

CoStar v Atkinson Hunt 8-28-06

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

COSTAR REALTY INFORMATION, INC., : Civil Action No.
Plaintiff, : PJM 06-655
v. :
ATKINSON HUNT, : Greenbelt, Maryland
Defendant. : August 28, 2006
: 10:30 A.M.

TRANSCRIPT OF MOTIONS PROCEEDINGS
BEFORE THE HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P-R-O-C-E-E-D-I-N-G-S

THE DEPUTY CLERK: Criminal Action PJM 2006-655,
Co-Star Realty Information, Inc. et al. versus Atkinson Hunt, et
al. The matter is now before the Court for a motions hearing.

5 THE COURT: All right. Counsel, identify yourselves
6 first for plaintiffs and then for defendants -- plaintiff, I
7 guess. There's two plaintiffs, sorry.

8 MR. DALINKA: Good morning, Your Honor. Alan Dalinka
9 on behalf of the two CoStar plaintiffs.

10 MR. MARBURY: And Hugh Marbury as well.

11 THE COURT: All right. And for the two defendants.

12 MR. TRUFFER: Good morning, Your Honor. Keith Truffer
13 on behalf of Resource Realty.

14 MR. GORMAN: And, Your Honor, Frank Gorman here on
15 behalf of Atkinson Hunt and --

16 MR. YANG: Michael Yang on behalf of Atkinson Hunt.

17 THE COURT: All right. Does it make sense for
18 Resource to go first?

19 MR. TRUFFER: Is this all right for the Court.

20 THE COURT: That's fine. As long as I hear you.

21 MR. TRUFFER: Your Honor, the plaintiffs have filed a
22 complaint in this case alleging the existence of a contract by
23 which computer software and computer database were made
24 available to the two defendants --

25 Resource has filed a Motion to Dismiss those claims
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1 for a number of reasons. There are two counts alleged against
2 Resource. One is contract, the other is fraud. As to the
3 contract count, we have alleged, alleged -- we have responded
4 that there was no such contract. There was never a meeting of
5 the minds as to the terms of the contract, particularly, as to
6 the individual which appears to be at the crux of, crux of the
7 plaintiff's complaint.

8 Specifically, and I, I will -- at this point, Your
9 Honor, we have submitted affidavits in, in -- along with our
10 response. And if the Court considers appropriate to consider

11 those, either for purposes of this hearing or as a Rule 56
12 motion, submit it for that purpose.

13 One of the affidavits that we have submitted comes
14 from our, our principal. And what had happened in this case, we
15 maintain, Your Honor, is that the contract was originally signed
16 by our client in New Jersey with a list of five license holders,
17 including Defendant David Atkinson. It was submitted, it was
18 transmitted to the plaintiff's office in Maryland and it was
19 counter-signed at that point.

20 However, during that transfer, a separate page, a
21 separate page of licensed users was inserted, not that which
22 our, my client signed, but which was later inserted, which
23 omitted Mr. Atkinson. Mr. Atkinson was on the list of five
24 users we signed, sent to CoStar. It was inserted a new page
25 omitting Mr. Atkinson, came back to our client, put it in a

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1 drawer, went on with business. Never discovered until the
2 existence of, until 2004 that Mr. Atkinson had been deleted in
3 any way.

4 Because of that, Your Honor, and we cited in brief to
5 what is no more than hornbook law the idea that there must be
6 some agreement as to specific terms of the contract in order for
7 there to be a contract. On this very critical issue, the
8 identification of Mr. Atkinson as licensed user of the product,
9 there was no such agreement as to that term.

10 Resource submitted his name as a licensed user, for
11 whatever reason it was omitted by the plaintiff, signed and
12 returned to us. At that point, Your Honor, we maintain there is
13 no contract and that the contract claim in count one stated by
14 the plaintiff must fall.

15 THE COURT: By what terms do you think you were

16 operating then at that point?

17 MR. TRUFFER: Well, Your Honor, we have -- we
18 understood that we were, and I'm going outside the pleadings at
19 this point.

20 THE COURT: Just tell me what you think was the
21 operative. Obviously, you were using their software.

22 MR. TRUFFER: Absolutely, Your Honor.

23 THE COURT: Pursuant to what?

24 MR. TRUFFER: We were using their software. We made
25 it available to the five users that we thought were identified,
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1 which included Mr. Atkinson. We were paying for five licenses.
2 We were performing one contract that included Mr. Atkinson and
3 CoStar was operating on a very different agreement.

4 THE COURT: And how long did that performance go on?

5 MR. TRUFFER: I believe it went on for about six
6 months. That's my best recollection, Your Honor. And those are
7 the reasons we believe there is not a contract and the contract
8 claim should fall.

9 The second element --

10 THE COURT: Well, but I gather that plugs into your
11 jurisdictional argument.

12 MR. TRUFFER: It does.

13 THE COURT: Because the contract has a choice of law,
14 choice of forum clause.

15 MR. TRUFFER: Yes, it does, Your Honor.

16 THE COURT: Well, before you go further, let's hear
17 the response to where we are on that, see how we join issue.

18 You have anything to add on that, Mr. Gorman? Are you
19 taking any similar position on that or what?

20 MR. GORMAN: Yes, it's a little different, because I
21 don't think the choice of forum clause applies or binds our

22 client at all.

23 THE COURT: All right. We'll hear more about that
24 momentarily. Let's hear the response though to this aspect of
25 the argument.

6

1 MR. DALINKA: Thank you, Judge.

2 In this case, you have a situation where you have a
3 defendant in Atkinson Hunt who had been denied the opportunity
4 to get a license by CoStar because they weren't the sort of
5 business that CoStar typically licenses.

6 What they did here was they tried to glom on to an
7 existing customer of CoStar; that being Resource Realty, the
8 other defendant. Starting back in time before the contract
9 that's even at issue that counsel raises in this case, there was
10 an existing agreement between CoStar and Resource Realty that
11 was up for renewal. That's the agreement that was in place
12 before the contract that gives rise to the claim here and that
13 contract also, by the way, had a Maryland choice of law and
14 choice of forum provision.

15 When a user such as Resource Realty enters into an
16 agreement with CoStar, that agreement requires that they log in
17 to a website by inserting a user i.d. and a passcode. In the
18 field on the screen where they do this log-in, it says your
19 log-in is subject to the terms of use. The terms of use exist
20 regardless of whether any individual user has an overarching
21 license agreement or has purchased a different license.

22 So I want to start with the broad proposition, Judge,
23 that each time any individual accesses the CoStar database
24 information by inserting a user name and a passcode, a contract
25 exist between the parties.

