

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

KLEIN & HEUCHAN, INC., Plaintiff and Counter-Defendant, v. COSTAR REALTY INFORMATION, INC. and COSTAR GROUP, INC., Defendants and Counter-Plaintiffs.	Civ. Act. No. 8:08-cv-01227-JSM-EAJ

COSTAR'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

CoStar Group, Inc. and CoStar Realty Information, Inc. (collectively, "CoStar") respectfully submit the following Proposed Findings of Fact and Conclusions of Law following the bench trial conducted in this matter beginning on March 1, 2010.[1]

[1] In a separate filing of today's date, CoStar submits its Opposition to Klein & Heuchan's Motion for Judgment as a Matter of Law (Doc. # 120). In order to avoid unnecessary duplication of the legal and factual arguments set forth in CoStar's Opposition brief, CoStar hereby incorporates them by reference into these Proposed Findings of Fact and Conclusions of Law, to the extent necessary.

TABLE OF CONTENTS

PRELIMINARY STATEMENT 8

I. BACKGROUND 11

II. BURDENS OF PROOF 15

III. COSTAR HAS PROVEN OWNERSHIP AND REGISTRATION 16

IV. COSTAR HAS PROVEN DIRECT INFRINGEMENT 17

V. COSTAR HAS PROVEN VICARIOUS INFRINGEMENT 18

A. Right and Ability to Control 20

B. Direct Financial Benefit 21

1. Legal Standard 21

2. K&H Obtained Several Financial Benefits from the Infringing Activity 25

VI. COSTAR HAS PROVEN CONTRIBUTORY INFRINGEMENT 28

A. Knowledge 29

1. Legal Standard 29

2. K&H Knew or Should Have Known of the Infringing Activity 30

B. Inducement and/or Material Contribution 36

VII. K&H'S ARGUMENTS IN EQUITY ARE UNAVAILING 38

A. K&H's Burden to Show Extraordinary Circumstances 38

B. K&H has not shown "Extraordinary Circumstances" 39

C. Each of K&H's Affirmative Defenses Fails 43

D. The Duty to Mitigate Doctrine Does Not Apply in this Case 47

E. K&H's Unclean Hands Bar it from Equity 50

VIII. STATUTORY DAMAGES 51

IX. COSTAR IS ENTITLED TO A PERMANENT INJUNCTION 56

TABLE OF AUTHORITIES

CASES

A&M Records, Inc. v. Napster, Inc.,
239 F.3d 1004 (9th Cir. 2001) 20, 21, 22

Air Caledonie Int'l v. AAR Parts Trading, Inc.,
315 F. Supp. 2d 1319 (S.D. Fla. 2004) 48

Arista Records LLC v. USENET.com,
633 F. Supp. 2d 124 (S.D.N.Y. 2009) 30

Arista Records v. Flea World,
No. 03-2670 (JBS), 2006 LEXIS 14988 (D. N.J. Mar. 31, 2006) 29

Arista Records, Inc. v. Beker Enterprises, Inc.,
298 F. Supp. 2d 1310 (S.D. Fla. 2003) 52

Atari Inc. v. North American Philips Consumer Electronics Corp.,
672 F.2d 607 (7th Cir. 1982) 57

BMG Music v. Gonzalez,
430 F.3d 888 (7th Cir. 2005) 57

Broadcast Music, Inc. v. Blumonday Inc.,
1994 U.S. Dist. LEXIS 17979, 332 U.S.P.Q.2d 1474 (D. Nev. 1994) 23, 24

Cable/Home Communication Corp. v. Network Productions, Inc.,
902 F.2d 829 (11th Cir. 1990) 29, 49, 52

Carrizales v. State Farm Lloyds,
518 F.3d 343 (5th Cir. 2008) 48

Casella v. Morris,
820 F.2d 362 (11th Cir. 1987) 9, 28, 29, 37

CBS Broad., Inc. v. EchoStar Communs., Corp.
450 F.3d 505 (11th Cir. 2006) 56

CBS Broad., Inc. v. EchoStar Communs., Corp.,
276 F. Supp. 2d 1237 (S.D. Fla. 2003) 56

Centel Cable TV Co. v. Thos. J. White Dev. Corp.,
1989 U.S. Dist. LEXIS 19064 (S.D. Fla. 1989) 50

Dreamland Ball Room v. Shapiro, Bernstein & Co.,
36 F.3d 354 (7th Cir. 1929) 22

Ellison v. Robertson,
357 F.3d 1072 (9th Cir. 2004) 23

Encyclopedia Britannica Educational Corp. v. Crooks,
542 F. Supp. 1156 (W.D.N.Y. 1982) 15

Ets-Hokin v. Skyy Spirits, Inc.,
225 F.3d 1068 (9th Cir. 2000) 16

F.W. Woolworth Co. v. Contemporary Arts, Inc.,
344 U.S. 228, 73 S.Ct. 22 (1952) 51

Faulkner v. National Geographic Society,
211 F. Supp. 2d 450 (S.D.N.Y. 2002) 30

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.,
499 U.S. 340 (1991) 17

Fonovisa, Inc. v. Cherry Auction, Inc.,
76 F.3d 259 (9th Cir. 1996) 9, 23

Gutter v. DuPont,
124 F. Supp. 2d 1291 (S.D. Fla. 2000) 42

H.M. Kolbe Co. v. Armgus Textile Co.,
315 F.2d 70 (2d Cir. 1963) 46

Home Indem. Co. v. Lane Powell Moss & Miller,
43 F.3d 1322 (9th Cir. 1995) 49, 50

In re Aimster Copyright Litigation,
334 F.3d 643 (7th Cir. 2003) 10, 29

Ivani Contracting Corp. v. City of New York,
103 F.3d 257 (2nd Cir. 1997) 39

J&J Sports Prods. v. Torres,
No. 6:09-cv-391-Orl-19DAB, 2009 U.S. Dist. LEXIS 52182 (M.D. Fla. June 21, 2009) 19

Jenkins v. Graham,
237 So. 2d 330 1970 Fla. App. LEXIS 6175 (Fla. Dist. Ct. App. 4th Dist. 1970) 48

Los Angeles News Serv. v. Reuters Television Int'l, Ltd.,
149 F.3d 987 (9th Cir. 1998) 49

Louvenia Hall v. Bodine Elec. Co.,
276 F.3d 345 (7th Cir. 2002) 42

Lowry's Reports, Inc. v. Legg Mason, Inc.,
271 F. Supp. 2d 737 (D. Md. 2003) 17, 20, 25, 27, 28, 41, 42, 43, 44, 47, 50

Lyons P'Ship, L.P. v. Morris Costumes, Inc.,
243 F.3d 789 (4th Cir. 2001) 39

M.L.E. Music Sony/ATV Tunes, LLC v. Julie Ann's, Inc.,
No. 8:06-cv-1902-T-17-EAJ, 2008 U.S. Dist. LEXIS 44873 (M.D. Fla. June 9, 2008) 20

MAI Systems Corp. v. Peak Computer, Inc.,
991 F.2d 511 (9th Cir. 1993) 17

Major Bob Music v. Stubbs,
851 F. Supp. 475 (S.D. Ga., 1994) 19, 24

Messer v. E.F. Hutton & Co.,
833 F.2d 909 (11th Cir. 1987) 48

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.,
545 U.S. 913 (2005) 18, 36

Morley Music Co. v. Café Continential, Inc.,
777 F. Supp. 1579 (S.D. Fla. 1991) 57

Nintendo of Am. v. Ketchum,
830 F. Supp. 1443 (M.D. Fla. 1993) 52

Oravec v. Sunny Isles Luxury Ventures L.C.,
469 F. Supp. 2d 1148 (S.D. Fla. 2006) 44

Ordonez-Dawes v. Turnkey Props.,
2007 U.S. Dist. LEXIS 25441 (S.D. Fla. April 2, 2007) 18

Pacific & Southern Co. v. Duncan,
744 F.2d 1490 (11th Cir. 1984) 56

Pegasus Imaging Corp. v. Northrop Grumman Corp.,
No. 8:07-CV-1937-T-27EAJ, 2008 U.S. Dist. LEXIS 99985 (M.D. Fla. Nov. 24, 2008) 18

Penguin Books v. New Christian Church,
No. 96-Civ-4126 (RWS), 2000 U.S. Dist. LEXIS 10394 U.S.P.Q. 2d 1680 (S.D.N.Y. July 25, 2000) 45

Peter Letterese & Assocs. v. World Inst. of Scientology Enters,
533 F.3d 1287 (11th Cir. 2008) 10, 11, 15, 38, 56

Ramirez v. United States,
767 F. Supp. 1563 (S.D. Fla. 1991) 15

Realsongs v. Gulf Broadcasting Corp.,
824 F. Supp. 89 (M.D. La. 1993) 23

Religious Technology Center v. Netcom,
907 F. Supp. 1361 (N.D. Cal. 1995) 30

Rogers v. Koons,
960 F.2d 301 (2d Cir.), cert. denied, 506 U.S. 934 (1992) 16

Shapiro, Bernstein & Co. v. H.L. Green Co.,
316 F.2d 304 (2d Cir. 1963) 19, 20

Slip-N-Slide Records, Inc. v. TVT Records, LLC,
2007 U.S. Dist. LEXIS 80787 48

Slip-N-Slide Records, Inc. v. TVT Records, LLC,
2007 U.S. Dist. LEXIS 80788 (S.D. Fla. Oct. 31, 2007) 53

Stevens v. Aeonian Press,
2002 U.S. Dist. LEXIS 20189; 64 U.S.P.Q.2D (BNA) 1920; Copy. L. Rep. (CCH) (Oct. 23, 2002) 55

Telectron, Inc. v. Overhead Door Corp.,
116 F.R.D. 107 (S.D. Fla. 1987) 50

Thompson v. Looney's Tavern Prods.,
No. 05-15364, 2006 U.S. App. LEXIS 27551 (11th Cir. Nov. 7, 2006) 43

Thornton v. J Jargon Co.,
580 F. Supp. 2d 1261 (M.D. Fla. 2008) 45

Thorsteinsson v. M/V Drangur,
891 F.2d 1547 (11th Cir. 1990) 15

Ticketmaster v. RMG Technologies, Inc.,
507 F. Supp. 2d 1096 (C.D. Cal. 2007) 17

United Feature Syndicate, Inc. v. Sunrise Mold Co., Inc.,
569 F. Supp. 1475 (S.D. Fla. 1983) 52

Walt Disney v. Video 47,
972 F. Supp. 595 (S.D. Fla. 1996) 15

Warner Bros. Entm't, Inc. v. RDR Books,
575 F. Supp. 2d 513 (S.D.N.Y. 2008) 57

STATUTES

17 U.S.C. § 106 45

17 U.S.C. § 106(1) 17

17 U.S.C. § 107 47

17 U.S.C. § 408(c) 16

17 U.S.C. § 410(c) 16

17 U.S.C. § 502(a) 56

17 U.S.C. § 504 .... 48, 51

17 U.S.C. § 504(c)(1) 51

17 U.S.C. §106(3) 17, 18

REGULATIONS

37 CFR § 202.3(b)(10) 16

PRELIMINARY STATEMENT

From January 2007 through April 2008, a Klein & Heuchan, Inc. ("K&H") sales associate named Scott Bell ("Bell") accessed over 13,000 password-protected CoStar web pages and downloaded the forty-five (45) copyrighted works that are the basis for CoStar's claims in this case. Without authorization from CoStar, Bell reproduced and distributed copyrighted CoStar material in connection with conducting research for K&H, participating in bi-weekly information sharing sessions mandated by K&H, and supporting the real estate information needs of the two principals at K&H as well as those of clients, prospective clients, and other colleagues. This activity constitutes copyright infringement, and K&H is liable for it. Mark and Steven Klein, the two principals that ran K&H, knew that K&H had no license to use CoStar but neither of them ever instructed Bell to stop. They also knew, from their experience with CoStar, that K&H needed a license from CoStar to access CoStar's content. Instead, they chose to benefit from and encourage the infringing activity.

