

Litigating the issue of attorneys' fees will require considerable time and effort, which will have been wasted should CoStar prevail in its appeal on the merits. Klein's Motion for Attorneys' Fees and Costs raises a host of issues, many not squarely addressed in the four corners of its Motion. Klein seeks to collect all of the fees it incurred as the prevailing party under the Copyright Act. Apart from the issue of whether an award of fees for Klein is appropriate in this matter (a proposition CoStar disputes), Klein fails to provide any legal basis for its request when it initiated the case as a Declaratory Judgment action. Klein also fails to explain how it is the prevailing party entitled to collect fees when CoStar prevailed on its claim as to Klein's sales agent, Third-Party Defendant Scott Bell. In addition, even if Klein were entitled to fees relating to its defense of the copyright counter-claim, Klein fails to apportion its fees. Klein makes no mention of deducting time attributable to the Declaratory Judgment claim it brought concerning an alleged breach of contract. (Doc. 2.) Further, because the billing information provided in support of Klein's request for fees does not segregate individual tasks, the billing records are not easily amenable to an analysis of the reasonableness of its claim.

As discussed below, no harm will come by deferring consideration of Klein's Motion until after the pending appeal is resolved. Accordingly, CoStar seeks to defer litigating the issue of attorneys' fees until such time as the appeal is concluded.

ARGUMENT

The Federal Rules of Civil Procedure contemplate that a district court may defer ruling on a request for attorneys' fees and costs until a pending appeal has been decided. *See* Comments to Fed. R. Civ. P. 54 (1993 amendments) ("If an appeal on the merits of the case is

taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved”). The Supreme Court has identified four factors to be considered in assessing a request for a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The stay factors contemplate “individualized judgments” in each case, and “the formula [for doing so] cannot be reduced to a set of rigid rules.” *Id.* at 777 (emphasis added).

In its appeal, CoStar contends that the district court misconstrued and misapplied the law as to vicarious and contributory infringement, and that it is entitled to relief under the undisputed factual record. In its ruling, among other things, the Court departed from established law by (i) requiring that the financial benefit necessary to prove vicarious infringement must be tied to a specific profit line in a defendant’s accounting ledger, and (ii) importing knowledge and intent into the financial benefit analysis. Likewise, by way of further example, whether Klein’s willful blindness and silence in the face of the infringing activity renders it a contributory infringer as a matter of law also presents a substantial question for appeal.

Since the Court has not likely lost faith in its own ruling in the past few weeks, CoStar does not belabor in detail all of the bases for its appeal. The fact, however, that the Court believes its ruling to be proper does not necessarily militate against the requested stay. The

first factor should be applied flexibly, as were it applied literally it would almost never be met. *United States v. ASCAP*, 1991 U.S. Dist. LEXIS 14274, *2-3 (S.D.N.Y. Oct. 3, 1991).

The second factor weighs heavily in favor of a stay. Granting the requested stay preserves judicial resources, the parties' resources, and allows CoStar to focus on preparing the matter for the Eleventh Circuit. Litigating the issue of attorneys' fees and costs will require that the Court expend resources that will have been wasted (and may have to be duplicated) in the event that CoStar succeeds in its appeal. Indeed, citing concerns of judicial efficiency, and without even examining the four factors cited above for stay of an order, courts often defer ruling on a request for fees until after an appeal on the merits is decided. *See, e.g., Hipp v. Liberty Nat. Life Ins. Co.*, 65 F. Supp.2d 1314, 1323 (M.D. Fla. 1999) ("In the interests of judicial economy, the Court will ... defer ruling on costs and attorneys' fees until all appeals have been resolved"), *aff'd in part, rev'd on other grounds in part*, 252 F.3d 1208 (11th Cir. 2001); *Nat'l Farmer's Org., Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1312 (8th Cir. 1988) ("Thus, rather than undertaking the time-consuming task of determining a reasonable attorney's fee, only to see the effort overturned on appeal, [] the district court wisely deferred ruling on attorneys' fees and costs pending appeal")(citations omitted); *Hammond v. Alcoa, Inc.*, 2009 U.S. Dist. LEXIS 14212, *3-4 (W.D. Pa. Feb. 24, 2009) (deferring motion for an award of attorney's fees while appeal on merits was pending, finding the motion "premature" and that to rule before the Third Circuit decides the appeal would be "inappropriate" and "inefficient"); *Lasic v. Moreno*, 2007 U.S. Dist. LEXIS 88608, *2-3 (E.D. Cal. Nov. 21, 2007) (finding it in interests of judicial economy to defer ruling on attorneys' fees request when appeal on merits is pending). In addition to judicial efficiency,

the parties can avoid the unnecessary expenditure of fees (should this Court issue the requested Stay) by having to brief the attorneys' fees issue only one time.

The third factor also weighs heavily in favor of a stay. Klein will not be harmed by the issuance of the Stay. There is no allegation or basis to allege that CoStar will be unable to pay an award of reasonable attorneys' fees following a ruling from the Eleventh Circuit, should CoStar lose the appeal and this Court deem an award of fees appropriate. Moreover, if the Court proceeds with litigating the issue of attorneys' fees now, (i) as discussed above there are an abundance of reasons why an award of attorneys' fees is inappropriate, and (ii) even if Klein's Motion were ultimately granted in some measure, pursuant to Fed. R. Civ. P. 62 CoStar would post a bond in order to obtain a stay upon appeal. Thus, as a practical matter, in no event will Klein collect any fees until after the Eleventh Circuit rules on CoStar's appeal.

The fourth factor, regarding the public interest, also falls in favor of CoStar. The public interest is in an efficient use of resources. Litigating the issue of attorneys' fees before the Eleventh Circuit has ruled on CoStar's appeal is simply not efficient, nor is there any prejudice to any party by deferring the issue.

CONCLUSION

For these reasons, CoStar respectfully requests the Court grant its motion for a stay pending appeal. Alternatively, CoStar requests an amended briefing schedule whereby the deadline for its opposition papers to Klein's motion for fees and costs would be twenty (20) days following this Court's denial of CoStar's request for a stay pending appeal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of May, 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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