

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
Southern Division

COSTAR REALTY INFORMATION, \*  
INC., et al. \*

Plaintiffs,

v. \*

Case No.: 8:06-CV-00655-PJM

ATKINSON HUNT, et al. \*

Defendants. \*

\*

\* \* \* \* \*

**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS COMPLAINT**

Defendant Atkinson Hunt (“Atkinson”), by its counsel, pursuant to Rule 12(b)(2) and (6), Federal Rules of Civil Procedure, move to dismiss the Complaint brought by CoStar Realty Information, Inc. and CoStar Groups, Inc. (collectively “CoStar”) as against Atkinson because this Court lacks personal jurisdiction over Atkinson, and in support says as follows:

CoStar’s complaint against Atkinson arises against the factual backdrop of Mr. David Atkinson’s efforts to form a joint venture with co-Defendant Resource Realty and Personal Property Evaluations, Inc., incorrectly named in the Complaint as Resource Realty of Southern New Jersey (hereinafter “Resource Realty”). Because Atkinson did not have contractual privity with CoStar and because it lacks minimum contacts with the forum state, Maryland, this Court cannot exercise personal jurisdiction over Atkinson and CoStar’s Complaint should be dismissed.

**I. INTRODUCTION**

Atkinson Hunt is the tradename of Laser Marketing, Inc., a New Jersey corporation with its principal place of business in Cherry Hill, New Jersey. See Declaration of David R. Atkinson at ¶ 2,

attached as Exhibit A. Atkinson has an office staff of approximately ten full-time employees and six part-time employees, though Mr. David Atkinson, the principal of the company, is responsible for all management and operational decisions. Atkinson Declaration at ¶¶ 1, 2. Atkinson's principal business involves the generation of leads for businesses. Atkinson Declaration at ¶ 3. Atkinson does not license or sell data, business information, or lists of information. Id.

In early 2004, Atkinson investigated the possible use of CoStar's databases in its business operations by inquiring with CoStar's sales representatives based in New Jersey. Atkinson Declaration at ¶ 4. After discussions with these sales representatives, Atkinson ultimately decided against using CoStar's databases, in part due to CoStar's refusal to grant Atkinson access to the databases on a trial or evaluation basis and also due to the availability of alternative databases offered by third parties that were similar to CoStar's databases. Id. Atkinson never entered into any contract or agreement with CoStar at that time or at any time thereafter. Id.

In or around August, 2004, Atkinson entered into discussions with Mr. James Davis, principal of Resource Realty, about a joint venture between Atkinson and Resource Realty. Atkinson Declaration at ¶ 5. Upon information and belief, Resource Realty then entered into a license agreement with CoStar for use of certain CoStar informational databases, and named Atkinson as an authorized user pursuant to that license agreement. Atkinson Declaration at ¶¶ 5, 6. Atkinson was not a party to that license agreement and was not involved in any negotiations or discussions relating to that license agreement. Atkinson Declaration at ¶ 6.

To the extent Atkinson made any use of the CoStar informational databases, such use was limited in nature and was strictly for purposes of evaluating whether the CoStar informational database was able to provide usable information for the joint venture. Atkinson Declaration at ¶ 7. Atkinson has not accessed or attempted to access any of CoStar's services since the time of

Atkinson's involvement in the joint venture with Resource Realty in 2004. Id. The joint venture between CoStar and Atkinson was never operational, did not actually do any business, and did not make any profits. Atkinson Declaration at ¶ 8.

Atkinson's contacts with the State of Maryland are very limited. Over the past ten years, Atkinson has provided leads to only seven entities operating in the State of Maryland, and such leads represent only approximately three percent of Atkinson's overall business during those ten years. Atkinson Declaration at ¶ 9. Atkinson does not own, use, or possess any real estate or other property in the State of Maryland and does not have a business address in Maryland. Atkinson Declaration at ¶ 10. Atkinson has never paid nor been required to pay taxes in the State of Maryland. Id. Further, Atkinson does not have any investments in Maryland, nor does it maintain an account with a Maryland-based bank. Id.

