asked, "Do you know if anyone at Klein & Heuchan had ever
8 received any CoStar information or printouts from Bell?"
9 And your answer was, "At Bell's deposition, he said that he
10 sent a market report to Steve, Judy Healey, and myself. I
11 frankly never met -- the first time I saw the CoStar market
12 report was at that -- at that deposition."

13 A Is that a question?

14 Q And then you went on, and the next question was, "Do
15 you know whether Bell ever gave -- do you know personally
16 whether Bell gave anyone at Klein & Heuchan something from
17 CoStar?" And your response was, "I believe he did not." Is
18 that correct?

19 A That is still my response, yes.

20 Q That's still your response?

21 A Yes.

22 Q But you testified a moment ago that you did receive
23 this e-mail that attaches a CoStar report; is that correct?

24 A Well, I believe I received it because it went to me,
25 and I'm not sure -- I can't tell you definitely that I

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1 received it, but I know it was sent to me.

2 Q So, a moment ago when I asked you whether or not you
3 had received this e-mail and you said yes, you're now
4 changing your testimony and saying, "I know this e-mail was
5 sent to me, but I don't know that I received it"?

6 A That is correct.

7 Q Even though it has your e-mail address on it?

8 A That's correct.

9 Q Did you check your e-mails to provide discovery in this
10 case?

11 A Yes, I did.

12 Q Do you recall, starting on page 36 of your deposition,
13 you were asked the following:

14 "QUESTION: What is your practice regarding saving
15 e-mails?

16 "ANSWER: Mine?

17 "QUESTION: Yes.

18 "ANSWER: I save them on my hard drive.

19 "QUESTION: And you organize them into folders?

20 "ANSWER: Sometimes.

21 "QUESTION: How?

22 "ANSWER: I'm not really a great technocrat, so, you
23 know -- I'm kind of old, so, you know --

24 "QUESTION: How long do you usually save e-mails for?

25 "ANSWER: Too long.

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1 "QUESTION: Do you know whether your system
2 automatically deletes e-mails after a certain period of
3 time?"

4 MR. GIBSON: Objection, improper impeachment.

5 THE COURT: He's not through yet. We'll see.

6 BY MR. OPPENHEIM:

7 Q "ANSWER: If he could ask me if I want to archive them
8 or delete them.

9 "QUESTION: And then do you archive them?

10 "ANSWER: Sometimes.

11 "So, do you have an e-mail archive somewhere?

12 "ANSWER: No -- on my computer, yes.

13 "QUESTION: Okay. Did you search that archive for any
14 documents related to CoStar?

15 "ANSWER: No."

16 Were those your questions -- were those the answers you
17 provided at your deposition?

18 A Yes.

19 Q Returning for a moment back to Exhibit 21, the subject
20 of the e-mail is the CoStar report, is it not?

21 A It is.

22 Q You have no reason to think that what's attached is not
23 a CoStar report, do you?

24 A No.

25 Q And while you don't recall whether or not you received

1 this e-mail, you're not denying that you received it, are
2 you?

3 A No.

4 Q Reports like the one attached to the August 16th, 2007,
5 e-mail help you understand the marketplace and provide you
6 with information about the market from researchers; is that
7 correct?

8 A Which report is that?

9 Q Reports like the one attached to this e-mail that we're
10 looking at right now?

11 A Well, I don't know what was attached to it.

12 Q Well, feel free to take a look at it.

13 A No. I'm sorry. Okay. What is the question then?

14 Q Reports like this e-mail help you understand the
15 marketplace and provide you with information about the
16 marketplace from researchers?

17 A No, they don't. This is a report of a spreadsheet of
18 office buildings in the Tampa market. I knew about them. I
19 know what these buildings are. I can get them -- I can get
20 them from *Black's Guide* and every place else.

21 Q I understand. Do you know, Mr. Klein, whether anyone
22 at Klein & Heuchan had ever seen or received any CoStar
23 reports or information while Mr. Bell was at Klein &
24 Heuchan?

25 A Only what he said in his deposition, that he sent them

1 to Steve and Judy Healey.

2 Q Were you aware at the time that Mr. Bell was at Klein &
3 Heuchan of individuals who had seen or received CoStar
4 information or reports?

5 A No.

6 Q In the interrogatories we discussed earlier, Mr. Klein,
7 you were asked a question in Interrogatory Number 8
8 (changing overhead exhibit), "Identify all persons
9 affiliated with Klein & Heuchan who, during their
10 affiliation with Klein & Heuchan, observed or received
11 information or products derived from CoStar services such as
12 CoStar market reports, printouts, search reports, property
13 details, or other such information." And you responded,
14 "Unknown." Is that right?

15 A That's right.

16 Q And now you're saying no, they did not receive them?

17 A That is correct.

18 THE COURT: Maybe I am confused. I don't think
19 that was his testimony. Maybe it's his testimony now.

20 Your previous question was, "While Scott Bell was
21 with Klein & Heuchan, do you know of anyone who received
22 CoStar information?" He said, "No." You impeached him with
23 an answer that said pretty much the same thing. But then
24 your next question was, "So, now you're saying that no one
25 received that information?" That's -- I don't think that's

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1 what he said up to this point.

2 MR. OPPENHEIM: I'm sorry. Let me see if I can
3 clarify this.

4 THE COURT: Okay.

5 BY MR. OPPENHEIM:

6 Q Mr. Klein, it's your testimony today that nobody at
7 Klein & Heuchan ever received any CoStar information from
8 Mr. Bell while he was at Klein & Heuchan; is that your
9 testimony?

10 A Other than the reports that we talked about in his
11 deposition, that is correct.

12 Q That's not what I am asking you, Mr. Klein. I'm asking
13 you if anyone at Klein & Heuchan received CoStar information
14 from Mr. Bell while he was at Klein & Heuchan?

15 A Judy Healey, Steve Klein, and that's it.

16 Q And yourself?

17 A No. I don't recall ever getting it, even though there
18 was an e-mail that he sent me. The first time I saw that
19 market report -- and it's in my deposition -- was at Scott
20 Bell's deposition.

21 Q I understand. So, your testimony today is you don't
22 know whether you received CoStar information, but you do
23 know that Mr. Steven Klein did and Miss Judy Healey did?

24 A Yes.

25 Q But in the interrogatory response when you were asked

1 that question -- you were asked to identify any individual
2 who had received CoStar information, and your answer didn't
3 include Mr. Steven Klein, and it didn't include Miss Judy
4 Healey. Your answer was "unknown"?

5 A Because at that time I didn't know -- that is correct.
6 At that time, I did not.

7 Q Did you ever ask Mr. Bell to provide you with
8 information from CoStar?

9 A No, I did not.

10 Q So, even though the e-mail we looked at said, "Here it
11 is" and you don't recall having received that, your
12 testimony is you don't recall having asked for it?

13 A No. My testimony is that I did not ask for it.

14 Q Mr. Klein, could you please look at Exhibit 54. It
15 should be Klein & Heuchan's response to CoStar's first
16 request for production of documents (changing overhead
17 exhibit).

18 A Okay.

19 Q The last page of this document contains a verification
20 by you; is that correct -- a verification by your counsel;
21 is that correct?

22 A Yes.

23 Q And you were asked as part of this litigation to
24 provide copies of all documents, data, or other tangible or
25 intangible computer records that were printed, copied from,

1 or otherwise derived from CoStar; is that correct?

2 A That's correct.

3 Q And your response was that there were none?

4 A That is correct.

5 Q You were also asked with Request Number 8 (changing
6 overhead exhibit) to produce all documents comprising,
7 reflecting, or relating to communications concerning
8 CoStar's allegation that Klein & Heuchan improperly used
9 CoStar's products and/or services, including all internal
10 Klein & Heuchan communications concerning those allegations.
11 And your response was, "None"?

12 A Correct.

13 Q Can you please turn to Exhibit 18?

14 A Did you say Exhibit 18?

15 Q Yes, Exhibit 18.

16 This was not a document that you produced during the
17 course of the litigation, was it?

18 A What was not a document?

19 Q Exhibit 18. It's up on the screen, if that makes it
20 easier. I'm sorry. I'm sorry. Let's go to 19 first. It's
21 up on the screen. This is not the document that you --

22 MR. GIBSON: This is 19.

23 BY MR. OPPENHEIM:

24 Q Excuse me, Exhibit 21. I think we got it right now.
25 My apologies.

1 It's up on the screen, if it makes it easier.

2 A It's that the one that was up before? Yeah, all right.

3 Q This wasn't an e-mail that was produced by Klein &
4 Heuchan in the litigation, was it?

5 A I don't know.

6 Q Well, in fact, Klein & Heuchan didn't produce any
7 e-mails regarding CoStar?

8 A Okay.

9 Q Isn't that correct?

10 A I don't believe we did, no.

11 Q Well, isn't that what we looked at in the request for
12 production response? That's what we saw?

13 A Is what we saw?

14 Q Well, just a moment ago we looked at your responses to
15 the request for production, and the response was "none," and
16 you --

17 A That is correct.

18 Q -- Klein & Heuchan produced no documents?

19 A I stand by that, none.

20 Q So, this e-mail that we've been looking at wasn't
21 produced by Klein & Heuchan, was it?

22 A No, it was not.

23 Q Exhibit 18 that we looked at yesterday -- let me start
24 with Exhibit 22, which we looked at yesterday, which was an
25 e-mail from Mr. Bell to Steven Klein, attaching the CoStar

1 office report for the year-end 2006. That was not a
2 document that was produced by Klein & Heuchan, was it?

3 A No, it was not.

4 Q Produced by Mr. Bell; correct?

5 A Yes.

6 Q And the back-and-forth response with respect to that
7 e-mail and the follow-up that appears in Exhibit 18 that we
8 looked at yesterday and again this morning, that also was
9 not produced by Klein & Heuchan, was it?

10 A That's correct.

11 Q It was produced by Mr. Bell?

12 A (Nods head.)

13 Q Correct?

14 A I believe.

15 Q And you never contacted your Internet service provider
16 to seek to obtain e-mails to respond to document requests,
17 did you?

18 A No, I did not.

19 MR. OPPENHEIM: Just one moment, if I may.

20 (Pause.)

21 BY MR. OPPENHEIM:

22 Q Mr. Klein, the -- in your declaratory-judgment action
23 against CoStar, Klein & Heuchan alleged that, quote, "At all
24 times material, Scott Bell was an authorized user of the
25 CoStar database." Is that correct?

1 A That's correct.

2 Q And your basis for that assertion was that Mr. Bell had
3 told you he had access to the CoStar database; is that
4 correct?

5 A That's correct.

6 Q And when -- and the basis for your belief that that
7 constituted authorization was that CoStar hadn't cut him
8 off; is that correct?

9 A For 13 months, that's correct.

10 Q And because CoStar is a technical company, they should
11 have cut him off?

12 A They should have if he wasn't authorized.

13 MR. OPPENHEIM: No further questions, Your Honor.

14 THE COURT: Take a 15-minute break.

15 (Recess at 10:16 a.m. until 10:30 a.m.)

16 MR. OPPENHEIM: One preliminary matter, if I may.

17 THE COURT: Okay.

18 MR. OPPENHEIM: I understand that the Defendants
19 intend to cross-examine Mr. Klein now and then recall him in
20 their case. As both a matter of expediency and a matter of
21 avoiding an opportunity to cover the same territory twice, I
22 believe it's appropriate for them to do their entire
23 examination of him now or defer and do it later in their
24 case; but to call the witness essentially twice seems to me
25 to be inappropriate. So, I would ask the Court for some

1 guidance on that.

2 THE COURT: I will let them call him twice. You
3 just can't ask the same questions or cover the same ground.

4 MR. GIBSON: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. GIBSON:

7 Q When was the first time that you discovered that anyone
8 at Klein & Heuchan had received materials from CoStar
9 through Bell?

10 A At Scott Bell's deposition.

11 Q Counsel asked you about your interrogatory responses,
12 and I believe it's Tab 54.

13 THE COURT: 53.

14 BY MR. GIBSON:

15 Q 53. When did you sign those interrogatory responses?

16 A Wrong glasses. The 2nd of March, 2009.

17 Q Mr. Bell's deposition was in August of 2009, was it
18 not?

19 A Yes, it was.

20 Q When was the first time that you had seen Exhibit 21?

21 A Yesterday.

22 Q Well, Exhibit 21 is the e-mail that was sent from
23 Mr. Bell to --

24 A Yes. That's the last time I remember seeing it.

25 Q Well, is it possible that you saw it at Mr. Bell's

1 deposition?

2 A Yes.

3 Q Would you have seen it at any time before then?

4 A I don't believe so.

5 Q Since your deposition, did you make an effort to search
6 your hard drive for any e-mails, any CoStar materials?

7 A Yes, I did.

8 Q Did you find anything?

9 A None.

10 Q Counsel asked you some questions about the dec. action
11 that was filed in Pinellas County. At that time that
12 lawsuit was filed, had you ever seen the license agreement
13 between CoStar and Coldwell Banker?

