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CASE NUMBER: 14-2-07669-0 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THE COUNTY OF KING

MOVE, INC., a Delaware corporation,
REALSELECT, INC., a Delaware
corporation, TOP PRODUCER SYSTEMS
COMPANY, a British Columbia unlimited
liability company, NATIONAL
ASSOCIATION OF REALTORS®, an
Illinois non-profit corporation, and
REALTORS® INFORMATION
NETWORK, INC., an Illinois corporation,

Plaintiffs,

vs.

ZILLOW, INC., a Washington corporation,
and ERROL SAMUELSON, an individual,

Defendants.

Case No. 14-2-07669-0 SEA

PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR ORDER TO SHOW CAUSE
RE CONTEMPT FOR DEFENDANTS'
VIOLATION OF PRELIMINARY
INJUNCTION

Filed Under Seal Per Court Order

Dated: _____

**(Contains Information Marked OCEO
(Don't Show Plaintiffs))**

1 **I. INTRODUCTION**

2 The defendants’ opposition is unbelievable in its excuses for contempt and reflects a cynical
3 dismissiveness of the Court’s authority. The defendants characterize the Samuelson Memo as
4 merely a “*document to hand off the in-progress tasks he could no longer work on.*” (Opp. at
5 4:47) (emphasis added).¹ At bottom, their position is that all of the infringing conduct that Errol
6 Samuelson was engaged in can continue in defiance of this Court’s order as long as it is
7 continuing misappropriation that began before the Preliminary Injunction, and as long as it is
8 Zillow, rather than Mr. Samuelson, directing other employees to continue the misappropriation.
9 The defendants further argue that they should not be held in contempt because “nowhere in the
10 Preliminary Injunction does it specify that Zillow is enjoined from transitioning Mr. Samuelson’s
11 job responsibilities to others.” (Opp., 9.) The notion that the Preliminary Injunction somehow
12 did not apply to misappropriations in progress the day the order was issued or does not apply to
13 Zillow is nothing short of absurd, and flies in the face of the express language of the injunction.
14 Indeed, the order specifies that: “Zillow is enjoined from, directly *or indirectly*, appropriating or
15 obtaining or seeking to appropriate or obtain from Mr. Samuelson, any of Plaintiffs Trade Secret
16 Information or any Move, Inc. and/or NAR confidential information identified above, or *utilizing*
17 *in any way such information previously obtained.*” (PI at 13) (emphasis added). Lest there be
18 any doubt about the scope of the Preliminary Injunction, it states in bold: “**The Preliminary**
19 **Injunction is binding on defendants, their agents, servants, employees, and attorneys, and**
20 **those persons in active concert or participation with them who receive actual notice of the**
21 **order by personal service or otherwise.**” (*Id.* at 17) (emphasis in original).

22 Judge Linde twice considered the plaintiffs’ request for a preliminary injunction. She denied
23 the first motion, and granted the second. Having thoroughly considered the evidence and
24 arguments, it could not have been her intention in including such broad language as to the scope
25

26 ¹ Between the Samuelson Memo and the defendants’ admissions in their opposition brief, there can be no question
27 as to whether the defendants’ actions were intentional. If the Court considers this an open issue, however, the
discovery identified in the plaintiffs’ motion for an Order to Show Cause should close it.

1 of the Preliminary Injunction that Zillow and Mr. Samuelson could circumvent the order by
2 continuing ongoing misappropriation simply by handing off the plaintiffs' confidential
3 information to other employees (and primarily the other Move employee who left with
4 Mr. Samuelson) to complete the misappropriation at Zillow's direction. But this is precisely
5 what the defendants admit they did. They proclaim their innocence by reading Judge Linde's
6 order in such a light as to render it wholly ineffectual. The defendants are in willful contempt of
7 the Preliminary Injunction, having openly defied its plain language, spirit, and intent. They did
8 everything possible to ensure the injunction did not so much as delay their continuing
9 misappropriation. Accordingly, the Court should issue the requested Order to Show Cause.