Atkinson does not have a mailing address, post office box, or telephone directory listing in the State of Maryland, and has never been required to submit to jurisdiction in any action in a state or federal court located in the State of Maryland. Atkinson Declaration at ¶ 11. Atkinson has never advertised in any Maryland-based publication or otherwise directed any business activities at Maryland. Atkinson Declaration at ¶ 11. Atkinson has never knowingly or intentionally caused any harmful or tortious activity in Maryland. Id.

Buoyed by "anonymous" reports (Complaint at 36), CoStar now attempts to maintain this litigation against a former prospective customer, Atkinson, that spurned CoStar in favor of its competitors.

## **II. THIS COURT LACKS PERSONAL JURISDICTION OVER ATKINSON**

When a court's power to exercise personal jurisdiction over a non-resident defendant (such as Atkinson Hunt) is challenged by a motion under Fed. R. Civ. P. 12(b)(2), "the jurisdictional

question is to be resolved by the judge, with the burden on the plaintiff ultimately to prove grounds for jurisdiction by a preponderance of the evidence.” Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 396 (4<sup>th</sup> Cir. 2003) (citing Mylan Labs., Inc. v. Akzo, N.V., 2 F.3d 56, 59-60 (4<sup>th</sup> Cir. 1993)). If the court rules without conducting an evidentiary hearing, relying solely on the basis of the complaint, affidavits, and discovery materials, plaintiff must have been able to make a prima facie showing of personal jurisdiction over the defendant. See, e.g., Carefirst, 334 F.3d at 396; see also, Mylan, 2 F.3d at 60. In Maryland, the burden of proving the existence of a factual basis for the exercise of personal jurisdiction, once the issue has been raised, rests squarely upon plaintiff’s shoulders. See McKown v. Criser’s Sales and Service, 48 Md. App. 739, 747 (1981).

There are two possible ways in which this Court could acquire personal jurisdiction over Atkinson: specifically or generally. “Specific jurisdiction exists where the suit arises from a defendant’s contacts with the forum state.” Atlantech Distrib., Inc. v. Credit General Ins. Co., 30 F. Supp.2d 534, 536 (D. Md. 1998). “General jurisdiction, which permits a court to subject a non-resident defendant to a suit in the forum wholly unrelated to any contact it has with the forum, exists only where the foreign defendant’s in-state activities amount to continuous and systematic contact with the state.” Id. (internal quotations omitted). CoStar has not alleged sufficient facts to meet either standard.

A. Plaintiff Cannot Make a Prima Facie Case of Specific Jurisdiction.

To establish specific jurisdiction, the court will consider “(1) the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in the state; (2) whether the plaintiffs' claims arise out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally ‘reasonable.’” See, e.g., Carefirst, 334 F.3d at 396; see also, Mylan, 2 F.3d at 60. For any argument that Atkinson intentionally engaged in tortious

activity sufficient to give rise to specific jurisdiction, CoStar must show that the harm was directed at Maryland, not just that it happened to be felt there. Specifically, Plaintiff must show that Atkinson knew that its conduct would cause harm in Maryland. CoStar Group, Inc. v. LoopNet, Inc., 106 F.Supp.2d 780, 785 (D. Md. 2000), aff'd 373 F.3d 544 (4th Cir. 2004); IMO Industries, Inc. v. Kiekert AG, 155 F.3d 254 (3rd Cir. 1998) (“[I]n order to make out the third prong of this test, the plaintiff must show that the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum”); Waffenschmidt v. MacKay, 763 F.2d 711, 713 (5th Cir. 1985) (“[I]n all cases,” to satisfy the effects test “the effect in the forum must have been purposeful”). Since all of Atkinson’s prior contacts with CoStar were through CoStar’s representatives in New Jersey, Atkinson could not have known that its use as an authorized user under Resource Realty’s agreement with CoStar would have any direct effect in Maryland.

Under a similar analysis, in determining whether a court’s exercise of specific jurisdiction comported with due process in a case involving conduct on the Internet, the Fourth Circuit held that a non-resident defendant was subject to jurisdiction only where: (a) the defendant intentionally directed electronic activity into the state; (b) with the intention of engaging in business in that state; and (c) that activity created, in a person within that state, a potential cause of action cognizable in the courts of that state. ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707, 714 (4<sup>th</sup> Cir. 2002). Even if Atkinson could be found to have directed electronic activity in Maryland (e.g., accessing the CoStar database allegedly maintained in Maryland), Atkinson did not intend to engage in business in Maryland and the activity did not create a potential cause of action in the State.