CoStar asserts claims for contributory and vicarious infringement against K&H, seeking an award of statutory damages and an injunction. K&H requests the Court enter a declaration that it did nothing wrong. CoStar and K&H agree, and the evidence at trial showed, (i) that CoStar owns the rights to the forty-five works at issue, (ii) that Bell downloaded them to his computer while working for K&H, and (iii) that Bell's downloading was not authorized by CoStar. The Court already found at summary judgment that Bell is a direct infringer, and the issue left for resolution concerns K&H's liability for the infringement.

In considering CoStar's claim for vicarious liability, the Court determined at summary judgment that K&H had the right and ability to supervise Bell. Thus, at trial, the only remaining element that CoStar needed to establish for vicarious liability was that of financial benefit, i.e., that K&H benefited from the infringing activity. For this, as per *Fonovisa, Inc. v. Cherry Auction, Inc.* 76 F.3d 259 (9^{th} Cir. 1996) and the other cases discussed herein, the law only requires that the infringing behavior inured to the benefit of K&H's operations, which it clearly did, and CoStar does not need to link the infringements to specific commissions. The evidence shows that Bell engaged in the copying for a singular purpose of helping him and others at K&H function as commercial real estate brokers/agents, with the hope and expectation of earning commissions. K&H also avoided paying the license fees that its competitors pay for access to CoStar and that it had previously complained to be too expensive. This constitutes vicarious infringement.

CoStar also has established contributory infringement. At trial, K&H did not deny knowing that Bell was downloading materials from CoStar; rather, K&H claimed it thought the activity was authorized because Bell had a working password from his former employer, Coldwell Banker NRT ("Coldwell"). K&H's claimed belief that Bell was authorized lacks credibility and does not survive any reasonable scrutiny. Moreover, the standard is know or have reason to know of the infringing activity, *see Casella v. Morris*, 820 F.2d 362, 365 (11^{th} Cir. 1987), such that even if Mark and Steve Klein really did not know that Bell's use was unauthorized (a dubious proposition given the circumstances), K&H absolutely *had reason to know*. K&H knew how CoStar licensed its services, knew that the CoStar services contained copyrighted works, and knew that Bell was using the CoStar products licensed to its competitor, Coldwell. In the face of these and other clear indicators of infringement, K&H unreasonably chose to assume the posture of an ostrich with its head in the sand, when the fact that Bell's use was infringing was readily verifiable. It is irrelevant whether K&H did this because it knew that Bell's use was unauthorized and did not want to stop it or because it did not want to know that his use was unauthorized. Under *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003) and the other cases discussed below, turning a blind eye to infringing behavior amounts to knowledge under the law, and it is clear K&H induced and/or materially contributed to the infringing activity such that liability is appropriate.

Faced with the rather straightforward case as to its liability, K&H seeks shelter under equitable principles, claiming that CoStar was complicit in the infringement or failed to mitigate its damages. In the Eleventh Circuit, however, equitable defenses should be applied to copyright suits only "in the most extraordinary circumstances." *Peter Letterese & Assocs. v. World Inst. of Scientology Enters*, 533 F.3d 1287, 1320 (11th Cir. 2008). Here, all that K&H offers in support of its implausible allegations is a one-line internal database entry by a lower-level CoStar employee, purporting to reflect a comment by a Coldwell receptionist concerning Bell in February 2007. K&H developed no record to support its theory beyond the ambiguous, isolated entry by a line-level CoStar researcher who had nothing to do with licensing or sales. As discussed below, K&H falls far short of meeting the stringent burden of proof it bears on its arguments in equity.

I. BACKGROUND

1. K&H filed this case in state court on June 4, 2008. (Doc. # 2). K&H sought a declaration that it had no liability to CoStar as a result of use of CoStar commercial real estate information services within K&H. (*Id.*) CoStar removed the action to this Court on June 24, 2008, and filed its counterclaims on November 21, 2008. (Doc. # 23). CoStar asserted contributory and vicarious copyright infringement claims against K&H, along with a third-party direct infringement claim against Bell. On November 25, 2009, this Court denied a motion for summary judgment that CoStar filed on its secondary infringement claims. (Doc. # 94). In ruling on that motion, this Court found that Bell committed direct infringement but that disputed issues of fact existed as to CoStar's vicarious and contributory infringement claims against K&H. (*Id.*) Subsequently, CoStar reached a settlement with Bell (Doc. # 105), leaving only the claims as between CoStar and K&H in the case.

2. CoStar builds, maintains and licenses access to commercial real estate information services. Its web-based products provide its licensed users with a wide array of information regarding office, industrial and retail properties and markets throughout the United States and parts of Europe. For any given property, CoStar provides photographs of the property and hundreds of fields of researched information and analysis. (Day 1; Alliegro; 54:07-66:01; 74:21-80:01; *see* Exs. 36, 39, 40, 41). The CoStar Property® product also includes extensive analytic market reports. (Day 1; Alliegro; 66:25-74:20; *see* Exs. 11, 12, 13, 22, 42, 43). CoStar creates and updates its products by employing a team of over eight hundred trained researchers, photographers

and analysts. (Day 1; Alliegro; 36:03-37:04; 40:23-47:08; *see* Ex. 39). The CoStar products are widely-licensed in the marketplace, with 15,000 client firms, 90,000 users, and a 90% renewal rate. (Day 1; Alliegro; 40:07-22). Access to the CoStar products provides an advantage to a broker who just has use of public records sources or multiple listing/bulletin board services, which are vastly different types of services. (Day 1; Alliegro; 40:23-49:15; 80:02-82:08) (Day 2; Bell; 32:08-33:17).

3. CoStar protects the intellectual property it creates by registering its copyrights in its photographs and its databases. (Day 2; Williams; 67:17-70:12). CoStar's customers pay a license fee computed on the basis of the number of commercial real estate professionals who work for the customer and the CoStar products and geographic markets to which they want access. (Day 1; Alliegro; 37:06-37:19; 51:06-53:24; *see* Ex. 70). CoStar never licenses its core professional products, such as the CoStar Property or CoStar COMPS® services at issue in this case, to individuals within a firm or company. (Day 1; Alliegro; 49:16-25; 51:06-52:17). A CoStar customer must register every pertinent user at a licensed site, paying a "fixed" license fee payment for the term of the license; i.e., the price does not decrease if one or more authorized users leave during the term. (Day 1; Alliegro; 50:01-51:02).

4. Users access CoStar's products through its website, www.costar.com. Authorized users enter a user name and password to access those products. (Day 1; Alliegro; 55:10-13) (Day 1; Bell; 157:04-19; *see* Ex. 35).

5. CoStar entered into a license agreement with Coldwell on September 30, 2005. (Stipulated Facts ¶ 4; *see* Ex. 5). That agreement provided that Coldwell would

pay for a total of thirty-six (36) Coldwell sales agents located at nine (9) Coldwell offices in Central Florida to access two of CoStar's core products, CoStar Property and CoStar Comps. Under the agreement and consistent with CoStar's standard terms published on its website, each user had to be either an employee or independent contractor working for Coldwell. (Day 1; Alliegro; 85:09-90:04; *see* Exs. 4, 5).

6. Bell worked as a real estate sales agent for Coldwell from September 2005 until November of 2006. (Stipulated Facts ¶ 7). Coldwell obtained a user account for Bell to use as one of its sales agents. (Stipulated Facts ¶ 5). When CoStar established Bell's access, it specifically informed Bell, in writing, that he could only use it in accordance with the license and online terms of use available at CoStar's website. (Day 1; Alliegro; 115:11-117:06; *see* Ex. 69). Bell could not use the CoStar service without initially agreeing to CoStar's Terms of Use and then periodically reaffirming that commitment in order to continue to use the service. (Day 1; Bell; 157:20-158:07). While Bell was authorized to download content from CoStar when he worked at Coldwell, Bell was not authorized to access or use the services following his departure from Coldwell. (Stipulated Facts ¶ 7).

7. Bell left Coldwell in November 2006 and joined K&H on December 17, 2006. (Stipulated Facts ¶ 9) (Day 1; Bell; 134:04-09). K&H is a commercial real estate firm headquartered in Clearwater, Florida, and it is owned in its entirety by Mark Klein. Steve Klein, Mark Klein's son, serves as Executive Vice President of K&H. (Stipulated Facts ¶ 12). K&H has between fifteen to twenty-four sales associates. (Day 1; Bell; 145:21-23) (Day 2; Williams; 87:02-88:24). CoStar has repeatedly tried to sell K&H

subscriptions to CoStar's services, and Mark Klein understood that a paid license was required to access CoStar's services. (Day 2; Mark Klein; 46:19-47:12). Yet K&H never licensed any of the CoStar products, nor has K&H ever paid CoStar any license fees for the access and use of the CoStar products. (See Stipulated Facts ¶¶ 8, 15).

8. Even though Bell was not authorized to access or use the CoStar online services following his departure from Coldwell, he used them repeatedly while at K&H. (Stipulated Facts ¶¶ 7, 9) (Day 1; Bell; 153:17-154:04). While working for K&H, Bell used his Coldwell username and password to access CoStar's online services from January 2007 through April 16, 2008. (Stipulated Facts, ¶ 11). CoStar's records show that Bell logged into CoStar's products approximately 130 times over this period, downloading over 13,000 pages of material from CoStar's database, including the forty-one (41) copyrighted building photographs and the four (4) copyrighted CoStar Market Reports that are the basis for CoStar's claims. (Day 2; Williams; 75:19-83:25; 91:12-93:14; *see* Exs 1-2, 30, 31,36, 37). Mark Klein and Steve Klein knew that Bell was accessing the CoStar service using the access codes he had from Coldwell. (Day 2; Mark Klein; 47:24-49:07) (Day 2; Steve Klein; 122:16-124:10). When Bell was asked whether he ever stopped to consider if he was still authorized to use the service even though he left Coldwell, Bell responded that he "didn't give it a thought." (Day 1; Bell; 154:13-16). Bell wanted to think he had authorized access to CoStar because he liked the service. (Day 1; Bell; 155:06-09).

9. In March 2008, CoStar detected that the Coldwell user account assigned to Bell accessed the CoStar products using an IP address associated with K&H. (Day 2;

Williams; 83:06-87:01). This discovery prompted the initiation of an investigation into the matter, as K&H was not licensed by CoStar.[2] (Day 2; Williams; 83:06-87:01). As part of that investigation, CoStar contacted Mark Klein at K&H to inquire as to Bell's usage. After a series of letters and telephone calls, though which CoStar confirmed the improper usage, CoStar cut-off the user name and password previously assigned to Bell. (*Id.*; *also see* Day 1; Alliegro; 120:13-21).

II. <u>BURDENS OF PROOF</u>

10. CoStar has the burden of demonstrating its copyright claims by the preponderance of the evidence. *Walt Disney v. Video 47*, 972 F. Supp. 595, 600 (S.D. Fla. 1996) (preponderance of evidence standard for claim of copyright infringement).

11. K&H bears the burden of proof on its affirmative defenses. *Thorsteinsson v. M/V Drangur,* 891 F.2d 1547, 1550-51 (11th Cir. 1990) (defendant bears the burden of proof on his or her affirmative defense). This burden extends to K&H's argument relating to mitigation of damages. *Ramirez v. United States*, 767 F. Supp. 1563, 1572 (S.D. Fla. 1991) ("Even if the Court assumes that plaintiffs had a duty to mitigate damages, defendant had the burden of proving plaintiffs' failure to mitigate, see S. Williston, A Treatise on the Law of Contracts § 1360 (3rd ed. 1968)...").