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1 So each time Resource Realty entered into the CoStar
2 database, which there is no dispute about in this case, they
3 entered into an agreement. Each time Atkinson Hunt entered into
4 the system, they entered into an agreement. The terms of use
5 that were operable called for this jurisdiction, called for
6 choice of law here in Maryland. That's the essence of the first
7 step.

8 The second step being the license agreement that
9 Resource Realty did enter into. We disagree with the contention
10 --

11 THE COURT: Well, but on the first proposition, what
12 are the terms and conditions? Don't they refer to the agreement
13 that you're about to talk about?

14 MR. DALINKA: Well, they further expand upon those
15 rights. In fact, both the terms of use, which is what's on the
16 website, and when you click on the terms of use link site,
17 counsel inserted in one of his papers the current terms of use,
18 which are different than the ones that we quoted in the
19 complaint that were operable during the time in the case. But
20 the terms of use constitute a separate agreement that sits on
21 top of or in addition to the individual license holder's rights.

22 The license holder's rights under the agreement that
23 Resource Realty entered into gave them rights to certain
24 databases. The terms of use governed actual use on the CoStar
25 --

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1 THE COURT: Is there a choice of forum, choice of law
2 clause and terms of use on the website?

3 MR. DALINKA: Yes, Judge. And during the time at
4 issue here, as quoted in the complaint, those were an exclusive
5 choice of forum in Maryland and a choice of law in Maryland.

6 And so, our proposition is that for personal
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7 jurisdiction purposes, every time both defendants entered into
8 the CoStar website, there was a choice of law and a choice of
9 venue here in Maryland.

10 THE COURT: All right.

11 MR. DALINKA: Thank you, Judge.

12 THE COURT: You want to reply to that argument, Mr.
13 Truffer?

14 MR. TRUFFER: Just very briefly, Your Honor. I think
15 the plaintiff's claim of harm doesn't relate to the overarching
16 agreement that was just referred to. It's the specific
17 accessing of the database by Mr. Atkinson that's at issue. At
18 least, that's what the complaint alleges throughout. It's not
19 the overarching relationship, not the overarching that every
20 individual access to the database.

21 In so far as Mr. Atkinson is --

22 THE COURT: I'm not sure I follow that point. He's
23 saying every time you access it, every time he accesses it, it's
24 according to the terms and conditions posted on the website.
25 And in your case, at a minimum, the additional contract, the

1 underlying contract. I'm not sure I understood your point
2 there.

3 MR. TRUFFER: I apologize, Your Honor.

4 The point is that the fight here isn't about any time
5 CoStar would have -- excuse me, Resource would have accessed the
6 database in other circumstances. The claim of harm here arises
7 out of specifically Mr. Atkinson's use. Whether he is a
8 licensed user determines once and for all whether there is a
9 contract at all.

10 So whether there existed a different contract at
11 different times by, by other Resource personnel, other Resource

12 licensed individuals isn't really the plaintiff's claim here.
13 In order for this to be an actionable claim, I submit, Resource
14 must have had some agreement by which Mr. Atkinson was excluded.

15 THE COURT: Well, all right, let me just jump for a
16 moment to Mr. Gorman's argument. According to the plaintiff,
17 every time that Atkinson accesses the website, he's entering
18 into an agreement too, according to the terms and conditions,
19 including with the choice of a forum clause. That's his
20 argument.

21 MR. TRUFFER: I understand.

22 THE COURT: Okay.

23 MR. TRUFFER: I understand. I'll let Mr. Gorman --

24 THE COURT: Well, you can argue that in a moment,
25 Mr. Gorman. Let me just stay with this argument for now.

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1 MR. TRUFFER: That's basically my reply, Your Honor.
2 I think there must be some agreement as to, we were operating
3 under the assumption Mr. Atkinson was a licensed user.

4 THE COURT: All right. Let's address that then, Mr.
5 Dalinka. Let's go back to that, the argument that it sounds
6 like, according to Mr. Truffer, a name was added and they didn't
7 realize it. A name was subtracted and they didn't realize it.

8 MR. DALINKA: Well, first and foremost, I mean,
9 there's obviously a factual dispute between the parties as to
10 what the list of users was. There's no dispute that there's a
11 problem with their documentation versus our documentation, and
12 we believe we have the better argument.

13 But the facts here that are particularly relevant that
14 we don't have a dispute about, which get at again the terms of
15 use in both the license agreement and the terms of use on the
16 website are that passwords can't be shared and that they are
17 limited to a single site.

18 And in this case, the single site was Resource Realty
19 site. And the allegation is that Resource Realty, even if Mr.
20 Atkinson was properly on their list, was permitted to use the
21 passwords only at the license site, being the Resource Realty
22 site, and we've alleged that that's not in fact what happened.
23 He used the site at another site.

24 In fact, we've also alleged that they shared that
25 password around the Atkinson office. Again, another violation
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1 of both the terms of use, and the license agreement that
2 Resource Realty specifically entered into.

3 So all of the sharing activities that went on at
4 Resource Realty in terms of, again, sharing it with somebody who
5 wasn't at their licensed site, those are the violations that
6 we've alleged are breaches of the agreement between the parties,
7 and those are the things that give rise to the harm that CoStar
8 claims here.

9 THE COURT: Mr. Truffer -- before you sit down, Mr.
10 Dalinka, let me see if I understand your argument as well. Are
11 you saying that because your documentation shows that Atkinson
12 was not a licensed user, that that voids all the other
13 conditions in the agreement, including the sharing issues or the
14 non-sharing issues?

15 MR. TRUFFER: The position is, we maintain that
16 Atkinson was a licensed --

17 THE COURT: I know you do, but leave that aside for a
18 moment. They're saying that there's reason to believe that he
19 was in fact not, and they can demonstrate that in a dispute of
20 fact. But what are you saying it does to the other terms and
21 conditions of the agreement?

22 MR. TRUFFER: I cannot say, Your Honor. If there are

23 indeed other allegations that other parts of the agreement were
24 breached, sharing for example, even if it were not with Mr.
25 Atkinson, but we don't maintain that they go away.

12

1 THE COURT: But that's one of their arguments. Isn't
2 that the essence of their breach of contract claim?

3 MR. TRUFFER: I don't know that's the essence of it.
4 It's part of it, Your Honor. But my point is, all of this flows
5 from the font of Mr. Atkinson. Mr. Atkinson is approved, there
6 may not be any other claim. If Mr. Atkinson is a licensed user,
7 there may not be any other claim.