14 A No, I did not.

15 Q Had you ever seen the terms of service for use?

16 A No, I did not.

17 MR. GIBSON: That's all I have. Thank you.

18 THE COURT: Any redirect?

19 MR. OPPENHEIM: Yes, please, Your Honor.

20 *REDIRECT EXAMINATION*

21 BY MR. OPPENHEIM:

22 Q Mr. Klein, at the time that you filed the lawsuit
23 against CoStar, had you asked Mr. Steven Klein or Judy
24 Healey whether or not they had ever received any CoStar
25 materials?

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1 A No, I did not.

2 Q So, you filed the lawsuit making the claims that you
3 did without having asked those questions of the people
4 within your office?

5 A That's correct.

6 Q And at the time that you signed your interrogatories in
7 this case, had you asked them, Mr. Steven Klein, your son,
8 or Miss Judy Healey whether or not they had ever seen or
9 received any CoStar materials?

10 A I don't recall that I did.

11 Q So, you executed the interrogatories without having
12 that due diligence; is that correct?

13 A That's correct.

14 Q And prior to responding to the request for production,
15 did you ever search your hard drive for documents related to
16 CoStar?

17 A No, I don't believe I did.

18 Q And yet you responded to the -- the request for
19 production indicating that you had no materials?

20 A That is correct.

21 MR. OPPENHEIM: No further questions at this time.

22 THE COURT: You may step down.

23 Call your next witness, please.

24 MR. OPPENHEIM: We would call Mr. Steven Williams.

25 (The witness was duly sworn or affirmed and

1 responded as follows:)

2 THE WITNESS: I do.

3 THE CLERK: Sir, would you please state your name
4 and spell your first and last name for the record?

5 THE WITNESS: Steven Williams. S-T-E-V-E-N
6 W-I-L-L-I-A-M-S.

7 THE CLERK: Thank you.

8 **STEVEN WILLIAMS,**

9 the witness, being sworn or affirmed, testified as follows:

10 *DIRECT EXAMINATION*

11 BY MR. OPPENHEIM:

12 Q Good morning, Mr. Williams.

13 A Good morning, Mr. Oppenheim.

14 Q What is it that you do for a living?

15 A I'm the assistant director of fraud and theft for
16 CoStar Group.

17 Q And how long have you worked for CoStar?

18 A I've worked for CoStar just over ten years.

19 Q And what is your education and background?

20 A I graduated from Purdue University with a bachelor's
21 degree in political science.

22 Q What roles have you held at CoStar?

23 A I started out in the research group and worked in the
24 group for approximately six and a half months. Then I was
25 promoted to the customer service group. Worked there for

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1 approximately three years and again was promoted into the
2 Legal Department after that time, and I worked in the Legal
3 Department ever since, advancing in roles over the last
4 seven years.

5 Q And what is your current title?

6 A I am the assistant director of fraud and theft for
7 CoStar Group.

8 Q Broadly, at a high level, what are your job
9 responsibilities as the assistant director of fraud and
10 theft?

11 A I am responsible for registering all CoStar's
12 copyrights with the Copyright Office, including its database
13 registrations, its photograph -- its photographs and
14 imagery, and I'm also responsible for investigating abuse by
15 CoStar's customers and non-customers of intellectual
16 property.

17 Q Does CoStar generally register copyrights in the
18 photographs it owns?

19 A It does.

20 Q Why is that?

21 A To protect CoStar's intellectual property.

22 Q Would you please turn to Exhibit 45, which should be in
23 the binders in front of you. I believe this exhibit's
24 already in evidence.

25 A Okay.

1 Q You'll see that this exhibit has many subparts. Is
2 that correct?

3 A That's correct.

4 Q Are you familiar with the documents contained in here?

5 A Yes, I am.

6 Q And the -- what are they?

7 A Those documents are the registration certificates for
8 CoStar's photography. The copyright allows us to file
9 copyrights, and we take advantage of that.

10 Q Does CoStar currently own the copyrights that are
11 contained in Exhibit 45?

12 A Yes, it does.

13 Q And has CoStar owned them since they their
14 registration?

15 A Yes, it does -- or yes, they have. Excuse me.

16 Q Does CoStar typically register multiple photographs on
17 a single registration?

18 A Yes.

19 Q And why is that?

20 A CoStar, as a matter of expediency for both the
21 Copyright Office and CoStar group, will register all
22 photographs at one time within a given period of time. The
23 Copyright Office allows us to register individual
24 photographs in a group as if they were produced as one
25 group.

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1 Q As though they were a single -- each work was a single
2 work?

3 A Correct.

4 Q Are you aware of the market reports at issue in this
5 case?

6 A Yes, I am.

7 Q Don't feel obliged to sit up into the mike every time.
8 I think everybody can hear you.

9 A Okay.

10 Q Does CoStar register its rights in those market
11 reports?

12 A Yes, it does.

13 Q And why does CoStar do that?

14 A To protect CoStar's intellectual property.

15 Q And what does CoStar register to cover its copyrights
16 in those market reports?

17 A CoStar registers quarterly copyright registrations with
18 the copyright office.

19 Q And for how long has CoStar been doing this?

20 A For as long as I've been with the company and, I think,
21 longer.

22 Q Could you please turn to Exhibit 46.

23 A (Complies.)

24 Q This should also be a multi-part exhibit.

25 A Okay.

1 Q Are you familiar with these copyright registrations?

2 A Yes, I am.

3 Q Does CoStar currently own the rights to the copyrights
4 in these registrations?

5 A Yes, it does.

6 Q And has CoStar owned those rights since their
7 registration?

8 A Yes, CoStar has.

9 Q Does CoStar's copyright registrations cover --
10 copyright registrations in its database cover the market
11 reports at issue in this case?

12 A They do, yes.

13 THE COURT: Weren't these stipulated facts?

14 MR. OPPENHEIM: Your Honor, the -- the fact that
15 CoStar has owned them perpetually I'm not sure was clear in
16 the stipulation, so I just wanted to clear up the record on
17 that. The registrations are in, and I haven't moved them in
18 and gone through the background on those.

19 MR. GIBSON: We stipulated that they own it, that
20 they registered them properly and continue to own them.

21 MR. OPPENHEIM: Well, we've got belts and
22 suspenders. I'm done with this.

23 THE COURT: You through with this witness?

24 MR. OPPENHEIM: No. I have some other questions.

25 BY MR. OPPENHEIM:

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1 Q Mr. Williams, are you familiar with how a user is given
2 access to the CoStar system?

3 A Yes.

4 Q And are you familiar with the limitations imposed on
5 the user's access?

6 A Yes, I am.

7 Q When an individual's given access, are they somehow
8 told what the limits of their access are?

9 A Absolutely.

10 Q And how are they told?

11 A They receive a -- an e-mail initially upon becoming a
12 user that explains that the user and the password set forth
13 is only for their personal use, not to be used by anybody
14 else, including others at --

15 THE COURT: Is this going to be any different than
16 what I have already seen?

17 MR. OPPENHEIM: Yes, Your Honor. We'll hit a few
18 different topics.

19 THE COURT: You're already shown the e-mail;
20 right?

21 MR. OPPENHEIM: Right, and I'm not going to show
22 it again.

23 BY MR. OPPENHEIM:

24 Q Beyond the e-mail providing access, are there other
25 ways, Mr. Williams, that CoStar communicates to users the

1 limitations of access?

2 A Sure. Through a license agreement, through online
3 terms of use, and those are all available -- the online
4 terms of use are available at CoStar's Website.

5 Q So, when does a -- when does a user see those terms of
6 use?

7 A Upon initial login into the CoStar system, they receive
8 a page that they cannot bypass until the user accepts or
9 does not accept the online terms of use.

10 Q Could you please turn to Exhibit 35.

11 Is this a copy of CoStar's online terms of use as they
12 existed in 2006, 2007, and 2008?

13 A Yes, it is.

14 Q Was the document created by CoStar?

15 A Yes, it was.

16 Q And maintained by CoStar in the ordinary course of its
17 business?

18 A Yes, this document is.

19 MR. OPPENHEIM: We'd move its admission.

20 MR. GIBSON: No objection.

21 THE COURT: Be admitted.

22 (Defense Exhibit 35 was received in evidence.)

23 BY MR. OPPENHEIM:

24 Q Mr. Williams, looking at this document, the third page
25 of it, does it describe what prohibited uses are of the

1 CoStar system?

2 A Yes, it does.

3 Q And could you please read the first prohibited use
4 under -- the first prohibited use in that page?

5 THE COURT: Well, I can't believe you flew
6 Mr. Williams down here to read this document. Everything
7 he's testified to so far I have already heard. Why don't
8 you tell me what facts you think you're going to get in
9 through this witness, and we'll see if the Defense is going
10 to stipulate to it.

11 MR. OPPENHEIM: We were going to go through the
12 terms of use, which we did not have previously admitted.

13 THE COURT: Which would apply to Mr. Bell.

14 MR. OPPENHEIM: That is now in evidence,
15 Your Honor. We're going to go through the fact that
16 Mr. Bell had agreed to the terms of use; that he agreed to
17 them at least every 30 days as he used the system; that the
18 terms of use were not only available for Mr. Bell, but they
19 were on the CoStar Website.

20 THE COURT: Okay. All that's been in evidence so
21 far.

22 MR. OPPENHEIM: Available to non-users to access
23 if they wanted to; that on the -- when using the CoStar
24 service, not only will a user's name and company name
25 appear, but also the user's company logo perpetually during

1 the course of their use.

2 THE COURT: Also in evidence.

3 MR. OPPENHEIM: I'm not sure that the company logo
4 piece was, Your Honor, just --

5 THE COURT: Coldwell Banker?

6 MR. OPPENHEIM: Coldwell Banker.

7 THE COURT: I mean, you've put that in several
8 times.

9 MR. OPPENHEIM: The fact that Mr. Bell could not
10 have changed the -- could not have changed that, that it had
11 to have said "Coldwell Banker" during the course of his use,
12 and then to discuss the records that we have, which are not
13 in evidence of Mr. Bell's actual usage during the time that
14 he was at Klein & Heuchan, and the educational materials on
15 the CoStar Website regarding unauthorized use.

16 THE COURT: All right. Everything you've
17 mentioned so far except the actual usage from your computer
18 records of Mr. Bell's access is in evidence.

19 But in an abundance of caution, does the Defendant
20 stipulate that all that is in evidence?

21 MR. GIBSON: Yes, Your Honor, up until the point
22 of their records and Mr. Bell's access.

23 THE COURT: Okay. So, let's just get to your
24 records and get them in evidence, although the Defendant may
25 have stipulated to that as well and saved you an airline

1 fare.

2 MR. OPPENHEIM: Well, if we want to also move
3 forward and avoid some testimony, you can put it in rather
4 than have Mr. Williams go through what's on the public part
5 of the site, the CoStar site, in terms of authorized uses.
6 We can just admit it as an exhibit.

7 MR. GIBSON: What tab is that?

8 MR. OPPENHEIM: It's not an exhibit. It's
9 information that he'll testify to, but I am happy to put it
10 in documents, if you want.

11 MR. GIBSON: May I see it?

12 MR. OPPENHEIM: Absolutely.

13 MR. GIBSON: Yeah. We'll stipulate this is
14 available on the public part of costar.com.

15 MR. OPPENHEIM: We'll mark it as Exhibit 70.

16 THE COURT: All right. Be admitted.

17 (Defense Exhibit 70 was received in evidence.)

18 BY MR. OPPENHEIM:

19 Q Mr. Williams, at some point in time, did CoStar become
20 aware of Klein & Heuchan's IP address?

21 A Yes, it did.

22 Q And how is it that CoStar became aware of Klein &
23 Heuchan's IP address?

24 A Klein & Heuchan, specifically Mark Klein, had access to
25 a trial subscription to CoStar, and we captured his IP

1 address at that time.

2 Q Could you please turn to Exhibit 31, or, if you want,
3 you can simply look on the screen.

4 A Thank you.

5 Q (Changes overhead exhibit.) Is this a copy of CoStar's
6 record with respect to that information?

7 A Yes, it is.

8 Q And is this a document that CoStar maintains in the
9 regular course of its business?

10 A Yes, it does.

11 MR. OPPENHEIM: We'd move the admission of Exhibit
12 31.

13 MR. GIBSON: No objection.

14 THE COURT: Be admitted.

15 (Defense Exhibit 31 was received in evidence.)

16 BY MR. OPPENHEIM:

17 Q Mr. Williams, what does this document show in terms of
18 when CoStar became aware of Klein & Heuchan's IP address?

19 A This document shows that CoStar -- as you can see in
20 the middle of the page, CoStar became aware of Mark Klein's
21 logins via the trial subscription on November 2nd, 2007.
22 It's actually on the left side and in the middle of the
23 page.

