

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

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

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Plaintiffs,

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v.

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Case No.: 07 CV 01182 AW

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CENTERS & MALLS, LLC, *et. al.*

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Defendants.

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**PLAINTIFFS’ REPLY TO DEFENDANTS’  
OPPOSITION TO PLAINTIFF’S MOTION FOR A  
TEMPORARY RESTRAINING ORDER**

Plaintiffs, CoStar Realty Information, Inc. (“CoStar”), and National Research Bureau, Inc. (“NRB”),<sup>1</sup> through counsel and pursuant to Rule 65 of the Federal Rules of Civil Procedure, respectfully move this Court for a temporary restraining order against defendants Centers & Malls LLC (“Centers & Malls”), Robert Galvin (“Galvin”) and Guy Hays (“Hays”). In support of this motion, CoStar states as follows:

**I. INTRODUCTION**

Centers & Malls’ founder and President Garrett Van Siclen has admitted to stealing the Shopping Center Directory, a copyrighted database owned by CoStar.<sup>2</sup> Without authorization, Mr. Van Siclen took a CD Rom that contained this copyrighted database from his former

<sup>1</sup> NRB has recently assigned all of its’ intellectual property rights to CoStar and has been merged into CoStar. An Amended Complaint reflecting this change will be filed shortly.

<sup>2</sup> The Shopping Center Directory was created and initially copyrighted by National Research Bureau. CoStar purchased the rights to the Shopping Center Directory when it acquired National Research Bureau, Inc. in January of 2005. CoStar paid millions of dollars to obtain the rights of the Shopping Center Directory. Mr. Van Siclen and Centers & Malls brazenly and illegally misappropriated the Shopping Center Directory without permission or any payment.

employer, copied the data and used it to create the Centers & Malls database.<sup>3</sup> Centers & Malls is now selling its database to customers for a profit. In addition, former CoStar employees Robert Galvin and Guy Hays each executed employment agreements with CoStar that contained a non-competition provision prohibiting them from working for a competitor within one year of the termination of their employment with CoStar.<sup>4</sup> Centers & Malls is a direct competitor of CoStar. *See* Deposition of Robert Galvin, attached hereto as Exhibit 3, pp. 91:15-92:17. Within one year of leaving CoStar Mr. Galvin became Centers & Malls' Vice President for Sales and Strategic Partnerships, and Guy Hays became its Director of Client Relations. Mr. Galvin and Mr. Hays remain in these capacities with Centers & Malls today.<sup>5</sup>

Due to the above actions, Plaintiffs respectfully request this Court enter a temporary restraining order enjoining Defendants and any third parties from continuing to disseminate the Centers & Malls' database which was created by copying information from the copyrighted Shopping Center Directory. Plaintiffs also respectfully request a temporary restraining order enjoining Defendants Galvin and Hays from continuing their employment with Centers & Malls.

As will be more fully set forth below, the Court should issue the requested relief for the following reasons:

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<sup>3</sup> Mr. Van Sieten estimates that approximately 70-80% of the data contained on the Centers & Malls database at its inception was taken directly from the Shopping Center Directory. *See* Deposition of Garrett Van Sieten, attached hereto as Exhibit 1, p. 186:5-15.

<sup>4</sup> Upon termination of his employment with CoStar, Galvin was paid \$30,806.33 in consideration for entering into a Confidential Separation Agreement and General Release. *See* Galvin Separation Agreement, attached hereto as Exhibit 2.

<sup>5</sup> It should be noted that there is an inherent conflict of interest with Galvin, Hays, and Centers & Malls all being represented by the same counsel. Galvin and Hays both testified at their depositions that they showed their CoStar employment agreements to Centers & Malls President Garrett Van Sieten and Centers & Malls' legal counsel, and that after discussions with Centers & Malls' counsel, Mr. Van Sieten informed Galvin and Hays that working for Centers & Malls would not violate the non-competition provisions of these agreements. *See* Exhibit 3, p. 130:4-132:8; *see also* deposition of Guy Hays, attached hereto as Exhibit 4, p. 29:13-30:20. This creates the potential for a cause of action by Galvin or Hays against Garrett Van Sieten and/or Centers & Malls. Further, this is direct evidence of Centers & Malls intentional interference with CoStar's contractual relations.

1. Defendants do not contest that Plaintiffs will be irreparably harmed if their activities are permitted to continue.

2. Defendants will not be irreparably harmed if the requested relief is granted, since Centers & Malls does not have any employees or centralized office, and Galvin and Hays have alternative means of generating income.

3. It is not in the public interest to permit the theft of intellectual property and the breach of voluntarily bargained for agreements.

4. Centers & Malls has the requisite “minimum contacts” with the State of Maryland for this Court to exercise either general or specific jurisdiction over it. Centers & Malls’ contacts with Maryland include but are not limited to: licensing agreements with at least 5 Maryland customers, the distribution of marketing materials to thousands Maryland residents, the direct solicitation of several Maryland residents by Centers & Malls Director of Client Development Guy Hays, and the listing of over 500 Maryland properties on the Centers & Malls website.

5. Galvin and Hays contractually bound themselves to jurisdiction in Maryland with the execution of their employment agreements with CoStar. These agreements expressly state that consideration for the agreement is the employee’s access to confidential information, thus they are enforceable.