10 II. AUTHORITY AND ARGUMENT

11 A. Defendants violated the Preliminary Injunction.

12 The defendants maintain that drafting the Samuelson Memo, or taking the steps instructed by
13 Mr. Samuelson, is not contumacious because "Mr. Samuelson was not enjoined from
14 summarizing what he had done before the order, nor did it enjoin others from taking his place.
15 On this point [argue the defendants] precision matters: the Preliminary Injunction did not
16 proscribe *all* Zillow employees from working on these projects (e.g., obtaining direct fees); it
17 proscribed *Mr. Samuelson* from working on them." (Opp. 6)(emphasis in original). In other
18 words, the defendants claim Zillow could do what Mr. Samuelson was enjoined from doing. The
19 explanation flies in the face of the language and spirit of the Preliminary Injunction. *See*
20 *Sherpix, Inc. v. Embassy Theatre*, 7 Wash. App. 954, 956 (1972) ("In construing a restraining
21 order, recognition is given not only to the letter but also to the spirit of the order"); *Blakiston v.*
22 *Osgood Panel & Veneer Co.*, 173 Wash. 435, 438 (1933) ("A party enjoined must not do a
23 prohibited thing nor permit it to be done by his connivance, nor effect it by trick or evasion. The
24 order of the court must be obeyed implicitly, according to its spirit, and in good faith")
25 (emphasis added). Mr. Samuelson, Zillow, and "their agents, servants, employees, and attorneys,
26 and those persons in active concert or participation with them" are enjoined from, *directly or*
27 *indirectly*, appropriating or obtaining or seeking to appropriate or obtain from Mr. Samuelson,

1 any of Plaintiffs Trade Secret Information or any Move, Inc. and/or NAR confidential
2 information identified above, or *utilizing in any way such information previously obtained.*” (PI,
3 13). As made clear in the injunction itself, no one at Zillow was permitted to use the plaintiffs’
4 confidential information. Yet, that is precisely what the defendants did, apparently across the
5 board, as they somehow concluded other Zillow employees could take direction from
6 Mr. Samuelson and continue activities he could not under the injunction.

7 To be clear, the Samuelson Memo does not simply provide a catalogue for acts of
8 misappropriation that took place *before* the Preliminary Injunction was issued, but it contains
9 directions to others for *future* acts that should be taken in furtherance of the on-going acts of
10 misappropriation. For instance, the Preliminary Injunction enjoined Mr. Samuelson from
11 “directly or indirectly” engaging in “[e]fforts to encourage data feeds from Multiple Listing
12 Services.” (PI, 6(j)). Rather than adhere to the terms of the Preliminary Injunction,
13 Mr. Samuelson violated the injunction just days after it was issued by writing instructions to
14 others to take actions he had started but could not continue. The first point in the memo contains
15 Mr. Samuelson’s instructions for obtaining a direct feed of listing data from Combined Los
16 Angeles/Westside MLS (“CLAW”). (Cock, Ex. A at Z60346.). In the memo, Mr. Samuelson
17 instructs Mr. Beardsley to send CLAW an “an updated agreement” with very specific provisions.
18 *Id.* The defendants instructed Zillow’s other employees to continue what Mr. Samuelson had
19 started. This includes 35 instructions to Mr. Samuelson’s right hand man Mr. Beardsley, who
20 came with him from Move (after deleting his email archive). May 1, 2014 sealed Stenhouse Dec.
21 at ¶ 33. One does not even have to read between the lines of the Preliminary Injunction to see
22 that this “direct or indirect” conduct contradicts the plain language of the injunction.

23 While the defendants admit Zillow circulated the Samuelson Memo and assigned specific
24 tasks contained therein to its employees, the defendants contend that Zillow has not violated the
25 Preliminary Injunction because “nowhere in the Preliminary Injunction does it specify that
26 Zillow is enjoined from transitioning Mr. Samuelson’s job responsibilities to others.” (Opp. 9.)
27 This evinces a disingenuous and cynical view of the Court’s order. The defendants even argue

1 that “Mr. Samuelson may have been enjoined from obtaining direct feeds, but Zillow was not.”
2 (*Id.*) The Preliminary Injunction directly contradicts the defendants’ argument: “Zillow is
3 enjoined from, directly or indirectly, appropriating or obtaining or seeking to appropriate or
4 obtain from Mr. Samuelson, any of Plaintiffs Trade Secret Information or any Move, Inc. and/or
5 NAR confidential information identified above, or utilizing in any way such information
6 previously obtained.” (PI, 13.) The Preliminary Injunction also states, in bold text, “**The**
7 **Preliminary Injunction is binding on defendants, their agents, servants, employees, and**
8 **attorneys, and those persons in active concert or participation with them who receive**
9 **actual notice of the order by personal service or otherwise.**” (*Id.* at 17.) One cannot imagine
10 that Judge Linde’s intent in issuing her detailed Preliminary Injunction proscribing over thirty
11 separate categories of conduct was to allow the defendants to finish by proxy the
12 misappropriation they had started through Mr. Samuelson. *See Sherpix, Inc. v. Embassy Theatre,*
13 *supra*, 7 Wash. App. at 956; *Blakiston v. Osgood Panel & Veneer Co., supra*, 173 Wash. at 438.