24 Q Mr. Williams, did CoStar maintain a record of usage of
25 service coming from Klein & Heuchan -- Klein & Heuchan's IP

1 address?

2 A It did.

3 Q Could you please turn to Exhibit 30?

4 A Certainly (complying).

5 Q (Changes overhead exhibit.) Mr. Williams, you
6 recognize this document?

7 A I do.

8 Q Could you describe what this document is, please?

9 A Sure. The document shows a record of Mr. Bell's logins
10 during the period of time when he was employed at Klein &
11 Heuchan.

12 Q Is this a log file that is collected and maintained by
13 CoStar?

14 A It is.

15 MR. OPPENHEIM: We would move into evidence
16 Exhibit 30.

17 MR. GIBSON: No objection.

18 THE COURT: Be admitted.

19 (Defense Exhibit 30 was received in evidence.)

20 BY MR. OPPENHEIM:

21 Q Mr. Williams, while Mr. Bell was working for Klein &
22 Heuchan, how many times did he log in to CoStar?

23 A Approximately 132 times.

24 Q And how many -- roughly how many CoStar pages did
25 Mr. Bell download to his computer during that period of

1 time?

2 A Approximately 13,000 pages.

3 Q Was CoStar able to determine what photographs, if any,
4 Mr. Bell may have downloaded while he was logged into the --
5 logged into the CoStar system?

6 A Yes. CoStar was able to determine some of the
7 photographs that Mr. Bell downloaded while he was logged in.

8 Q Could you please turn to Exhibit 37.

9 A Sure (complying).

10 Q (Changes overhead exhibit.) Do you recognize this
11 document?

12 A I do.

13 Q What is it?

14 A It's a record of the pages that Mr. Bell downloaded to
15 his computer while he was logged into CoStar during the
16 period of time he was with Klein & Heuchan.

17 Q And is this a log file that CoStar maintains in the
18 regular course of its business?

19 A Yes, it does.

20 MR. OPPENHEIM: We move this into evidence,
21 Exhibit 37.

22 MR. GIBSON: No objection.

23 THE COURT: Be admitted.

24 (Defense Exhibit 37 was received in evidence.)

25 BY MR. OPPENHEIM:

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Federal Official Court Reporter, U.S. District Court
Middle District of Florida, Tampa Division

1 Q Could you just quickly explain the format of this
2 document?

3 A I'm not sure I understand the question.

4 Q Well, this is a spreadsheet with multiple columns; is
5 that correct?

6 A Oh, that's correct, yes.

7 Q And the columns here, you actually look at three
8 pages -- the first three pages actually go side by side, not
9 one under the other; is that right?

10 A That's correct.

11 Q Then the next three pages would be the subsequent rows
12 in the spreadsheet?

13 A Correct.

14 Q I don't want to go through this document in detail, but
15 I do want to understand the information that CoStar
16 collected. Starting in the middle of the page (pointing),
17 it says "user I.D." What is that a reference to?

18 A The user I.D. is the number associated with each of our
19 users. In this instance, 3313614 was assigned to Scott
20 Bell.

21 Q And the date and time stamp is an indication of what?

22 A The date and time stamp is when Mr. Bell logged into
23 the system.

24 Q Okay. And then to the left of that there's a column
25 that's labeled "property I.D."

1 A That's correct.

2 Q And what is the property I.D. a reference to?

3 A The property I.D. is a number that we assigned to each
4 of our property records within our database and the
5 photographs associated with them.

6 Q So, if I were to look at the third page of this
7 document, there appear to be addresses. Are those addresses
8 correlations to the property I.D.s?

9 A Yes, they are.

10 Q So, if I'm reading this properly, the first entry here
11 (pointing) shows on January 22nd, 2007, Mr. Bell logged in
12 and he looked at a property I.D. by the number of 5316685,
13 and that is the address of 5424 Provost Drive in Holiday,
14 Florida; is that right?

15 A Correct.

16 Q And there's other information on the second page
17 related to each property that shows, for instance, in this
18 instance that that's a general retail establishment for auto
19 repair; is that correct?

20 A That's correct.

21 Q Is there a photograph contained on each of the
22 properties that is referenced in this log file?

23 A Yes, there is.

24 Q And did CoStar review the photographs that Mr. Bell
25 downloaded to his computer?

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1 A Yes, CoStar did.

2 Q Is CoStar asserting claims based on some of those
3 photos?

4 A Yes, CoStar is.

5 Q How many of them?

6 A CoStar's asserting claims on 41.

7 Q Could CoStar assert claims on additional photographs?

8 A It could.

9 Q And how could they do that?

10 A By verifying the ownership of photographs of CoStar and
11 then associating with Mr. Bell's logins while he was at
12 Klein & Heuchan.

13 Q Could you please turn to Exhibit 36.

14 A (Complies.)

15 Q This is another part of those multi-part exhibits.

16 A Okay.

17 Q Just pull out "C."

18 I don't want to belabor this, Mr. Williams, but what do
19 each of the parts of this exhibit represent?

20 A The first page of the exhibit lists the address. It's
21 a piece of paper with address where it's located in the
22 central Florida area. The second page of the document in
23 "C" would be a photograph of the building.

24 Q (Changes overhead exhibit.)

25 A And the third page would be a copy from the Enterprise

1 system showing that the CoStar photo was registered with a
2 copyright and owned by CoStar.

3 Q And the fourth page?

4 A The fourth page, I'm sorry, is the page with the CoStar
5 property and user system.

6 Q And are all of the photographs contained in Exhibit 36
7 the photographs that CoStar's asserting claims on in this
8 case?

9 A Yes, they are.

10 Q And all of them can be correlated back to the log files
11 we just went through?

12 A Yes, that's correct, in Exhibit 37.

13 Q Or the market reports that are at issue in the case?

14 A Yes.

15 MR. OPPENHEIM: I may be able to resolve the next
16 piece by stipulation, if opposing counsel and the Court want
17 to. Exhibits 1 and 2 are summaries that pull together the
18 various log files, copyright certificates, and photographs
19 that we've just gone through. I can have Mr. Williams
20 explain how we did that, and --

21 MR. GIBSON: I completely understand that. I have
22 no objection to 1 and 2 coming in evidence.

23 THE COURT: All right. They will be admitted.

24 (Defense Exhibits 1 and 2 were received in
25 evidence.)

1 MR. OPPENHEIM: Would it benefit the Court to walk
2 through it, or should we not put the exhibits up?

3 THE COURT: I prefer you not.

4 MR. OPPENHEIM: Very well.

5 BY MR. OPPENHEIM:

6 Q Mr. Williams, what did you do once you saw someone at
7 Klein & Heuchan accessing the CoStar service?

8 A We undertook an investigation. I manage a group of
9 people at CoStar that are responsible for investigating
10 misuse of the CoStar system, what we believe is misuse of
11 the CoStar system, and we undertook an investigation after
12 we saw an IP address assigned with Mark Klein come into
13 CoStar after the trial had ended.

14 Q When roughly did that happen?

15 A That happened in approximately November 2006 -
16 January 2007, in that range.

17 Q When did you undertake your investigation?

18 A Oh, I'm sorry. The investigation began in March 2008.

19 Q And did you contact Mr. Klein as part of that
20 investigation?

21 A Yes, I did.

22 Q When did you do that?

23 A I contacted Mr. Klein in April of 2008.

24 Q And you had a telephone call with him?

25 A Yes, I did.

1 Q Can you describe who was on that telephone call?

2 A To the best of my knowledge, it was Mr. Klein.

3 However, there may have been others. It was a speakerphone,
4 from what I remember, and the only one that spoke was
5 Mr. Klein.

6 Q And yourself?

7 A And me.

8 Q And what happened on that phone call?

9 A I explained to Mr. Klein why I was contacting him. He
10 earlier had received a letter from me explaining CoStar's
11 position as to what had occurred -- received a letter from
12 CoStar's Legal Department.

13 Q Well, let me back up. So, CoStar sent a letter to
14 Mr. Klein?

15 A Correct.

16 Q When did CoStar do that?

17 A We sent a letter to Mr. Klein after a series of
18 non-returned phone calls in April of 2008.

19 Q Okay. And so, you then -- subsequent to sending that
20 letter, you had a conversation with Mr. Klein?

21 A That's correct. We attempted to contact Mr. Klein
22 throughout the end of March when we became aware of the
23 situation. He did not return our phone calls. In the
24 beginning of April, we made the determination that we needed
25 to send a letter to receive some kind of a response.

1 Q Okay. And after you sent the letter, you had a
2 telephone call between and you Mr. Klein. I'd like you to
3 describe what happened on that telephone call.

4 A Sure. I explained to Mr. Klein why the letter was
5 sent. He had some questions about why the letter was sent.
6 The context of the conversation -- it seemed to me that
7 Mr. Klein was shocked about what had occurred. He said he
8 didn't know why Mr. Bell would have made logins to CoStar
9 and thought that if Mr. Bell had made logins to CoStar, that
10 he did it on his own and not as part of something that the
11 company directed but then suggested that contact -- we have
12 a second phone call the next day with Mr. Bell on the phone.

13 Q So, Mr. Bell wasn't on this first phone call?

14 A To the best of my knowledge, no.

15 Q And Mr. Klein said what about Mr. Bell using CoStar?

16 A He said that if he did something, that he did it on his
17 own volition and that Mr. Klein had not directed him to do
18 it.

19 Q Did Mr. Klein acknowledge that he knew that Mr. Bell
20 had been accessing CoStar?

21 A No, he did not.

22 Q And did you then subsequently have another call with
23 Mr. Klein and Mr. Bell on the phone?

24 A I did.

25 Q And on that call, was there an effort to settle the

1 controversy?

2 A Yeah -- excuse me, yes. From what I can remember from
3 the conversation, it was again on speakerphone. Mr. Bell
4 was in the room. Mr. Klein was in the room. I don't know
5 if anybody -- Mr. Mark Klein was in the room. I don't know
6 if anybody else was on the phone.

7 We started the conversation off by listening to
8 Mr. Klein bring Mr. Bell up to speed as to the conversation
9 the prior day, and then Mr. Bell was nearly silent from then
10 on. He said a few words at the beginning of the phone call
11 and did not say anything else.

12 Mr. Klein drove the phone call, for the most part,
13 wanting to know what CoStar's position was, what CoStar
14 intended by sending the letter, and eventually what CoStar
15 was looking for.

16 Q I'm not interested in asking about any settlement
17 discussions.

18 A Okay.

19 Q What did you do -- I assume you didn't settle the
20 controversy on the call?

21 A We did not.

22 Q Now, what did you do after that telephone call?

23 A I passed -- went on to the conversation with CoStar's
24 internal counsel.

25 Q And what did you do with Mr. Bell's access?

1 A I discontinued his access immediately.

2 Q In the course of analyzing the improper use of CoStar's
3 service from Klein & Heuchan, did you ever have occasion to
4 calculate what CoStar's lost license fees were from that
5 access?

6 A Yes, I did.

7 Q And what would -- what did your calculations show that
8 Klein & Heuchan -- initially have shown Klein & Heuchan
9 would have paid in license fees for that improper usage?

10 A The initial review showed that there were 17 beneficial
11 users. I then took a look at CoStar's pricing chart for
12 what 17 people would pay for the dataset in question. I
13 priced it out at 4111 per month, and I submitted that along
14 with a letter that was sent out by the Legal Department to
15 Mr. Klein.

16 Q By "4111," you mean \$4,111?

17 A Correct.

18 Q That's each month?

19 A Yes.

20 Q And that's based on 17 users over what period of time,
21 over how many months?

22 A It's based on 17 users for approximately 17 months.

23 Q And for how many -- how did you determine how many
24 services to charge for, to include in the -- in the license
25 calculation?

1 A I took a look at what Mr. Bell had access to through
2 Coldwell Banker Commercial NRT and applied that same dataset
3 to what Mr. Klein and Klein & Heuchan would have paid for
4 that same dataset for their company size.

5 Q But you didn't include all of CoStar's services, only
6 those that -- that Mr. Bell had accessed?

7 A That's correct.

8 Q Did you ever -- do you believe at this time that that
9 calculation of damages is the proper calculation?

10 MR. GIBSON: Objection, Your Honor.

11 THE COURT: Sustained unless you have a foundation
12 for the question other than not being the proper charge.

13 MR. OPPENHEIM: Let me rephrase the question.
14 Your point is well-taken.

15 BY MR. OPPENHEIM:

16 Q Do you have reason to believe that that calculation is
17 not the proper calculation of what the license fees would
18 have been for Klein & Heuchan?

19 A Yes. Upon further review, that number seemed to be
20 incorrect. The \$4,111 I initially priced for Mr. Klein's
21 company was not the correct number. We did a follow-up
22 investigation, and we learned that there were 24 individuals
23 that we would consider as beneficial users at Mr. Klein's
24 company.

25 Q And if the calculation had been done based on 24

1 beneficial users, what would the monthly license fees have
2 been?