6. Plaintiffs are likely to succeed in their breach of contract claims against Galvin and Hays because Galvin and Hays have violated the non-competition provisions of their employment agreements with CoStar by working for one of CoStar’s direct competitors within one year of the termination of their employment. The non-competition provisions of the Galvin and Hays employment agreements are reasonable as to geography, scope, and breadth of activity, and are therefore enforceable.

7. Plaintiffs are likely to succeed in their copyright infringement claim against Defendants, because they have proof that the Shopping Center Directory is copyrighted, is an original and creative work, and Centers & Malls President Garrett Van Siclen has admitted that he copied this database.

8. There are several other Counts against Defendants in this litigation that Plaintiffs are likely to succeed upon, including but not limited to intentional interference with contractual relations, violation of §43(a) of the Lanham Act, and misappropriation.

## **II. STANDARD OF LAW**

The parties do not dispute the legal standard required for obtaining a temporary restraining order. In determining whether or not to award injunctive relief, a court usually must weigh and evaluate the evidence to assess four interrelated factors: 1) the likelihood that the plaintiff will succeed on the merits; 2) the likelihood of irreparable harm to the plaintiff if the injunctive relief is denied; 3) the likelihood of irreparable harm to the defendant if the requested relief is granted; and 4) the public interest. *NaturaLawn of America, Inc. v. West Group, LLC*, No. 06-3325, 2007WL1191131 at 3 (4<sup>th</sup> Cir. 2007); *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4<sup>th</sup> Cir. 1991); *Blackwelder Furniture Co. v. Selig Manufacturing Co.*, 550 F.2d 189, 193 (4<sup>th</sup> Cir. 1977).

## **III. ARGUMENT**

CoStar has suffered, and will continue to suffer irreparable injury for each day that the above activities by Defendants are permitted to continue. Defendants do not deny that Plaintiffs will be irreparably harmed if Centers & Malls or other third parties are permitted to continue disseminating information unlawfully copied from the Shopping Center Directory, and if Galvin and Hays are permitted to continue working for Centers & Malls. Nor do Defendants assert that

they will be irreparably harmed if they are enjoined from continuing these activities. On this point it is worth noting that Centers & Malls claims that it has no employees and no centrally located office. *See* Exhibit 1, p. 24:20-26:18. Mr. Galvin claims he is an independent consultant performing independent work for Centers & Malls. *See* Exhibit 3, p. 9:5-16. Mr. Hays states that he is an independent contractor for Centers & Malls who has other sources of income. *See* Exhibit 4, p. 133:14-134:9. The address listed on Centers & Malls correspondence is in fact the address for a box in a Mailboxes, Etc. store. *See* Exhibit 1, 26:14-27:4. Thus, if the Court were to enter an Order shutting down the entire Centers & Malls operation, the harm would be minimal and would affect a limited number of individuals. Finally, Centers & Malls does not assert that it is in the public interest to permit the theft of intellectual property, or to encourage the breach of freely bargained for agreements.

While not seriously contesting any of the above factors, Defendants' Opposition to Plaintiff's Motion for a Temporary Restraining Order ("Opposition") relies entirely on technical arguments which, as will be set forth more fully below, are without merit. To protect the interests of CoStar, and of its approximately 550 Maryland-based employees, this Court should issue a temporary restraining order enjoining Defendants and any third parties from continuing to disseminate information unlawfully copied from the Shopping Center Directory, and enjoining Galvin & Hays' continued employment with Centers & Malls.

**A. *The Court is within its' authority to exercise personal jurisdiction over Centers & Malls***

When determining whether a court has authority to exercise personal jurisdiction over a non-resident defendant, "the burden on the plaintiff is simply to make a prima facie showing of sufficient jurisdictional basis in order to survive the jurisdictional challenge." *Combs v. Bakker*, 886 F.2d 673, 676 (4<sup>th</sup> Cir. 1989). "In deciding whether the plaintiff has proved a prima facie

case of personal jurisdiction, the district court must draw all reasonable inferences arising from the proof, and resolve all factual disputes, in the plaintiff's favor. *Mylan Labs, Inc. v. Akzo, N.V.*, 2 F. 3d 56, 60 (4<sup>th</sup> Cir. 1993).

“Maryland courts have concluded that the State's longarm statute, Md.Code Ann., Courts & Jud. Proc. §6-103, expands Maryland's exercise of personal jurisdiction to the extent allowed by the Due Process Clause of the Fourteenth Amendment.” *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 710 (4th Cir. 2002). “Because the limits of Maryland's statutory authorization for the exercise of personal jurisdiction are coterminous with the limits of the Due Process Clause, the statutory inquiry necessarily merges with the constitutional inquiry, and the two inquiries essentially become one.” *Id* (internal citations omitted). The Supreme Court has held that for a state to exercise personal jurisdiction over a non-resident defendant, the defendant must have certain minimum contacts with the state such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154 (1945)(internal citations omitted).