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[2] CoStar's records included the IP address then-used by K&H because Mark Klein, in November 2007, had attempted to log into CoStar as part of a free trial subscription with CoStar for a different, more limited product than what Coldwell licensed from CoStar. (Day 2; Williams; 76:02-23; *see* Ex. 31). (Day 1; Alliegro; 104:04-11; 112:07-113:18) (Day 2; Stipulation; 134:22-135:16). It is, of course, the prerogative of the copyright owner to permit some copying free of charge, in order to generate a larger market for its works, and doing so does not abrogate its rights in any way. *Encyclopedia Britannica Educational Corp. v. Crooks*, 542 F. Supp. 1156, 1180 (W.D.N.Y. 1982).

III. COSTAR HAS PROVEN OWNERSHIP AND REGISTRATION

12. CoStar has asserted claims of copyright infringement stemming from the reproduction, and in some instances distribution, of the forty-one (41) works described in the Summary of CoStar Photographs Allegedly Infringed (Ex. 1) and the four (4) works described on the Summary of CoStar Market Reports Allegedly Infringed (Ex. 2) . K&H has stipulated that CoStar owns the works at issue and registered them prior to the unauthorized copying. (Stipulated Facts ¶ 1, 2, 6).[3] The testimony at trial also supported this. (Day 2; Williams; 67:05-70:20, *see* Exs. 45, 46).

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[3] A single group registration may be filed to register all the works that a particular photographer creates and that are published within the same calendar year. Uncontested Points of Law ¶ 2; 17 U.S.C. § 408(c); 37 CFR § 202.3(b)(10). Where registration was filed within five years after first publication of the work, the copyright registration certificate constitutes prima facie evidence of the copyright ownership, validity, and originality of each work to which plaintiffs claim exclusive rights. Uncontested Points of Law, ¶ 4; 17 U.S.C. § 410(c); *Klein & Heuchan, Inc. v. CoStar Realty Information, Inc., et al.*; No. 8:08-cv-1227-T-30EAJ (Nov. 25, 2009) (Doc. # 94). The Copyright Act protects original works of authorship that possess some minimal degree of creativity. Uncontested Points of Law, ¶ 3. In its opposition to CoStar's motion for summary judgment, K&H challenged whether CoStar's photographs deserve copyright protection. (Doc. # 72). As trial approached, K&H reversed course and stipulated that, under the Copyright Act, photographs receive copyright protection and any or almost any photograph will have the necessary originality to support a copyright merely by virtue of the photographers' personal influence, choice of subject matter, angle of photograph, lighting, determination of the precise time when the photograph is to be taken, and other variants. Uncontested Points of Law, ¶ 1. The fact of the matter is that copyright protection for photographs is well-established in today's law. *Klein & Heuchan, Inc. v. CoStar Realty Information, Inc., et al.*; No. 8:08-cv-1227-T-30EAJ (Nov. 25, 2009) (Doc. # 94); *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir.), *cert. denied*, 506 U.S. 934 (1992); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076-77 (9th Cir. 2000).

IV. **COSTAR HAS PROVEN DIRECT INFRINGEMENT**

13. To make out a *prima facie* case of copyright infringement, a plaintiff must show that (1) it owns a valid copyright, and (2) defendants violated one of the exclusive rights of the copyright owner. (Uncontested Points of Law ¶ 6). *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

14. The copying of a copyrighted work in the memory of a computer constitutes a "reproduction" under the Copyright Act. *See* Uncontested Points of Law, ¶ 7; 17 U.S.C. § 106(1); *Klein & Heuchan, Inc. v. CoStar Realty Information, Inc., et al.*; No. 8:08-cv-1227-T-30EAJ (Nov. 25, 2009) (emails containing attachments consisting of pictures and information constitute "clear evidence of copying"); *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (finding that unauthorized transfer of copyrighted material into a computer's random access memory infringed owner's copyrights); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 745 (D. Md. 2003) ("Unauthorized electronic transmission of copyrighted text, from the memory of one computer into the memory of another, creates an infringing "copy" under the Copyright Act"); *Ticketmaster v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096, 1105-06 (C.D. Cal. 2007) ("copies of webpages stored automatically in a computer's cache or random access memory upon a viewing of the webpage fall within the Copyright Act's definition of "copy""). Public distribution of a copyrighted work is an exclusive right reserved to the copyright owner, and usurpation of that right constitutes infringement. (Uncontested Points of Law, ¶ 8; 17 U.S.C. §106(3)).

15. This Court, in its November 25, 2009 Order, already determined that Bell engaged in direct infringement. (Doc. # 94). Between January 2007 and April 16, 2008, Bell downloaded to his computer each of the photographs described on the List of CoStar Photographs Allegedly Infringed and each of the market reports described on the List of CoStar Market Reports Allegedly Infringed. Stipulated Facts ¶ 3; *see supra* ¶ 8. Bell also distributed copies in some instances. (*See, e.g.*, Ex. 22).

V. COSTAR HAS PROVEN VICARIOUS INFRINGEMENT

16. A defendant "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (citing *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d. Cir. 1963)); *Pegasus Imaging Corp. v. Northrop Grumman Corp.*, No. 8:07-CV-1937-T-27EAJ, 2008 U.S. Dist. LEXIS 99985, *5 (M.D. Fla. Nov. 24, 2008) (adopting the language set forth above from *Grokster*); *Ordonez-Dawes v. Turnkey Props.*, 2007 U.S. Dist. LEXIS 25441, *9 (S.D. Fla. April 2, 2007) (same).[4]

17. Knowledge of the infringement is not necessary to a finding of vicarious infringement. A defendant may be vicariously liable for infringement even if ignorant of the infringement. *See Klein & Heuchan, Inc. v. CoStar Realty Information, Inc., et al.*;

[4] At trial, K&H quoted a footnote from the Supreme Court's decision in *Grokster*, claiming that vicarious infringement requires the defendant to "profit directly" from the infringement. The text of the Supreme Court's *Grokster* opinion actually re-affirms the longstanding standard for vicarious infringement; namely, that one "infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *Grokster*, 545 U.S. at 930. The Supreme Court in *Grokster* resolved the case on the grounds of contributory infringement and made no attempt to change the law of vicarious infringement liability. Indeed, both the text and the footnote each cite to the Second Circuit's *Shapiro, Bernstein* case, *see infra* ¶ 18.

No. 8:08-cv-1227-T-30EAJ (Nov. 25, 2009) (recognizing that knowledge of the infringement is not necessary for vicarious infringement); Uncontested Points of Law, ¶ 9; *Major Bob Music v. Stubbs*, 851 F. Supp. 475, 480 (S.D. Ga., 1994) (owner of establishment has right and ability to control activities at establishment and vicarious liability can be imposed even where the controlling individual had no knowledge of the infringement); *Pegasus Imaging Corp,* 2008 U.S. Dist. LEXIS at *5 (a defendant may be vicariously liable for copyright infringement "even if ignorant of the infringement").

18. The Second Circuit's decision in *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307-08 (2d Cir. 1963), has been broadly adopted as the clearest articulation of when vicarious liability attaches. *See, e.g., J&J Sports Prods. v. Torres*, No. 6:09-cv-391-Orl-19DAB, 2009 U.S. Dist. LEXIS 52182, *7-8 (M.D. Fla. June 21, 2009) (adopting *Shapiro* and noting vicarious copyright infringement "may be established by demonstrating that the individual had the right to supervise the infringing parties and received a financial benefit from the infringement; the plaintiff need not demonstrate direct knowledge of the infringing activity or that the infringer was necessarily acting within the scope of employment"). In *Shapiro*, the court found vicarious infringement liability for a chain-store owner that received 10% or 12% of gross receipts from an independent concessionaire who, without chain-store owner's knowledge, sold infringing records. *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d at 308. As the Second Circuit explained, "[w]hen the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of copyrighted material . . . the purposes of copyright law may be best effectuated by the imposition of

liability upon the beneficiary of that exploitation" and imposing vicarious liability, "even in the absence of an intention to infringe or knowledge of infringement, is not unusual" and "cannot be deemed unduly harsh or unfair." *Id.,* at 307-09.

19. As discussed below, CoStar has proven vicarious infringement.

A. Right and Ability to Control

20. A defendant has the right and ability to control the infringing activity when the defendant has the power to police the conduct or make inquiry to prevent or limit the infringement. This does not depend on the existence of an employer-employee relationship and can occur in the context of an independent contractor. (Uncontested Points of Law ¶ 9; *accord* NIMMER § 12.04[A][2] (citing cases for the proposition that, "the proprietor of a dance hall is liable for infringing performances or the orchestra, even if the orchestra is hired as an independent contractor and exclusively determines the music to be played")). "To escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent. Turning a blind eye to detectable acts of infringement for the sake of profit gives rise to liability." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). [5]

[5] *See M.L.E. Music Sony/ATV Tunes, LLC v. Julie Ann's, Inc.,* No. 8:06-cv-1902-T-17-EAJ, 2008 U.S. Dist. LEXIS 44873, *9 (M.D. Fla. June 9, 2008) ("Because Defendants benefited from the performances and admitted they owned, controlled, managed, and operated [the facilities where the infringement occurred], they are vicariously liable for the infringement."); *Arista Records v. Flea World,* No. 03-2670 (JBS), 2006 U.S. Dist. LEXIS 14988, *37 (D. N.J. Mar. 31, 2006) ("If the Market's growth outpaced Defendants' ability to monitor and control what happens on their own premises by their own vendors, then they should have reduced the size and scope of their operations or hired more security to meet their obligations, or both."); *Lowry's Reports, Inc.,*271 F. Supp. 2d at 745 (defendant had the right and ability to supervise its own employees, who infringed plaintiff's copyrights at defendant's offices, using defendant's equipment and while

21. At summary judgment, this Court found that K&H had the requisite right and ability to control. (Doc. # 94, at 7-8). The evidence adduced at trial was consistent with that earlier finding, and K&H did not contest it. While at K&H, Bell was required to attend two mandatory sales meetings each week. (Stipulated Facts ¶ 12). Both Mark Klein, the Chief Executive Officer and sole owner of K&H, and Steven Klein, the Executive Vice President of K&H, oversaw Bell's work, including giving constructive feedback on his work performance. (*Id.*) All property listings obtained by Bell had to be accepted by either Mark Klein or Steven Klein. (*Id.)* The listing agreements for Bell's properties had to be signed by Mark Klein or Steven Klein. (*Id.)* Mark Klein and Steven Klein also discussed marketing strategies with Bell, (*Id.*), and had to approve his marketing fliers before any mailings, (Day 1; Bell; 199:18-25). K&H had the right to "sever" its relationship with Bell for violations of K&H's policies. (Day 1; Bell; 200:01-03). Further, because K&H "holds" Scott Bell's commercial real estate license, his ability to practice commercial real estate was controlled by K&H. K&H had the ability to tell Bell to stop accessing CoStar but did not do so. (Day 1; Bell; 200:01-07).

B. Direct Financial Benefit

1. Legal Standard

22. K&H seeks to avoid liability by arguing that the infringement cannot be tied to any specific commissions earned by the firm and therefore did not benefit K&H. As discussed below, this argument rests on an incorrect legal premise. A defendant

working for defendant, and that defendant's employees infringed plaintiff's copyrights in contravention of policy or order bears not on liability but on damages and the award of attorney's fees).

profits or financially benefits from infringement even if there is no profit-making in an accounting sense of the word. For financial benefit, the infringement does not need to be tied to a particular line-item of profit, as it is enough to show that the infringement generally benefitted the defendant. Indeed, if the law limited a copyright owner's right to those instances where a defendant succeeds in its business, there would be a perverse incentive to copy first and ask for permission later. Similarly, it would run counter to copyright law and policy, and whittle away the incentives to create, if a copyright owner could not enforce its rights where the unauthorized copying benefitted defendant's general, overall operations but did not translate to a discernable line-item of profit.