3 A The monthly license fees would have been \$5,381 per
4 month for the dataset in question.

5 MR. OPPENHEIM: One moment, Your Honor. I may be
6 done.

7 (Pause.) A few follow-up questions before we're
8 done.

9 BY MR. OPPENHEIM:

10 Q Mr. Williams, why is it that you began your
11 investigation into the improper access of CoStar by someone
12 at Klein & Heuchan in March of 2008 instead of November 2007
13 when you had obtained Mr. Klein's IP address?

14 A March 2008 was the first indication that we had that
15 anything was occurring. We had not tracked Mr. Klein's IP
16 address actively; and when we saw it had been coming in, we
17 initially -- we immediately took action.

18 You have to remember that we have 90,000 client users,
19 and we can't routinely look at IP addresses to see if
20 they're coming in for non-subscribers for every single one
21 of them.

22 Q I want to look at that log file again, if we can --
23 we'll come back to the log file in a minute. Let me clarify
24 one other issue first. You mentioned a moment ago -- you
25 were describing the telephone conversation that you had with

1 Mr. Klein without Mr. Bell on the line, and you used the
2 word "shocked." Could you describe that, why Mr. Klein
3 indicated he was shocked?

4 THE COURT: Sustained.

5 MR. GIBSON: Thank you.

6 THE COURT: There's no evidence that he indicated
7 he was shocked. He said he assumed -- based on his
8 reaction, that he seemed to be shocked. He didn't ask him
9 why. He drew that conclusion.

10 MR. OPPENHEIM: Let me clarify this testimony
11 then.

12 BY MR. OPPENHEIM:

13 Q Could you describe what Mr. Klein said on that
14 telephone call?

15 A Yes. To the best of my knowledge, Mr. Klein indicated
16 and said that he was shocked. I mean, those were his words,
17 to the best of my knowledge.

18 Q And why did he say he was shocked?

19 MR. GIBSON: Objection, Your Honor.

20 THE COURT: Sustained.

21 MR. OPPENHEIM: What's the objection? He's
22 testifying as to what he heard.

23 MR. GIBSON: Speculation.

24 THE COURT: The question wasn't clear that you
25 were seeking what he said. Your question was why was he

1 shocked. Is your question why did he say he was shocked?

2 MR. OPPENHEIM: Yes.

3 THE COURT: You may answer that question.

4 MR. GIBSON: Thank you.

5 THE WITNESS: Mr. Klein said he was shocked
6 because he wasn't aware of Mr. Bell's logins into the
7 system. That's what he indicated in the first phone call.

8 BY MR. OPPENHEIM:

9 Q So, Mr. Klein indicated on the telephone call that he
10 was not aware Mr. Bell was accessing the CoStar system?

11 A That's correct, in the first phone call.

12 Q In the first phone call. Going back to Exhibit 30 for
13 a moment, Mr. Williams (changing overhead exhibit).

14 A Okay.

15 Q Did you determine based on this exhibit which logins
16 came from Klein & Heuchan and it -- as compared to coming
17 from Mr. Bell's home?

18 A Yes, I did.

19 Q Can you describe that for us, please?

20 A Sure. As you can see from the document, there are
21 multiple IP addresses or Internet addresses.

22 The one identified as 71.43 on this page came from
23 Mr. Klein's company. You can tell it's a business by
24 looking at the second column over next to the IP address
25 that's identified as "IP host." Then it indicates an IP

1 address, and then it says ".southeast" or "southeast.biz."

2 The other IP address on the page, 96.228.134 --

3 Q I am sorry. The next address?

4 A It's in the middle of the page.

5 Q Here (pointing)?

6 A Under "IP address"; correct. In the middle of the
7 page. It begins with "96."

8 Q Oh, this one. I am sorry.

9 A That appears to be a residential login.

10 Q Okay. And then turning the page on this at some point
11 in time, the 71.43.134 number changes, and then there's a
12 new number, 71.43-- let me do that again.

13 THE COURT REPORTER: Please slow down.

14 MR. OPPENHEIM: I'm sorry. Let me do that again.

15 BY MR. OPPENHEIM:

16 Q On the next page, it appears that the IP address
17 changes to 71.43.112.217. Do you see that?

18 A Yes, I do.

19 Q And does that indicate that Mr. Klein -- Mr. Bell was
20 no longer logging in from Klein & Heuchan?

21 MR. GIBSON: Objection, leading.

22 THE COURT: I'm sorry.

23 MR. GIBSON: Leading.

24 THE COURT: Sustained.

25 BY MR. OPPENHEIM:

1 Q Mr. Williams, what -- what -- what can you determine
2 based on that IP address?

3 A The IP address, while it changed, remained within the
4 same Internet service provider. From time to time, Internet
5 service providers will provide different IP addresses. They
6 reassign numbers. Some are static; some are dynamic --
7 dynamic changes over time. So, this shows that while the
8 number changed, it was still being accessed from Mr. Klein's
9 company.

10 Q Is this --

11 A I'm sorry.

12 Q And this is still a business IP address, not a
13 residential address?

14 A That's correct.

15 MR. OPPENHEIM: No further questions.

16 THE COURT: Cross?

17 *CROSS-EXAMINATION*

18 BY MR. GIBSON:

19 Q Good morning.

20 A Good morning.

21 Q We have never met, have we?

22 A No.

23 Q What's an IP address?

24 A Internet number associated with an Internet service
25 provider. It's a number where people connect to the

1 Internet using their computers.

2 Q Someone owns a IP address; is that correct?

3 A They lease an IP address from the Internet service
4 provider.

5 Q And some people own IP addresses; is that correct?

6 A That's correct.

7 Q Who owns 71.43.67.134?

8 MR. OPPENHEIM: Objection. No foundation.

9 THE COURT: Answer, if you know.

10 Overruled.

11 THE WITNESS: I don't know without -- for --

12 BY MR. GIBSON:

13 Q Is it possible for someone to investigate who owns an
14 IP address?

15 A It is.

16 Q How would you do that?

17 A You would use services such as www.aaron.net, which
18 are service providers that let you know who owns Internet
19 service numbers.

20 Q It's a simple Web search, isn't it?

21 A It is.

22 Q So, did you undertake to determine who owns
23 71.43.67.134?

24 A I believe we did, yes.

25 Q Who owns it?

1 A Again, I don't have information in front of me.

2 Q You don't know as you sit here today?

3 A No.

4 Q So, can I assume from that that you don't know who
5 owned any of the IP addresses that are listed as incoming IP
6 addresses from which Mr. Bell accessed the CoStar system?

7 A Unless it's identified in the IP host on the page as
8 the ownership -- as to the ownership, no, I do not.

9 Q Let's take a look (changing overhead exhibit).

10 A No. The page in question does not identify the
11 ownership of the IP addresses.

12 Q You can't say that any address other than 71.43.67.134
13 was traffic that came in from Klein & Heuchan?

14 A Again, the number changes over time, so, I -- we would
15 look at the number as it's reassigned by the Internet
16 service provider and say that it is owned or leased by that
17 same company. It's still provided by the service provider,
18 and service providers do change IP addresses over time.

19 Q I understand that; but as you sit here today, you can't
20 tell us what individual service provider owns any of these
21 IP addresses that are listed on that form; correct?

22 A Not with the information in front of me, no. I could
23 if I had other information in front of me.

24 Q Based on Exhibit 30 --

25 A Exhibit 30, okay.

1 Q -- when is the first time that 71.43.67.134, that IP
2 address -- Mr. Bell uses that IP address?

3 A I am sorry, Mr. Gibson, could you repeat the question?

4 Q When is first time that Mr. Bell uses, according to
5 your records of Mr. Bell's online activity -- utilizes the
6 CoStar's services through the .134 IP address?

7 A The .134 IP address -- the IP address ending in "134"
8 seems to come in at the earliest occurrence November 13th,
9 2007.

10 Q Then subsequent to that, various other IP addresses are
11 used through the March -- I'm sorry, April 16th, 2008, IP
12 address; correct?

13 A There are occasional logins over various IP addresses
14 over that period of time.

15 Q Exhibit 2 is a listing of the four CoStar office
16 reports that CoStar is alleging Mr. Bell improperly
17 accessed; correct?

18 A That's correct.

19 Q When did Mr. Bell access these (changing overhead
20 exhibit)?

21 A There's no date on the page. I mean --

22 Q From where did Mr. Bell access these?

23 A From where did Mr. Bell access these? He accessed from
24 them from an IP address associated with Mr. Klein's company.

25 Q When?

1 A During the period of time of November 2006 through
2 April 2008.

3 Q How is it you can say he accessed it from an IP address
4 associated with Mr. Klein's company?

5 A Mr. Bell indicated that he did.

6 Q Mr. Bell specifically told you that he downloaded these
7 four specific office reports from Mr. Klein's company?

8 A I believe so.

9 Q When? During your telephone conversation?

10 A No. During the period of time November 2006 through
11 April 2008.

12 Q When did Mr. Bell tell you this?

13 A Mr. Bell did not specifically tell me.

14 Q Are you referring to testimony Mr. Bell has provided?

15 A Yes, I am.

16 Q This is the first page (changing overhead exhibit) of
17 Exhibit 1; correct?

18 A I don't have it in front of me, but let me just verify
19 it.

20 That's correct. That's page 1.

21 Q The first six entries are photographs contained within
22 the market reports -- those four market reports; correct?

23 A That's correct.

24 Q And then after those listings are the 41 photographs
25 that CoStar's alleging Mr. Bell infringed; correct?

1 A The 41 that we know of.

2 Q The forty-one that you testified today are part of the
3 claim why we're here today?

4 A Correct.

5 Q And as part -- are you able to tell me from where
6 Mr. Bell downloaded these particular photographs?

7 A Mr. Bell downloaded these photographs during the period
8 of November 2006 through April 2008 while he was at Klein &
9 Heuchan's office.

10 Q How can you tell that? What document will tell me that
11 he downloaded these photographs from the Klein & Heuchan
12 office?

13 A Exhibit 37.

14 Q Where on Exhibit 37 (changing overhead exhibit) will it
15 show that those -- all 41 photographs were downloaded from
16 the Klein & Heuchan office?

17 A If you match up the date and the time from the last
18 column on Exhibit 1, page 1, with the date and date stamp
19 containing Exhibit 37, you'll be able to determine where the
20 pictures were downloaded.

21 Q You've done this?

22 A Yes.

23 Q But correct me, though: All the IP addresses listed on
24 Exhibit 30, you assumed that every one of those IP addresses
25 are associated with Klein & Heuchan?

1 MR. OPPENHEIM: Objection, misstates his
2 testimony.

3 THE COURT: Overruled.

4 THE WITNESS: I believe that I said that the IP
5 addresses beginning with "71" were the ones owned by
6 Mr. Klein's company.

7 BY MR. GIBSON:

8 Q But not all the ones listed here start with "71";
9 correct?

10 A That's correct. There are other IP addresses on that
11 page.

12 Q And you don't know for a fact that every IP address
13 that begins with "71" is associated with Klein & Heuchan?

14 A Again, Internet service providers will change IP
15 addresses over time. It's not a static IP address in all
16 circumstances. The tell-tale sign is the ISP remained and
17 ".biz" began during this period of time.

18 Q Are you familiar with the company called RoadRunner"?

19 A Yes, I am.

20 Q What's RoadRunner?

21 A It's an Internet service provider.

22 Q It's a very large Internet service provider in the
23 Tampa Bay area?

24 A Well, I don't know that.

25 Q Okay. Do you know if it provides Internet service to a

1 large number of businesses in the Tampa Bay area?

2 A I'm not from Tampa, so I --

3 Q You don't know? Correct, you don't know?

4 A I don't know.

5 Q Okay. How did you quantify the number of beneficial
6 users, first at 17 and then at 24?

7 A We looked into who's doing relevant work within an
8 organization, you know, based on what they're doing for the
9 company, and we calculate the price based on what they're
10 doing. If they are performing brokerage work, then we
11 consider them to be relevant.

12 Q I'm just curious how you did that. Did you look up the
13 licenses in the state of Florida for who's associated with
14 an address, or how did you determine the number 17?

15 A That's initially one of the steps that we would have
16 taken. We also would have undertaken other steps to see who
17 was employed by Mr. Klein's company and searching the
18 Internet, among other things, trying to understand who
19 everybody that works for Mr. Klein's company is.

20 We would look at the Florida licensing site, as well as
21 other regulatory sites, if they're available, to determine
22 what people are doing within the client offices. In this
23 case it's not a client office.

24 Q Did you maintain a file for your investigation? Did
25 you keep notes?

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Middle District of Florida, Tampa Division

1 A I believe I did, yes.

2 Q You did?

3 A Yes.

4 MR. GIBSON: That's all I have, Your Honor.

5 THE COURT: Any redirect?

6 MR. OPPENHEIM: Just a few questions, Your Honor.

7 *REDIRECT EXAMINATION*

8 BY MR. OPPENHEIM:

9 Q Mr. Williams, when you look up an IP address on a
10 service such as Aaron, would it tell you the individual
11 company that had leased the IP address, or would it provide
12 information about a Internet servicer provider?