Defendants contend in their Opposition that Centers & Malls does not have the requisite “minimum contacts” with the State of Maryland for this Court to exercise personal jurisdiction. Preliminary discovery in this matter has revealed that this contention is untrue. First, Centers & Malls has contracted to supply its database service to at least five customers within the State of Maryland. *See* Centers & Malls License Subscription form for John Dimeo of DLC Management Corporation, attached hereto as Exhibit 5; *see also* Centers & Malls License Subscription Form for Frank Kenan, Sam Judd, and Jessica Bruner of Edens & Avant, attached hereto as Exhibit 6; *see also* Centers & Malls License Subscription form for Richard Hynes, attached hereto as Exhibit 7. Each of these Maryland subscribers was bound by the Centers &

Malls Terms and Conditions of use form. *See* Centers and Malls Terms and Conditions Form, attached hereto as Exhibit 8; *see also* Exhibit 1, p. 245:8-20. These five Maryland customers, by themselves, establish sufficient contacts for the Court to exercise personal jurisdiction over Centers & Malls. *See, e.g. Digital Equipment Corp. v. Alta Vista Technology, Inc.*, 960 F. Supp. 456, 472 (D. Mass. 1997)(totality of Defendant’s contacts with Massachusetts, including three sales to Massachusetts residents through Defendant’s website, made personal jurisdiction over Defendant appropriate); *see also American Network, Inc. v. Access America*, 975 F. Supp. 494, 496 (S.D.N.Y.1997)(court asserted personal jurisdiction over an internet company with approximately 7500 subscribers, 6 of whom came from New York).

In addition to the above, Centers & Malls regularly solicits business within the State of Maryland. The Centers & Malls’ website, which is available to any Maryland resident with access to the internet, touts the company as serving the needs of professionals in the real estate industry “worldwide”. *See* Centers and Malls website, attached hereto as Exhibit 9. Since the company’s founding in 2006, Centers & Malls has issued six “e-mail blasts”, each sending marketing materials to over 30,000 potential customers chosen from the International Council of Shopping Center’s (“ICSC”) membership lists. *See* Exhibit 1, p. 129:1-130:19. Centers & Malls also sent out a mass postal mailing to this same customer list when Centers & Malls was first formed. *See* Exhibit 4, p. 111:5-13. The list of ICSC members located within the State of Maryland is over 90 pages long.<sup>6</sup> Also, Centers & Malls places a monthly advertisement in “Shopping Center Today”, a publication of the International Council of Shopping Centers. This publication is sent to all ICSC members. *See* Exhibit 1, p. 168:3-15. In fact, CoStar employees

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<sup>6</sup> Due to this list’s length, CoStar has not attached it as an exhibit to this motion, however, Plaintiffs will supply copies of this list at the June 8, 2007 hearing on its motion for a temporary restraining order.

who are ICSC members have received this advertisement in Maryland. *See* Centers & Malls advertisement sent to CoStar employee, attached hereto as Exhibit 10.

More specifically, Centers & Malls and its Director of Client Development Guy Hays have regularly transacted and/or solicited business directly from Maryland residents. For example, Centers & Malls sent a letter to the Mills Corporation in Chevy Chase, Maryland on January 8, 2007 requesting to enter into an agreement which would give it access to the Mills' Corporation's website. *See* January 8, 2007 letter, attached hereto as Exhibit 11. In addition, Mr. Hays engaged in e-mail communications with the hopes of obtaining business with Janet Gribble of Federal Realty Investment Trust in Rockville, Maryland. *See* Hays November 27, 2006 e-mail, attached hereto as Exhibit 12. He did the same with Gary Barks of Citifinancial, and Scott Planks of Under Armour, both based in Baltimore, Maryland. *See* Hays April 16, 2007 e-mail, attached hereto as Exhibit 13; *see also* Hays May 15, 2007 e-mail, attached hereto as Exhibit 14. In fact, Citifinancial was regularly listed on Mr. Hays "pipeline reports" to Mr. Van Sieten throughout 2007 as a potential business opportunity. *See* Hays pipeline reports, attached hereto as Exhibit 15. Mr. Hays admitted at his deposition that his goal in communicating with these Maryland residents was to make a sale. *See* Exhibit 4, p. 102:18-103:21. Mr. Hays also received e-mail communications and data for property listings from General Growth Properties, Inc.'s Columbia Maryland office. *See* May 8, 2007 Hays e-mail, attached hereto as Exhibit 16. Mr. Hays further testified at his deposition that he has recently reduced his efforts in soliciting potential Maryland customers for Centers & Malls as a result of the present litigation and the advice of Mr. Van Sieten. *See* Exhibit 4, p. 125:9-127:6. Thus, it is quite possible that Defendants would have solidified even more contacts with the State of Maryland but for their conscious efforts to evade jurisdiction in this matter.



The Centers & Malls database lists various information about retail shopping centers worldwide. The database currently contains over 26,000 listings. Of these, there are 505 listings for retail shopping centers within the State of Maryland. *See* Exhibit 1, p. 143:16-144:9. Of the 505 Maryland properties listed on the Centers & Malls website, 391 contain photographs of the properties. *Id.* Centers & Malls President Garrett Van Siclen admitted at his deposition that he has contracted to have photographs taken of properties located in Maryland. *See* Exhibit 1, p. 139:21-140:13. Therefore, by having photographs taken of Maryland properties, Centers & Malls contracted to have work performed within the State of Maryland.