8 THE COURT: Anymore on the breach of contract claim?

9 MR. TRUFFER: No, Your Honor.

10 THE COURT: Anything more to say on your motion then?

11 MR. TRUFFER: Not insofar as the contract claim is
12 concerned, Your Honor.

13 THE COURT: All right. But does your contract claim
14 then flow into your choice of forum claim?

15 MR. TRUFFER: It does, Your Honor. There's also a
16 claim as to the fraud count. I mean, there's an argument as to
17 the fraud count.

18 THE COURT: Well, let me hear you briefly on your
19 jurisdictional argument and then we'll move on to the fraud
20 issue.

21 Have a seat.

22 MR. TRUFFER: In terms of jurisdiction, Your Honor,
23 the only claim that is apparently being made by the plaintiff
24 here that jurisdiction is appropriate is based on that contract.
25 If the contract does not exist for the reasons I have just

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1 argued, if it is not appropriate to enforce it for the reasons I
2 just argued, then the jurisdictional argument goes away.

3 I don't believe there's any evidence that's been
4 submitted by the plaintiff in this case, other than the contract
5 itself, other than the choice of forum clause. I don't think,
6 again, I don't believe --

7 THE COURT: Well, let's see what plaintiff says in
8 response to that.

9 MR. DALINKA: Well, the servers that are at issue
10 predominantly are located in Maryland. The personnel who had to
11 field the representations from the other side with regard to who
12 was appropriately a licensed user and who weren't, some of those
13 folks are in Maryland and some of those folks are in other
14 places. None of them happened to be in New Jersey.

15 CoStar's sales rep. who is responsible for this was
16 actually in Pennsylvania, I think, and he regularly comes to
17 Maryland for business purposes as well. But the allegation
18 beyond the contract term against both defendants is that they
19 have committed tortious acts in this district by using the
20 services of CoStar that exist in this jurisdiction.

21 And as Resource Realty's brief recognizes, the Fourth
22 Circuit says that the long-arm jurisdiction of this Court is
23 co-extensive with due process. It's certainly in this case the
24 situation where they purposely availed themselves of a company
25 that they knew existed in Maryland, that offered services in

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1 Maryland. And that by doing the password sharing, by sharing
2 the access off-site were affecting a business in the state of
3 Maryland, and therefore jurisdiction would be appropriate here
4 in Maryland.

5 THE COURT: All right. Mr. Truffer, response to that?

6 MR. TRUFFER: Very briefly, Your Honor. I'll let the
7 tortious conduct part of that argument flow when I discuss the

8 fraud count, because the rest of it is a breach of contract
9 count.

10 Other than this particular contract, as I submitted
11 before, I don't think there's any evidence the plaintiff has
12 produced to show that there is any activity, systemic,
13 continuance or otherwise by my client, Resource, a New Jersey
14 corporation which was solicited on this contract in New Jersey,
15 which downloaded the information in New Jersey, any contact
16 systemic or otherwise with the state of Maryland, other than
17 this contract. And as I said before, that rises or falls in the
18 weight of my initial argument.

19 THE COURT: All right. Let me hear you on your fraud
20 count.

21 MR. TRUFFER: Fraud count is very simple, Your Honor.
22 We maintain they simply have not pled with enough specificity
23 under Rule 9(b) to make out the claim. The rules are very clear
24 about the particularity required for such a fraud count. The
25 allegations taken on their face allege that there was some
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1 misrepresentation at some point in time between unnamed parties,
2 in unnamed documents, in unnamed e-mails over vague and
3 conclusory allegations of what the misrepresentation was.
4 Whether that was part and parcel of the original downloading of
5 the information, whether it was some subsequent communication as
6 to what the true activity was, it's not at all clear and does
7 not permit this defendant to fairly frame a defense to that
8 fraud claim. For that reason, Your Honor, we move to dismiss
9 it.

10 THE COURT: Mr. Dalinka.

11 MR. DALINKA: It's our position, Judge, that the
12 allegations in the complaint more than put the defendants on
13 notice that they made communications to CoStar about the nature

14 of who was accessing, how they were accessing. Those facts are
15 set forth in the complaint with enough knowledge, with enough
16 specificity to put the defendants on knowledge (sic) who are the
17 ones who are truly going to be the ones knowledgeable about who
18 are the individuals within Resource Realty who are making the
19 false and misleading representations.

20 There's no reason to dismiss the fraud claim outright
21 and certainly through the course of discovery, the exact details
22 will become more than plain.

23 THE COURT: Well, stay with this for a minute. I need
24 to understand. Are you saying that Resource made specific
25 statements to your people about Atkinson? Give me specifics.

16

1 What are you talking about?

2 MR. DALINKA: There are communications when CoStar was
3 dealing with this particular account regarding who the
4 authorized users were going to be. There are communications
5 back and forth. When is Mr. Atkinson going to become a staff
6 member at Resource Realty? The question of whether he was truly
7 qualified to be an employee or not were facts that were
8 communicated from Resource Realty to CoStar that CoStar relied
9 upon in connection with the relationship, in connection with
10 maintaining --

11 THE COURT: You mean, had he been an employee, there
12 wouldn't be a problem?

13 MR. DALINKA: If Mr. Atkinson was an employee of
14 Resource Realty and was physically located at Resource Realty's
15 site, this entire dispute would be of a different character.
16 The only difference whether we'd have a dispute at all or not is
17 whether he behaved the same way in that situation. Our
18 allegation is that he downloading a massive amount of data,

19 which is also a violation of the license agreement. But this
20 aspect of it in terms of whether he was a proper person or not,
21 which is the most straightforward one from our point of view
22 wouldn't be an issue, if he was an employee --

23 THE COURT: Are you alleging fraud though in
24 connection with whether he got on the list as an authorized
25 licensee or not?

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1 MR. DALINKA: Well, not specifically, Judge. What
2 we're alleging is that they fraudulently gave information to
3 CoStar to maintain the license between Resource Realty and
4 CoStar.

5 In other words, the fraud was in the inducement to
6 obtain the license renewal and to maintain it over time.

7 THE COURT: Because statements were made about the
8 access that Atkinson had?

9 MR. DALINKA: Who the licensed users were going to be
10 and the extent of that licensed use, yes.

11 THE COURT: And this all occurred in connection with
12 the renewal?

13 MR. DALINKA: At the time of the renewal and during
14 the time of the renewal license afterward.

15 THE COURT: And Atkinson clearly wasn't on prior to
16 the renewal?

17 MR. DALINKA: That's my understanding, Judge, yes. In
18 fact, as I said before, Mr. Atkinson had tried to become a
19 licensee in that period before or right around the renewal.