13 A It could do either/or.

14 Q And does it -- does using one of those services
15 necessarily direct you to the identity of a small company
16 like Klein & Heuchan?

17 A No, it would not.

18 Q The log files that we looked at in Exhibit -- Exhibit
19 37 with the log file with all the photographs -- one moment,
20 please.

21 (Pause.)

22 BY MR. OPPENHEIM:

23 Q Exhibit 37, which has -- which you testified about
24 earlier -- 37, this document (changing overhead exhibit) --
25 you recall this document?

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Middle District of Florida, Tampa Division

1 A Yes, I do.

2 Q Does this log file include information regarding market
3 reports that a -- that Mr. Bell downloaded?

4 A No. This log file does not.

5 Q Why is that?

6 A This log file is a log-on history for Mr. Bell's logins
7 to our system. It does not contain that information,
8 because our systems do not track when market reports are
9 downloaded.

10 MR. OPPENHEIM: No further questions.

11 THE WITNESS: Thank you -- oh, I'm sorry,
12 Your Honor.

13 THE COURT: How long was Mr. Klein's free trial
14 period?

15 THE WITNESS: Mr. Klein's free trial period, off
16 the top of my head -- I may be a little off on the dates
17 without looking at the documentation -- began -- without the
18 information, Your Honor, I don't want to speculate and give
19 you wrong information. If I saw a document, I could answer
20 that question.

21 THE COURT: Do you have that document available to
22 you?

23 MR. OPPENHEIM: Give us one minute and let us see.

24 (Pause.) Your Honor, maybe this is a good time
25 for a short break, and I'll see if I can find that document

1 and determine whether or not we're prepared to rest.

2 THE COURT: Okay. Let's take a ten-minute break.

3 (Recess from 11:30 a.m. to 11:40 a.m.)

4 THE COURT: What did you find?

5 MR. OPPENHEIM: We're working on that answer,
6 Your Honor. Once we have it, we believe we'll stipulate as
7 to that and put it before the Court, and hopefully we will
8 have it during the course of the lunch break.

9 THE COURT: All right.

10 MR. OPPENHEIM: So, when we come back, we'll have
11 it.

12 Other than that, Your Honor, we're prepared to
13 rest.

14 THE COURT: All right.

15 What says the Defense?

16 MR. GIBSON: Your Honor, I wish to make several
17 motions, one of which is a fairly substantial motion that
18 has been fully briefed. I've been told it's on its way
19 here. I defer to you on how you want to handle it. We
20 could finish it and get it filed over the lunch break. We
21 can handle two other motions. It's up to Your Honor how
22 Your Honor wishes to proceed.

23 THE COURT: Let's do them all now.

24 MR. GIBSON: Okay. Your Honor, with respect to
25 CoStar's claim of contributory negligence for copyright

1 infringement, Your Honor issued an order November 25th of
2 2009; and in it, with respect to the contributory claim, the
3 Court found that there was a material question of fact on
4 the knowledge issue, and specifically as to whether or not
5 anyone at Klein & Heuchan knew that Mr. Bell's access to the
6 CoStar database was unauthorized.

7 It's undisputed that Mr. Bell, after leaving
8 Coldwell Banker, continued to access the CoStar database.
9 It's undisputed, based on the terms of the service and based
10 on the license agreement between Coldwell Banker and CoStar,
11 that you had to be associated with Coldwell Banker in order
12 to be an authorized user. Those are undisputed facts.

13 Any continued access -- the issue is whether
14 Mr. Klein or anyone at Klein & Heuchan knew that he was not
15 authorized. The closest evidence that has been presented to
16 Your Honor that Mr. Klein knew is an implication that
17 somehow the databased offered by the Pinellas or Gulf Coast
18 Realtor's Association -- there was some switch that everyone
19 in that office had to be associated with that in order to
20 gain access to that.

21 Other than that, Mr. Bell himself has said he
22 thought he was -- he was authorized. He thought he was
23 being given a subscription, and he thought that it was going
24 to be turned off. Both Mr. Bell -- both Mr. Bell and
25 CoStar's own witness described the telephone call that

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1 occurred after the letter was sent informing everyone that
2 Mr. Bell was not authorized. It was a surprise, a shock.
3 That's when everyone determined that Mr. Bell was not
4 authorized.

5 Mr. Klein has testified that he did not know, and
6 CoStar has presented no evidence that would rise to the
7 level of merely a scintilla of evidence from which a trier
8 of fact could find that K&H had knowledge that Mr. Bell's
9 access was unauthorized.

10 Your Honor, turning to the vicarious claim,
11 Your Honor has already determined that K&H had the ability
12 to control Mr. Bell. The remaining question is whether K&H
13 directly benefited from the control that they had and
14 directly benefited from the copyright infringement that
15 Mr. Klein -- Mr. Bell had. This really is an issue of law.

16 The evidence is clear that CoStar contends that
17 the damages -- I'm sorry, that the direct benefit is the
18 license fees that were not paid.

19 It's clear from the evidence presented that K&H
20 and Mr. Bell made no money, made no commissions based on the
21 access -- the direct access that Mr. Bell had. It's clear
22 that Mr. Bell, through his entire working history at K&H,
23 made approximately \$16,200, and none of those closings can
24 be associated with CoStar access.

25 The only issue is whether as a matter of law K&H

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1 can be held to have been directly benefited from the access
2 of -- of Mr. Bell because of the licensing fees, and there
3 are some cases out there that associate licensing fees with
4 a direct benefit. But I would submit, Your Honor, that
5 every single one those cases involve a licensing fee for a
6 product that is necessary for the business that is doing its
7 business.

8 There are licensing fees for karaoke bars.
9 There's licensing for other bars where they have hired a DJ.
10 But the Court cites in its own order that the avoidance of
11 licensing fees may be a direct benefit and cites to a
12 specific case; and in that case, it was a bar that hired a
13 DJ and that DJ and the bar weren't paying the licensing fees
14 for all the songs that were being played.

15 That bar received dozens and dozens of letters
16 from the copyright holders, had received calls, had received
17 visits from the owners of the copyright holders prior to
18 being sued and still avoided paying it and still maintained
19 its business and made money, a bar, a karaoke establishment,
20 a DJ.

21 These people can't do their work unless they pay
22 the licensing fees. They can't operate a business at all.
23 K&H -- there are a variety of different products, utilities,
24 that can be used for them to do their work. They don't need
25 that service, and they didn't want that service.

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1 This case is not one in which the avoidance of a
2 licensing fee -- they did not want it, and they cannot
3 establish that -- that there was a direct -- direct profit.
4 That's what *Grokster* in the Supreme Court classifies as
5 vicarious liability, direct profit. For that reason, we ask
6 that the Court enter a judgment as a matter of law on the
7 vicarious issue.

8 Lastly and most importantly, Your Honor, the
9 vicarious copyright-infringement claim has its basis in the
10 theories of respondeat superior. We are preparing a motion
11 and will file the case law.

12 Number one, based on basic common law, the release
13 of an agent releases the principal if the principal is only
14 being held liable on theories of vicarious liability. On
15 the vicarious theory, taking that theory alone, K&H is not
16 being sued, has not pled that K&H in any way directly
17 infringed on the copyright. So, their liability flowed
18 solely from the actions of Mr. Bell.

19 Mr. Bell has testified -- and it's been filed with
20 the Court, the release. Mr. Bell has been released; and
21 because of that, K&H cannot be held liable on the theories
22 of vicarious liability.

23 Mr. Oppenheim will get up and say we have
24 specifically provided for that in the release, and I would
25 submit, Your Honor, that a careful reading of the release,

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1 which we must do -- we've also cited some case law that in
2 reading a contract, words must have been given their plain
3 meaning.

4 In reading the release, number one, it's clear
5 that what they have done is released Mr. Bell from all
6 liability and, in essence, given him a backdoor license.
7 They've said, "You're released from any and all claims of
8 copyright infringement as if you were an original license
9 holder."

10 So, for that reason alone, Mr. Bell now has a
11 license -- it's as if he had a license; and for that reason,
12 K&H can't be held liable on that claim. More importantly,
13 Your Honor, the second paragraph of the release attempts to
14 carve out a third-party liability, which we submit you can't
15 do anyway; but the -- the -- the release says that shall not
16 cover any third parties who have -- may have made
17 unauthorized or unlicensed use of the CoStar product.

18 Again, Your Honor, a careful reading of that
19 language -- that's direct infringement. They've never
20 alleged that K&H made unauthorized or unlicensed use of the
21 product. They alleged that they allowed Mr. Bell, who had
22 the license, to make the unauthorized use and unlicensed use
23 of the product.

24 A careful review of the release, along with
25 Mr. Bell's testimony that he has been released, shows that

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1 K&H cannot be held liable on a theory of vicarious
2 liability. For that reason, on that issue, the vicarious --
3 the vicarious-liability judgment as a matter of law should
4 be issued in K&H's favor.

5 THE COURT: All right. I will take your motions
6 under advisement.

7 MR. GIBSON: Thank you, Your Honor.

8 THE COURT: Are you prepared to proceed?

9 MR. OPPENHEIM: Your Honor, you don't want to hear
10 from Plaintiffs on the motions?

11 THE COURT: I hate to disappoint you, but no.
12 You ready to proceed?

13 MR. GIBSON: We are.

14 THE COURT: All right. We'll take a lunch recess
15 until 1:15.

16 COURT SECURITY OFFICER: All rise.

17 THE COURT: Let's make that 1:30. I just
18 remembered I have an appointment out of the office.

19 (Recess from 12:03 p.m. until 1:30 p.m.)

20 THE COURT: Call your first witness.

21 MR. GIBSON: Your Honor, I would first move to
22 have what has been premarked as 69 moved into evidence --
23 admitted into evidence, excuse me.

24 THE COURT: That's this thing here?

25 MR. GIBSON: Yes, sir.

1 THE COURT: It will be admitted.

2 (Plaintiff's Exhibit 69 was received in evidence.)

3 MR. GIBSON: We call Mr. Mark Klein.

4 **MARK KLEIN,**

5 the witness, being previously sworn or affirmed, testified
6 as follows:

7 *DIRECT EXAMINATION*

8 BY MR. GIBSON:

9 Q Mr. Klein, if you could get the book that has Exhibits
10 61, 62, 63, and 64.

11 Is there a separate red well, legal-sized paper?

12 MR. GIBSON: May I approach, Your Honor, and give
13 him --

14 THE COURT: Yes.

15 THE WITNESS: 61?

16 BY MR. GIBSON:

17 Q Yes, sir. Can you identify for me what it is -- I'm
18 sorry, 60 first. Can you identify for me what has been
19 marked as 61?

20 A It is a -- the beginning of a commission statement.

21 Q Is this a Klein & Heuchan file?

22 A It is a Klein & Heuchan file.

23 Q Is it a deal file?

24 A It is.

25 Q Is it a file for one of the deals Mr. Bell closed?

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1 A Yes, it is.

2 Q Is this for one of the leases that Mr. Bell closed at
3 5404 Cypress Center?

4 A It is.

5 Q If you can, turn to 61, and let me ask you -- 60, is
6 that an accurate representation of the Klein & Heuchan deal
7 file for that deal?

8 A Yes, it is.

9 Q And are those documents kept in the ordinary course of
10 business at Klein & Heuchan?

11 A Yes, they are.

12 Q Can you identify what is 61?

13 A This is a deal file on 1250 Roger Street, Suite Number
14 1. It's a lease file.

15 Q Is this one of the deals that Mr. Bell closed while he
16 was employed at Klein & Heuchan?

17 A Yes, it is.

18 Q Is it an accurate reflection of the Klein & Heuchan
19 file?

20 A Yes, it is.

21 Q Is this file kept in the ordinary course of business of
22 Klein & Heuchan?

23 A Yes, it is.

24 Q Can you go to 62? Tell me what that is.

25 A A deal file on the same address, 1250 Rogers Street,

1 Suite J, Bay Health, LLC, and National Rental Properties,
2 LLC.

3 Q Is this another one of the leases that Mr. Bell closed
4 at the 1250 Rogers Street address?

5 A Yes, it is.

6 Q Is that an accurate depiction of the Klein & Heuchan
7 file?

8 A Yes, it is.

9 Q Can you tell me what 63 is?

10 A 63 is the transaction file when we sold the property to
11 WinTrust of Tampa Bay.

12 Q Is this the deal file for the one deal Mr. Bell sold --
13 the one property Mr. Bell sold while at Klein & Heuchan?

14 A Yes, it is.

15 Q It accurately reflects the Klein & Heuchan file?

16 A Yes, it does.

17 MR. GIBSON: Your Honor, I would move for entry of
18 Exhibits 60 through 63 into evidence.

19 MR. OPPENHEIM: Your Honor, I would object. These
20 documents -- he's moved to admit files, and it's not
21 individual documents. As I kind of leaf through this, there
22 are checks in here. There are e-mails. There are letters.
23 There are tax forms. So, I don't believe he's adequately
24 identified -- authenticated or provided a basis for the
25 admission of the entirety of simply a file.