23. In the well-known dance hall line of vicarious liability cases, which date back at least as far as *Dreamland Ball Room v. Shapiro, Bernstein & Co.*, 36 F.3d 354, 355 (7th Cir. 1929), a music publisher did not need to show that a band's playing of a *particular* song led to increased attendance at the dance hall or increased drinking at the bar as a result of that particular song being played. Rather, it was enough for vicarious liability that the owner of the dance hall hired bands that sometimes played copyrighted music without authorization and did not prevent or limit the infringement. Similarly, in *Napster*, the copyright owners demonstrated financial benefit by proof that the infringement generally was intended to benefit the defendant and without reference to specific benefit the downloading of individual songs had on Napster. *A&M Records v. Napster, Inc.*, 239 F.3d at 1023. Instead, in order to demonstrate vicarious infringement, a copyright owner need only show an overall, general benefit to defendant from the infringing activity.

24. In *Fonovisa, Inc. v. Cherry Auction, Inc.* 76 F.3d 259, 263 (9^{th} Cir. 1996), the Ninth Circuit rejected virtually the identical argument as made by K&H in this case. In *Fonovisa*, a flea market operator sought to avoid liability for the infringing sound recordings sold by vendors at the flea market by arguing that the plaintiff never demonstrated that the flea market operator made commissions that could be tied directly to the infringing sales. *Id.* The Ninth Circuit rejected that argument and recognized that when the infringement improves the attractiveness of the business generally, it suffices as a financial benefit for purposes of vicarious liability. *Id.* Furthermore, in *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9^{th} Cir. 2004), the Ninth Circuit held that there is no "quantification requirement," explaining the essential aspect of the "direct financial benefit" inquiry is whether there is a causal relationship between the infringing activity and *any financial benefit a defendant reaps*, regardless of *how substantial* the benefit is in proportion to a defendant's overall profits." *Id.* (emphasis added).

25. There are plenty of other examples that refute K&H's overly narrow argument as to the scope of vicarious infringement. In *Realsongs v. Gulf Broadcasting Corp.*, 824 F. Supp. 89, 92 (M.D. La. 1993), which concerned the unauthorized public performance of songs on a radio station, the court determined that the owners of a radio station had a sufficient direct financial benefit in the infringing activities such that vicarious liability applied, even though the direct infringers had hired the station, the fee charged for air time was unrelated to program content, and the station had yet to turn a profit. In *Broadcast Music, Inc. v. Blumonday Inc.* 1994 U.S. Dist. LEXIS 17979, *4, 332 U.S.P.Q.2d 1474, 1475 (D. Nev. 1994), a suit involving the alleged unauthorized

public performance of musical compositions at a restaurant, the court determined that direct financial interest need only"be tied to the operation as a whole, not exclusively to the infringement." The court explained:

> "The profits from a restaurant are derived in part from the entertainment provided. Defendants cannot deny that they expected financial benefit from the entertainment made available at their establishment. Defendants cannot avoid responsibility by requiring a specific showing of profits derived from the performances at issue."

Id. In addition, in the *Major Bob Music* case, 851 F. Supp. at 480, which concerned the unauthorized performance of musical works at a "watering hole," the court found that an enterprise is considered to be profit-making even if it never actually yields a profit, and the defendant "derives a financial benefit from the operation of the establishment and all activities that take place there." *Id.*

26. Finally, *Lowry's Reports, Inc. v. Legg Mason, Inc.* is also instructive. In that case, plaintiff Lowry's Reports created proprietary reports reflecting and analyzing stock market conditions and activity, and it limited access to the reports to licensed subscribers. Defendant Legg Mason was a financial services firm whose business consisted of asset management, securities, brokerage, and investment banking. Defendant Legg Mason licensed a single copy of the reports yet disseminated copies internally and used the copies to prepare for a daily internal call to discuss stock market information with Legg Mason brokers. The court held that Legg Mason employees infringed Lowry's copyrights and Legg Mason was a vicarious infringer. The court determined that that there cannot be any doubt that Legg Mason had "an obvious and direct financial interest" in the copying, which was done by its employees to further Legg

Mason's operations. *Lowry's Reports*, 271 F. Supp. 2d at 746. Moreover, the court specifically found that saving the costs of additional subscriptions is an obvious and direct financial interest in the copying. *Id.* The court did not require the plaintiff to show causal link between infringement and defendant's profits.

2. K&H Obtained Several Financial Benefits from the Infringing Activity

27. In the case at bar, K&H directly benefitted from the infringing activity in at least four separate ways.

28. First, K&H obtained the benefit of Bell copying the works at issue, from January 2007 until April 2008, in his capacity as a sales associate for K&H. The CoStar information service was squarely related to the scope of his work for K&H. Indeed, the infringing activity was done for the purpose of conducting research and learning about the market, reviewing specific properties, searching for properties and market trends, and downloading market reports. (Day 1; Bell; 154:05-154:12; 167:04-168:04; 173:15-175:12; 186:20-193:25; *see* Exs. 11, 12, 13, 15, 16, 17, 22, 23, 24). The exclusive reason Bell used the CoStar products was for the benefit of K&H, in the hopes of learning information; making himself a better sales agent and earning commissions for him to split with K&H. (Day 2; Bell; 33:21-34:08). K&H hired Bell with the hope he would earn money for K&H. (Day 2; Mark Klein; 37:15-23). K&H paid Bell sales commissions whereby Bell and K&H split in half all revenue that resulted from a lease or sale deal that Bell handled. (Stipulated Facts ¶ 13) (Day 1; Bell: 198:16-199:07).

29. For the infringing activity to have benefited K&H, it is not necessary to show that Bell distributed the works to others at K&H. Indeed, to hold otherwise would

limit vicarious infringement to instances where the direct infringement resulted from violation of the copyright owner's exclusive right of public distribution. That is not the law. Vicarious infringement can result from violations of any of the exclusive rights set forth in the Copyright Act. For instance, in *M.L.E. Music Sony/ATC Tunes*, 2008 U.S. Dist. LEXIS at *8, the court rejected the argument that the proprietors of a lounge could avoid vicarious liability on the basis that they had not themselves performed the copyrighted musical works without a license. Bell worked for K&H and his copying alone, to further his role as a K&H sales agent, is enough to demonstrate the requisite financial benefit to K&H.

30. Second, Bell made copies of copyrighted CoStar material and distributed it to others at K&H, including Mark Klein, Steven Klein and Judi Healey. (Day 1;Bell; 168:08-170:22; 172:11-173:11) (Day 2;Mark Klein; 57:06-20). Bell downloaded and reviewed the CoStar market reports every quarter (Day 1; Bell; 175:02-12), and distributed certain copies to Mark Klein, Steve Klein, and another colleague, Judi Healey to assist them with their work for K&H (Day 1; Bell 175:13-24). In fact, Bell provided copies of copyrighted CoStar reports directly to Mark Klein and Steve Klein in the first half of 2007. (Day 1; Bell; 176:04-186:16) (Exs. 18, 21, 22). K&H also benefitted by virtue of the copyrighted photographs and market reports that Bell provided to clients and prospective clients. (Day 1; Bell; 154:05-167:03, *see* Exh. 20). These acts also satisfy the requisite financial benefit to K&H from the infringing activity.

31. Third, Bell's unauthorized copying of CoStar's copyrighted works provided Bell with information and insights that he regularly shared with others at the

K&H bi-weekly meetings, which included a general "rap session" and discussion of specific deals, opportunities and trends. (Day 1;Bell; 196:22-198:15) (Day 2; Mark Klein; 43:16-45:10). Bell testified that he offered information at these meetings that he obtained from the CoStar service. (Day 1; Bell: 198:12-15). This rap session is similar to the daily conference call in the Lowry's Reports case, where the court found a clear financial benefit. (*See supra* ¶ 26.) Bell was expected to share information he obtained with others at K&H. (Day 2; Mark Klein; 43:16-18). K&H's own Policy Manual, in a paragraph entitled "Revenue Sharing," specifically states, "**[t]he company recognizes the value that associates bring to the company by sharing information**." (Ex. 48) (emphasis added). Bell used the CoStar services to conduct research in his role as a K&H sales agent, including to share information with his colleagues; in doing so he reproduced copyrighted CoStar photographs and market reports; and, thus, K&H cannot now credibly deny that Bell's use of CoStar did not directly benefit the firm. This too is enough to demonstrate the requisite financial benefit to K&H.

32. Fourth, K&H avoided the cost of paying license fees to CoStar for this copying of CoStar's copyrighted works, and there can be no doubt that this constitutes a direct profit from the infringing activity. As this Court and others have recognized, avoidance of the proper license fee is a clear example of a financial benefit. *Klein & Heuchan, Inc. v. CoStar Realty Information, Inc., et al.*; No. 8:08-cv-1227-T-30EAJ (Nov. 25, 2009) (avoidance of licensing fee can be direct financial benefit); *accord supra* ¶ 26 (*Lowry's Reports* case). In fact, in addition to saving the cost of license fees, K&H

also directly profited from the infringing activity by virtue of saved internal research costs.

33. K&H argues that Bell did not earn much by way of commissions and those he did earn cannot be tied to CoStar's copyrighted works; yet that is not the test. As discussed above, *see supra* ¶¶ 22-26, it is enough that the infringing activity occurred in connection with the operations of the business of K&H. In the *Blumonday* discussed above, *see supra* ¶ 25, the court noted that the profits from a restaurant are derived in part from the entertainment provided and the restaurant cannot avoid responsibility by requiring a specific showing of profits derived from the performances at issue. The same is true in this case, where K&H's profits are derived in part from the unauthorized copying of CoStar's works to increase the knowledge, insights and market knowledge of Bell and the other brokers and agents at K&H. And, at a very minimum, K&H avoided substantial subscription costs and lessened its own internal research costs as a result of the infringing activity.

VI. COSTAR HAS PROVEN CONTRIBUTORY INFRINGEMENT

34. A contributory infringer is one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another. *See* Uncontested Points of Law ¶ 10; *Klein & Heuchan, Inc. v. CoStar Realty Information, Inc., et al.*; No. 8:08-cv-1227-T-30EAJ (Nov. 25, 2009); *Casella v. Morris*, 820 F.2d 362, 365 (11^{th} Cir. 1987). CoStar has proven these elements.

A. Knowledge

1. Legal Standard

35. Contributory liability requires that the secondary infringer know or have reason to know of the infringing activity. *Klein & Heuchan, Inc. v. CoStar Realty Information, Inc., et al.*; No. 8:08-cv-1227-T-30EAJ (Nov. 25, 2009) ("knowledge means that either the alleged contributory infringer has actual knowledge or has reason to know of the infringing activity") (quoting *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987). A defendant need not have actual knowledge or knowledge of specific infringements. In *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 845 (11th Cir. 1990), the Eleventh Circuit found contributory infringement liability even assuming the defendant could prove that he did not know that the subject work was copyrighted.. The Court held that actual knowledge is not required; the fact that a defendant *should have known* is enough to support liability. *See also Arista Records v. Flea World*, No. 03-2670 (JBS), 2006 LEXIS 14988 (D. N.J. Mar. 31, 2006) (plaintiffs are not required to show that defendants have knowledge of specific infringements at the time the defendants materially contributed to the direct infringement, and to hold otherwise would run contrary to holdings of *Fonovisa* and *Napster*).