B. There Are No Grounds To Support General Jurisdiction.

“To establish general jurisdiction, the defendant’s activities in the State must have been

‘continuous and systematic.’” Carefirst, 334 F.3d at 397 (quotation omitted). While CoStar’s Complaint does not specify whether it is asserting general or specific jurisdiction, the facts set out in the Atkinson Declaration make clear that Atkinson’s activities in Maryland are certainly not sufficiently “continuous and systematic” as to make general jurisdiction possible. Atkinson is a New Jersey corporation that operates out of an office in Cherry Hill, New Jersey. Atkinson Declaration at ¶ 1. As discussed in Beyond Systems, Inc. v. Real Time Gaming Holding Co. LLC, the fact that a computer can access a website in Maryland alone is insufficient to establish general jurisdiction. 878 A.2d at 581-82 (“Though the maintenance of a website is, conceivably, a continuous presence everywhere, the existence of a website alone is not sufficient to establish general jurisdiction in Maryland.”); see also Revell v. Lydoy, 317 F.3d 1082, 1086 (5th Cir. 2002); Bancroft & Masters, Inc. v. Augusta Nat’l, Inc., 223 F.3d 1082, 1086 (9th Cir. 2000).

Even the existence of correspondence and communications with a resident of Maryland is an insufficient basis for jurisdiction. In Zinz v. Evans and Mitchell Industries, 22 Md. App. 126 (1974), the Maryland Court of Special Appeals found that Maryland did not have personal jurisdiction over a Georgia corporation and an executive of that corporation as a result of that executive’s writing and mailing of a correspondence to Maryland from Georgia. Unlike in the Zinz case where paper correspondence was written and then intentionally addressed and sent to Maryland via certified mail, in the instant case Atkinson is merely alleged to have “repeatedly directed electronic activity and interacted with CoStar’s computer servers in Bethesda, MD” (Complaint at 3). Even if Atkinson did access CoStar’s computer services in Maryland, under Zinz, the Court would still not have sufficient basis to exercise personal jurisdiction over Atkinson under § 6-103(b)(3).

C. This Court Cannot Exercise Long-Arm Jurisdiction Over Atkinson Under Maryland Law

Under Federal Rule of Civil Procedure 4(k)(1)(A), a federal court may exercise personal jurisdiction over a defendant who “could be subject to the jurisdiction of a court of general jurisdiction in the state in which the district court is located.” The court must then first determine whether the state’s long-arm statute authorizes the exercise of jurisdiction over the defendant in the circumstances presented. See, ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 622 (4<sup>th</sup> Cir. 1997). A federal district court may exercise personal jurisdiction over a nonresident defendant “if (1) an applicable state long-arm statute confers jurisdiction and (2) the assertion of that jurisdiction is consistent with constitutional due process.” Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1199 (4<sup>th</sup> Cir. 1993).

Many courts have determined that Maryland’s long-arm statute, Md. Code Ann., Cts. & Jud. Proc. § 6-103, authorizes the exercise of personal jurisdiction to the limits permitted by the Due Process Clause of the Fourteenth Amendment. See, ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 710 (4<sup>th</sup> Cir. 2002), cert. denied, 537 U.S. 1105 (2003). “A court’s exercise of jurisdiction over a nonresident defendant comports with due process if the defendant has ‘minimum contacts’ with the forum, such that to require the defendant to defend its interests in that state ‘does not offend traditional notions of fair play and substantial justice.’” Carefirst, 334 F.3d at 396, quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

In applying Maryland’s long-arm statute, then, federal courts often declare that “[the] statutory inquiry merges with [the] constitutional inquiry.” Carefirst, 334 F.3d 390, 396-97 (citing Stover v. O’Connell Assocs., Inc., 84 F.3d 132, 135 (4<sup>th</sup> Cir. 1996), cert. denied, 519 U.S. 983 (1996)); see also, ALS Scan, 293 F.3d at 710. The Maryland Court of Appeals recently clarified that analysis under the long-arm statute remains a requirement of the personal jurisdiction analysis. Mackey v. Compass Mktg., Inc., 391 Md. 117, 141 n.6 (2006) (“[w]e did not, of course, mean . . .

that it is now permissible to simply dispense with analysis under the long-arm statute”). Thus, while the due process limitation defines the outer bounds of an inquiry under Maryland’s long-arm statute, it does not eliminate the need to identify a prong of the statute that appears to confer jurisdiction.

