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CASE NUMBER: 14-2-07669-0 SEA

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HONORABLE JOHN CHUN
Noted for Consideration: April 21, 2015
Motion to shorten time pending

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MOVE, INC., a Delaware corporation,
REALSELECT, INC., a Delaware
corporation, TOP PRODUCERS
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,

v.

ZILLOW, INC., a Washington corporation,
ERROL SAMUELSON, an individual,
CURTIS BEARDSLEY, an individual, and
DOES 1-20,

Defendants.

No. 14-2-07669-0 SEA

DEFENDANT ZILLOW, INC.'S
OBJECTION TO AND MOTION TO STRIKE
PLAINTIFFS' NOTICE OF
SUPPLEMENTAL SUPPORT AND
DECLARATION OF DAVID SINGER IN
SUPPORT

ZILLOW'S OBJECTION & MOTION TO
STRIKE

LEGAL125638745.1

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I. INTRODUCTION

Despite its lack of relevance to the underlying motions and, in what can only be interpreted as an intentional effort to smear Zillow before this Court and in the court of public opinion, Plaintiffs have filed a self-titled “Notice of Supplemental Support” in dereliction of their clear legal obligations and in disregard for the rules of procedure and the Court’s protective order and protocol for appealing the Special Master’s orders. The “Supplemental Support” has no substantive relevance to the pending Motions to Revise the Special Master’s Orders regarding the scope of third-party subpoenas relating to Zillow’s merger with Trulia, and thus their Notice of Supplemental Support and the accompanying declaration should be disregarded in its entirety.¹

Without seeking permission of the Court, without filing under seal, and despite having already used every inch of the five-page limit this Court imposed for seeking revision of an order from the Special Master, Plaintiffs rushed to gratuitously file a 3-page, purported “supplemental notice” that does nothing more than trumpet scurrilous accusations against all of the Defendants and numerous Zillow employees. In any other venue, the false and misleading accusations would be libelous. Incredulously, Plaintiffs base these very serious allegations on an unsigned, unsworn, vitriolic letter purporting to be a “treasure map” to uncovering wrongful acts by Defendants.

Despite its dubious source and obviously vengeful intent, Plaintiffs accept without question the accuracy of the letter, which in addition to its diatribe, discloses (albeit inaccurately) Zillow's highly confidential, internal business strategies and programs. The disclosures warrant designation under the Court’s Second Amended Protective Order. Unfathomably though, Plaintiffs opted to file this document in open court notwithstanding the obvious ramification of

¹ That is not to say the letter is unimportant. Zillow takes any allegation of wrongdoing very seriously, including those in the anonymous letter and by Plaintiffs, and are taking immediate steps to internally investigate whether there is any truth to the accusations and the credibility of the anonymous author.

1 publically disclosing Zillow’s trade secrets. They then refused to place the letter under seal.

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3 Only one conclusion can be drawn from Plaintiffs’ untoward decision to act on this letter in the
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5 manner that they did: They seek to malign Zillow publicly and harm Zillow competitively.
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7 In short, there is no question that this letter has set off fireworks on all sides, and no doubt
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9 the Court will hear about it in all of its messy details in one or more motions to come. However,
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11 motions that address only the scope of third party subpoenas are not the appropriate venue to
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13 assess this letter. Plaintiffs’ “Notice of Supplemental Support” does not provide the Court with
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15 additional legal authority, such as a newly rendered decision by a controlling court submitted to
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17 assist the Court’s decision-making.² Instead, Plaintiffs have simply filed—in open court, without
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19 any attempt to protect the confidential information ostensibly being revealed about Zillow’s
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21 internal workings—an inadmissible piece of evidence that serves only to inflame and distract.
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23 Zillow objects to Plaintiffs’ Notice of Supplemental Support and the supporting Singer
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25 Declaration and respectfully requests the Court disregard both during its consideration of the
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27 pending motions to revise the Special Master’s orders.
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29 II. STATEMENT OF FACTS

30 On April 6, 2015, Plaintiffs filed two motions to reverse decisions made by the Special
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32 Master, the Honorable Judge Bruce Hilyer (Retired), appointed earlier in this case to govern and
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34 control discovery regarding the trade secrets of two powerful competitors. *See* Order Appointing
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36 Special Master, Dkt. No. 269 (attached to the Declaration of Mary P. Gaston (“Gaston Decl.”) as
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38 Ex. A). The first motion challenged the Special Master’s decision to revise one topic of eight in
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40 Plaintiffs’ subpoena to third-party Trulia, Inc. (also a competitor) in a Motion to Revise the
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42 Special Master’s Order Quashing Key Portions of the Document Subpoena to Trulia (“Motion to
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47 ² While the Rules of Appellate Procedure may allow such submissions of additional authorities to
appellate courts, *see* RAP 10.8, even there such supplements “should not contain argument.” *Id.*