Courts may exercise judicial power over out of state defendants in two ways: by finding specific jurisdiction based on conduct connected to the suit, or by finding general jurisdiction. *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F. 3d 707, 711-12 (2002). General jurisdiction arises out of a defendant's general, more persistent, but unrelated contacts with the state. *Id.* at 712. "To establish general jurisdiction over the defendant, the defendant's activities within the State must have been 'continuous and systematic', a more demanding standard than is necessary for establishing specific jurisdiction." *Id.* citing *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868 (1984). Under the present circumstances, this Court may assert either general or specific jurisdiction over Centers & Malls.

Since its inception, Centers & Malls' contacts with the State of Maryland have been continuous and systematic. Centers and Malls has signed up at least five Maryland customers to subscribe to its database. It has issued marketing materials to thousands of prospective customers in Maryland. It has listings for over 500 Maryland properties on its database. It has sent contractors into the State of Maryland to take photographs of Maryland properties, which are then posted on the Centers & Malls database. Centers & Malls and its' Vice President of

Client Development have directly communicated and continue to communicate directly with prospective clients in Maryland in the hopes of soliciting business. The above activities conducted within the State of Maryland are continuous and systematic, and are therefore enough for this Court to exercise general jurisdiction over Centers & Malls.

With respect to specific jurisdiction as it relates to business activity transmitted over the internet, the Fourth Circuit Court of Appeals has adopted the three part *Zippo* test. *See ALS Scan, Inc.*, 293 F. 3d at 714; citing *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). This test states that “a State may, consistent with due process, exercise judicial power over a person outside of the State when the person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, within a person within the State, a potential cause of action cognizable in the State’s Courts.” *Id.* These three prongs have all been satisfied in the present case.

First, there can be no dispute that Centers & Malls has directed electronic activity into the State of Maryland. Any Maryland resident with access to the internet may visit the Centers & Malls database and take a “test drive” of the Centers & Malls database. *See* Exhibit 9. Second, there is also no dispute that Centers & Malls has displayed a manifested intent of engaging in business within the State of Maryland. As was stated above, Centers & Malls has registered five Maryland subscribers to its services, has sent e-mail blasts and other marketing materials to thousands of prospective Maryland customers, lists information and photographs on its database of hundreds of properties located within the State of Maryland, has contracted to have photographs taken of hundreds of properties within the State of Maryland, and has actively solicited business from potential Maryland customers through letters, e-mails, and telephone

calls. Third, Centers & Malls President Garrett Van Sicle has admitted that Centers & Malls' database was created by copying the Shopping Center Directory. The Shopping Center Directory is a copyrighted compilation. By purposefully providing Maryland residents with subscriptions and access to its database, Centers & Malls is creating, within Plaintiffs, a potential cause of action for copyright infringement that is cognizable in Maryland courts.

***B. The CoStar Employment Agreements are Supported by Consideration and Thus Provide Jurisdiction over Galvin and Hays***

There is no dispute that Mr. Galvin and Mr. Hays executed employment agreements in connection with their employment with Plaintiff CoStar. *See* Employment Agreement of Robert Galvin, attached hereto as Exhibit 17; *see also* Employment Agreement of Guy Hays, attached hereto as Exhibit 18. By executing these agreements, Mr. Galvin and Mr. Hays expressly agreed that any proceeding arising out of an alleged breach of these agreements would be held in either the Circuit Court for Montgomery County or the United States District Court for the District of Maryland. *See id* at Paragraph 4.4. Defendants' Opposition alleges that Mr. Galvin and Mr. Hays' consent to jurisdiction within the State of Maryland is unenforceable because their employment agreements with CoStar lacked consideration. This contention is blatantly false.

First, the Galvin and Hays employment agreements with CoStar explicitly state: "Employee acknowledges and agrees that ***in consideration for entering into this Agreement*** Employee will come into contact with, have access to and learn various technical and non-technical trades secrets and other Confidential Information, which are the property of the Company." *Id* at Paragraph 2.5(a)(emphasis added). At their depositions, both Mr. Galvin and Mr. Hays conceded that they were exposed to confidential information while employed by CoStar. *See* Exhibit 3 at p. 123:8-125:14; *see also* Exhibit 4 at p. 17:20-19:7. Thus, there is no dispute that by their very terms, the Galvin and Hays employment agreements were supported by

consideration thereby making them enforceable. As a result, Mr. Galvin and Mr. Hays' contractual consent to jurisdiction in the United States District Court for the District of Maryland should be upheld by this Court.