Determining whether a Maryland court may exercise personal jurisdiction over a foreign defendant requires a two-step analysis. “First, the requirements under the long-arm statute must be satisfied, and second, the exercise of jurisdiction must comport with due process.” Mackey v. Compass Marketing, Inc., 391 Md. 117 (2006). We have construed our long-arm statute to authorize the exercise of personal jurisdiction to the full extent allowable under the Due Process Clause. (citations omitted). Thus, if to exercise specific jurisdiction in a given case would violate Due Process, we construe our long-arm statute as not authorizing the exercise of personal jurisdiction over the defendant. Id. At 130.

Bond v. Messerman, 391 Md. 706, 721-22 (2006).

There may be cases which, while satisfying constitutional due process, fail to satisfy Maryland’s long-arm statute. See, e.g., Krashes v. White, 275 Md. 549, 559 (1975); see also Joseph M. Coleman & Associates, Ltd. v. Colonial Metals, 887 F.Supp. 116, 118-19 n.2 (D. Md. 1995) (“[I]t does not follow from the principle that the General Assembly intended to ‘expand the exercise of personal jurisdiction to the limits of the due process clause’ that the language of the long arm statute should be ignored; rather, a more correct understanding of the first principle is that to the extent that a defendant’s activities are covered by the statutory language, the reach of the statute extends to the outermost boundaries of the due process clause.”)

In considering whether there is personal jurisdiction over Atkinson Hunt, it is appropriate to begin with the Maryland long-arm statute, which states in relevant part:

- (b) A court may exercise personal jurisdiction over a person, who directly or by an agent:
  - (1) Transacts any business or performs any character of work or service in the State;
  - (2) Contracts to supply goods, food, services, or manufactured products in the State;



- (3) Causes tortious injury in the State by an act or omission in the State;
- (4) Causes tortious injury in the State or outside of the State by an act or omission outside of the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State; ...

Md. Code Ann., Cts. & Jud. Proc § 6-103(b). Subsection (a) limits this exercise of jurisdiction by providing that “If the jurisdiction over a person is based solely upon this section, he may be sued only on a cause of action arising from any act enumerated in this section.” See, Md. Code Ann., Cts. & Jud. Proc § 6-103(a). Thus, the factual prongs of subsection (b) which give rise to jurisdiction must arise in the same context as the conduct of which a plaintiff complains.

CoStar’s complaint does not specifically claim long-arm jurisdiction as a basis for jurisdiction over Atkinson Hunt, but instead bases its claims in three areas: (a) that Atkinson Hunt has “committed the tortious and other actionable acts alleged herein with foreseeable consequences in this State”, (b) that Atkinson Hunt “[agreed] to the Terms of Use for the [www.costar.com](http://www.costar.com) website” and therefore “consented to the jurisdiction of this Court,” and (c) that Atkinson Hunt has “repeatedly directed electronic activity and interacted with CoStar’s computer servers in Bethesda, Maryland.” See Complaint at ¶ 9. While CoStar hints at the application of Maryland’s long-arm statute, failure to identify any particular prong of the statute upon which Plaintiff relies may, in itself, support a dismissal. See, e.g., Johansson Corp. v. Bowness Constr. Co., 304 F.Supp.2d 701, 704 & n.1 (D.Md. 2004) (dismissal may be appropriate if a plaintiff fails to identify a specific Maryland statutory provision authorizing jurisdiction). Assuming however, *arguendo*, that CoStar’s Complaint is properly pled with respect to jurisdiction, there still do not exist sufficient facts to support jurisdiction in the State of Maryland over Atkinson Hunt.