1 Now, it may be, if he explains the purpose for
2 which he offers this, that they can stipulate to it; but I
3 don't believe it's -- he's laid a foundation for the
4 admission of the entirety of simply these files.

5 THE COURT: Response?

6 MR. GIBSON: I can spend some time going over what
7 is contained within the file, if the Court would -- it goes
8 to -- they have nothing to do with CoStar. These are the
9 files that are maintained by K&H, and everything involving a
10 file goes into it -- involving a deal or closing.

11 MR. OPPENHEIM: I'm not sure how he would be able
12 to use these files to establish anything with respect to
13 CoStar.

14 THE COURT: Well, if he's producing the whole file
15 for the purpose of trying to show that there's nothing in
16 the file that has anything to do with CoStar, it would be
17 relevant. Therefore, I overrule the objection. I will
18 admit the documents.

19 MR. OPPENHEIM: I'm sorry, I didn't hear your
20 ruling, Your Honor.

21 THE COURT: I overrule your objection, and I
22 admitted the documents.

23 (Plaintiff's Exhibit 60, 61, 62, and 63 were
24 received in evidence.)

25 BY MR. GIBSON:

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1 Q We've heard some testimony about a telephone call
2 involving CoStar and you. Can you tell the Court what
3 happened?

4 A Yes. I received the Federal Express letter in April --
5 I think it was April 17th -- signed by Mr. Ricketts telling
6 me that Scott Bell had been using their proprietary
7 information illegally and asking me to pay them 60-- \$69,000
8 and to buy you a license for my company.

9 In the last paragraph of the letter, there --

10 MR. OPPENHEIM: Objection, Your Honor, hearsay.

11 THE COURT: Overruled.

12 THE WITNESS: I am sorry.

13 BY MR. GIBSON:

14 Q Go ahead. Keep going.

15 A In the last paragraph of the letter was a telephone --

16 THE COURT: A letter came from a representative of
17 a party; right?

18 MR. OPPENHEIM: The document's not in evidence,
19 Your Honor. It's not -- it speaks for itself.

20 THE COURT: Well, that wouldn't be a hearsay
21 objection. That would be best evidence.

22 MR. OPPENHEIM: All right. Best-evidence and
23 hearsay objection.

24 THE COURT: Overruled as to hearsay. It's an
25 admission against interest of a party opponent. I grant it

1 as to best evidence.

2 BY MR. GIBSON:

3 Q Number 57 in your book. Do you have 57 in front of
4 you?

5 A Yes.

6 Q Is that the letter you received via Federal Express on
7 April 17th of 2008?

8 A Yes, it is.

9 Q Okay. Can you continue telling the Court what happened
10 after you received that letter?

11 A That letter asked me to call Mr. Ricketts if I wanted
12 to discuss this. I called Mr. Bell in, got him into my
13 room, got him on the speakerphone, and called Mr. Ricketts.
14 Mr. Steve Williams took the call, and I queried him about
15 what this was all about; and he said, "Well, did you ever
16 have -- do you have anybody working for you that used to
17 work for Coldwell Banker?"

18 I said, "I have three people that used to work for
19 Coldwell Banker."

20 He said, "Is one of them Scott Bell?"

21 I said, "Yes."

22 He said, "Well, he's been accessing -- we know that
23 he's been accessing your files for a long time. What we
24 really didn't know is whose IP address it was coming from.
25 So, when you logged onto the CCIM trial offer" -- and we

1 didn't know it was a trial offer -- "we picked up and
2 amalgamated the IP address, and that's what it's about."

3 I said, "Well, I don't think you have an action against
4 me, and I'm kind of shocked, because I believed that he had
5 an authorized use of this deal."

6 He said, "Well, you know what? We might be able to
7 give you a two-man license for \$10,000 if you'd be willing
8 to settle this for that."

9 I said --

10 MR. OPPENHEIM: Objection. Rule 408.

11 THE COURT: Sustained.

12 MR. OPPENHEIM: Move to strike.

13 THE COURT: Strike it.

14 THE WITNESS: The next day I received a phone call
15 from a -- I think it was Mr. Ricketts, who said, "The man
16 that made that offer to you had no authority to do that."
17 That's what the letter was about.

18 BY MR. GIBSON:

19 Q Okay. So, you had one telephone conversation --

20 MR. OPPENHEIM: I also move to strike that last
21 testimony on the same grounds, Your Honor. It still goes to
22 settlement.

23 THE COURT: In the second telephone call, the
24 gentleman said the first man had no authority to make the
25 offer?

1 THE WITNESS: That is correct.

2 MR. OPPENHEIM: It just simply goes to the
3 settlement discussions, Your Honor.

4 THE COURT: Overruled.

5 BY MR. GIBSON:

6 Q So, on the 17th, you had one telephone conversation
7 with Mr. Williams?

8 A Right.

9 Q Who was the --

10 A And, by the way, I initiated that phone call; and I
11 want to tell you that I returned all my phone calls, even
12 the phone calls that I get from the CoStar researchers. I
13 have three people that -- I have one primary person
14 answering the phone, two backups, and I have voice mail; and
15 I never -- never -- I never received a call from
16 Mr. Williams.

17 Q Other than the second telephone conversation -- let me
18 ask you, do you know who you were speaking with on the
19 second telephone conversation you had with the CoStar
20 representative?

21 A I believe it was Mr. Ricketts. He -- is Mr. Ricketts
22 an attorney?

23 Q You don't know who it was.

24 A No, I don't know who it was.

25 Q Okay. Did you have any other contact with CoStar?

1 A About a month later, I received a fax from them
2 saying, "Since you refuse to negotiate with us, we're going
3 to file this suit in federal court on the" -- I think it was
4 the 3rd of June or something -- "if you don't settle."

5 MR. OPPENHEIM: Objection. Best evidence.

6 THE COURT: Overruled.

7 BY MR. GIBSON:

8 Q If you can turn to Tab 59. Is what's been marked as 59
9 the document that you received via fax?

10 A Yes, it is.

11 MR. GIBSON: Your Honor, I would move that what's
12 been marked as 57 and 59 be received in evidence.

13 MR. OPPENHEIM: No objection, Your Honor.

14 THE COURT: Be admitted.

15 (Plaintiff's Exhibits 57 and 59 were received in
16 evidence.)

17 BY MR. GIBSON:

18 Q After receipt of that fax, any further contact with
19 CoStar?

20 A No.

21 Q Was the -- what's been marked as 57, April 16th, is
22 that the first indication you had that Mr. Bell was not
23 authorized to access CoStar?

24 A Yes, it was.

25 MR. GIBSON: Your Honor, I have no further

1 questions.

2 THE COURT: All right. Any cross?

3 MR. OPPENHEIM: Very brief, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. OPPENHEIM:

6 Q Hello again, Mr. Klein.

7 A Mr. Oppenheim.

8 Q Exhibits 60 through 63, the deal files you testified
9 about --

10 A Yes.

11 Q -- your testimony was that they contained no CoStar
12 information; is that correct?

13 A Yes.

14 Q Do they contain any other information from any other
15 database information service?

16 A No, I don't believe so.

17 MR. OPPENHEIM: No further questions.

18 THE COURT: Any redirect?

19 MR. GIBSON: No, Your Honor.

20 THE COURT: Call your next witness.

21 MR. GIBSON: Mr. Steven Klein.

22 (The witness was duly sworn or affirmed and
23 responded as follows:)

24 THE WITNESS: I do.

25 THE CLERK: You may be seated. Would you state

1 your name and spell your first and last name for the record?

2 THE WITNESS: Sure. My name is Steven Klein.

3 S-T-E-V-E-N K-L-E-I-N.

4 THE CLERK: Thank you.

5 STEVEN KLEIN,

6 the witness, being sworn or affirmed, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. GIBSON:

9 Q Mr. Klein, what is your profession?

10 A I'm sorry.

11 Q What is your profession?

12 A I'm a real-estate broker.

13 Q What licenses do you hold in the state of Florida?

14 A I hold a license -- a real-estate license as a broker
15 in the state of Florida.

16 Q Where do you work?

17 A I work at Klein & Heuchan.

18 Q And how long have you worked there?

19 A I've worked there since approximately 1998.

20 Q What do you do at Klein & Heuchan?

21 A I lease and sell commercial real estate.

22 Q And you worked with Mr. Bell?

23 A Yes, I do.

24 Q Did you ever ask Mr. Bell to obtain any information
25 from the CoStar database?

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1 A No, I did not.

2 Q Did you ever ask Mr. Bell to forward an e-mail to you
3 with information from the CoStar database?

4 A No, I did not.

5 Q I ask you to look at what's been admitted in evidence
6 as Exhibit 18.

7 THE COURT: 18 was never offered into evidence.

8 MR. GIBSON: Okay. It's been marked as 18.

9 Let's go to 22 then.

10 MR. OPPENHEIM: I will solve that problem. We'll
11 move 18 in evidence if it will make it easier.

12 THE COURT: Okay.

13 MR. GIBSON: No objection.

14 THE COURT: Admitted.

15 (Defense Exhibit 18 was received in evidence.)

16 BY MR. GIBSON:

17 Q 18. The bottom of the first page appears to be an
18 e-mail from Mr. Bell to you, does it not?

19 A Yes, sir, it does.

20 Q Do you ever recall receiving that e-mail?

21 A No, sir, I don't.

22 Q You recall opening this attachment containing CoStar
23 materials on or about April of 2007?

24 A No, sir, I don't.

25 Q The top of 18 is an e-mail that also appears to be an

1 e-mail from Mr. Bell to you; is that correct?

2 A Yes, sir, it does.

3 Q Do you ever recall opening any such document?

4 A No, sir, I don't.

5 Q During the course of this lawsuit were you asked to
6 search your computer for CoStar materials?

7 A Yes, sir, I was.

8 Q Did you?

9 A Yes, sir, I did.

10 Q Did you find anything?

11 A No, sir, I did not.

12 MR. GIBSON: No further questions.

13 THE COURT: Cross.

14 CROSS-EXAMINATION

15 BY MR. OPPENHEIM:

16 Q Good afternoon, Mr. Klein.

17 A Good afternoon, sir.

18 Q You testified that you never asked Mr. Bell to obtain
19 information from CoStar for you; is that correct?

20 A That's correct.

21 Q But you didn't testify that Mr. Bell never provided you
22 with CoStar information, did you?

23 A I'm sorry?

24 Q Well, let me ask the question: Did Mr. Bell actually
25 provide you with information from CoStar?

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1 A I'm not aware of him doing such.

2 Q You're not aware. You don't recall, is that what
3 you're saying?

4 A I don't recall him doing such.

5 Q And Exhibit 18, the e-mail exchange that you just
6 looked at, that is your e-mail address on here, is it not?

7 A Yes, sir, it is.

8 Q And your testimony is that you did receive this, or you
9 just don't recall receiving it?

10 A I do not recall receiving it, sir.

11 Q And you testified that you searched your computer for
12 documents; is that correct?

13 A Yes, sir.

14 Q Did you do that prior to Klein & Heuchan responding to
15 the document request in this case?

16 A I don't believe I did, sir.

17 Q When did you do that?

18 A After the deposition, sir.

19 Q And were you aware, Mr. Klein, that Mr. Bell was using
20 the CoStar service?

21 A That's correct, sir.

22 Q And you are aware that he had access by virtue of a
23 user name and password he had obtained from Coldwell Banker?

24 A Yes, sir.

25 Q Or I should -- let me correct that.

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1 You were aware that he was using a user and password
2 that had been obtained for him by Coldwell Banker from
3 CoStar?

4 A Yes, sir.

5 Q And you never instructed Mr. Bell not to use that user
6 name or password, did you?

7 A That's correct.

8 Q You never instructed Mr. Bell to find out whether he
9 was permitted to use that user name or password, did you?

10 A That's correct.

11 MR. OPPENHEIM: No further questions.

12 THE COURT: Any redirect?

13 MR. GIBSON: Defense rests.

14 THE COURT: What says the Plaintiff?

15 MR. OPPENHEIM: With the exception of obtaining a
16 stipulation of fact to put in the record with respect to the
17 trial period, I believe we're done. We're concluded with
18 the evidence in this case with one exception: I want to
19 make sure I moved into evidence Exhibit 22. I believe I
20 did. I believe that I did, but I also thought that I moved
21 in 18.

