

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

KLEIN & HEUCHAN, INC.,

Plaintiff,

v.

Case No.: 8:08-cv-01227-JSM-MSS

**COSTAR REALTY INFORMATION, INC.,
and COSTAR GROUP, INC.,**

Defendants.

**PLAINTIFF/COUNTER-DEFENDANT, KLEIN & HEUCHAN, INC.'S
MOTION FOR ATTORNEYS' FEES AND COSTS WITH
INCORPORATED MEMORANDUM OF LAW**

Plaintiff/Counter-Defendant, KLEIN & HEUCHAN, INC. (hereinafter "Klein"), by and through its undersigned counsel, and pursuant to Rule 54, Federal Rules of Civil Procedure, and Local Rule 4.18, hereby files this Motion for Attorneys' Fees and Costs with Incorporated Memorandum of Law and respectfully requests that this Court enter an Order taxing Defendants for reasonable attorney's fees totaling \$131,823.32 and to assess costs totaling \$2,272.95, as substantiated by the supporting affidavits, and in support thereof states as follows:

I. INTRODUCTION

This Court should award Klein reasonable attorneys' fees for its successful defense of the Counterclaim seeking damages for alleged copyright infringement. Klein has prevailed on the alleged copyright infringement count before this Court and its attorney's fees and costs are reasonable under the appropriate standards.¹

¹ The Affidavit of Jeffrey W. Gibson and the Affidavit of Paul M. Finamore, Esq. are being contemporaneously filed with this motion.

II. THE PARTIES

Defendants/Counter-Plaintiffs, COSTAR REALTY INFORMATION, INC. and COSTAR GROUP, INC. (hereinafter collectively “CoStar”), are Delaware corporations with their principal place of business and corporate offices located in Bethesda, Maryland. *See* Counterclaim, ¶¶ 1 & 2. CoStar is a commercial real estate information services provider making real estate information available through its website. *Id.* at ¶¶ 9-11. CoStar has vast operations throughout the nation. *Id.* at ¶¶ 9 & 10. CoStar employs over 1,100 individuals who canvass the country building its information databases. *Id.* Access to the vast majority of CoStar’s information is limited to authorized users. *Id.* at ¶ 11.

In contrast to the size and nationwide scope of CoStar, Klein is a closely held Florida corporation based in Clearwater, Pinellas County, Florida. Klein provides brokerage services, property management services and development services to clients within the Tampa Bay area. Klein’s sole shareholder is Mark S. Klein a real estate broker licensed in the State of Florida and a Certified Commercial Investment Member. In addition to Mr. Klein, approximately 18 other Independent Service Professionals work out of two (2) offices maintained by Klein in Clearwater, Pinellas County, Florida.

III. PROCEDURAL HISTORY OF THE CASE

CoStar made allegations that Klein wrongfully obtained access to its computer database(s). Subsequently, on June 4, 2008, Klein filed an action in Florida state court (“the Florida lawsuit”) seeking a declaratory judgment regarding its rights and obligations to Defendants/Counter-Plaintiffs. (Dkt. #2). That same day, counsel for Klein forwarded the lawsuit to in-house counsel for CoStar asking if they could accept service. CoStar did not respond to counsel. Instead, CoStar filed a complaint in District Court for the District of

Maryland on June 17, 2008 (the “Maryland lawsuit”). CoStar’s filing of the separate Maryland lawsuit was a blatant attempt to obtain legal advantage over Klein, a small regional real estate brokerage firm in Pinellas County, Florida. CoStar attempted to wage war against Klein on two jurisdictional fronts – one with no connection to Klein – in an attempt to forum shop in a jurisdiction inconvenient to Klein and to almost all of the relevant witnesses.

CoStar then removed the Florida state suit to this Court and filed a motion seeking to dismiss the action or transfer it to the second-filed Maryland lawsuit. (Dkt. #8). This Court denied CoStar’s Motion to Dismiss or to Transfer Venue on September 3, 2008 finding no compelling reason to depart from the first-filed rule. (Dkt. #10). Subsequently, Klein filed a Motion to Transfer Venue in the Maryland lawsuit. The Maryland District Court granted Klein’s Motion to Transfer Venue on March 26, 2009, finding that the interests of judicial economy would best be served by transferring the case to the District Court for the Middle District of Florida where the instant litigation involving the same parties was already pending.

CoStar filed its counterclaims against Klein and Co-Defendant SCOTT BELL (hereinafter “Bell”) on November 21, 2008 asserting one (1) cause of action against Klein for contributory and vicarious copyright infringement stemming from its employment of Bell and his alleged violations of federal copyright law. (Dkt. #23, Count II). A bench trial was held on March 1 and 2, 2010, in which this Court found that Klein was not liable for either contributory or vicarious infringement. (Dkt. #141).