- a. Atkinson does not transact sufficient business or perform sufficient work or services in Maryland to give rise to jurisdiction § 6-103(b)(1)

Despite the fact that, over the past ten years, Atkinson has provided leads to seven entities operating in the State of Maryland, representing approximately three percent of Atkinson's overall business over that period of time, such contacts do not satisfy § 6-103(b)(1) because the statute requires that the cause of action arise from the act enumerated in the section, i.e., the transaction of business or performance of work or services. Md. Code Ann., Cts. & Jud. Proc., § 6-103(a). The causes of action alleged against Atkinson in the Complaint (i.e., breach of contract, fraud, tortious interference, and violation of federal and state statutes relating to computer access) do not arise from Atkinson's contacts with the state. Plaintiff has alleged no facts that connect Atkinson's provision of leads to entities operating in Maryland with any of the allegations of the Complaint.

Atkinson's contacts with Maryland also do not satisfy due process. To determine whether the exercise of specific jurisdiction comports with due process, a court must consider (1) the extent to which the defendant has purposefully availed himself or herself of the privilege of conducting activities in the forum state; (2) whether plaintiff's claims arise out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally "reasonable." See, e.g., Carefirst, 334 F.3d at 397; Johansson Corp., 304 F.Supp.2d at 704. Atkinson's contacts do not satisfy the due process prong because CoStar's claims do not arise out of Atkinson's limited contacts with Maryland.

CoStar has failed to establish a *prima facie* case of personal jurisdiction pursuant to subsection (b)(1).

- b. Atkinson does not contract to supply goods, food, services, or manufactured products in Maryland to give rise to jurisdiction § 6-103(b)(2)

While Atkinson does not deny that it has had some limited business contacts with entities operating in the State of Maryland, those contacts do not satisfy § 6-103(b)(2) because the cause of

action which CoStar complains of does not arise from any “contracts to supply goods, food, services, or manufactured products in Maryland.” See Md. Code Ann., Cts. & Jud. Proc., § 6-103(b). Atkinson has never entered into any contracts with CoStar, so there are no contracts which could serve as a basis for jurisdiction under subsection (b)(2).

CoStar has failed to establish a *prima facie* case of personal jurisdiction pursuant to subsection (b)(2).

- c. Atkinson has not caused tortious injury in the State by an act or omission in Maryland to give rise to jurisdiction § 6-103(b)(3)

There have been no factual allegations that Atkinson has committed any act or omission in Maryland which would give rise to tortious injury. While CoStar alleges facts which it claims support a count for tortious interference with contract and prospective business relations (Complaint at ¶ 11), none of those facts are alleged to have occurred in Maryland. Even by CoStar’s own admissions, Atkinson’s acts or omissions, to the extent any of its acts or omissions are actionable, did not occur in Maryland – presumably, because all of the relevant events (including any acts or omissions by Atkinson) also occurred in New Jersey. With respect to Atkinson’s joint venture with Resource Realty, Atkinson has never caused any tortious injury by an act or omission in Maryland which could serve as a basis for jurisdiction under subsection (b)(3).

CoStar has failed to establish a *prima facie* case of personal jurisdiction pursuant to subsection (b)(3).

- d. Atkinson Hunt does not regularly do or solicit business, engage in any other persistent course of conduct in the State or derive substantial revenue from goods, food, services, or manufactured products used or consumed in the State to give rise to jurisdiction § 6-103(b)(4)

Even if CoStar’s allegations with respect to Atkinson’s tortious acts are taken as true, subsection (b)(4) would only be applicable “if [a defendant] regularly does or solicits business,

engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State.” As stated in the Atkinson Declaration, Atkinson has limited contacts with the State of Maryland, with its only regular contact consisting of providing leads to companies operating in the State of Maryland, such leads representing approximately three percent of Atkinson’s overall business as measured over the preceding ten years. Atkinson Declaration at ¶ 9. There is no regular solicitation or persistent course of conduct by Atkinson in Maryland and the leads generated by Atkinson for Maryland entities represent only a minute portion of Atkinson’s business, certainly not any “substantial” amount of “revenue” as required under and which could serve as a basis for jurisdiction under subsection (b)(4).

CoStar has failed to establish a *prima facie* case of personal jurisdiction pursuant to subsection (b)(4).