Even if the Court were to find that Galvin and Hays' access to CoStar's confidential information did not provide ample consideration, the agreements were supported by additional consideration in the form of employment with CoStar. At their depositions, both Mr. Galvin and Mr. Hays stated that they would not have been permitted to work with CoStar had they refused to execute these employment agreements. *See* Exhibit 3 at p. 129:5-14; *see also* Exhibit 4, at p. 29:8-11. Defendants' Opposition argues that Galvin and Hays' employment with CoStar is excluded as consideration based on the parol evidence rule. Defendants' argument however, is based on a misapplication of this rule. In Maryland, parol or extrinsic evidence "is inadmissible to vary, alter or contradict a writing which is complete and unambiguous, where no fraud, accident or mistake is claimed." *Pumphrey v. Kehoe*, 261 Md. 496, 504, 276 A.2d 194, 199 (1971)(internal citations omitted). In the instant case, Plaintiffs are not attempting to introduce evidence of consideration to vary, alter, or contradict the terms of the Galvin and Hays employment agreements. Instead, Plaintiffs are introducing this evidence to establish the valid formation of a contract. Evidence used to establish the formation of a contract is not parol evidence. *See, e.g. Catholic University of America v. Bragunier Masonry Contractors, Inc.*, 139 Md. App. 277, 300, 775 A.2d 458, 472 (2001)(evidence is not "parol evidence" if not being offered to vary the terms of an integrated writing). Defendants' Opposition cites to a footnote in a recent Maryland Court of Appeals decision that stated that parol evidence may be used to contravene the existence of a contract. *See* Opposition, p. 8-9, citing *Cochran v. Norkunas*, 919 A.2d 700 (2007). From this footnote, Defendants jump to the inexplicable conclusion that parol

evidence *may not* be used to establish the existence of a contract. Defendants cite absolutely no authority to support this proposition. If anything, the adverse inference that parol evidence may be used to establish the formation of a contract should be drawn from this footnote.

Thus, the express terms of the Galvin and Hays employment agreements with CoStar provide for consideration in the form of exposure to Confidential Information. Galvin and Hays do not dispute that they were exposed to confidential information during their employment with CoStar. *See* Exhibit 3 at p. 123:8-125:14; *see also* Exhibit 4 at p. 17:20-19:7. Further, Galvin and Hays were both provided additional consideration for their employment agreements in the form of employment with CoStar. On top of this, Galvin was provided with even more consideration upon the termination of his employment with CoStar, by being given over \$30,000 in severance. *See* Exhibit 2. For all of these reasons, the Court can exercise jurisdiction over Galvin and Hays pursuant to paragraph 4.4 of these agreements.

***C. Plaintiffs are likely to succeed on their breach of contract claims against Defendants Galvin and Hays***

Defendants' Opposition argues that Plaintiffs' are unlikely to succeed in their breach of contract claims against Defendants Galvin and Hays because the non-competition provisions of their employment agreements with CoStar are overbroad.<sup>7</sup> In Maryland, courts will uphold non-competition provisions in employment agreements "if the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and do not impose undue hardship on the employee or disregard the interests of the public." *Ruhl v. F.A. Bartlett Tree Expert Co.*, 245 Md. 118, 123-24, 225 A.2d 288, 291 (1967)(citing *MacIntosh v. Brunswick Corp.*, 241 Md. 24, 31, 215 A.2d 222, 225

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<sup>7</sup> Defendants Opposition also states that this breach of contract claim is unlikely to succeed because the Galvin and Hays employment agreements lacked consideration. Plaintiffs' adopt and incorporate their arguments with respect to this claim in section IIIB above.

(1965)). Maryland Courts will initially look to whether a non-competition provision is facially overbroad. If the provision is not overbroad on its face, the Court will examine the facts and circumstances of each case. *Millward v. Gerstung International Sport Education, Inc.*, 268 Md. 483, 488, 302 A.2d 14, 16 (1973). In the instant case, the non-competition provisions of the Galvin and Hays employment agreements are not facially overbroad. Instead they are specifically limited in duration, geographic scope, and breadth of restricted activities so that these restrictions are no greater than necessary to protect CoStar's legitimate business interests. In fact, to avoid the possibility that this non-competition provision be construed as overly restrictive, the agreements provide that the provision can be waived by consent of CoStar's Chief Executive Officer. *See* Exhibits 17 and 18 at paragraph 2.5(c).

The non-competition provision of CoStar's employment agreements with Mr. Galvin and Mr. Hays prohibit Galvin and Hays, for a period of one year following the date of their termination from employment, ownership, or association with a company "engaged in the provision of real estate information or software". *Id.* In recognition of the nationwide and international scope of CoStar's business, the restrictions are applicable in the United States, Canada, and the United Kingdom. *Id.*

With respect to duration, the non-competition provision of Galvin and Hays' agreements expire one year after the termination of their employment with CoStar. There can be no dispute that a one-year restriction on competition is reasonable under Maryland law. Maryland courts have often found that agreements that prohibit an employee from competing with a former employer for a period of greater than one year following termination to be a reasonable restraint on trade. *Holloway v. Faw, Casson & Co.*, 319 Md. 324, 572 A.2d 510, 515 (1990)(upholding a five year restrictive covenant after having judicially modified it down to a three year non-

competition prohibition); *see also Griffen v. Guy*, 172 Md. 510, 192 A. 359 (1937)(restrictive covenant between barbers upheld although unlimited as to time); *Anderson v. Truitt*, 158 Md. 193, 148 A. 223 (1930)(non-competition covenant for furniture salesman with twenty-five year restriction found reasonable). Thus, if Maryland courts are willing to find the above restraints on employment to be reasonable, there is no doubt that CoStar's one-year restriction as to Galvin and Hays is reasonable under the present circumstances.