22 THE COURT: She says 22 is in evidence.

23 What's the stipulation about the trial period?

24 MR. OPPENHEIM: Your Honor had asked regarding --
25 had asked a question before lunch as to the period of time

1 that Mr. Klein had been provided a trial subscription to
2 CoStar, and we're collecting the facts to put together in a
3 stipulation of fact on that point, and I believe my
4 colleagues will have it here momentarily. They are just
5 drafting something in the other room.

6 THE COURT: All you have to do is tell me.

7 MR. OPPENHEIM: They were calling to find out the
8 period. I believe that the answer, Your Honor, is that in
9 July of 2007, for a period of four to five months, Mr. Klein
10 was given access to a -- a different service than has been
11 an issue in this case. It didn't involve the Property
12 service, the Comps service, or the Tenant service. It
13 involved a version of CoStar which is a light version and
14 would have provided some limited access, but not access to
15 everything that's been at issue in this case.

16 THE COURT: Okay.

17 MR. GIBSON: Your Honor, on behalf of the Defense,
18 we would renew the motions that were made at the close of
19 Plaintiff's case.

20 THE COURT: And I'll continue to take them under
21 advisement.

22 You want to make closing arguments, or you want to
23 do it in writing?

24 MR. OPPENHEIM: Your Honor, we'd like an
25 opportunity to make closing argument.

1 THE COURT: All right, proceed.

2 MR. OPPENHEIM: I'm having trouble getting my
3 computer turned on. One moment, Your Honor.

4 (Pause.) Just a moment, Your Honor. I have to
5 reboot. Technology's great sometimes until it breaks. It's
6 coming up. Just a moment.

7 This may be exactly why the Court doesn't allow
8 computers into the courtrooms.

9 (Pause.)

10 THE COURT: I am going to ask each side to give me
11 proposed findings of fact, and you can make arguments at
12 that time, if you want to do it then.

13 MR. OPPENHEIM: If the Court will --

14 MR. GIBSON: That's fine on the part of the
15 Defense.

16 THE COURT: I would like proposed findings of fact
17 from each side, and I want you to do your written closings
18 at the same time arguing your position in the case. That
19 way I will have your case citations and your proposed
20 findings of fact that I can refer to.

21 MR. OPPENHEIM: As opposed to delivering it
22 orally?

23 THE COURT: Yes.

24 MR. OPPENHEIM: Because I just got it up.

25 THE COURT: It's only because I said that that you

1 got it up (laughing).

2 MR. OPPENHEIM: Then why didn't you say it earlier
3 (laughing)?

4 THE COURT: I'll give you the opportunity to make
5 oral closing, if you wish. I am going to tell you that no
6 matter what anybody says in this case, I want to see written
7 findings of fact, and I want to review the cases again.

8 MR. OPPENHEIM: If the Court will indulge me on
9 just a few of the legal issues, but yes, we will submit a
10 full findings of fact with case law. I would appreciate
11 just a limited opportunity, if we could.

12 THE COURT: All right.

13 *CLOSING ARGUMENTS*

14 MR. OPPENHEIM: I want to begin by thanking
15 Mr. Gibson -- his collegiality and professionalism in this
16 proceeding has been exemplary -- and the Court for its
17 patience in this matter.

18 I will not spend much time. I'm not intending to
19 go through each and every element, but what I would like to
20 do is touch on a few of the more critical elements.

21 With respect to the issue of direct infringement,
22 I think that has largely been resolved, but I would like to
23 just briefly address two issues with respect to the direct
24 infringement. The first is the issue raised by certain
25 questions by the Defendants with respect to a product by the

1 name of "Showcase," and the second is the issue of the trial
2 subscription.

3 I'm not sure whether the Defendant's questions
4 with respect to those issues were directed at somehow --
5 somehow erasing the underlying direct infringement --

6 THE COURT: You can save your breath about
7 Showcase. The testimony is that Showcase wasn't even an
8 item until after the period in question in this case.

9 MR. OPPENHEIM: I agree. With respect to the
10 trial subscription, Your Honor, this is not an instance
11 where any of Mr. Bell's conduct occurred on the trial
12 subscription; and so, it's not as though because Mr. Klein
13 may have had access to certain of the photographs by virtue
14 of a trial subscription that somehow it wipes clean the
15 slate of the underlying direct infringement.

16 It is, I would analogize, similar to an individual
17 who's caught downloading a major motion picture illegally
18 off the Internet and their defense is to say, "Well, I could
19 have recorded it on a VCR off the television." You can't
20 somehow suggest that your illegal conduct on the one hand is
21 now wiped clean by virtue of the fact that you could have
22 engaged in similar conduct that arguably was legal.

23 So, I don't believe that -- that the trial
24 subscription plays a role with respect to the liability
25 issues; and so, I will now move on unless the Court wants to

1 hear more on the underlying direct infringement to the
2 issue -- the issue of knowledge or contributory
3 infringement.

4 The Defendants have suggested a number of times,
5 both in their briefs to this Court previously and in their
6 earlier motion, that the standard is one of actual
7 knowledge. Well, the *Cable Home Productions* case out of the
8 Eleventh Circuit makes it clear that's not the standard.
9 It's whether or not the defendant knew or should have known
10 of the infringing behavior, but the standard actually goes
11 beyond that, because the case law makes clear -- and the
12 best case to look at for this is the *Napster* case out of the
13 Seventh Circuit.

14 The case law makes clear that willful blindness
15 constitutes knowledge. So, with that as a backdrop -- and
16 we're happy to cite to the Court many cases on these issues.
17 The facts that were put before the Court demonstrate that
18 the Defendant knew or at least should have known of the
19 infringing behavior.

20 There is no dispute that Mr. Bell was using CoStar
21 while he was at Klein & Heuchan, that he was doing it using
22 the Coldwell user name and password, and that -- and that
23 Klein & Heuchan knew that he was doing that.

24 And there's no dispute that -- that -- there's no
25 dispute that he used that service to obtain the information

1 in the underlying infringement. And there's no dispute that
2 when he used the service it had his name on it and it said
3 "Coldwell Banker," and there's no question Mr. Bell didn't
4 testify that he paid for it individually. He didn't testify
5 that he knew it was for a period of time. He simply said,
6 "I never considered it. I never thought about it."

7 So, the question is did Klein & Heuchan know of
8 the underlying infringement? Well, I would suggest, of
9 course they did. Mr. Klein is a sophisticated businessman.
10 We've seen that, and we've heard that. CoStar had been
11 pitching to Klein & Heuchan for ten years to do a license
12 deal, including -- we heard from Mr. Alliegro somewhere
13 between seven to nine different demonstrations of the
14 service to Klein & Heuchan, and he described that on two
15 different instances an actual license was sent to Klein &
16 Heuchan, and Mr. Alliegro described that the standard
17 language in that license described who's an authorized user
18 and who's not.

19 So, it is simply not believable that Mr. Klein can
20 say, "I didn't know that the use of this service was
21 unauthorized." Now, maybe if we take it at face value we
22 then turn to the issue of whether or not he should have
23 known.

24 Well, recall the testimony we heard about the
25 Pinellas Real Estate Multiple Listing Services. That

1 testimony was that it was a service that required that every
2 individual in the office be licensed and that there were --
3 was one individual who wasn't licensed and that Mr. Bell
4 didn't want to be licensed, and Mr. Klein was aware of the
5 need to have everybody licensed, because what he did is he
6 reported that those two -- that the one individual who
7 wasn't licensed and Mr. Bell were actually going to be
8 working at a different office in order to make sure that the
9 office could maintain their license to that Pinellas Real
10 Estate Multi-listing Service.

11 And we heard from Mr. Bell that he didn't, in
12 fact, work at the other office, that that was just something
13 that was done to maintain the other license. So, Mr. Klein
14 was well aware that certain services needed an office-wide
15 license.

16 Now, we heard some testimony that some services
17 don't. CoStar would suggest that those are very different
18 services, and we heard significant testimony about CoStar's
19 valuable advantage over those types of services. But at a
20 minimum, that demonstrates that Mr. Klein either should have
21 known or at least should have asked a question.

22 He's too sophisticated a businessman to not have
23 asked in light of the fact that he knew some services needed
24 an office-wide license. He's too sophisticated to know in
25 light of the fact that he knew Coldwell Banker, his

1 competitor, had paid for the license.

2 Now, Mr. Klein is well aware of the need -- of the
3 desire for one firm to make sure that their associates don't
4 take valuable information with them when they go to work for
5 a competitor; and in the -- in Klein & Heuchan's policy
6 manual, there is a very specific provision on this. Excuse
7 me, the independent contractor agreement, not the policy
8 manual.

9 The independent contractor agreement says, quote,
10 "The salesman shall not, after the termination of the
11 contract, use to his own advantage or to the advantage of
12 any other person or corporation any information gained from
13 the files or business of the broker relating to properties
14 for sale, lease, or rental."

15 Now, while that provision has to do with specific
16 information about a -- a deal that -- that, for instance,
17 Klein & Heuchan may have been doing, Mr. -- Mr. Klein knew
18 well that companies didn't want their employees to go to a
19 competitor and take something with them that will help the
20 competitor. That's why they had that provision, and he
21 should have known that when Coldwell paid for that service,
22 it, at least, should have raised a red flag that he should
23 have asked a question, but he didn't. He didn't ask a
24 question, and he never asked Mr. Bell to ask a question.

25 THE COURT: Well, your argument's about what

1 someone should have known, and willful blindness is a
2 double-edged sword, isn't it? I mean, the same arguments
3 you've just made could be applied to your -- to CoStar's
4 researcher who found out specifically that Mr. Bell had left
5 Coldwell Banker and they didn't know where he went.

6 MR. OPPENHEIM: Your Honor, if the --

7 THE COURT: And if you want to talk about willful
8 blindness, couldn't the researcher have just filled in a
9 different form and sent it to Legal and said, "Here's an
10 authorized user that left Coldwell Banker"?

11 MR. OPPENHEIM: I would suggest that there is an
12 enormous qualitative difference here, and here's why: First
13 of all, you had a low-level researcher who's making a call
14 to someone who she didn't even know if he was a user.

15 The testimony was she wouldn't necessarily know
16 that Mr. Bell was a user and that she -- she entered
17 something onto a spreadsheet, which is, at best, ambiguous.
18 On the one hand, the note says that he had left Coldwell.
19 On the other hand, if the note said that he had
20 transferred -- if he had simply transferred to another
21 Coldwell office, it wouldn't have meant anything. If he had
22 moved from Coldwell's office to another licensed office, it
23 wouldn't have meant that there should have been any change
24 in his access to the service.

25 We heard that from Mr. Alliegro. They wouldn't

1 have changed anything. He wouldn't have been deactivated.

2 So, the notion that, no offense intended to the 800
3 or so researchers at CoStar, a low-level researcher having
4 to ask questions as compared to the CEO of a company is, I
5 think, very different. I think it's enormously different.
6 But more than that, the law on this as to willful blindness
7 is specific as to the Defendant in a secondary-liability
8 case.

9 Let me -- let's think of it in the context of
10 the -- of one of the peer-to-peer copyright infringement
11 cases. The defendants in Napster claimed they didn't know,
12 first of all, the specific underlying infringement. The
13 court -- the case law on this is clear it didn't matter, and
14 that issue went up on the *Grokster* case and was never an
15 issue. You don't have to know of the specific underlying
16 infringements as a matter of knowledge.

17 They then said that, "Well, the underlying
18 infringements may not be infringing, because they could be
19 insulated either by fair use of the Audio Home Recording Act
20 provision within the Copyright Act that could immunize
21 copying. Ultimately they lost on those legal theories. The
22 district court ruled there was no fair use and there
23 was no -- there was -- the Audio Home Recording Act didn't
24 cover that.

25 But that didn't mean that Napster, as the

1 peer-to-peer entity, was suddenly insulated, because they
2 could have believed that the underlying infringement wasn't
3 infringing. Napster was held responsible for that
4 underlying infringement. They couldn't simply put their
5 head in the sand. They couldn't simply say, "Well, we don't
6 know of the specific infringement." They couldn't simply
7 say, "Well, this may be okay," which are the three arguments
8 that are being put forward by the Defendants here.

9 I think the analogies are useful here. When an
10 attorney begins to work for a law firm, the attorney's
11 issued a Westlaw password to do research with, and the law
12 firm pays for that access to that valuable service, albeit a
13 service that largely rests off the words written by judges
14 like yourself, but it is a valuable service for which
15 Westlaw charges a lot of money.

16 When the attorney leaves the law firm, they may
17 still well have their user name and password, and they may
18 go work for somebody else or hang up their own shingle and
19 may try to take business with them. If the law firm doesn't
20 report that the user name should be turned off, the attorney
21 can't continue to use that Westlaw password.

22 Take another example: You could plug into that
23 example a firm credit card or a calling card, though people
24 don't use calling cards anymore. The same example would be
25 true. The ad exec can't take the firm American Express from

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1 one company and, when he leaves the company, keep using that
2 American Express simply because he has it. "I've got it. I
3 can use it." It must be authorized. They never took it
4 back. They never turned it off.