### **III. THERE IS LITTLE FACTUAL NEXUS BETWEEN THIS CASE AND THE STATE OF MARYLAND**

In its Complaint, CoStar alleges three grounds for personal jurisdiction over Atkinson, stating that Atkinson has: (a) “committed the tortious and other actionable acts alleged herein with foreseeable consequences in this State”, (b) “[agreed] to the Terms of Use for the [www.costar.com](http://www.costar.com) website” and therefore “consented to the jurisdiction of this Court,” and (c) “repeatedly directed electronic activity and interacted with CoStar’s computer servers in Bethesda, Maryland.” See Complaint at ¶ 9. CoStar further alleges that “a substantial part of the events giving rise to the claims occurred in this District, and a substantial part of the property that is the subject of the action is situated in this District.” See Complaint at ¶ 10. Each of these will be discussed in turn as to why they are insufficient grounds for personal jurisdiction.

A. Atkinson Has Not Committed Any Acts With “Foreseeable Consequences” in Maryland As All Of Its Contacts With CoStar Were In New Jersey

From Atkinson’s original inquiry with CoStar in early 2004, its communications were solely with CoStar representatives in New Jersey. At that time, Atkinson engaged in discussions with CoStar’s New Jersey-based sales representatives and never had contact with any CoStar representatives in Maryland. See Atkinson Declaration at ¶ 4.

During the period of time when Resource Realty and Atkinson were in discussions regarding the proposed joint venture, Atkinson also could not have known that any of its acts would have consequences, foreseeable or unforeseeable, in Maryland. It was Atkinson’s belief that Resource Realty entered into a license agreement with CoStar, through CoStar’s New Jersey sales office, under which Atkinson was a permitted user. Any use of or access to CoStar’s database would have occurred in New Jersey, with the actual location of CoStar’s servers unknown (and perhaps unknowable) to Atkinson. See Atkinson Declaration at ¶¶ 5, 6.

Contrary to CoStar’s allegations, because Atkinson’s contacts with CoStar were exclusively in New Jersey, and all acts relevant to this action occurred in New Jersey, it could not have known that any of its actions would have “foreseeable consequences” in Maryland, let alone any state other than New Jersey. Atkinson’s actions may support jurisdiction in New Jersey, but they are insufficient to support a claim for jurisdiction in Maryland.

B. Atkinson Has Never Entered Into Any Contracts With CoStar and Atkinson

It is undisputed that Atkinson’s initial early-2004 communications with CoStar did not result in any contract or license agreement. See Atkinson Declaration at ¶ 4; Complaint at 31. The only contract between either defendant with CoStar was between Resource Realty and CoStar; Atkinson was not a party to that contract. Atkinson was, however, named as one of five authorized users

under the contract, consistent with Atkinson's role in the joint venture. Atkinson Declaration at ¶ 6. CoStar now claims that Atkinson was not an authorized user under the Resource Realty-CoStar license agreement and that, therefore, Atkinson's "agreement" to the Terms of Use on the CoStar website constitutes consent to personal jurisdiction.

It was Atkinson's clear belief, supported by the written agreement between Resource Realty and CoStar, that Atkinson was an authorized user under that agreement. As an authorized user, Atkinson did not need to enter into a separate agreement or contract with CoStar; its use of and access to the CoStar website would have been governed by and permissible under the Resource Realty-CoStar agreement. Any action for breach should be brought against the party with contractual privity with CoStar, not that party along with authorized users under that party.

With respect to the "Terms of Use" on the CoStar website, there is no allegation that a user such as Atkinson was required to affirmatively assent to any form of "click-wrap" agreement; CoStar only alleges that a user must "scroll" through terms and "accept" them when "logging in." CoStar is effectively arguing that the act of logging in constitutes an assent to its Terms of Use. This is inconsistent with applicable caselaw: clear manifestation of assent is a critical requirement in the enforcement of any contract based on a "click-wrap" agreement: "Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." See, Specht v. Netscape Communications Corp., 306 F.3d 17 (2d. Cir. 2002). The mere fact that a link to "Terms of Use" appeared on a page along with a notice that "logging in" will constitute assent to those terms is insufficient to create contractual privity between Atkinson and CoStar as it is not an unambiguous manifestation of assent. CoStar could have done many things to ensure that, in order to access its databases, an unambiguous manifestation of assent would occur, but it did not, and as a result, there

no express contract between CoStar and Atkinson and no basis for personal jurisdiction in Maryland.