Maryland law does not require a non-competition provision to contain a geographic limitation to be considered reasonable. *Deutsche Post Global Mail, Ltd. v. Conrad*, 292 F. Supp. 2d 748, 756 (D. Md. 2003)(finding that if a restriction is to legitimately prevent competition, it stands even where there is no geographic limitation). Where there is a geographic limitation provision in a non-competition provision, Maryland courts will uphold the provision where there is a logical nexus between the location of the employer's business activity and the restrictive geographic area. *Becker v. Bailey*, 268 Md. 93, 299 A. 2d 835 (1973)(covenant not to compete enforceable if restraint confined within limits which are no wider as to area than are reasonably necessary to protection of business of employer).

In this case, CoStar has restricted Galvin and Hays' activities as narrowly as possible to include only geographic areas where CoStar conducts business. CoStar's business activities extend across the United States and also include Canada and the United Kingdom. As a result, the restrictions in Galvin and Hays' employment agreements include these areas. There is a logical nexus between the location of CoStar's business activities and the restricted geographic area, and the restraint is confined within limits that are no wider than reasonably necessary to protect CoStar's legitimate business interests. Given that Maryland courts have found non-competition provisions to be reasonable even without any limitation as to geographic scope, the

limitation of the restriction in the present case to only areas where Costar conducts business is entirely reasonable.

With respect to the breadth of the activities restrained, the CoStar non-competition provision prohibits Galvin and Hays from working for businesses “engaged in the provision of commercial real estate information or software.” This restriction is closely tied to the work that Galvin and Hays had been performing for CoStar, and does not seek to bar Galvin and Hays employment in the broad commercial real estate industry in which they were working. In fact, by signing their agreements, Mr. Galvin and Mr. Hays both expressly agreed that:

Employee’s experience and capabilities are such that Employee can obtain employment with a new employer engaged in a different business or services different from that conducted by the Company, and the entry of an injunction to enforce the duty of non-competition set forth herein shall not prevent employee from earning a livelihood.

Exhibits 17 and 18, paragraph 2.5(d).

Defendants interpret the non-competition provisions of the Galvin and Hays agreements to illogical extremes, arguing in their Opposition that the provision precludes Galvin and Hays from working for companies such as Microsoft and Google even if their employment is unrelated to the company’s commercial real estate activities. There is nothing in the plain language of this provision that supports such an interpretation. Maryland courts must construe contracts to effectuate the reasonable intentions of the parties. *Imas Gruner & Associates, Ltd. v. Stringer*, 48 Md. App. 364, 367, 427 A.2d 1038, 1040 (1981). Maryland Courts do not interpret contracts in a manner that would render provisions superfluous or having no effect. *Towson University v. Conte*, 384 Md. 68, 81, 862 A.2d 941, 948 (2004). Defendants Opposition ignores two key clauses of the non-competition provisions in the Galvin and Hays agreements. First, Defendants ignore the fact that both Galvin and Hays acknowledged that “the Company is engaged in a



highly competitive business and . . . engaging in any business which is directly or indirectly competitive with the Company will cause it great and irreparable harm.” Exhibits 17 and 18, paragraph 2.5(b). Defendants also ignore the fact that Paragraph 2.5(c) of the Galvin and Hays employment agreements specifically lists businesses engaged in the provision of commercial real estate information or software that Galvin and Hays were prohibited from working with. These businesses included but were not limited to: “Loopnet, Inc., Exceligent, Black’s Guide, Dorey Publishing, Commercial Search, Cityfleet, Octane Ventures, Officespace.com, Marshall & Swift, Yale Robbins, and REIS.” *Id.* Centers & Malls doubtless would have also been included on this list, however, the company was not in existence at the time that these agreements were executed. When the Galvin and Hays agreements are construed as a whole, there is no doubt that the parties’ intent was to prohibit Galvin and Hays from working with companies that engage in the same limited type of business as CoStar. This is an entirely reasonable restriction as to the breadth of Galvin and Hays’ activities.

Since the non competition provisions of the Galvin and Hays employment agreements are reasonably limited as to duration, geographic scope, and breadth of activity, these provisions are not facially overbroad. The Court must therefore examine the facts and circumstances of this particular case. Galvin and Hays did not go to work for *The Washington Post*, or Google, or Microsoft, or any of the other companies listed in Defendants’ Opposition. Instead, Galvin and Hays became senior executives with Centers & Malls; a company engaged in the exact same type of business as CoStar.<sup>8</sup> The non-competition provision of the Galvin and Hays employment agreements would have permitted them to work at any of the company’s cited in Defendants’

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<sup>8</sup> In fact, at his deposition, Mr. Galvin testified that he is currently performing services for Centers & Malls under a contract with a non-competition provision. *See* Exhibit 3 at p. 91:15-93:6. Before being instructed not to answer further questions by his counsel, Mr. Galvin explained that the Centers & Malls non-competition provision specifically prohibits him from performing working for CoStar. *Id.*

Opposition, as long as they were not “engaged in the provision of real estate information or software.” This allows Galvin and Hays numerous opportunities within the extremely broad real estate industry. Despite this, Galvin and Hays specifically chose to work for a direct competitor of CoStar. There is no doubt that Galvin and Hays breached the non-competition provisions of their agreements with CoStar, as they have admitted performing services for Centers & Malls, and have admitted that Centers & Malls are a competitor of CoStar. Therefore, there is a high likelihood that Plaintiffs’ will succeed in their breach of contract claims against Galvin and Hays.