IV. MEMORANDUM OF LAW

A. Klein’s Motion for Attorneys’ Fees is Timely Presented and Properly Preserved by the Pleadings.

Pursuant to Local Rule 4.18, Klein is entitled to seek recovery for attorneys’ fees in connection with this action because this Motion is filed within fourteen (14) days following the

entry of the Final Judgment and a claim for attorneys' fees has been preserved by the pleadings. In its Counterclaim, CoStar alleged copyright infringement under 17 U.S.C. § 501 et seq. (the "Copyright Act"), and specifically sought an award of attorney's fees pursuant to Section 505. See Counterclaim, ¶¶ 35-45 & Prayer for Relief. Klein was not required to separately claim entitlement to attorneys' fees. Furthermore, this Circuit permits a defendant to recover attorneys' fees despite the fact that the defendant has not requested such fees in its pleadings. See *Capital Asset Research Corp. v. Finnegan*, 216 F.3d 1268, 1270 (11th Cir. 2000). Additionally, pursuant to Rule 54(c), an award of attorneys' fees is justified even where the prevailing party failed to plead for such an award. See *Marston v. Red River Levee & Drainage District*, 464 F.Supp. 1228, 1232 (W.D. La. 1979), aff'd, 632 F.2d 466 (5th Cir. 1980).

B. Klein Should Be Awarded Attorney's Fees to Compensate It for Its Meritorious Defense of CoStar's Allegations.

The question of whether to award fees in a copyright case is committed to the sound discretion of the trial court. *Cable/Home Communications Corp. v. Network Productions, Inc.*, 902 F.2d 829, 853 (11th Cir. 1987). The applicable language of the Copyright Act provides as follows:

Remedies for infringement: Costs and attorney's fees.

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against a party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

17 U.S.C. § 505.

Prior to 1994, many Circuits adopted a dual standard under Section 505 whereby a greater burden was placed upon prevailing defendants than on prevailing plaintiffs to recover attorneys' fees. Prevailing defendants in copyright cases had to show bad faith or frivolousness to recover attorneys' fees. *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1022 (7th Cir.

1991), *certiorari denied*, 502 U.S. 861. However, the Supreme Court in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), rejected this “dual standard.” After Fogerty’s successful defense of a copyright infringement action filed against him by Fantasy, Inc., the district court denied his motion for attorneys’ fees pursuant to Section 505. *Id.* at 517. The Court of Appeals affirmed, declining to abandon its dual standard for awarding Section 505 fees. *Id.*

The Supreme Court disagreed, holding that prevailing plaintiffs and prevailing defendants must be treated alike under Section 505. *Id.* at 534. The Court reasoned that a successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright. *Id.* at 526. The Court reasoned that defendants who seek to advance meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement. *Id.* The Court stated that no precise formula governs the determination, but instead equitable discretion should be exercised. *Id.* at 534. The Court noted four (4) nonexclusive factors to guide courts’ discretion: frivolousness, motivation, objective unreasonableness (both factual and legal components), and the need in particular circumstances to advance considerations of compensation and deterrence. *Id.*

In the instant action Klein was forced to defend itself from CoStar’s allegations of copyright infringement in lawsuits brought in both Florida and Maryland courts. At the conclusion of a trial in this matter, Klein was found not to have violated the copyright protection afforded to CoStar’s database(s). In granting Final Judgment in its favor, this Court has vindicated Klein from CoStar’s accusations. A party such as Klein who has advanced a meritorious defense should be encouraged to litigate such defense. Additionally, as the defendant in the Counterclaim action, Klein did not receive monetary compensation at the

conclusion of the litigation. Therefore, an award of attorney's fees would recognize Klein's steadfast opposition to CoStar's allegations and would further the interests of the Copyright Act. A review of the *Fogerty* factors enumerated above further supports an award of attorney's fees in favor of Klein.

1. CoStar's Claims Against Klein Were Not Objectively Reasonable.

This Court should question the objective reasonableness of CoStar's position on both claims of contributory infringement and vicarious liability. CoStar presented no evidence showing that Klein had information about when the right to use the service was terminated. *See* Judgment, page 5. This Court determined that Klein neither knew nor should have known that Bell's access of CoStar's information service was unauthorized and could not be liable for contributory infringement. *Id.* at 14.

Additionally, CoStar brought the action for vicarious infringement knowing that it could not show that Klein made any profit from the infringing material, yet arguing that such knowledge was unnecessary. *Id.* at 18. In this case, Klein did not intentionally make use of CoStar's service, did not share the use among other agents in the office, did not use the information in making any sales, and immediately stopped upon learning of the infringement. *Id.* at 21. Klein did not receive any obvious and direct financial benefit from the exploitation of the copyrighted material. Furthermore, Bell's infringing was not of any direct benefit to Klein. *Id.* at 22.

CoStar maintained both claims of copyright infringement in contradiction to the law and with sufficient knowledge of the facts supporting Klein's defense. As a result, the lawsuit against Klein was objectively unreasonable.