C. Atkinson Has Not Repeatedly Directed Electronic Activity With CoStar's Computer Servers

Despite CoStar's allegation that Atkinson has repeatedly accessed CoStar's computer servers (Complaint at 9, 57), Atkinson's actual access to CoStar's computer servers was limited to the period of time when Resource Realty and Atkinson were in discussions regarding their proposed joint venture, a time when Atkinson was an authorized user of the CoStar information databases. See Atkinson Declaration at ¶ 7. Atkinson has not accessed or attempted to access any of CoStar's information databases since the time of Atkinson's involvement in the joint venture with Resource Realty in 1994. Id. The alleged "repeated" electronic activity did not occur and, therefore, cannot serve as a basis for personal jurisdiction.

D. Maryland Is An Inconvenient Forum

CoStar's allegations that "a substantial part of the events giving rise to the claims occurred in this District, and a substantial part of the property that is the subject of the action is situated in this District" are misleading. Despite CoStar's efforts to make it appear that relevant witnesses and events occurred in Maryland (See Plaintiffs' Response in Opposition to Defendant [Resource Realty]'s Motion to Dismiss or Transfer and attached Declaration of Scott Zebrak), virtually all events and individuals with first-hand knowledge of the facts and circumstances in this case are actually located in New Jersey. Further, there is very little relevant "property" at issue, and to the extent there is any actual property, that property is intangible (e.g., the CoStar database).

All events relating to the purchase of a five-user license by Resource Realty in connection with the joint venture between Resource Realty and Atkinson occurred in the State of New Jersey: sales inquiries were made by Resource Realty in New Jersey, salespersons based in CoStar's New

Jersey office were responsible for selling the license to Resource Realty, all of the authorized users under the license agreement were and are, upon information and belief, located in New Jersey, all witnesses (including employees of both Resource Realty and Atkinson) were and are, upon information and belief, located in New Jersey, and all electronic and paper records relating to defendants' use of the CoStar database are maintained in New Jersey.

Atkinson is a small, New Jersey-based company with one office, whose management and operational decisions are all made by a single individual, Mr. David Atkinson. Upon information and belief, Resource Realty is also a small, New Jersey-based company with one office whose management and operational decisions are all made by a single individual, Mr. James Davis. In contrast, CoStar is a publicly traded company with over 1,000 employees across the United States, providing commercial real estate information on 66 markets in the United States and United Kingdom. See CoStar Website (<http://www.costar.com>). The only CoStar office and salespersons that had direct contact with Resource Realty and Atkinson were located in New Jersey.

While Atkinson and Resource Realty are only found in New Jersey, CoStar is found throughout the United States, including New Jersey. It would be burdensome to require the sole principals of two New Jersey companies to travel to Maryland to defend this litigation, but it would not be similarly burdensome for CoStar to send one of its thousand employees as its representative for litigation or have its New Jersey-based sales staff appear as witnesses. Considering CoStar's claims all have their factual basis in the alleged unauthorized access to CoStar's database and that the agreement between CoStar and Resource Realty originated through its New Jersey office, it is difficult to conceive as to why CoStar believes its witnesses will include a sales director, sales manager, multiple members of a product development team, salesperson, and corporate vice president, none of whom is apparently located in New Jersey. See Zebrak Declaration at ¶ 9. In



contrast, the Zebrak Declaration does not even mention any individuals in New Jersey or CoStar's New Jersey regional office, though there would likely be more individuals in New Jersey with first-hand knowledge of the events at issue in this case than anywhere else.

Lastly, CoStar's claim that "most or all of the documents relevant to this case are located in Maryland" or that there is "property" subject to this action in Maryland is also misleading. Considering that, in fact, most if not all of the few relevant documents in this case are available in electronic format, those documents should be easily accessible anywhere. As a company that prides itself on its use of electronic documents and delivery of information in electronic form, CoStar should have no trouble producing documents in electronic form, without any geographic limitations.

#### **IV. CONCLUSION**

Atkinson lacks minimum contacts with the State of Maryland and does not have sufficient contacts for the State of Maryland to exercise personal jurisdiction upon it. For the foregoing reasons, Atkinson respectfully requests that the Court grant its Motion to Dismiss and dismiss the Complaint with prejudice.

/s/

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