14 **B. The Defendants’ Requested *in Camera* Review is Inappropriate.**

15 The defendants request *in camera* review of the unredacted “transition document” so the
16 Court can see the defendants’ alleged “good faith effort to comply with the order.” (Opp. 2).
17 The lack of good faith is apparent, however, from the unredacted portions alone.

18 In addition, the purpose of an *in camera* review is to determine privilege issues and other
19 issues of confidentiality. *See, e.g., Cedell v. Farmers Ins. Co. of Washington*, 176 Wash. 2d 686,
20 700, 295 P.3d 239, 246 (2013). But that is not what the defendants are asking for here. Instead,
21 the defendants are asking the Court to allow them to waive the attorney client privilege – but just
22 for the Court – so just the Court can see whether the defendants’ claimed version of the facts is
23 correct while leaving the plaintiffs no ability to challenge the claimed facts in the redacted
24 portions of the memo. Such a one-sided substantive review denies the plaintiffs’ their
25 fundamental right to review and respond to the evidence. *See, e.g., In re High Sulfur Content*
26 *Gasoline Products Liab. Litig.*, 517 F.3d 220, 231-32 (5th Cir. 2008) (“[e]x parte proceedings are
27 an exception to the rule in our judicial system and contrary to its adversarial nature”). It would

1 be an inappropriately-limited waiver of privilege. If the defendants want to waive privilege, they
2 should waive privilege and deal with the consequences of that waiver.

3 The claimed in camera waiver is also unnecessary because the defendants' explanation for
4 their conduct is set forth in their opposition. That is the proper vehicle in which to examine the
5 legitimacy of the defendants' proffered justifications for their conduct.

6 **C. The Court should issue an Order to Show Cause.**

7 The defendants contend the Court should reject the plaintiffs' requested remedies because
8 they are punitive in nature. More specifically, the defendants assert that, if "neither Defendant
9 has violated the Preliminary Injunction since July 2014," holding the defendants in contempt
10 now would punish them for past conduct. (Opp. 11.) Of course, the argument is inconsistent
11 with the defendants' faulty theme that Zillow personnel can freely do what Mr. Samuelson was
12 restricted from doing by the injunction. The Samuelson Memo also supports the strong inference
13 that the enjoined activity last for some period of time and is likely ongoing. The identified
14 discovery will shed light on this for the parties and Court. The argument also ignores the point
15 that the Samuelson Memo was sent to senior legal personnel at Zillow in July 2014, hidden for
16 nearly half a year, and only recently produced in this case.

17 The defendants' attempt to turn the tables by suggesting that the plaintiffs are engaging in
18 "gotcha tactics" by seeking to compel compliance with the Preliminary Injunction is ridiculous.
19 The plaintiffs respectfully requested an Order to Show Cause designed to reveal the extent of the
20 defendants' misconduct, to aid the Court in its determination of what remedial sanctions will
21 ensure compliance, and to reimburse costs. The requested order would not extend beyond the
22 scope of discovery already contemplated in this action, and would allow the Court to more
23 accurately adjudicate the defendants' contempt while fashioning an appropriate remedy.

1 DATED February 2, 2015, at Seattle, Washington.

2 s/Jack M. Lovejoy

3 Jack M. Lovejoy, WSBA No. 36962

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on February 2, 2015, I electronically filed the foregoing with the
3 Clerk of the Court using the Court's CM/ECF System which will send notification of such filing
4 to those registered to receive electronic notices by email transmission at the email addresses
5 provided.

6 **CM/ECF Participants:**

7 Clemens H. Barnes
8 Estera Gordon
9 Miller Nash Graham & Dunn LLP
Counsel for Errol Samuelson

10 Susan E. Foster
11 Kathleen M. O'Sullivan
12 Katherine G. Galipeau
13 Perkins Coie LLP
Counsel for Zillow, Inc.

14 I declare under penalty of perjury under the laws of the State of Washington that the
15 foregoing is true and correct.

16 DATED at Seattle, Washington on February 2, 2015.

17 /s/ Janet Petersen

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