20 THE COURT: How had he tried to become a licensee?
21 You mean, directly through CoStar or through Resource?

22 MR. DALINKA: As I understand it, he had contacts with
23 the CoStar representatives and made inquiries of CoStar as to
24 whether he could become a licensee.

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THE COURT: And what was the result of that?

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MR. DALINKA: He was denied a license.

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THE COURT: Was there a reason given?

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MR. DALINKA: As I understand it, the type of business that he is engaged in --

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THE COURT: Meaning what?

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MR. DALINKA: As I understand it, he's some sort of a consultant. He's not in the real estate business, per se. I believe in their papers they talked about a marketing business. Those are not businesses that CoStar licenses to under its license --

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THE COURT: I mean, is there evidence? Are there documents that reflect Atkinson's efforts to negotiate a direct licensing deal with CoStar?

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MR. DALINKA: I believe there are e-mails that my client has and we'll produce in the course of discovery in this case. And there's going to be live testimony of people who talked to him.

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THE COURT: And is it your position that Atkinson's name came up during the renewal or didn't come up during the renewal?

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MR. DALINKA: Atkinson's name did not come up during the initial part of the renewal. It came up in connection with trying to finalize this document that counsel says came back in a different form than they agreed to it.

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In other words, this list of users is something that's

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fluid with CoStar. A licensee like Resource Realty can with

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CoStar's consent change the list of license user during the term

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of a license.

4 The purpose being, let's say a licensed user buys a
5 five seat license. In other words, five employees at their site
6 will use the system. If one of the employees who is on that
7 five site license leaves the company, that company still has the
8 five site license and they may want -- the five seat license.
9 They may want a new employee, they may have hired somebody new.
10 They would then fill that, inform CoStar as to who the new
11 person was so that new person could be an authorized user.

12 THE COURT: And it's CoStar's position that Atkinson
13 specifically was not supposed to be among those people?

14 MR. DALINKA: It's CoStar's position that Atkinson as
15 he came to use it was not one of those people. He was mentioned
16 at some point in the discussions. I've seen, as part of my Rule
17 11 inquiry, the e-mail traffic that shows that they were trying
18 to add him as a user once you got into the renewal phase.

19 THE COURT: And your client's view was because he
20 wasn't an employee, he wouldn't qualify?

21 MR. DALINKA: Right, correct.

22 THE COURT: All right.

23 MR. DALINKA: Thank you, Judge.

24 THE COURT: Mr. Gorman, let's hear from you.

25 MR. GORMAN: All right, Your Honor. Good morning.
20

1 We moved to dismiss for lack of jurisdiction, not on
2 the merits of the causes of action. But I would like to orally
3 move also to transfer under 1404, which is part of the motion
4 made by Resource. We didn't make it, but when we get there, I'd
5 like to join in that.

6 Let me just first address forum non-selection,
7 although logically the Long-Arm Statute might come first, but
8 let's address terms of use.

9 There are two things here. There is the license

10 agreement between CoStar and Resources. We're not a party to
11 that. That's the first thing.

12 Secondly, they've sued Atkinson Hunt Corporation.
13 Much of this discussion has been about Mr. David Atkinson
14 individually. He's not a defendant in this case. I don't think
15 there's any doubt that Atkinson, not the corporation, seems to
16 me is not involved in all the facts that we're talking about.

17 Now, let's go to the terms of use. We have the
18 license agreement, the terms and conditions. They are in the
19 record here. I can have Mr. Yang show them to Your Honor. And
20 then there are terms of use you see when you go online. No one
21 knows on this record exactly what the online terms of use said.
22 They haven't provided it. It's not in here, what it said in
23 August of '04.

24 But what we do know from the record here is that the
25 agreement, the terms and conditions to the license said that the
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1 jurisdiction, exclusive jurisdiction, was an agreement between
2 the parties. That's attached to the opposition from Resources.
3 And if you look at paragraph 17 of the printed terms and
4 conditions of the license, it says, the parties irrevocably
5 consent to the exclusive jurisdiction in Maryland, the parties.

6 We don't know exactly what it said on the terms of use
7 in August of '04 when we actually went online. But we do know
8 further that the CoStar documentation said that if there's any
9 conflict or any confusion -- strike the word conflict -- that
10 the written terms and conditions to the license prevail.

11 THE COURT: I need to find that document.

12 MR. GORMAN: Okay, Mr. Yang can bring it up to you if
13 you'd like to see it.

14 THE COURT: If you have it, let me see it.

15 MR. GORMAN: This is the license agreement
16 subscription form. The second page talks about who are the
17 authorized users. The third and fourth page are the written
18 terms and conditions.

19 And the first point I want to make, I think we've
20 underlined it in red. The sentence says, To the extent a
21 conflict exist, and that's between the terms of use you see
22 online or you may or may not see online, but you perhaps could
23 see. And these written terms and conditions, the written terms
24 and conditions govern.

25 THE COURT: What's the conflict?

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1 MR. GORMAN: Well, the conflict is if you, if you go
2 down to paragraph 17 on the fourth page of what Mr. Yang handed
3 you, you'll see that the second -- 17 is choice of law
4 jurisdiction. The second sentence which begins on the right
5 hand margin says, The parties irrevocably consent to exclusive
6 jurisdiction federal and state court. But there's no dispute on
7 this record that Atkinson Hunt, defendant in this case, is not a
8 party. There's no dispute that Mr. David Atkinson, the
9 individual, is not a party. So -- and we don't know what the
10 terms of use say or said in August '04, which sides into another
11 point. This website is what's called under the Zippo analogy in
12 the Fourth Circuit, a passive website.

13 In more modern websites, when you see the terms and
14 conditions, you have to say "I agree" before you can continue.
15 You're kind of locked out. That's not the way this worked in
16 August of '04, the way I believe it. So there's no evidence
17 here that Mr. Atkinson or anybody else actually read the terms
18 and conditions online, because you didn't have to to access the
19 information.

20 THE COURT: What did -- well, it is the corporate
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21 defendant, I guess, but let's talk about Atkinson individually
22 for a moment. What did he sign, if anything? What did he know,
23 if anything?

24 MR. GORMAN: He did not know of the license agreement.
25 He thought he was authorized to use it, because as you see, he
23

1 is listed on the second page.

2 THE COURT: Well, did he ever see that document?

3 MR. GORMAN: He never saw it. He was told he had it
4 and he was given a password. He never saw this agreement, but
5 he was told he was authorized to use it. Given a password and
6 he used it.

7 THE COURT: Why wouldn't he be covered by their
8 agreement though, as a licensee? He's basically a sub-licensee,
9 isn't he?