36. Knowledge may be imputed where there are "clear indicators" that an activity infringes or where the lack of actual knowledge was not objectively reasonable; indeed, willful blindness equates to knowledge in copyright law. *See In re Aimster Copyright Litigation*, 334 F.3d at 650 ("Willful blindness is knowledge, in copyright law . . . as it is in the law generally" because a "deliberate effort to avoid guilty knowledge is

all that the law requires"); *Arista Records LLC v. USENET.com*, 633 F. Supp. 2d 124, 154 (S.D.N.Y. 2009) (turning a "blind eye" to infringement has been found to be the equivalent of knowledge and, thus, knowledge of specific infringements is not required to support a finding of contributory infringement); *Faulkner v. National Geographic Society*, 211 F. Supp. 2d 450, 474 (S.D.N.Y. 2002) (knowledge of the infringing activity may be actual or constructive and knowledge may be imputed where there are "clear indicators" that an activity is infringing, where the infringements are readily verifiable, or where the lack of actual knowledge was not objectively reasonable); *Religious Technology Center v. Netcom*, 907 F. Supp. 1361, 1374 (N.D. Cal. 1995) ("Where a BBS operator cannot reasonably verify a claim of infringement, either because of a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement, the operator's lack of knowledge will be found reasonable").

2. <u>K&H Knew or Should Have Known of the Infringing Activity</u>

37. Taken individually or collectively, the facts and circumstances indicate that K&H knew or should have known of the infringing activity. Mark Klein and Steve Klein are sophisticated businessmen and their denials of knowledge of the infringing activity are neither credible nor objectively reasonable:

38. First, K&H had firsthand knowledge that CoStar's services require a license for authorized use. CoStar attempted to license its products to K&H many times over a period of almost ten years. (Stipulated Facts ¶ 8). K&H received eight or nine product demonstrations from CoStar salespersons, along with at least one licensing

proposal in March 2006. (Day 1; Alliegro; 82:09-15; 84:06-10). Mark Klein testified that testified that: (i) he knew CoStar was a commercial real estate service; (ii) CoStar salespeople had been calling on him for years and came and did demonstrations for him; (iii) CoStar does a good job marketing its service; and (iv) he knew that access to CoStar required a paid license. (Day 2; Mark Klein; 46:19-47:10). During the product demos, CoStar informed K&H of how it licensed its service.[6] (Day 1; Alliegro; 82:16-85:08). (Day 1; Alliegro; 83:18-84:05). Mark Klein understood the terms upon which CoStar licenses its products well-enough to complain to others at K&H that he viewed the CoStar service as too expensive. (Day 1; Bell; 200:24-201:08).

39. Second, K&H was aware of Bell's use of the CoStar online services while at K&H (Stipulated Facts ¶ 10). K&H was also aware that Bell's access was the result of Coldwell's license rather than Bell's own license or a license given to K&H. (Day 2; Mark Klein; 47:24-49:07) (Day 2; Steve Klein 122:16:124:10). Shortly after Bell joined K&H, Mark Klein and Steve Klein learned that Bell was using the CoStar products through the access codes that he had from his former employer, Coldwell. (Day 2; Mark Klein; 48:02-08) (Day 1;Bell; 155:10-156:18; 201:09-22). In fact, Bell provided copies of copyrighted CoStar reports directly to Mark Klein and Steve Klein in the first half of 2007. (Day 1; Bell; 175:02-186:16) (Exs. 18, 21, 22). Those reports had prominent copyright notices on them. (Exs. 11, 12, 13, 22, 42, and 43). Mark Klein even watched Bell perform research within the CoStar system where the screen displayed Bell's name and the name of the licensee, Coldwell Banker NRT. (Day 1;Bell; 156:02-22; 158:08-

[6] Neither Mark Klein nor Steve Klein disputed Alliegro's testimony on this point.

159:11) (Day 1; Alliegro; 60:07-61:19; 107:02-14). Likewise, at all times that Bell worked at K&H, pages from CoStar that he printed included a Coldwell Banker Commercial NRT designation, a CoStar copyright notice, and a link to the CoStar online terms of use agreement. (Day 1; Bell; 160:04-163:09, *see* Ex. 19).

40. Third, common sense dictates that K&H should have known of the infringing activity. If UPS hires a driver who previously worked for Federal Express, UPS cannot reasonably claim that it thought the driver could use his old Federal Express truck to deliver UPS packages just because the driver still had the keys. Similarly, a law firm cannot hire an associate and ask him or her to continue using the Lexis or Westlaw accounts provided by the U.S. Government during the associate's judicial clerkship. Here, K&H knew that Bell's access to CoStar came through a password licensed and paid for by one of K&H's competitors, Coldwell. (Day 1; Bell; 147:10-15). This constituted a clear indicator of infringing activity. K&H knows that CoStar products are expensive, and knew or should have known that no company would license such a service for the benefit of its competitor to use. Licensing access to CoStar is not akin to purchasing a subscription to the Wall Street Journal or a local real estate magazine. As K&H was fully aware from the multiple sales demonstrations it received over the years, CoStar is a powerful research tool that costs thousands of dollars each month to license and bears no resemblance to a portable, time-based subscription, nor could anyone within the commercial real estate industry have reasonably thought otherwise. In fact, K&H should have been particularly sensitive to this given that its own office policies limit usage of its business property for work purposes and limits the use of information gained while

working at K&H such that it cannot be used at a subsequent employment. (Ex. 48; Day 2; Mark Klein; 38:24-39-07).

41. Fourth, there is no doubt that K&H turned a blind eye to the infringing activity and acted with willful blindness that equates to knowledge under the law, *see supra* ¶¶ 35-36. K&H made no effort to determine whether Bell's use of CoStar on behalf of K&H was authorized. A single telephone call or review of the CoStar website would have quickly made clear that Bell's use was improper. K&H did not review the online Terms of Use or other educational documents on the publicly-available CoStar website, which make it clear that Bell's usage was unauthorized.[7] K&H did not contact CoStar or Coldwell by phone or email (or otherwise) to ask about Bell's usage, nor did K&H ask Bell to contact CoStar or Coldwell. (Day 2; Mark Klein; 50:17-22) (Day 2; Steven Klein; 124:01-10). K&H never asked Bell when his CoStar access would expire, or even if the usage was authorized; rather, K&H stopped asking questions once it

[7] CoStar's terms of use are available on the publicly-accessible portions of its website at www.costar.com. (Day 2; Williams; 71:01-74:17). Those Terms of Use indicate that only an "Authorized User" can access the password-protected areas of the CoStar website; *e.g.*, the CoStar Property and CoStar COMPS services that Bell was able to access through his Coldwell passcodes. (Exs. 35). The Terms of Use define the Authorized User as an individual "(a) employed by a CoStar Client or an Independent Contractor (as defined below) of a CoStar Client at a site identified in the License Agreement, and (b) who is specified in the License Agreement as a user of a specific Passcode-Protected Product." (*Id.*) The publicly accessible area of the CoStar website also contains a "Licensing FAQs" document. (Ex. 70). This document clearly contemplates licensing the CoStar services to offices, not individuals. It explains that "the number of individuals at a shop benefitting from the CoStar subscription (i.e., the pertinent organization size) should not exceed the number of licensed Authorized Users." (*Id.*) The document adds that only authorized officers at CoStar can make any exceptions to these answers and the standard CoStar license agreement. (*Id.*). Finally, the public area of the CoStar website also has a document entitled "What is piracy?", (Trial Exhibit 70), which, among other abuses, lists "[h]olding a CoStar User ID under your own name but working for a separate unlicensed company with commercial real estate information needs." (*Id.*)

learned that Coldwell was the source of Bell's access. (Day 1; Bell; 201:09-202:18). Had K&H asked Bell, it would have learned that neither CoStar, nor Coldwell ever told Bell that he could continue using the CoStar service once he left Coldwell. (Day 1; Bell; 139:17-24). Likewise, had K&H ever asked CoStar or read the publicly accessible documents on the CoStar website, the answer as to whether Bell could continue to use the service would have been a resounding "no." (Day 1; Alliegro; 53:25-54:06; *see* Exs. 35, 70). K&H chose not to ask questions because it already knew the answers. The sole basis for their alleged belief that Bell was authorized was the fact that he had a functioning password. (Day 2; Mark Klein; 62:06-12). This is as legitimate as a company claiming that its salesperson could use the corporate credit card of his former employer to wine-and-dine clients and further the business of his new employer because the former employer did not cancel the individual's corporate credit card.

42. Finally, the Court should take K&H's discovery conduct into account in weighing credibility. In Interrogatory Responses, Mark Klein attested that he did not know anyone at K&H who had used CoStar services. (Day 2; Mark Klein; 56:06-58:14). In other words, Mark Klein's early position in the case was that *K&H was unaware that Bell was using CoStar*. This claim by Klein is exactly what he told Williams on the telephone when CoStar first called him about the infringement. (Day 2; Williams; 85:15-85:21; 89:22-91:11). Then, after Mark Klein was confronted with documents and testimony from Bell, he changed his response. In his deposition and at trial, Klein acknowledged that as early as February 2007, he was aware of the use of CoStar by Bell

and he sought shelter under the argument that he did not know it was unauthorized. (Day 2; Mark Klein; 47:24-49:07).

43. During discovery, when K&H was asked for documents related to CoStar, it responded that it had no such documents. (Day 2; Mark Klein; 58:14-61:18). This, of course, limited CoStar's ability to test K&H's claims of innocence. At trial, both Mark Klein and Steve Klein acknowledged that they never searched their computers prior to responding to CoStar's Request for Production of Documents.[8] This explains K&H's failure to produce a single email or document related to CoStar. Nor prior to signing sworn interrogatory answers did Mark Klein even check with Steve Klein or Judi Healey as to whether or not they had received any CoStar materials. (Day 2; Mark Klein; 64:22-65:20).

44. As well, in opposing CoStar's motion for summary judgment, Mark and Steve Klein each provided declarations swearing that they "do not recall ever receiving any information from CoStar." The Kleins signed those declarations *after* having seen emails at Mr. Bell's deposition that were addressed to each of them containing CoStar materials (documents that they never produced in this litigation), yet neglected advising the Court about those or related communications. For instance, at trial, Mark Klein

[8] Both Kleins testified that at some unspecified time after the summer of 2009 but prior to trial they searched their computers and found no documents. (Day 2; Mark Klein; 53:09-54:21; 64:05-09) (Day 2; Steven Klein; 123:13-18). This is curious insofar as Bell produced email communications with both of the Kleins but at trial they each claimed that they had nothing. In any event, the fact that both Mark and Steve Klein may have finally searched their computers for documents does not render their clear discovery violation harmless. It is impossible to know whether their failure to find documents was a result of emails and documents not being retained, the fact that their hard drives may have been wiped clean, they had new computers, or some other reason. K&H filed this lawsuit back in 2008 and its preservation of documents should have commenced long before whatever dilatory searches the Kleins claim to have performed.

testified that he was aware that both Steve Klein and Judi Healey had received CoStar reports. (Day 2; Mark Klein; 50:17-61:18). And, Trial Exhibit 21 is an email from Bell to Mark Klein, with the subject line of "CoStar Report" and text that says "Here it is." Accordingly, given the failure to provide discovery as required and the prior denials which they recanted at trial, their current denials of knowledge should be given no weight and their denials of knowing that Bell's access was wrongful should be discredited.

B. <u>Inducement and/or Material Contribution</u>

45. Having established that K&H knew or should have known of the infringing activity, the next question is whether K&H induced or materially contributed to the infringing activity. Inducement and material contribution are distinct theories of contributory liability through which defendants can be found liable. Inducement requires that the defendant has undertaken purposeful acts aimed at assisting or encouraging others to infringe copyright, whereas material contribution applies when a defendant provides the "sites and facilities" where the infringement occurs. *See* Uncontested Points of Law, ¶ 12; *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, Ltd., 545 U.S. 913, 936-37 (2005).