***D. Plaintiffs are likely to succeed in their copyright infringement claim against Centers & Malls***

To prove copyright infringement, a plaintiff must show first that it owned the copyright to the work that was allegedly copied, and second, that the defendant copied protected elements of the work. *Bouchat v. Baltimore Ravens, Inc.*, 241 F. 3d 350, 353 (4<sup>th</sup> Cir. 2001), citing *Towler v. Sayles*, 76 F.3d 579, 581 (4<sup>th</sup> Cir.1996) (citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991)). A Plaintiff’s registration of a copyright, when “granted by the Copyright Office, is prima facie proof of the validity of plaintiff’s copyright, including the existence of the elements of originality and fixation.” *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 434 (4<sup>th</sup> Cir. 1986). In disputing the validity of a copyright, defendants “have the burden of overcoming the presumption arising out of the granting of the copyright by the Copyright Office.” *Id.*

In the instant case, there is a high likelihood that Plaintiffs will succeed in their copyright infringement case against Defendants. There is no dispute that National Research Bureau has regularly copyrighted the database that is at issue in this litigation. *See* Copyright registration forms, attached hereto as Exhibit 19. There is also no dispute that CoStar became the rightful

owner of this copyright when it acquired National Research Bureau in January of 2005. Plaintiffs' have therefore already established a presumption that the Shopping Center Directory is a copyrightable and original work. In addition, Centers & Malls' President admitted at his deposition that he took a CD Rom copy of the Shopping Center Directory from his former employer, and used the information contained in this CD Rom as the foundation for the Centers & Malls database. *See* Exhibit 1 at p. 67:14-72:12; 186:5-15. Plaintiffs have therefore established a presumption that their database is copyrightable, and have conclusively established that this database was inappropriately copied by Centers & Malls President Garrett Van Siclen. These facts by themselves demonstrate that Plaintiffs are likely to succeed on their copyright infringement claim.

Defendants Opposition makes several baseless arguments in an attempt to show that the data contained in the Shopping Center Directory is not copyrightable. First Defendants appear to argue that the Shopping Center Directory is not copyrightable because it is available in a number of public libraries across the country. This argument is nothing more than a red herring and should be disregarded by this Court. The fact that the Shopping Center Directory is available in certain public libraries has absolutely no bearing on whether or not this work can be copyrighted. Public libraries contain countless copyrighted works. The fact that these works are available to the public does not allow the public to copy the information contained therein and sell it for a profit.

Defendants' Opposition next argues that Centers & Malls' arrangement of data on its database is different than the arrangement of the Shopping Center Directory. Assuming for the purposes of this Reply only that this contention by Defendants is true, it is irrelevant. To prove copyright infringement, Plaintiffs have to show that Defendants copied protected elements of the

work in question. *Bouchat* 241 F. 3d at 353. Plaintiffs do not have to prove that the arrangement or information in the Shopping Center Directory is identical to that in the Centers & Malls database. In the instant case there is no doubt that Centers & Malls has copied the Shopping Center Directory, as its President Garrett Van Sicen conceded this at his deposition. *See* Exhibit 1 at p. 67:14-72:12; 186:5-15.

In a remarkably analogous situation to the case at hand, a Tennessee federal District Court granted a copyright holder's motion for summary judgment based upon copyright infringement after current and former employees copied the plaintiff's registry in to establish a competing enterprise. *Tennessee Walking Horse Breeders' and Exhibitors' Association v. National Walking Horse Association*, 2007 WL 325774 (M.D.Tenn). Plaintiff maintained and copyrighted a registry of Tennessee Walking Horses, listing each horse's pedigree and certain physical characteristics. *Id.* at 1. Similar to Centers & Malls' actions, defendants in this case attempted to create a competing organization, but did not possess an independently created database and therefore copied plaintiff's registry. *Id.* at 3. Defendants attempted to avoid an adverse judgment by relying on the fact that only seven out of 158 color designations for various horses were copied from plaintiff's registry and they had also made various slight modifications to categorical descriptions of the horses. *Id.* at 7. However, the Court rejected the defendants' argument that this constituted only de minimis infringement, holding that the alleged infringer "must demonstrate that the copying of the protected material is so trivial 'as to fall below the quantitative threshold of substantial similarity.'" *Id.* (quoting *Gordon v. Nextel Communications and Mullen Advertising, Inc.*, 345 F.3d 922, 924 (6<sup>th</sup> Cir. 2003). As has been demonstrated above, Centers & Malls' copying of the Shopping Center Directory in the instant case was far from trivial.

The Second Circuit Court of Appeals has also rejected the interpretation that infringement occurs only when a subsequent compiler produces an exact replica of a copyrighted compilation. *Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc.*, 945 F.2d 509, 514 (2nd Cir. 1991). The Court reasoned that such an argument would allow subsequent compilers to avoid infringement suits simply by adding facts to a verbatim copy of the copyrighted compilation, or conversely, omitting facts in the copy. *Id.* The Court stated the key issue in determining whether a copyrighted factual compilation has been infringed is whether the organizing principle guiding the selection of data for the two publications is in fact substantially similar. *Id.* at 516. In the instant case, there is no doubt that the listings from the Centers & Malls database are substantially similar to the listings from the Shopping Center Directory. In fact, Centers & Malls' President Garrett Van Siclen conceded at his deposition that 70-80% of the listings on the Centers & Malls' database at the company's inception were copied from the Shopping Center Directory. *See Exhibit 1* at p. 186:5-15. Further, the forensic analysis conducted by Plaintiffs' investigator is more than enough to establish that the Centers & Malls database and the Shopping Center Directory are substantially identical. *See Affidavit of Andrew Crain*, attached hereto as Exhibit 20.