10 MR. GORMAN: I wouldn't call him that. I'd call him
11 authorized user.

12 THE COURT: Well, but the license, he's operating
13 pursuant to a license where somebody is bound. You mean, he
14 could do these things and say -- they could give it to any
15 number of people and say, we don't know what the terms and
16 conditions of the agreement are?

17 Well, suppose they gave them to licensed users and
18 they all used it illegally. Are you saying they wouldn't be
19 bound by any of the terms and conditions?

20 MR. GORMAN: No, then I think the way it is is they
21 have to go against Resource, and Resource have a cause of action
22 against us.

23 THE COURT: That doesn't seem right.

24 MR. GORMAN: I mean, we're not a party to the
25 contract.

1 THE COURT: But you're saying every user could go out
2 and breach 100 different ways, and they couldn't sue your people
3 directly because they say we didn't know what the master
4 agreement says.

5 MR. GORMAN: Of course I'm not saying that, Your
6 Honor.

7 THE COURT: Well, that's the thrust.

8 MR. GORMAN: My thrust is simply that we didn't see
9 the terms and conditions.

10 THE COURT: And therefore, you say you're not bound by
11 it?

12 MR. GORMAN: Yes, but many employees of a company
13 wouldn't have a right to go into a manager's office and say, by
14 the way, I want to see the contract you just signed with
15 somebody because I'm your employee and I'm going to be liable.
16 That's not the way it works. Generally the employees are
17 entitled to rely on the employer.

18 THE COURT: Who is it that designates the users?

19 MR. GORMAN: Resource.

20 THE COURT: All right. So you're operating pursuant
21 to their designations?

22 MR. GORMAN: Absolutely. And as I say here, I believe
23 there is a conflict here because they have not shown what the
24 terms of use said in 2004 with respect to this choice of forum,
25 this exclusive jurisdiction. All they've shown is what this
25

1 agreement said and the terms and conditions. And that exclusive
2 jurisdiction in Maryland applies only to the parties, and this
3 Defendant Atkinson Hunt is not a party.

4 THE COURT: Let me go back to you, Mr. Dalinka. What
5 about the, I gather it's the website terms and conditions he's

6 talking about. Where does that refer to choice of forum as of
7 2004?

8 MR. DALINKA: Well, let me direct Your Honor's
9 attention to the allegations we made in the complaint, because
10 we did in fact set forth the terms of use that were applicable
11 during the relevant time in the complaint starting at paragraph
12 18 and continuing through paragraph 23.

13 And in these paragraphs, the first one being -- is a
14 direct response to counsel's comment, which is that an
15 authorized user, this is paragraph 18, the authorized user must
16 scroll through and accept the applicable online terms of use,
17 and then it goes on and includes the statement I referred to
18 earlier about, quote, By using this site, you agree to our terms
19 of use. Those are all statements that are contained in the very
20 field where they input the password and the user code.

21 THE COURT: By terms of use, do you mean the terms and
22 conditions of the master agreement?

23 MR. DALINKA: No, I mean the terms of use that
24 immediately follow in paragraph 19 of the complaint, as well as
25 additional terms of use in the one for jurisdiction being quoted
26

1 in paragraph 23 of the complaint.

2 THE COURT: And where did -- I know you alleged these,
3 but just out of curiosity, have you printed the terms of use
4 that were in effect as of the time of the agreement.

5 MR. DALINKA: My client has a copy. I've seen it. I
6 do not have it here with me today. We did not include it in our
7 papers because we set forth the paragraphs on the pleadings
8 that we were most concerned about. They have submitted a more
9 recent version of the terms of use and I don't dispute that my
10 client has changed the terms of use, but those changes came

11 after the time relevant to complaint. They are not set forth in
12 the complaint.

13 THE COURT: And what, they do not include a choice of
14 forum clause?

15 MR. DALINKA: They include a choice of forum, but it's
16 no longer exclusive.

17 THE COURT: And what's the operative date that you say
18 we're relying on?

19 MR. DALINKA: I believe it's late 2004 through about
20 mid-2005.

21 THE COURT: And were the changes to the terms and
22 conditions making the forum, choice of forum clause not
23 exclusive after all that period?

24 MR. DALINKA: That's my understanding, Judge.

25 THE COURT: All right. Mr. Gorman.

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1 MR. GORMAN: If Your Honor would look at paragraph 23
2 of the complaint, you have it in front of you.

3 THE COURT: I have it.

4 MR. GORMAN: That's the key part here. It says, The
5 terms of use provide that the user, but there's the key word.
6 They don't put that in quotes. It's somebody, quote,
7 irrevocably consents. But the issue here is, from my client's
8 perspective rather, who is that somebody. And the only thing on
9 the record is that that somebody is a party. In other words --

10 THE COURT: No, the terms of use in 18 and 19 refer to
11 the user and says, you're bound by the terms and conditions.
12 Doesn't that arguably substitute user for parties?

13 MR. GORMAN: Well, what they've cited here in 19 says
14 exactly what Your Honor said, but then you have to go say, what
15 am I bound to? Let's go look at the choice of jurisdiction
16 clause. That's what's not quoted in full in paragraph 23.

17 Paragraph 23 conspicuously omits who irrevocably
18 consents in the terms of use you see online. They say it's
19 user, but they don't quote it. The only thing in the record as
20 to who is bound is the --

21 THE COURT: Well, but you're on a Motion to Dismiss to
22 though.

23 MR. GORMAN: Lack of jurisdiction. I mean, they're
24 saying that we agreed to Maryland forum because of the terms of
25 use online. That's their argument.

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1 THE COURT: Well, maybe you ought to file a Motion for
2 Summary Judgment then. I don't know how we do this on a
3 straight argument that, on a Motion to Dismiss that I take your
4 allegations against their allegations.

5 MR. GORMAN: Well, I think they have the burden to
6 show a prima facie case that we agree to be bound by Maryland
7 jurisdiction, and they haven't done that. Where is the -- why
8 don't we have a copy of what the terms of use were in 2004 and
9 early 2005. We should have them. We don't.

10 What they gave us is the agreement they entered into
11 which says that only the parties agree to Maryland jurisdiction.

12 THE COURT: Well, is there such a document, Mr.
13 Dalinka? I assume you're saying there is. Why isn't that
14 filed?

15 MR. DALINKA: Well, on a Motion to Dismiss, I didn't
16 think it necessary to file a photocopy of the terms of use when
17 we have the plain statement of it in the complaint and we have
18 Mr. Zebrak's declaration that during the relevant times the
19 terms of use contained the choice of forum clause. I mean, I
20 think from a standpoint of a Motion for Personal Jurisdiction
21 we've set forth more than ample facts to demonstrate it.