46. K&H affirmatively encouraged Bell's infringement. Bell testified that on different occasions Mark Klein and Steve Klein each asked Bell to access the CoStar products to obtain information for them for different commercial endeavors. Mark Klein asked Bell to get information on a particular property from CoStar. (Day 1;Bell; 168:08-170:22) (Day 2; Bell; 25:23-27:02). Steve Klein requested CoStar information for a client that eventually consummated a transaction through K&H. (Day 1; Bell; 172:11-

173:13). In fact, Steve Klein expressly said "thanks" to Mr. Bell for forwarding a copy of a copyrighted CoStar market report that included CoStar photos. (Day 1; Bell; 169:15-180:15; *see* Exs. 18 and 22). Mr. Bell also testified that Mark Klein once told him that his research in the CoStar products was "great." (Day 1; Bell; 156:02-22). In addition to the specific requests for information, K&H encouraged Bell to use the CoStar products by virtue of the bi-weekly meetings in which they sought to have him share information about the market – information they knew he would and did obtain from CoStar. K&H encouraged Bell to use the CoStar service and in so doing he made unauthorized copies of CoStar's copyrighted works. They never told Bell to stop providing them with CoStar market reports or anything else about his use of CoStar. (Day 1; Bell 179: 08-11; 184:12-186:191; 203:01-03). By any standard, this constitutes inducement.

47. In *Casella v. Morris*, 820 F.2d 362, 365-66 (11th Cir. 1987), the defendant induced infringement by purporting to sell a copyrighted work to a third-party when he knew that he did not have the rights to sell it and then doing nothing to stop the third party from exploiting the work. Similarly, K&H knew that Bell accessed and used the CoStar service without authorization while at K&H but did nothing to stop it. K&H's inaction in the face of Bell's ongoing infringement constitutes inducement under the Eleventh Circuit's *Casella* decision.

48. As to material contribution to the infringing activity, in *Flea World*, the plaintiffs did not need to show that defendants took steps to "foster" or "promote" infringement at the flea market; rather, it was enough that they provided the "site and facilities" for the infringing activity though the provision of wooden tables, booth spaces,

security, free parking, maintenance of the grounds, and restrooms. 2006 U.S. Dist. LEXIS 14988, *51-52.

49. Similarly, K&H provided Bell with office facilities and Internet service from and though which Bell accessed CoStar. (Day 2; Mark Klein; 37:24-39:06) (Day 1; Bell; 157:04-22) (Day 2; Williams; 91:15-93:14; 97:16-99:17; *see* Ex. 30). Bell used K&H scanners and copiers to copy, alter and redistribute CoStar's copyrighted works, including to prospective clients. (Day 1; Bell; 163:10-167:02; *see* Ex. 20). K&H further provided Bell with a K&H e-mail account (Day 2; Mark Klein; 38:20-21), which he could and did use to distribute CoStar copyrighted works to K&H colleagues and to clients and prospective clients. (Day 1; Mark Klein; 37:24-39:06) (Exh. 22). These facts, coupled with K&H's knowledge of the infringing activity, make K&H liable for contributory infringement.

VII. K&H'S ARGUMENTS IN EQUITY ARE UNAVAILING

50. K&H pled a host of equitable theories in an effort to avoid liability or lessen the amount of damages. Set forth below are the reasons why K&H's equitable theories fail under the facts and law.

A. K&H's Burden to Show Extraordinary Circumstances

51. In the Eleventh Circuit, the equitable principles asserted by K&H should be applied in a copyright infringement case only in the most extraordinary of circumstances. In *Peter Letterese & Assocs. v. World Inst. of Scientology Enters*, 533 F.3d at 1320-21 (11th Cir. 2008), the Eleventh Circuit ruled that, "[o]nly in the most extraordinary circumstances will laches be recognized as a defense" to a copyright

infringement claim filed before the statute of limitations has run. Application of judicially-created equitable principles interferes with the judgment of Congress as to the appropriate time limits and damages for actions brought under the statute. Indeed, the separation of powers principles that counsel against use of a judicially-created doctrine to bar a federal statutory claim filed under an express statute of limitations is so strong that the 2nd and 4th Circuits say that it is unavailable altogether. *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 260-61 (2nd Cir. 1997); *Lyons P'Ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001).

B. K&H has not shown "Extraordinary Circumstances"

52. The facts of this case do not present the sort of "extraordinary circumstances" that would warrant interference with the proper application of copyright law. K&H alleges that CoStar knew of Bell's infringement as early as February 2007 and yet for some unexplained reason did nothing to stop it. K&H's argument rests exclusively on a single piece of evidence; namely, the presence in CoStar's internal contact management database of an entry by Sylvia Alvarenga, a CoStar researcher, which states, "Receptionist said he was no longer at Coldwell, did not give further info as to where he transferred to. Re-assigned his listings." Ex. 69. (Day 1; Alliegro; 119:04-11). When carefully examined, these two incomplete sentences do not support K&H's arguments in equity.

53. As a threshold matter, K&H did not depose or call Sylvia Alvarenga as a witness in order to present as evidence what she actually knew and when.[9] Nor did K&H depose or call any witnesses from Coldwell to testify regarding what they had told CoStar. Rather, K&H chose to rest its entire defense on this on ambiguous data entry. In contrast, the unequivocal testimony of CoStar's representatives indicated that CoStar was not aware that Bell either had left Coldwell in February 2007 or had joined K&H. (Day 1; Alliegro; 122:25-125:19; 128:18-130:10). Had CoStar known what Bell was doing, it would have terminated his access immediately. (Day 1; Alliegro; 53:25-54:06; 122:25-123:10). In fact, proof that CoStar did not learn of the infringing activity until March or April 2008 can be seen from the fact that, in February 2008, CoStar emailed Bell his UserId and password – something it would never have done had it known he left Coldwell and/or joined K&H. (Day 1; Alliegro; 119:12-23; 127:11-128:09; *see* Ex. 69). The ambiguous data entry by Ms. Alvarenga is not enough to call into question the CoStar testimony that they did not know Mr. Bell was infringing. As if this were not enough, there are numerous additional reasons that each independently refutes the significance of this internal database entry.

54. First, the entry is ambiguous as to what Ms. Alvarenga knew. While the entry indicates that Bell was "no longer" at Coldwell, it also indicates that he "transferred." Reading each of the first two sentence fragments independently, Bell could have either left the employ of Coldwell or could have simply transferred to any one of the many other Tampa/St. Petersburg offices that Coldwell maintained. It is common

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[9] Ms. Alvarenga has not been an employee at CoStar since 2007. K&H sought no discovery regarding Ms. Alvarenga or her whereabouts.

for brokers to move around, especially in a firm like Coldwell that had numerous offices within central Florida. (Day 1; Alliegro; 50:01-51:02; 85:09-20). And that the entry note, "re-assigned his listings," is not necessarily an indication that he left Coldwell. (Day 1; Alliegro; 129:22-130-10; 132:14-133:03). If Bell simply transferred to another Coldwell office, it would not have caused CoStar to change anything with respect to his access to the CoStar products. (Day 1; Alliegro; 123:20-124:10). Nor would Coldwell Banker have had an obligation to inform CoStar if Bell moved from one licensed Coldwell site to another Coldwell licensed site. (Day 1; Alliegro; 125:16-19).

55. Second, Ms. Alvarenga attempted to contact Bell in her capacity as a researcher, in order to update information in the CoStar products regarding property listings. (Day 1; Alliegro; 126:02-09). CoStar research professionals call brokers all day long to discuss commercial real estate activity and often have no business reason to discern if the person on the other end of the phone is a client or non-client. (Day 1; Alliegro; 126:10-127:10). There is simply **no proof** in the record that the researcher knew or should have known (i) that Mr. Bell was an authorized user of CoStar's services, and (ii) that he would continue using the CoStar services if and when he left the employ of a CoStar client. Thus, the receptionist's comments would not have had and should not have had any significance to the researcher. Indeed, in *Lowry's Reports,* the court refused to allow defendants to avoid responsibility for their own misdeeds by shifting blame to the copyright owner based on an isolated telephone call, noting that the mere affixation of copyright notices can be enough to bar an equitable defense. 271 F. Supp. 2d at 747. The same result should apply here.

56. Third, CoStar researchers have no responsibility for issues associated with user's access or licensing. (Day 1; Alliegro; 43:23-44:03; 125:23-126:01). CoStar research professionals develop the content for the CoStar products and have no responsibility for identifying a particular broker as a client or non-client and then managing the licenses of those deemed to be a client. (*Id.*) Other CoStar employees handle those functions. (Day 1; Alliego; 92:18-93:08). As a matter of agency law, the purported knowledge of a line-level researcher who has no responsibility for sales or user access does imbue CoStar with knowledge. *See, e.g., Louvenia Hall v. Bodine Elec. Co.*, 276 F.3d 345, 356 (7th Cir. 2002) (company not negligent in failing to discover and rectify acts by employees because Title VII "neither requires nor expects management of a company to be aware of every impropriety committed by every low-level employee"); *Gutter v. DuPont*, 124 F. Supp. 2d 1291, 1310 (S.D. Fla. 2000) (the best test for determining whether notice to or knowledge of an agent is imputed to his or her principal is whether the conduct or facts known by the agent were within the sphere of authority of that particular agent). Because K&H failed to establish that any other CoStar employee reviewed the entry, much less that the entry was reviewed by someone whose sphere of authority related to granting or denying access to Bell, K&H's defense fails as a matter of law.

57. Fourth, to the extent that the statement by the Coldwell receptionist should have raised a red flag for CoStar to look into the matter (a proposition that CoStar disputes), an inquiry of Coldwell's website would have indicated that Bell still worked for Coldwell. The testimony from Bell was that his name and profile appeared on the

Coldwell website until March or April of 2007. (Day 1; Bell; 141:23-143:15). So, had anyone followed up in February 2007 to see if Bell still worked for Coldwell, its website would have indicated that he still worked for Coldwell.[10]

58. Infringing activity hurts CoStar and it works assiduously to avoid unauthorized access. K&H seeks to have this Court hold that a copyright owner who misses a potential opportunity to increase security by changing the locks (i.e., shutting off Bell's passcodes) somehow creates a "free pass" to unlock the door, enter the house, and walk out with valuable property. Such a holding would be contrary to law, would create an impossible standard for copyright owners to meet and is without a factual basis for its application. The "silence and inaction" arguments made by K&H "rarely suffices in statutory cases of infringement." *Lowry's Reports, Inc.*, 271 F. Supp. 2d at 747. Rather, undue delay bars relief in an instance like *Thompson v. Looney's Tavern Prods.*, No. 05-15364, 2006 U.S. App. LEXIS 27551, *15-16 (11th Cir. Nov. 7, 2006), where the copyright owner knew of defendants' plans to make a movie but waited over nine years to file suit. In stark contrast, this is a run-of-the mill copyright infringement case and K&H's resort to equity is unavailing.

C. Each of K&H's Affirmative Defenses Fails

59. First, as its 13th affirmative defense (Doc. # 25), K&H pled that any damages sought by CoStar are attributable to and were caused by a third-party, Bell.

[10] In the same vein, had CoStar looked at Bell's user activity in February 2007, it could not possibly have linked it to K&H because CoStar did not have K&H's Internet Protocol address until November 2007. *See supra* fn. 2. Moreover, even with respect to the period of November 2007 forward, CoStar still had to be able to uncover the overlap between the IP address for the Klein trial subscription login and the IP address for the Coldwell access codes assigned to Bell, a step accomplished only as a result of sophisticated technology and an active compliance division. (Day 2;Williams; 89:10-21).

That affirmative defense has no application in an action regarding secondary infringement, however, as every case of contributory or vicarious liability necessarily involves the defendant being held to answer for the direct conduct of another. *See Flea World, Inc.*, 356 F. Supp. 2d at 416-17 (striking same argument when pled as an affirmative defense).

