

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.

**KLEIN & HEUCHAN, INC.'S RESPONSE IN OPPOSITION TO
COSTAR'S MOTION FOR STAY PENDING APPEAL
AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff/Counter-Defendant Klein & Heuchan, Inc. (hereinafter "Klein") respectfully submits this Response in Opposition to CoStar's Motion for Stay Pending Appeal and Memorandum of Law in support thereof.

ARGUMENT

1. CoStar has not Met its Burden of Demonstrating the Elements Required for a Stay

An appellant seeking a stay pending appeal must carry the burden of demonstrating four factors: 1) that there is a likelihood that he will prevail on the merits of the appeal; 2) that he is likely to suffer irreparable injury if a stay is not granted; 3) that the other parties will not be substantially harmed if a stay is entered; and 4) that the stay will be in the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Michigan Coalition v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). In *Michigan Coalition v. Griepentrog*, the Sixth Circuit recited the four factors set forth above, and then said, "the movant [for a stay pending appeal] must address each factor, regardless of its relative strength, providing specific facts and affidavits

supporting assertions that these factors exist.” *Id.* at 154. CoStar has not sufficiently addressed each of the four factors, and has not produced proof in any form for this Court’s consideration. Accordingly, CoStar has not carried its burden on any of the four elements.

A. It Is Unlikely that CoStar will Prevail on the Merits of the Appeal

First and foremost, CoStar has not shown it to be likely that it will prevail on appeal. CoStar has not provided this Court with supporting documentation that substantiates the arguments presented in its Motion. In *Bank of Nova Scotia v. Pemberton*, 964 F.Supp. 189, 190 (D.V.I. 1997), the court denied the appellant’s motion for stay because the appellant “failed to make a strong showing that he [would] succeed on appeal.” In that case, the appellant submitted an accompanying affidavit with its motion for stay. In the instant case, CoStar has submitted no such documentation. In *Gusdonovich v. Business Inf. Co.*, 119 F.R.D. 15, 17 (W.D. Pa. 1987) the court denied the appellants’ motion for stay, since their assertions were “not verified in any way, nor [had] the defendants provided any affidavits or corporate documents to support their claim...” Similarly, CoStar has failed to provide verification of the factual allegations and claims made within its Motion for Stay and has failed to make a strong showing that it would succeed on appeal.

Furthermore, CoStar states 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.” (Doc. 149 at 3). CoStar provides three points that will be raised on appeal where this Court “departed from established law.” *Id.* CoStar first argues that this Court incorrectly required that the financial benefit necessary to prove vicarious infringement must be tied to a specific profit line in a defendant’s accounting ledger. CoStar further argues that the Court incorrectly imported knowledge and intent into the financial benefit analysis. However,

the Court's Final Judgment describes in great detail that the determination of whether a direct financial benefit is one that is inherently fact specific. The Court has determined that "not every benefit is a direct financial benefit" and has distinguished this case from those cited by CoStar based on the facts specific to the relationship between Klein and CoStar. Lastly, CoStar plans to argue on appeal that Klein's willful blindness and silence to the infringing activity renders it a contributory infringer as a matter of law. However, these characterizations involve determinations of fact which have previously been made by the Court over the course of the trial and are evidenced extensively in the record.

B. CoStar Will Not Suffer Irreparable Harm If a Stay Is Not Granted

CoStar states that the second factor "weighs heavily in favor of a stay." This couldn't be further from the truth and CoStar has misapplied the determinations of the various district courts cited in its Motion. Although Klein concedes that this Court has an interest in judicial efficiency, a ruling on Klein's Motion for Attorney's Fees should not be delayed where it is the only decision left to this Court. In *Hipp v. Liberty Nat. Life Ins. Co.*, 65 F.Supp.2d 1314, 1323 (M.D. Fla. 1999), this Court determined to defer ruling on costs and attorney's fees until all appeals had been resolved because after the prevailing plaintiff filed a motion for costs and attorney's fees, the defendant filed multiple post-trial motions, including a motion for remittitur or for new trial and a motion for judgment as a matter of law. Because the attorney's fee issue is the only one pending before this Court, a determination of fees would not be inappropriate at this time and would not cause CoStar to suffer irreparable harm.

C. Klein May be Substantially Harmed If a Stay Is Granted

Despite the assertions made by CoStar, Klein is concerned that CoStar may become uncollectible before the final determination on the matter of attorney's fees following the

pending appeal. If Klein is ultimately successful on appeal, an award of attorney's fees at such time may be futile if uncollectible. A cost bond which includes attorney's fees may solve this problem. Such a bond is simply security for Klein as the prevailing party and does not provide for automatic payment to Klein. *See Garrett v. Board of Trs. of the Univ. of Ala. at Birmingham*, 359 F.Supp.2d 1200, 1203 (N.D. Ala. 2005) (finding that a bond is simply an insurance policy; it is not automatically forfeited to a defendant who prevails on appeal). For the foregoing reasons, in the event that this Court finds sufficient reasons to grant CoStar's Motion for Stay, the Court should require CoStar to post a bond in the amount of \$134,096.27 or other security for attorney's fees expended through this stage in the litigation.

D. The Public Interest Favors an Immediate Award of Attorney's Fees

The Copyright Act serves the purpose of "enriching the general public through access to creative works" *Fogerty v. Fantasy*, 510 U.S. 517, 527 (1994). The Fogerty Court determined that the boundaries of copyright law must be demarcated as clearly as possible and that defendants who seek to advance a meritorious copyright defense should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate claims of infringement. *Id.* This Court would best promote the interests of the Copyright Act by determining at this time an appropriate award of attorney's fees for Klein's meritorious defense of the copyright infringement claims.

CONCLUSION

For these reasons, Plaintiff, KLEIN & HEUCHAN, INC., respectfully requests this Court deny CoStar's Motion for Stay Pending Appeal, and grant any further relief the Court deems just and proper.

RESPECTFULLY SUBMITTED this 25th day of May, 2010.

s/ Jeffrey W. Gibson.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 25, 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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