22 Again, if there's going to be debate as to the terms,
23 that goes to the merits of the case and I think we'll be fully
24 prepared to address those at the appropriate time.

25 THE COURT: All right. Anything further, Mr. Gorman?
29

1 MR. GORMAN: With all due respect, I disagree with
2 counsel. It doesn't go to the terms. The only way they have to
3 hold us in to Maryland jurisdiction, which would -- that's what
4 our -- we moved to dismiss for lack of personal jurisdiction.

5 THE COURT: No, it's not the only way. They can hold
6 you in if you are considered to be covered by the contract as
7 well, not merely by the terms and conditions on the website.
8 That's a supplemental argument.

9 MR. GORMAN: Okay. Well, I think if you look at their
10 pleadings, that's their only argument that they used for us. I
11 understand that's Your Honor's point, but they're saying we're
12 bound -- we're not part of the contract, but we're bound because
13 of the terms of use that were on the website which no one has
14 seen in this case. And in fact, their own document says that
15 what I have seen in this case controls and governs over the
16 online terms of use.

17 I can also go to the Long-Arm Statute argument if Your
18 Honor wants me to.

19 THE COURT: Well, go ahead.

20 MR. GORMAN: Under the Long-Arm Statute, we believe
21 that there is no jurisdiction here under the applicable
22 provisions of 6103 of the Maryland Courts of Judicial
23 Proceedings. We didn't transact any business here in Maryland.

24 Most of these cases are just the opposite of this.
25 And most of the cases, it's the defendant who is being sued
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1 because of their presence through their website. This is just
Page 24

2 the reverse.

3 We've got CoStar with its website trying to bootstrap
4 and grab the users in to this, to jurisdiction in our home
5 state. And even on the argument we just made, but certainly
6 here, we have to consider due process. It would violate
7 fundamental notions of fair play if every time one of the
8 millions of people clicked on to a database that they
9 automatically said they can be sued up in Montana, Lands End up
10 in New England, Westlaw in Minneapolis. That would violate
11 notions --

12 THE COURT: Well, of course if they were granted
13 access to a limited database and they agreed that they would be
14 bound, what's wrong with that?

15 MR. GORMAN: Well, I think that's why -- nothing wrong
16 with it, but --

17 THE COURT: That's why the licensors do it, isn't it,
18 because they'd have to chase all over the country after all
19 their users. And they say in effect, look, if you use our
20 database and we have a dispute, we're going to have to litigate
21 in a given forum.

22 MR. GORMAN: And in order to do that, and under the
23 due process clause, they have to make darn sure that you have
24 notice of this and you've agreed to it, and that's what's sorely
25 lacking, Your Honor, in this case vis-a-vis Atkinson Hunt and
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1 Mr. Atkinson.

2 So we didn't transact any business here. We didn't
3 contract to supply anything here in Maryland. We didn't cause
4 any tortious injury in Maryland, and we didn't cause any
5 tortious injury from outside the state. We just didn't do any
6 business here either in a general sense --

7 THE COURT: So let's assume for a minute that you used
8 it without authorization.

9 MR. GORMAN: Yes.

10 THE COURT: What is that, a tort? Aren't you -- got
11 to allow that they made proper allegations that you used it
12 without authorization. What have you done? You either
13 committed a tort or you breached a contract. You've done
14 something. Where did you commit it?

15 MR. GORMAN: I think it's de minimis.

16 THE COURT: No, it's not de minimis if it was
17 unauthorized use.

18 MR. GORMAN: You can't have a tort in the air. You
19 have to have some damage. If I went on there and just
20 inadvertently used the database, how did I damage anybody?

21 THE COURT: That's clearly not true. You clearly,
22 clearly can't just say that you can use somebody's database and
23 there's no damage, and therefore you get to do it. That's not
24 true. You certainly breached the -- maybe you've committed a
25 conversion of property that's not yours. I mean, there's all
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1 sorts of theories, but I'm trying to figure out where it
2 occurred by your logic. Where do you think it happened?

3 MR. GORMAN: Whatever I did happened, whatever my man
4 did -- and by the way, my man is not a defendant -- but Hunt
5 did, he did in New Jersey. He was sitting at a computer in New
6 Jersey and he accesses a database, which it happens to turn out
7 is in Maryland. No one knows where the servers are located when
8 you go online.

9 When you go online to Google, do a Google search, no
10 one knows where the physical servers are. They're probably all
11 over the place, but Mr. Hunt did not know where servers were.
12 They could be anywhere. So again, to me the act of -- if Your

13 Honor wants to call it a tort, let's assume it is. I don't
14 fault your reasoning.

15 THE COURT: Well, it sounds like something.

16 MR. GORMAN: It's definitely not a breach of contract.

17 THE COURT: Well, maybe it is.

18 Let me hear from Mr. Dalinka on that.

19 MR. DALINKA: As we set forth in our response brief to
20 the Atkinson motion, and I apologize if I've used Mr. Atkinson
21 interchangeably with the company, but the intent of the
22 allegations in the complaint is that the company, Atkinson Hunt,
23 as I understand it usually acting through Mr. Atkinson himself,
24 but the company Atkinson Hunt did the things that are alleged
25 and that's why they are here.

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1 With regard to the access, as we put in our -- as we
2 put forth in our response, there's no question that Mr. Atkinson
3 had every indication that he was dealing with a Maryland
4 company, with a company who had fielded impact of the uses of
5 his database.

6 And we're not talking about, as Your Honor was
7 observing, somebody who merely surfed on to one particular web
8 page. We're talking about a situation where somebody took an
9 access user i.d. and a passcode and affirmatively clicked
10 another button.

11 He tried to allude to the Zippo case, which is the
12 hallmark of the cases holding ISPs responsible. While I would
13 maintain, Your Honor, that Mr. Atkinson's conduct and Resource
14 Realty's conduct is very much like the folks who had active
15 websites, because they are actively reaching out by clicking, I
16 accept terms of use; by clicking, here is my password and my
17 i.d., let me in so I can access this otherwise limited resource.

18 Both the defendants accessed the resources here in
19 Maryland, affected a Maryland company. Personal jurisdiction is
20 more than appropriate. Due process would agree with that.

21 THE COURT: Final word on that from anyone?

22 MR. GORMAN: I can just give Your Honor some cases on
23 the long arm jurisdiction and the due process. If I can hand
24 them up to, Your Honor.

25 THE COURT: All right.

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1 MR. GORMAN: Okay. There is actually four I want to
2 give you. First it is ALS Scan. Do you want the cites on the
3 record or just the cases?