60. Second, K&H pled waiver as its 10th affirmative defense. Waiver occurs "only if there is an intent by the copyright proprietor to surrender rights in his work.'" *Oravec v. Sunny Isles Luxury Ventures L.C.*, 469 F. Supp. 2d 1148, 1177 (S.D. Fla. 2006) (quoting *Napster* case), *aff'd* 527 F.3d 1218 (11th Cir. 2008). And that intent must be manifested by some overt act. *Id. Here,* K&H has not and cannot point to any evidence of waiver by CoStar. Indeed, the evidence demonstrated that CoStar properly registered its copyrights, included copyright notices on its works, attempted to protect its copyrighted works from infringement, and asserted claims for infringement. There is no evidence, overt act or otherwise, to suggest that CoStar intended to surrender its rights in its works.

61. Third, K&H pled estoppel as its 11th affirmative defense. The defense of estoppel is "a drastic remedy and must be applied sparingly." *Lowry's Reports, Inc.*, 271 F. Supp. 2d at 746 (quoting *Keane Dealer Servs., Inc. v. Harts*, 968 F. Supp. 944, 948 (S.D.N.Y. 1977)). The defense of estoppel requires that: (1) the copyright owner knew the facts of the infringement, (2) the copyright owner intended its conduct to be acted upon or the copyright owner acted such that the alleged infringer has a right to believe it was so intended, (3) the alleged infringer is ignorant of the true facts, and (4) the alleged

infringer relies on the copyright owner's conduct to his detriment. *Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261, 1282 (M.D. Fla. 2008); *Penguin Books v. New Christian Church*, No. 96-Civ-4126 (RWS), 2000 U.S. Dist. LEXIS 10394, * 51-52, 55 U.S.P.Q. 2d 1680 (S.D.N.Y. July 25, 2000). There was no evidence at trial that CoStar knew the infringement was ongoing and acted in a manner that would have led K&H to believe that it was permitted to continue to infringe. Indeed, the testimony by CoStar was that as soon as it became aware that Bell was infringing, it de-authorized his Coldwell username and password.

62. Fourth, K&H pled laches as its 12th affirmative defense. Laches requires that: (1) Plaintiff delayed in asserting his rights; (2) the delay was not excusable; and (3) there was undue prejudice to Defendants. *Thornton*, 580 F. Supp. 2d at 1286; *Oravec*, 469 F. Supp. 2d at 1176. In the case at bar, CoStar easily asserted its copyright claims against K&H well within the three year statutory period of limitations. That alone should be dispositive of this defense. But, beyond that, K&H has presented no evidence to support the theory that CoStar delayed asserting its rights in an inexcusable manner that prejudiced K&H.

63. Fifth, as its 9th affirmative defense, K&H argues that CoStar's claims should be extinguished because of its purported negligence in not preventing the infringement. There is no basis for this affirmative defense either in fact or in law. Copyright infringement is a strict liability offense and a copyright owner need not police the marketplace in order to gain the benefit of the legal protections under the Copyright Act. *See, e.g.,* 17 U.S.C. § 106; *H.M. Kolbe Co. v. Armgus Textile Co.*, 315 F.2d 70,

74 (2d Cir. 1963) (copyright law does not impose upon copyright proprietors the duty of policing the distribution of pirated works); *Flea World*, 356 F. Supp. 2d at 417 (the argument that copyright owners have an affirmative duty to police infringing activity on their own and are obligated not to sleep on their rights relates only to the defense of laches). In this respect, K&H's effort to use equitable principles to undermine hornbook copyright law should not be permitted.

64. Moreover, the evidence presented at trial demonstrated that CoStar protects its copyrights and acted reasonably. (Day 1; Alliegro; 38:09-22; 92:05-97:05; 114:03-11; see Exh. 35, 70). CoStar relies primarily on licensing and technology to protect its copyrighted works. CoStar's most important means of protecting its copyrights is by seeking to license those who want to access its works. CoStar's active sales force was evident in this case by virtue of the repeated efforts CoStar made to license K&H. Its licenses with customers make clear that only employees and independent contractors may access CoStar's products, and require that customers notify CoStar when an authorized user departs the company. The license provisions are not only available to the licensee, but are also posted on CoStar's website. CoStar posts the equivalent of "no trespassing" signs in the form of online Terms of Use and other educational materials posted on its website which make it easy for anybody to determine what activity is or is not infringing. (*Id.*) Not only must a user accept those Terms of Use when first accessing the CoStar products, but they must be accepted every thirty days or the user will be denied access to CoStar's products. (*Id.*; *accord* Day 1; Bell; 157:20-158:07). CoStar also employs technological measures to protect its copyrighted works,

including the use of a password-protected website that requires the use of a security certificate for access. (*Id.*)

65. Sixth, K&H pled fair use (as its 6th affirmative defense). Fair use is a statutory defense that impacts whether there is an underlying direct infringement, which is a predicate for secondary liability. While K&H raised this defense early in the case, the parties reached stipulations that effectively conclude that Bell committed direct infringement. The Court's ruling on CoStar's summary judgment motion also reached the same conclusion. *See* Order, dated November 25, 2009, at 6 ("The evidence presented shows that Bell directly infringed upon CoStar's valid copyrights.") Therefore, this is inapplicable. The facts adduced at trial also would not establish any of the statutory fair use factors set forth in 17 U.S.C. § 107. None of K&H's for-profit, commercial activity falls within any of the traditional fair uses of criticism, comment, news reporting, teaching, scholarship, or research. *Id.* Bell's use for K&H was purely commercial and non-transformative. He used the service, rather than paying the customary license fees, copying 100% of the copyrighted works that he accessed. And, finally, unauthorized use and copying jeopardizes the market for CoStar's copyrighted works, and cannot be deemed fair. *Lowry's Reports,* 271 F. Supp. 2d at 749 (citing Supreme Court's Harper & Row case for proposition that "[a] use that supplants any part of the normal market for a copyrighted work cannot ordinarily be deemed fair).

D. <u>The Duty to Mitigate Doctrine Does Not Apply in this Case</u>

66. As its purported 14th affirmative defense, K&H alleged that CoStar failed to mitigate its damages. The duty to mitigate is not an affirmative defense that

undermines liability; rather, it is an equitable state law doctrine allowing for the *reduction* of damages in certain instances. *Carrizales v. State Farm Lloyds*, 518 F.3d 343, 350 (5th Cir. 2008); *Air Caledonie Int'l v. AAR Parts Trading, Inc.*, 315 F. Supp. 2d 1319, 1338 (S.D. Fla. 2004); *Jenkins v. Graham*, 237 So. 2d 330, 332, 1970 Fla. App. LEXIS 6175 (Fla. Dist. Ct. App. 4th Dist. 1970). The duty to mitigate doctrine does not apply in this case.

67. Under Florida law, "a party cannot recover damages he could have prevented through the exercise of reasonable care and diligence." *Slip-N-Slide Records, Inc. v. TVT Records, LLC*, 2007 U.S. Dist. LEXIS 80787 (S.D. Fla. Oct. 31, 2007) (quoting *Messer v. E.F. Hutton & Co.*, 833 F.2d 909, 921 (11th Cir. 1987)). This duty to mitigate doctrine is also sometimes referred to as "avoidable consequences," which "is that one seeking damages as a result of another's act cannot recover those damages which he could have avoided by the exercise of reasonable care." *Air Caledonie Int'l v. AAR Parts Trading, Inc.*, 315 F. Supp. 2d at 1337 (quoting *Jenkins v. Graham*, 237 So.2d 330, 332 (Fla. 4th DCA 1970)). The burden rests with the defendant to show that the plaintiff breached a duty to mitigate damages. *Slip-N-Slide Records, Inc. v. TVT Records, LLC*, 2007 U.S. Dist. LEXIS 80787, * 39.

68. In this specific case, however, CoStar has elected to receive statutory damages pursuant to 17 U.S.C. § 504 and K&H has cited to no authority to support its assertion that a duty to mitigate applies in a *statutory damages* action or how it might apply. As discussed above, the duty to mitigate is an equitable, state law doctrine that sits wholly outside of the statutory scheme created by Congress for the awarding of

statutory damages. When applied in an actual damages case, mitigation limits the *actual* damages that a prevailing plaintiff might otherwise obtain. But the application of that doctrine does not fit comfortably in the statutory damages regime that furthers the legislative policy decision to deter infringement and incentivize the creation of copyrighted works. Statutory damages do not require proof of actual damages and seek to accomplish more than simply recoup for a copyright owner their lost profits. *See Cable/Home Commc'n Corp.,* 902 F.2d at 850 (statutory damages are appropriate regardless whether or not adequate evidence exists as to the actual damages incurred by plaintiffs or the profits gained by defendants); *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) ("[A] plaintiff may recover statutory damages whether or not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant, in order to sanction and vindicate the statutory policy of discouraging infringement.") (internal quotation marks omitted).

69. Moreover, even if a duty to mitigate hypothetically did apply as a matter of law (a proposition CoStar disputes), factually, there there was no failure to mitigate in this case. CoStar acted with reasonable care and diligence at all times herein. *See supra* ¶¶ 63, 64. Plus, a "duty to mitigate damages does not arise until the party upon whom the duty is impressed is aware of facts making the duty to mitigate necessary." *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1329 (9th Cir. 1995). In the *Lane Powell* case, the Ninth Circuit found there was no failure to mitigate where the plaintiff might have known that it would be exposed to a claim but did not necessarily know that it

would not have had a defense to such an action. *Id.,* at 1329-30. Here, the record overwhelmingly indicates that CoStar first learned of the infringing activity in late March 2008, and it acted swiftly to remedy the matter. But, even *if* a researcher at CoStar had known that Bell was no longer at Coldwell, there is absolutely *no proof* in the record the researcher knew that Bell had access to the CoStar service and had continued (or would continue) to use the service after leaving Coldwell. *See supra* ¶¶ 54-55. Further, the knowledge of the researcher would not flow to CoStar in any event. *See supra* ¶ 56. Thus, just like the plaintiff in the *Lane Powell* case, that CoStar did not know of the facts indicating the infringing activity until its anti-piracy efforts uncovered Bell's unauthorized use and copying at K&H in March/April 2008 dispels any notion that CoStar could have or should have acted sooner.

E. <u>K&H's Unclean Hands Bar it from Equity</u>

70. Finally, the doctrine of unclean hands bars K&H from relying on any equitable defenses or principles. *See Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 140 (S.D. Fla. 1987) (recognizing the maxim, "He who comes into equity must come with clean hands"); *Centel Cable TV Co. v. Thos. J. White Dev. Corp.*, 1989 U.S. Dist. LEXIS 19064, * 36 (S.D. Fla. 1989) (noting "[e]quity will stay its hand where a party is guilty of conduct condemned by honest reasonable men"). In *Lowry's Reports*, , the court barred the defendant from raising an equitable defense where it "could easily have ascertained what it could and could not do by making inquiry of [plaintiff]" but failed to do so. *Lowry's Reports*, 271 F. Supp. 2d at 747. The same is true in this case. K&H acted in bad faith by using the CoStar service rather than paying for a proper

subscription and by not stopping it or making a reasonable inquiry. K&H knew or should have known of the infringing activity, benefitted from it, and cannot now seek relief in equity. This especially true due to its litigation misconduct.

71. Based on the foregoing, K&H's a K&H's equitable theories fail.

VIII. STATUTORY DAMAGES

72. CoStar, having established K&H's infringement, has elected to recover such statutory damages under section 504(c)(1) of the Copyright Act.