Defendants' Opposition also places a great deal of emphasis on the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 111 S.Ct. 1282 (1991). Defendants' reliance upon *Feist* to exonerate their misappropriation of the Shopping Center Directory is misplaced. In *Feist*, the Court held that a telephone directory that contained the names, addresses, and telephone numbers of subscribers in alphabetical order was not organized in an original or creative way, and therefore was not subject to copyright protection. As a result, the defendant's use was held not to infringe Plaintiff's copyright because only facts

were copied. Despite this holding, it is clear that the Supreme Court intended their decision in *Feist* to be limited more or less to the facts of that case. For instance, the Court stated

Originality requires only that the author make the selection or arrangement independently (i.e. without copying that selection or arrangement from another work), and that it display some **minimal level of creativity**. Presumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent.

*Id* at 358-59 (emphasis added). In other words, the Supreme Court in *Feist* held that while just about anything is copyrightable, a telephone directory simply listing the names, addresses, and telephone numbers of subscribers in alphabetical order is not. By contrast, the Shopping Center Directory certainly contains the requisite “minimum level of creativity” to make the compilation copyrightable.

A great deal of creativity has gone into the Shopping Center Directory. Each property listing on the Shopping Center Directory contains 29 fields of data that make up the property’s description. *See* Affidavit of Andrew Florance, attached hereto as Exhibit 21. Many of these fields are non-factual and unique, including such categories as “Center Type”, “Market Positioning”, and “Center Shape”. *Id*. The tenant listings and square footages for each of these listings are also unique, since these listings are dependent upon a decision by CoStar/NRB field researchers as to which buildings that make up a shopping center or mall will be included in a given listing based on “consumer experience.” *Id*. For example, Plaintiffs’ field researchers may decide that a free-standing restaurant within a given shopping center should not be included in a given listing due to “consumer experience.” The “consumer experience” criteria for selection or exclusion is based upon a subjective analysis of how the consumer views a particular property. For example, a property listing in the directory might include a strip center and a separate, free-standing gas station owned by a different entity because the buildings share

connecting parking lots. These decisions based on “consumer experience” necessarily shape the data in other fields, such as center square footage and tenant lists. *Id.*

The uniqueness of the fields within the Shopping Center Directory, their organization, and the decision of what fields to include in the database is more than enough of a “creative spark” to establish this database as copyrightable. Further, Defendants’ Opposition noticeably omits any reference to the fact that the CD Rom version of the Shopping Center Directory (which is also copyrighted), contains a unique search function which allows its users to select among various fields and search for properties that match various criteria. The existence of this search function by itself demonstrates that the Shopping Center Directory possesses far in excess of the minimum level of creativity required by the Supreme Court in *Feist* to support copyright protection.

This very Court has interpreted *Feist* and found a compilation copyrightable under factual circumstances strikingly similar to the case at hand. In *Montgomery County Association of Realtors, Inc. v. Realty Photo Master Corporation*, 878 F.Supp. 804 (D. Md. 1995), Judge Legg found that a real estate database was copyrightable where it “contained marketing puffery that cannot be characterized as factual . . . [and] a unique and elaborate system of abbreviations in organizing its database.” *Id.* at 810. In reaching this determination, the Court pointed out the fact that the listings on the Plaintiffs database “contain[] some purely factual information relating to the home (*e.g.* address, style, age, floor plan, asking price) does not negate the original presentation and arrangement of the information in the database.” *Id.* Similar to the database in *Montgomery County Association of Realtors*, the Shopping Center Directory contains fields such as “Center Type” and “Market Positioning” which cannot be characterized as factual. Further, as described above, the Shopping Center Directory is organized in a unique and elaborate manner.

Plaintiffs possess a valid Copyright for the Shopping Center Directory. Defendants have admitted that they copied the Shopping Center Directory. This alone is enough to establish that there is a high likelihood that Plaintiffs will succeed on their copyright infringement claim. Further, Defendants' reliance on *Feist* is not enough to rebut the presumption that the Shopping Center Directory is copyrightable. This unique fields, arrangement, and search function of this database possesses much more of the "minimum level of creativity" required to establish that a compilation is copyrightable.

**IV. CONCLUSION**

For all of the foregoing reasons, this Court should enter a temporary restraining order enjoining Defendants and any third parties from continuing to disseminate the Centers & Malls' database to all current and prospective customers, as well as a temporary restraining order enjoining Defendants Galvin and Hays from continuing to work for Centers & Malls.

Respectfully submitted,  
CARR MALONEY P.C.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 6th day of June, 2007, a copy of the foregoing was electronically mailed and sent via first class mail to: Walter E. Diercks and Jeffrey Harris, attorneys for Defendants, Rubin, Winston, Diercks, Harris & Cooke LLP, 1155 Connecticut Avenue, NW, 6<sup>th</sup> Floor, Washington, DC 20036.



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Thomas L. McCally