4 THE COURT: If you have the cases, just hand them up.

5 MR. GORMAN: Okay. That's the one that uses the Zippo
6 analogy that exercise of jurisdiction depends on whether or not
7 the sliding scale of the internet website. If it's passive,
8 there's no jurisdiction. If it's active, there probably is.
9 This again is in reverse, but I submit that CoStar has a passive
10 website here.

11 Secondly, we've given you CareFirst. By the way, I
12 should say ALS, the Motion to Dismiss was granted and then
13 affirmed by Fourth Circuit.

14 Next case is CareFirst of Maryland. Also is a another
15 case cited by the Fourth Circuit --

16 THE COURT: I'm familiar with these cases.

17 MR. GORMAN: -- affirmed. Involves cases of specific
18 jurisdiction. I've highlighted some pages.

19 Third case is another Fourth Circuit opinion called
20 Stover versus O'Connell Associates. This is actually a
21 telephone case, but the Motion to Dismiss granted by District
22 Court, affirmed by Fourth Circuit.

23 And lastly Diamond Health Care of Ohio. Also a Fourth
Page 28

24 Circuit case. Motion to Dismiss by the District Court, the lack
25 of jurisdiction, affirmed by the Fourth Circuit. I think these
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1 four cases contain the relevant law in the Fourth Circuit.

2 THE COURT: Anything further, Mr. Dalinka?

3 MR. DALINKA: Well, I would certainly direct Your
4 Honor to the Fourth Circuit case that counsel refers to, the
5 CareFirst of Maryland case, which on Page 397 says, quote, Even
6 a single contact may be sufficient to create jurisdiction when
7 the cause of action arises out of that single contact provided
8 that the principle of fair play and substantial justice does not
9 thereby offend it.

10 And in this case we allege that each and every time
11 Mr. Atkinson and Resource Realty reached out and put in their
12 password and i.d., they have actively contacted Maryland, have
13 interacted with Maryland and have caused injury in Maryland and
14 it's more than fair to hale them into court here.

15 THE COURT: All right. Anything further --

16 MR. TRUFFER: Yes, Your Honor. Resource has also
17 asked the Court to transfer this case to the state of New Jersey
18 for convenience purposes. And I would submit, Your Honor, even
19 though the servers may have been in Maryland, even though the
20 data itself may have been housed in Maryland, I don't believe
21 there's any evidence to suggest that the off-loading it, and
22 thus the use of it, the accessing, the computers themselves, the
23 individuals who off-loaded, downloaded the information all are
24 in the state of New Jersey. That's all of Resource's personnel,
25 that's all of Atkinson Hunt's personnel, all of their witnesses
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1 there resident there.

2 For purpose of convenience, Your Honor, these are

3 going to be the critical, I presume the critical individuals who
4 are going to be involved in discovery in this case. They are
5 all New Jersey people. While there may be some, certainly some
6 individuals in Maryland in the home office, all of the damage,
7 if one will, took place in the state of New Jersey.

8 For that reason, Your Honor, we'd ask that you
9 transfer this case from Maryland to New Jersey for the
10 convenience of the parties, particularly for discovery.

11 THE COURT: Mr. Dalinka.

12 MR. DALINKA: Your Honor, the 1404 analysis starts
13 with the first point, which is jurisdiction has to be proper in
14 the transferee jurisdiction. Under the terms of both the
15 license agreement that Resource entered into and the online
16 terms of use, exclusive jurisdiction was called for in this
17 court, not in the court in New Jersey. That in and of itself is
18 reason enough to deny a 1404 motion.

19 Next, of course, plaintiff's choice always has some
20 weight that the Court should give to it. And here, as Your
21 Honor observed in some of your questions to my opponents, we
22 have a situation where we have a company that has customers
23 across the country and it should not be required to go chasing
24 them across the country for their illegal conduct directed at
25 the company here in Maryland.

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1 Third, as we set forth in Mr. Zebrak's declaration,
2 substantial number of CoStar's witnesses either reside in this
3 district or regularly travel to this district. All of those
4 factors weigh in favor of keeping venue here, as well as the
5 agreement points that I made earlier.

6 THE COURT: Anything further?

7 MR. TRUFFER: No.

8 MR. GORMAN: I want to join in the Motion to Transfer
Page 30

9 for the venue, if you don't dismiss me.

10 THE COURT: All right.

11 MR. TRUFFER: Your Honor, if the Court please, just
12 one follow-up comment as to the fraud count. Mr. Dalinka went
13 into some specificity in his response to the Court as to the
14 allegations of fraud in the case. None of those, I hasten to
15 point out, anywhere stated in the complaint. There's nothing
16 more than conclusory allegations in there, and for those reasons
17 I would urge the Court to grant the Motion to Dismiss as to the
18 fraud count.

19 THE COURT: Co-Star Realty Information, Inc. and
20 CoStar Group, Inc. have sued Atkinson Hunt and Resource Realty
21 in Southern New Jersey. The suit proceeds in five counts.
22 Count one for breach of contract by the defendants. Count two
23 for fraud by the defendants. Count three is for violation by
24 the Defendant Atkinson Hunt of 18 U.S.C., Section 1030, computer
25 fraud. Count four alleges tortious interference with contract
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1 and perspective business relationship by the defendant Atkinson
2 Hunt. And count five alleges computer-related offenses under
3 New Jersey law by Defendant Atkinson Hunt.

4 The matter is before the Court on the motion of
5 Defendant Resource Realty to dismiss for lack of personal
6 jurisdiction, for failure to state a claim and requesting
7 transfer of venue to the state of New Jersey.

8 The Defendant Atkinson Hunt also moves to dismiss for
9 lack jurisdiction, presumably joins all the motions that are on
10 the grounds that are alleged by the Defendant Resource.

11 The essential allegations are that CoStar is a
12 commercial real estate information services provider. It
13 licenses its software for a fee. It has a licensing agreement

14 by which the licensee is issued exclusive access to the real
15 estate information database of CoStar.

16 In August, 2004, Resource Realty signed an agreement
17 with CoStar to license a certain number of users of the software
18 and agreed, in essence, that it would not provide access to any
19 third parties to the CoStar information database or otherwise
20 share the information without permission of CoStar.

21 There is a forum selection clause in the agreement.
22 It provides that the, quote, This agreement shall be construed
23 under the laws of the state of Maryland. The parties
24 irrevocably consent to the exclusive jurisdiction of the federal
25 and state courts located in the state of Maryland for the

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1 purpose of any action brought in connection with this agreement
2 or the use of the licensed product.