5 Take a different example: Take a UPS driver,
6 delivery-van driver, and he -- he drives for UPS. He gets
7 keys to one of those brown UPS vans. Well, one day he
8 decides to leave and go work for Federal Express; and UPS,
9 for whatever reason, doesn't get his keys to the van. That
10 doesn't mean he can keep using the UPS delivery van while
11 he's working for FedEx. Of course he can't. We all know
12 that.

13 So, the notion that just because somebody has a
14 user name or password that they have a reason to believe
15 that it's authorized is -- is in my mind absurd, because we
16 can go after example after example like this and say, "Of
17 course not. Of course not. Of course not."

18 And the notion that the analysis is somewhat
19 different when it comes to CoStar, an extremely valuable
20 service that Mr. Klein knew was expensive, just doesn't hold
21 water.

22 Let me -- unless the Court has further questions
23 on the issue of knowledge, I will turn to the vicarious
24 liability. With respect to vicarious liability, I believe
25 that there's no dispute with respect to the right and

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1 ability to control. And so, what I'd like to talk about for
2 a minute is the issue of profit or benefit.

3 The Court and the Defendants have cited the language of
4 the *Grokster* decision that there must be profit. I want to,
5 for a moment, break down the concept of profit a little bit,
6 because there are a couple of important principles here.
7 First of all, the -- the term "profit" doesn't actually
8 require that there be a profit in the accounting sense of
9 the word. Klein & Heuchan didn't need to have made money
10 from the use of the CoStar service in order to have
11 profited, and there's plenty of case law on this.

12 *Nimmer*, one of the treatises that is frequently
13 cited as an authority on copyright law, talks about this,
14 citing the *Napster* case for the proposition that even absent
15 the receipt of any revenues, a future hope to monetize is
16 sufficient to demonstrate a direct financial interest; and
17 that's, of course, what happened here. Mr. Bell anticipated
18 that he would make money over time.

19 Or look at the *Major Bob Music* case where the
20 court said, "An enterprise is considered to be profit-making
21 even if it actually never yields a profit." We could go on
22 and on about this.

23 The language out of the *Grokster* case which talks about
24 profit isn't meant in an accounting sense of the word. In
25 fact, the *Grokster* decision wasn't a vicarious infringement

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1 case. It was -- at least in the Supreme Court. It was
2 underneath or below.

3 In the Supreme Court, the issue of vicarious
4 infringement wasn't addressed. It was purely an issue of
5 inducement. And, of course, in most of those peer-to-peer
6 cases, there was no profit. Those services did not make any
7 money.

8 It's also, from a profit perspective, not
9 necessary to show that each individual infringement resulted
10 in a financial benefit. So, the Defendants have put
11 forward, you know, deal files and said, "Well, here are the
12 deal files that demonstrate the -- the revenues that were
13 earned by Mr. Bell, the commissions; and none of them
14 involved CoStar."

15 Well, apart from the fact that we don't know about
16 the information -- the background information and how it may
17 be used in those deals, it's just not the standard.

18 A copyright holder doesn't have to show that the
19 entity that -- that there's specific profit from a specific
20 infringement.

21 In the -- in the *Broadcast Music* case out of
22 Nevada, the court said there need not be any showing of
23 specific profit from the particular work that infringed.
24 The *Elson vs. Robertson* case out of the Ninth Circuit, same
25 thing. But think about it just kind of logically from the

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1 dance hall cases. In the dance hall cases, the dance halls
2 were held liable as secondary infringers by virtue of the
3 infringement that occurred by the bands that came in and
4 played.

5 Now, the copyright holders didn't have to show
6 that any particular song resulted in more individuals coming
7 to the dance hall, buying more beer, that it in any way was
8 directly tied to any particular profit by the dance hall.
9 That -- that's not the way those dance hall cases, which
10 really developed in many respects the area of vicarious
11 infringement -- that's not the way the dance hall cases
12 worked, and the same is true here.

13 We don't have to make that direct showing; and,
14 again, think of it in the peer-to-peer cases, because
15 there's so much rich case law out of those cases. None of
16 the sound-recording owners in those peer-to-peer cases had
17 to show the infringement of a particular sound recording,
18 for example, Mariah Carey's sound recording. She wouldn't
19 have to show -- or the owner of her sound recording wouldn't
20 have to show that her particular song had been downloaded a
21 certain number of times that resulted in profit. That
22 wasn't the way the analysis was done.

23 The question was, was the downloading, the
24 infringing activity, and the uploading, the infringing
25 activity -- did it result in potential profit or expectation

1 of profit or benefit? And also obviously from a profit
2 perspective, as this Court has already recognized, lost
3 license fees constitute a profit, and we will address that
4 further in the proposed findings of fact and conclusions of
5 law.

6 THE COURT: I don't think that's exactly what I
7 said, but go ahead.

8 MR. OPPENHEIM: So, just factually for a moment,
9 there are really three issues with respect to profit. Bell
10 benefited. He benefited because it gave him generalized
11 knowledge. He benefited because it gave him specific
12 knowledge about the individualized things he was
13 researching. But Klein & Heuchan also benefited, and the
14 way they benefited was because, in part, Bell was more
15 educated.

16 Klein & Heuchan wants to create this perception
17 that Bell was in some way separate and different than Klein
18 & Heuchan and that the benefits attributed to him somehow
19 aren't attributed to them as a Defendant, but that's, of
20 course, not the case. He was a sales associate for Klein &
21 Heuchan; and so, to the extent that he benefited from
22 CoStar, which he said he did, then Klein & Heuchan benefited
23 because he was part of Klein & Heuchan, and you can't
24 disaggregate him from it. It's not as though he was at his
25 desk downloading music, doing something separate and apart

1 from the business activities of Klein & Heuchan. Everything
2 that he did with CoStar involved commercial real estate.

3 So -- so, there's that benefit, but it's also the
4 benefit that he distributed information to others. Now, the
5 Defendants have denied, "Oh, I don't remember receiving
6 this, and I didn't necessarily read this." It's not
7 believable.

8 They received e-mail. They said, "Thanks." They
9 sent follow-up e-mails. Mr. Bell's testimony on this is
10 credible.

11 Let me turn then, Your Honor, to -- to the last
12 point that I want to address today, and that is where we
13 started this case yesterday morning when the Court asked me
14 about equitable defenses.

15 Pardon me one moment while I grab a piece of
16 paper. The Court asked whether or not the doctrine of
17 mitigation of damages would apply in a copyright case. The
18 circuits are split on whether or not equitable defense has
19 ever applied in a copyright case. The Fourth Circuit has
20 ruled that they don't, that copyright is a statutory scheme
21 and not subject to the common-law equitable defense. The
22 Eleventh Circuit considered the Fourth Circuit's decision;
23 and in the *Peter Letterese* --

24 THE COURT: I'm not sure mitigation of damages is
25 an equitable defense. Mitigation of damages is the

1 responsibility of every person who is wronged to try to
2 lessen the harm.

3 MR. OPPENHEIM: Your Honor, the damages that
4 CoStar is seeking in this case are statutory damages set
5 forth in the Copyright Act.

6 THE COURT: Well, for example, let's say CoStar --
7 CoStar's position is they did not learn of the infringement
8 until March of 2008. Let's say when they learned of it in
9 March of 2008 they did nothing and waited until March 2009
10 to say anything to Klein & Heuchan. Is it your position
11 they could sue for damages all the way through March of
12 2009?

13 MR. OPPENHEIM: Well, certainly they could file a
14 claim under the statute of limitations. The question then
15 would be not whether or not Klein & Heuchan would be liable
16 to the extent of the damages for that intervening period;
17 and under the doctrine of mitigation of damages, I guess the
18 question would be, did CoStar act reasonably in -- in -- in
19 not doing anything for, I think you mentioned, a one-year
20 period. You said March of 2008 to March of 2009. And so,
21 that would be the question. Did they act reasonably in not
22 doing anything?

23 I suppose I need to think about that and think
24 about the facts there, but certainly that's not the case we
25 have here. Here we have -- we have the unequivocal

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1 testimony that it was -- the infringement was first
2 discovered in March of 2008. And so --

3 THE COURT: No. The issue we were discussing is
4 whether or not mitigation of damages is, one, relevant and,
5 two, an equitable defense.

6 MR. OPPENHEIM: Well --

7 THE COURT: I think you just agreed that it can be
8 relevant given the correct facts; and, two, I don't think
9 you addressed whether or not you're conceding as to whether
10 or not it's an equitable defense.

11 MR. OPPENHEIM: Well, it's not part of the
12 statutory scheme. So, if it's going to apply, it has to be
13 an equitable defense. If it were a defense that arose out
14 of Florida statutory law, it wouldn't apply to the federal.
15 So, the only way it could apply would -- the only way it
16 could apply would be as an equitable defense; and as an
17 equitable defense under the Eleventh Circuit, the Eleventh
18 Circuit has said only in the most extraordinary
19 circumstances that laches -- and this case is a laches case,
20 but the case talks generally about equitable defenses --
21 that laches will be recognized as a defense to a copyright-
22 infringement claim filed before the statute of limitations
23 has run.

24 The Eleventh Circuit found that it didn't apply
25 and noted that a copyright owner cannot be fully cognizant

1 of all infringements that occur throughout the length and
2 breadth of this country and that the information received by
3 the copyright owner may be largely hearsay. But this case
4 out of the Eleventh Circuit is saying that to the extent
5 that you're going to apply -- consider applying an equitable
6 defense, you should be very cautious in doing so, and I
7 believe that's the case here.

8 CoStar has, as the testimony described, a
9 significant number of users; and the -- the usage, as we saw
10 in the log files, by any given user is significant. They
11 cannot track every IP addresses; and even if they track IP
12 addresses, they can't know whether or not that IP address,
13 in fact, belongs to somebody who is or is not authorized.
14 They learned of it in March of 2008, and they acted once
15 they learned.

16 Now, Klein & Heuchan is going to take the position
17 that they actually learned of it in February by virtue of
18 the entry by the researcher, and I don't want to repeat what
19 I've already said with respect to that being a low-level
20 employee and the information in there being very vague, but
21 it could well have been -- we don't know -- that the
22 researcher could have gone onto the Coldwell Website to find
23 out if Mr. Bell was still at Coldwell, and the testimony
24 indicated that his picture was still on the Coldwell Website
25 as of February of 2007 because they hadn't taken it down.

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1 So, at best, the February 2007 information by a
2 low-level researcher is ambiguous; but if the researcher
3 had, in fact, followed up, the researcher may have found
4 that, in fact, he was still working for Coldwell. So, in
5 any event, I have -- I don't believe that the equitable
6 defenses apply here, and I -- and by virtue of law; but even
7 if they do apply, I think, as a matter of fact, the facts
8 don't support the arguments that are made by the Defendant.

9 On that note, Your Honor, I will rest, and we'll
10 fully -- we'll submit full conclusions of law and statements
11 of fact.

12 THE COURT: All right, thank you.

13 Mr. Gibson.

14 MR. GIBSON: Your Honor, unless the Court has
15 specific issues the Court would want me to address, I will
16 take the invitation to submit everything in writing.

17 THE COURT: That would be fine.

18 MR. GIBSON: Thank you, Your Honor.

19 THE COURT: How many days would you like to submit
20 your briefs on the issues?

21 MR. GIBSON: Two weeks? One week? Ten days?
22 Eleven days?

23 THE COURT: How about ten days? How about a week
24 from Friday? Is that all right?

25 MR. GIBSON: Perfect.

1 MR. OPPENHEIM: That would be fine, Your Honor.

2 Is that correct?

3 One moment, Your Honor, if I may confer.

4 (Pause while conferring with co-counsel.) Could
5 we actually ask for a little bit of additional time? My
6 client is unfortunately proceeding directly from here to a
7 securities litigation that he's going to be on trial -- not
8 personally on trial -- for what period of time? -- until
9 next Friday. Could we do it one week past that, Your Honor?

10 THE COURT: Yeah. How about two weeks from
11 Friday?

12 MR. GIBSON: That would be great.

13 THE COURT: All right, thank you.

14 (Adjourned at 2:35 p.m.)

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1 CERTIFICATE OF REPORTER
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4 I, SHERRILL L. JACKSON, Federal Official Court
5 Reporter for the United States District Court, Middle
6 District of Florida, Tampa Division,

7 DO HEREBY CERTIFY, that I was authorized to and
8 did, through use of Computer-Aided Transcription, report in
9 shorthand the proceedings and evidence in this cause, as
10 stated in the caption on page 1 of this transcript, and that
11 the foregoing pages numbered 1 to 147, inclusive,
12 constitute a true and correct transcription of my
13 shorthand report of said proceedings and evidence.

14 IN WITNESS WHEREOF I have hereunto set my hand
15 this 19th day of March, 2010.

16 *s/Sherrill L. Jackson*

17 _____
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19 Federal Official Court Reporter
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