2. CoStar's Motivation for Filing the Instant Action Is Questionable.

This Court should also question CoStar's motivation for filing its Counterclaim against Klein for copyright infringement. CoStar was informed that Bell had left his previous employer in February of 2007, yet took no steps to cancel his password and prevent future access to the copyrighted material. *See* Judgment, page 6. Over one (1) year later in April 2008 CoStar notified Klein of the unauthorized use by letter. *Id.* at 7. Upon receipt of this letter, Klein immediately telephoned CoStar and assured them that Bell's unauthorized use was unknown and would cease immediately. *Id.* Following this contact, CoStar attempted to use Bell's prior unauthorized use to encourage Klein into subscribing to CoStar's service, stating that it would not seek damages for past use if Klein would begin subscribing. *Id.* When Klein refused to subscribe to CoStar's service, CoStar threatened to sue for damages and the instant litigation ensued. *Id.*

3. Considerations of Compensation and Deterrence Weight In Favor of Awarding Attorney's Fees to Klein.

Because Klein does not stand to gain from the Final Judgment, an award of attorney's fees would best compensate Klein for its successful defense of these claims. Where a meritorious claim or defense is not lucrative, an award of attorneys' fees may be necessary to enable the party possession the meritorious claim or defense to press it to a successful conclusion rather than surrender it because the cost of vindication exceeds the private benefit to the party. *Assessment Technologies of WI, LLC v. WIREdata, Inc.*, 361 F.3d 434, 437 (7th Cir. 2004). When the prevailing party is the defendant, who by definition receives not a small award but no award, the presumption in favor of awarding fees is very strong, for without the prospect of such an award, the party might be forced into a nuisance settlement or deterred altogether from exercising his rights. *Id.* An award of attorney's fees will compensate Klein for its expenses

incurred in advancing its meritorious defense and advance the idea that a party should not be forced into surrendering its rights in a copyright infringement claim.

C. **Klein is Entitled to Attorney's Fees and Costs as it is the Prevailing Party and the Fees and Costs Sought are Reasonable.**

In this Circuit, a showing of bad faith or frivolity is not a precondition to awarding attorneys' fees. *Cable/Home Communications*, 902 F.2d at 853; *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 832 (11th Cir.1982). When determining an award of attorneys' fees to a copyright litigant under 17 U.S.C. § 505, the only two (2) statutory requirements for this Court to consider are that the fees be granted to the prevailing party and that the amount be reasonable. *Cable/Home Communications*, 902 F.2d at 853; *Casella v. Morris*, 820 F.2d 362, 366 (11th Cir. 1987); *Original Appalachian Artworks*, 684 F.2d at 832. Klein is the prevailing party in this action and the fees and costs sought in this Motion are reasonable under the relevant standards.

1. **Klein is the Prevailing Party in this Action.**

A "prevailing party" under the attorneys' fees authorization in 17 U.S.C. § 505 is identified as "the party succeeding on a significant litigated issue that achieves some of the benefits sought by that party in initiating the suit." *Cable/Home Communications*, 902 F.2d at 853 (internal citations omitted). In granting Final Judgment in favor of Klein this Court has established that Klein has prevailed on the count alleged against it for contributory and vicarious copyright infringement. Because CoStar's counterclaim did not involve claims that were "purely technical or *de minimis*," Klein's success in defending itself qualifies it as the prevailing party in the subject litigation. *Id.* (quoting *Texas State Teachers Ass'n v. Garland Ind. School Dist.*, 489 U.S. 782 (1989)).

2. The Attorneys' Fees Klein Seeks Are Reasonable Under *Johnson*.

In this Circuit, a district court must consider twelve (12) factors in awarding statutorily authorized attorneys' fees. In determining whether or not an award of attorneys' fees are reasonable, the this Court should apply the relevant factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). See *Cable Home Communications*, 902 F.2d at 853 (reasonableness of attorney's fees award controlled by consideration of the *Johnson* factors in this circuit). These twelve (12) *Johnson* factors to be considered are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d 717-719. An analysis of each of the *Johnson* factors and a review of the Affidavits attached to support the fees reveals that Plaintiff's attorneys' fees are reasonable.

LOCAL RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), counsel for both sides are required to confer in person or by telephone in a good faith effort to resolve the issues raised by Motion for Attorney's Fees with Incorporated Memorandum of Law. The undersigned counsel hereby certifies that he has conferred with opposing counsel in a good faith effort resolve by agreement the issues raised in this Motion, and those efforts have not resulted in a resolution of the issues.

WHEREFORE Plaintiff KLEIN & HEUCHAN, INC. respectfully requests this Court grant this Motion for Attorney's Fees and enter an Order taxing Defendants for reasonable attorney's fees totaling \$131,823.32 and to assess costs totaling \$2,272.95 for a total award of \$134,096.27, and by granting any further relief the Court deems just and proper.

RESPECTFULLY SUBMITTED this 3rd day of May, 2010.

s/ Jeffrey W. Gibson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3, 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 all counsel of record including the following:

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