3 There were -- the allegation is that Resource Realty
4 provided David Atkinson of Atkinson Hunt with its user profile
5 and passwords, and that Mr. Atkinson was engaged in activities of
6 Resource Realty working as an independent contractor.

7 Further allegation is that Atkinson had previously
8 engaged with CoStar, discussions with CoStar about becoming a
9 licensee, but was not authorized to be such. The argument that
10 is made by Resource is that on the copy of the, quote-unquote,
11 contract that they have, Atkinson was listed as an authorized
12 user of licensing agreement.

13 They say that CoStar modified those terms by removing
14 Atkinson's authorization and notify the Resource Realty of the
15 change. And that when it signed the agreement, it understood
16 that Atkinson or Atkinson Hunt was authorized as a user.

17 The matter went forward and the argument made by the
18 plaintiff is that the authorization of Atkinson was not
19 authorized either under the contract and that all access that in

20 fact was had by Atkinson and/or Atkinson Hunt to the database
21 was illegal and constituted a breach of contract and/or, and a
22 tort of one fashion, in addition to violating various computer
23 laws. And as I said, the matter is before the Court on a number
24 of grounds.

25 Now, the essential argument made by the Defendant
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1 Resource Realty, as I understand it is that the contract which
2 contains the forum selection clause presumably was altered by
3 the plaintiffs and therefore presumably the forum selection
4 clause is no longer viable. That although there was some kind
5 of agreement in place between the plaintiff, CoStar, CoStar
6 entities and Resource, that it was not an agreement that would
7 contain the forum selection clause.

8 Let me start with the concept of a forum selection
9 clause. Clearly, forum selection clauses are legal if
10 reasonable. And in the context of these kinds of national
11 database-type access, the idea of a forum selection clause makes
12 eminent good sense for the reasons suggested by plaintiff's
13 counsel that the companies that license these agreements would
14 have to sue in 50 different jurisdictions every time there was a
15 breach. So insisting on a forum selection clause would make
16 good sense.

17 There is a dispute. The way this matter is argued
18 now, and this is a Motion to Dismiss, is that in fact there was
19 a contract as alleged by the plaintiff in this case that did not
20 authorize Atkinson or Atkinson Hunt as user.

21 The Court takes those allegations under a Motion to
22 Dismiss as well-pleaded, and is not in a position now to say
23 that that is not a viable contract or that the forum selection
24 clause is not viable.

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And for that purposes, the Court is easily prepared to
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1 conclude that the contract in so far as Resource is concerned is
2 properly alleged. We'll see what happens, perhaps, on a Motion
3 for Summary Judgment at some point, but for now it's properly
4 alleged, taking the allegations in the light most favorable to
5 the plaintiffs. And that would make the forum selection clause
6 also viable.

7 And again, it's one of those issues where the
8 jurisdictional clause is sort of intertwined with the argument
9 on the merits and the courts ordinarily do go forward in those
10 cases and determine that the contract has to be decided about
11 its liability and will sort out the issue some later point. But
12 for now, well-pleaded and that certainly covers Resource.

13 The second question is whether the, Atkinson Hunt is
14 covered by the agreement. I would start with the basic
15 proposition, even if not argued by the plaintiff, that to the
16 extent that they are operating pursuant to the license that
17 Resource holds, that they are bound by the terms and conditions
18 whether they knew about them or not. That would be enough to
19 tie in Atkinson Hunt under the master agreement and its choice
20 of forum clause.

21 Were that not so, again you get into this anomalous
22 situation where every potentially user could claim who's
23 operating pursuant to a license that it did not know what the
24 terms and conditions were, and therefore would not be bound by
25 what would be the very sensible forum selection clause that you
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1 find in agreements like this.

2 It's further alleged in the complaint that on the
3 website there are specific terms and conditions that indicate
4 that there will be a choice of forum clause every time someone

5 accesses the website with the password and so on. And that is
6 alleged again in the Motion to Dismiss -- in the complaint. The
7 Motion to Dismiss doesn't prevail against that in terms of
8 taking it in the best light offered by the plaintiffs.

9 So the Court is again prepared to conclude that from a
10 jurisdictional standpoint, Atkinson Hunt is bound by the terms
11 of the master agreement or as alleged by the terms of use that
12 are posted on the website. And again, that tends to tie in the
13 decision on the merits with some of the jurisdictional issues
14 where the Court ordinarily holds cases like that in.

15 So to that extent, to the extent that any of the
16 defendants seek to dismiss the case based on jurisdictional
17 grounds, the Court would find that that motion is not well
18 taken.

19 Now, one could go through the analysis about whether
20 in fact the Long-Arm Statute applies. This is a kind of a
21 thorny area that one is just getting into more and more case law
22 on this issue. I don't really need to reach that issue because
23 I think we are fairly in court on the allegations as taken by
24 the -- as made by the plaintiffs in this case that there would
25 be a choice of forum clause that would extend not only to

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1 resource, but to Atkinson Hunt.

2 And that frankly is, sort of moots the issue of the
3 Motion to Transfer, because to the extent that there is proper
4 jurisdiction in Maryland, the Court stays here. There may or
5 may not be information available in New Jersey, but the fact is
6 there's plenty of information available in Maryland too, and
7 this is a choice that's made by the plaintiff. They've chosen
8 this forum and the balance of inconvenience, if you will, is not
9 greater for the defendants than the plaintiffs in this case.

10 All the factors that would militate in favor of keeping the case
11 here certainly do in this case. There's no better reason to be
12 in New Jersey.

13 As for the allegations of fraud, that's one that I
14 would take some exception with. I think there needs to be more
15 specificity with regard to the allegations of fraud. I don't
16 think they are specific enough.

17 I'm going to grant the Motion to Dismiss with leave to
18 amend only as to the fraud count as to both defendants. I think
19 you need to be more specific about who allegedly said what to
20 whom and what circumstances, because as I read the count, it
21 really doesn't say.

22 I heard counsel say something more specific than what
23 the complaint says, but I think in order to be able to plead,
24 they need to see what that is. So, except for the issue of --
25 well, I think the formal decision is the motions of the

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1 defendants are granted in part, denied in part. Granted only as
2 to the Motion to Dismiss the fraud count, but granted without
3 prejudice with leave to amend in 20 days. Otherwise, the Motion
4 to Dismiss is denied for reasons stated on the record. I'll
5 enter an order to that effect today, all right. And then we'll
6 get you into a scheduling order right away.

7 All right. Thank you, counsel.

8 (Recess at 11:2:08 a.m.)

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CERTIFICATE OF COURT REPORTER

I, Linda C. Marshall, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/

Linda C. Marshall, RPR
Official Court Reporter

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