73. A prevailing plaintiff who elects to collect statutory damages is entitled to a sum of not less than $750 or more than $30,000 for each individual work that was infringed. If a defendant's actions were willful, then the cap increases to $150,000 per work infringed. Uncontested Points of Law, ¶ 13; 17 U.S.C. § 504. Willful infringement is that committed with knowledge of or "reckless disregard" for the plaintiffs' copyrights. Reckless disregard can be inferred from continuous infringement, a past pattern of infringement, continuing infringement despite warnings, or other circumstances. Uncontested Points of Law, ¶ 14. CoStar need not prove any actual damages in order to be entitled to an award of statutory damages. *See supra* at ¶ 69; *see also* 17 U.S.C. § 504(c)(1) ("[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action. . . .").

74. As the Supreme Court recognized in *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233, 73 S.Ct. 22, 225 (1952), "a rule of liability which merely takes away the profits from an infringement would offer little

discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct."

75. The factors to be considered in determining the amount of statutory damages include: (i) the expenses saved or profits reaped by the infringer; (ii) the revenue lost by plaintiff; (iii) the infringer's state of mind; and (iv) the need to deter copyright infringement. *See* Uncontested Points of Law, ¶ 15; *Cable/Home Commc'n Corp.,* 902 F.2d at 850; *Milk Money Music v. Oakland Park Entm't Corp.*, 2009 U.S. Dist. LEXIS 121661, *5 (Dec. 10, 2009). Importantly, the aim is not just to compensate plaintiff for its injury but also to put defendants on notice that it costs more to violate the copyright laws than it does to obey them. Accordingly, it is common for a statutory damages award to be set at some multiple of what it would have cost to obtain a proper license, often at two to three times such amount. *See* Uncontested Points of Law, ¶ 15.[11]

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[11] *See also Milk Money Music v. Oakland Park Entm't Corp.*, 2009 U.S. Dist. LEXIS 121661 (Dec. 10, 2009) ($7,000 per work infringed, for total award of $28,000, was reasonable where cost of proper license would have been $9,000, given plaintiff's attempts to license defendant and the need to give defendants an incentive to obey copyright laws rather than violate them); *New World Music Co. v. Tampa Bay Downs, Inc.*, 2009 U.S. Dist. LEXIS 1221, Copy. L. Rep. (CCH) P29684 (M.D. Fla. Jan. 6, 2009) (after noting that courts often award statutory damages at some multiple of unpaid license fees, commonly in the range of two or three times what the infringer would have paid in license fees, entering award of $15,000 per work infringed, for a total award of $90,000); *Arista Records, Inc. v. Beker Enterprises, Inc.,* 298 F. Supp. 2d 1310, 1312-14 (S.D. Fla. 2003) (awarding statutory damages in the amount of $35,000 for each of the 54 works infringed for a total amount of $ 1,890,000.00, and citing *Nintendo of Am. v. Ketchum,* 830 F. Supp. 1443, 1445 (M.D. Fla. 1993) (awarding statutory damages for each video game infringed as to which Nintendo owned copyrights) and *United Feature Syndicate, Inc. v. Sunrise Mold Co., Inc.,* 569 F. Supp. 1475, 1481 (S.D. Fla. 1983) (plaintiff permitted recovery of

76. If K&H had licensed access to the CoStar products that it used for the period of January 2007 through April 2008, it would have paid license fees of $5,381 per month for sixteen months, or $86,096.[12] (Day 2;Williams; 87:01-89:04). That figure represents cost savings that K&H improperly avoided and lost license fees that CoStar would have collected had K&H properly obtained a license.[13]

77. The need to deter infringement is significant in this case. CoStar invests $120 million dollars per year to create and maintain its products, including with roughly 30 individuals whose job it is to cover the Florida market. (Day 1; Alliegro; 36:03-14; 51:06-52:03). The overwhelming majority of the commercial real estate community in

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statutory damages for each separate copyrightable cartoon character that was illegally duplicated)).

[12] CoStar's Pretrial Statement of Damages inaccurately calculated the lost license fees at a lesser amount of $69,887.

[13] The fact that Coldwell remained licensed during this period of time and continued to pay CoStar license fees based on usage that would have covered Bell's use if he still worked for Coldwell does not mitigate the lost license fees in any respect. Under its agreement with CoStar, Coldwell committed to pay for a certain number of user slots for a certain time period, (Exh. 5), and the monthly fee does not decrease if one or more authorized users leave during the term. (Day 1; Alliegro; 50:01-51:02) The usage by K&H was entirely unauthorized and a proper license for the firm would have cost $5,381/month. Because CoStar only licenses its core products on an office-wide basis, any consideration of lost license fees must look at what it would have cost for K&H to license access to Costar. (Exh. 70). Moreover, the facts support the conclusion that the infringements benefitted the whole firm. The copyrighted material Bell downloaded and distributed from the CoStar products was shared widely with the entirety of the office, both by providing specific reports to Mark Klein, Steve Klein and Judi Healey, and by sharing the market information generally with the rest of the sales team at K&H at the bi-weekly sales meetings. In addition, in calculating the cost of a proper license, it is important to note that a Florida plaintiff's proof of damages will be sufficient if it provides some evidence from which the amount of damages may be satisfactorily ascertained, proof of the amount of damages need not conform to any particular methodology, exact proof of the amount of damages is not required, and the risk of uncertainty falls to the wrongdoer, not the injured party. *Slip-N-Slide Records, Inc. v. TVT Records, LLC*, 2007 U.S. Dist. LEXIS 80788, * 35-36 (S.D. Fla. Oct. 31, 2007).

Florida licenses access to CoStar products and roughly 90% renew year-after-year. (Day 1; Alliegro; 40:07-22). CoStar has about 15,000 client firms licensed to use one or more CoStar product, with about 90,000 individuals at those firms designated as authorized users. (Day 1; Alliegro; 40:11-19). The revenue CoStar generates from licenses pays for CoStar's massive yearly investment (Day 1; Alliegro; 37:06-19), and if companies like K&H obtain the benefit of the service without paying for a license, it jeopardizes CoStar's business in a number of harmful ways. In particular, CoStar not receiving the license fees it would otherwise generate reduces its ability to reinvest in its services, maximize value for shareholders, and could force CoStar to increase its prices for those who fairly pay.

78. The facts of this case demonstrate the significant need for a deterrent message. CoStar repeatedly sought to license its products to K&H, yet K&H declined and opted to get the benefit of the services illegally. As discussed above, the rules as to who can access CoStar's products and under what terms are posted on CoStar's publicly accessible site, yet K&H chose not to make any reasonable inquiry. K&H ignored all warnings in blatant disregard of copyright law. K&H deliberately obtained an unfair benefit over its competitors by not paying for the CoStar products it was using. This is also not the first time that K&H has skirted licensing rules to avoid paying the proper fees for an information service. (Day 1; Bell; 151:16-153:16) (Mark Klein misrepresenting Bell's true work address to avoid another provider's licensing enforcement). K&H has no policies to train its staff about respecting intellectual property. (Day 1; Bell; 145:16-20). Accordingly, K&H needs to be deterred from engaging in this type of conduct in the

future. If a business like K&H does not want to pay for a service, it must then refrain from using the service. K&H and others need to understand that taking the service on whatever terms it unilaterally deems desirable can result in significant penalties. After one party "jumps the turnstile" rather than paying fees, others think they can do the same and legitimate customers resent paying full fare, and that could ultimately have a devastating impact on copyright owners like CoStar.

79. Finally, the Court must also consider K&H's litigation conduct, which has been anything but forthright. Rather than step forward and work with CoStar to resolve this dispute, K&H took the other approach – to try to avoid responsibility and blame others, not participate in the discovery process as required, and provide false or evasive testimony. This must be considered in weighing the appropriate level of statutory damages. *See Stevens v. Aeonian Press*, 2002 U.S. Dist. LEXIS 20189, *11-12; 64 U.S.P.Q.2D (BNA) 1920; Copy. L. Rep. (CCH) (Oct. 23, 2002) (among other considerations, the court placed emphasis on the fact that throughout the litigation the defendant had been far from forthcoming with information and documents, except to the extent that it has suited his purposes).

80. The parties have correctly stipulated that the aim of the Court is not just to compensate plaintiff for its injury but also to put defendants on notice that it costs more to violate the copyright laws than it does to obey them, and that it is common for a statutory damages award to be set at some multiple of what it would have cost to obtain a proper license, often at two to three times such amount. *See* Uncontested Points of Law, ¶ 15. Accordingly, it is appropriate to award a total of $258,288 for the 45 infringements

at issue. This amount represents three times the lost license fees or approximately $5,740 per work – which is at the lower end of the statutory damages spectrum for non-willful conduct. Because that award falls near the low end of the range for non-willful infringement, it is not necessary for the Court to make a finding as to whether K&H was a willful infringer.

IX. COSTAR IS ENTITLED TO A PERMANENT INJUNCTION

81. The Copyright Act provides that, "[a]ny court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a); *see also Pacific & Southern Co. v. Duncan,* 744 F.2d 1490, 1499 n.17 (11th Cir. 1984). In the Eleventh Circuit, a plaintiff seeking a permanent injunction must satisfy the following four-factor test before the Court will exercise its discretion to grant or deny such relief: (1) that the plaintiff has suffered an irreparable injury; (2) that remedies at law are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy is warranted; and (4) the public interest would not be disserved. *Peter Letterese and Assocs. Inc.*, 533 F.3d at 1323 (citing *eBay Inc. v. MercExchange, L.L.C.*, 548 U.S. 388 (2006)). Here, each element is satisfied and injunctive relief is appropriate.

82. Irreparable harm is presumed in copyright infringement actions. *CBS Broad., Inc. v. EchoStar Communs., Corp.*, 276 F. Supp. 2d 1237, 1255 (S.D. Fla. 2003), *rev'd in part and aff'd in part on other grounds*, 450 F.3d 505 (11th Cir. 2006). There is not an adequate remedy at law because only an injunction, not damages, can protect

CoStar against future infringements. *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 552-53 (S.D.N.Y. 2008). As a copyright holder, CoStar is entitled to avoid the irreparable damage that will occur if K&H continues to infringe upon its copyrights. "A private party's discontinuation of unlawful conduct does not make the dispute moot . . . . An injunction remains appropriate to ensure that the misconduct does not recur as soon as the case ends." *BMG Music v. Gonzalez*, 430 F.3d 888, 893 (7th Cir. 2005).

83. The balance of hardships favors an injunction. K&H has no legitimate reason to resist compliance with an appropriate injunction, and there is significant need to deter further infringement of CoStar's copyrights. The public interest also overwhelmingly favors issuance of an injunction. The entry of an injunction is "necessary to preserve the integrity of the copyright laws which seek to encourage individual efforts and creativity by granting valuable enforceable rights." *Atari Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 620 (7th Cir. 1982) (preliminary injunction); *Morley Music Co. v. Café Continential, Inc.*, 777 F. Supp. 1579, 1583 (S.D. Fla. 1991) ("A Plaintiff is entitled to a permanent injunction in a copyright action when liability has been established and where there is a threat of continuing violations"). Injunctions are "regularly issued" because of the strong public interest in copyright protections. *Arista Records, Inc. v. Beker Enters.*, 298 F. Supp. 2d at 1314. *See also* 4-14 Nimmer § 14.06 ("[I]t is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing misappropriation of the skills, creative energies, and resources which are invested in the protected work.").

84. Accordingly, K&H, and its principals, officers, employees, independent contractors, successors and assigns and all person working in active concert or participation with them should be (a) restrained and enjoined from making any unauthorized access to or use of any CoStar database service, and (b) ordered to permanently delete and destroy all portions of any CoStar copyrighted work within their possession.

85. Finally, given that K&H should be adjudged liable as an infringer, its request for a declaration of non-liability should be denied.

Dated: March 26, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of March, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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