1 Revise Trulia Subpoena”). Plaintiffs filed the Motion to Revise Trulia Subpoena and most of its
2 supporting materials under seal, Dkt. No. 524D, and Zillow promptly filed a joinder supporting
3 the sealing of these materials, Dkt. No. 533 (filed April 8, 2015).
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6 The second of Plaintiffs’ motions challenged the Special Master’s revisions to Plaintiffs’
7 subpoenas to third-parties J.P. Morgan and Goldman Sachs, the investment advisors to Trulia and
8 Zillow, respectively, during the recently closed merger between the two companies. *See*
9 Plaintiffs’ Motion to Revise the Special Master’s Order Re Subpoenas to Goldman Sachs and J.P.
10 Morgan (“Motion to Revise Morgan/Goldman Subpoenas”). Plaintiffs also moved to seal this
11 motion and its supporting materials, Dkt. No. 524B, and again, Zillow joined to support the
12 protection of the confidential materials cited and discussed in these pleadings, Dkt. No. 534 (filed
13 April 8, 2015).
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16 On Friday, April 10, with no warning to Defendants, Plaintiffs filed a “Notice of
17 Supplemental Support” in open court. Despite the fact that the filing did not register on King
18 County’s Electronic Court Records (“ECR”) system, *see* Gaston Decl. at Exs. B & C (screenshots
19 of ECR and public dockets as of April 11), multiple media outlets reported on the filing (and not
20 surprisingly, Move’s spokespersons had carefully prepared comments at the ready), *see id.* Ex. E
21 (Inman news article). Plaintiffs added three pages of argument and included a declaration
22 attaching a letter addressed to “David Skinner” (David Singer represents Plaintiffs) “just
23 received” the day before (although the postmark itself is illegible in the copy received by
24 Defendants) from an unidentified person. The letter styles itself a “treasure map” for Plaintiffs’
25 counsel to uncover alleged wrongdoing by the Defendants. It is not a sworn statement submitted
26 under penalty of perjury; its author does not even identify him or herself, let alone sign the
27 document, and it was sent without a return address. And it contains blatant inaccuracies. *See*
28 Declaration of Erin Coningsby ¶¶ 3-6 (filed April 13, 2015).
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III. ISSUES PRESENTED

When deciding whether the Special Master erred in his specific rulings regarding the scope of discovery of third party subpoenas, should the Court consider Plaintiffs’ “Supplemental Support,” which includes an unsigned, unsworn letter making unfounded allegations about Defendants generally, but does not contain allegations relevant to the underlying motions specifically.

IV. EVIDENCE RELIED UPON

Zillow relies on the Declaration of Mary P. Gaston filed in support of this motion, the Declaration of Erin Coningsby, its motion to shorten time, and the record in this matter.

V. LEGAL AUTHORITY AND ARGUMENT

Zillow requests the Court refuse to consider the additional argument and unverified, inflammatory letter submitted as “supplemental support” for their motions to revise the Special Master’s order regarding subpoenas issued to Trulia, J.P. Morgan, and Goldman Sachs. *Plaintiffs’ apparent objective was simply to get this venomous letter in front of the Court—and the public—as quickly and in whatever manner possible.* The pending motions were the easiest avenue for doing so. This filing was entirely outside the scope of proper procedure. First and foremost, the protocol established by this Court—and stipulated to by all of the parties—requires a motion for revision to be based on the record considered by the Special Master and limited to a brief, five-page argument. Plaintiffs’ supplemental filing both introduces new evidence and adds three pages of arguments. Second, the unsigned letter does not meet the standard for supplementing the record as contemplated in the local court rules, nor is it admissible evidence. Finally, both the Notice and the declaration are wholly irrelevant to the issues before the Court on the limited question whether the Special Master’s discovery orders should be revised.

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A. The protocol for revising Special Master order does not allow for supplemental filings.

First and most importantly, Plaintiffs’ “Notice” is in fact a three-page brief and attempts to introduce evidence not in front of the Special Master during his original consideration of the matter. This maneuver violates the protocol and purpose established by this Court in appointing a Special Master to govern the discovery disputes in this case; a protocol stipulated to by all of the parties. *See* Gaston Decl., Ex. A at 1 (“The parties stipulate that the Court should enter the following order.”). If for no other reason, the Court should refuse to consider this attempt to circumvent the protocol stipulated to by the parties and, if deemed necessary, remand the matter back to the Special Master to consider this latest development.

Under the Order Appointing the Special Master, “[a]ny order entered by the Special Master shall be subject to revision by the Court.” *Id.*, Ex. A at ¶ 10. “Such revision shall be upon the records of the case,” and a party moving for revision may “provide a short (up to five pages) explanation of why the Special Master’s order should be revised.” *Id.* A response is similarly limited to five pages, and the protocol does not allow for reply briefs. *Id.*

Here, this venomous letter was never before the Special Master, and he has yet to rule on how it might impact the course of discovery. And the “Notice,” containing extensive argument rather than simply identifying the supplemental authority to be considered by the Court, exceeds the five-page limit for the motions for revisions. (Both the Motion to Revise Trulia Subpoena and Motion to Revise Morgan/Goldman Subpoena used every last inch of their five page motions.) To ignore these procedural defects would be to undermine the purpose of appointing a Special Master to control discovery.

B. Plaintiffs’ Notice and Supplemental Submission should be disregarded.

The Court has broad discretion to strike or otherwise disregard evidentiary support that is

1 untimely filed, improperly structured, not based on personal knowledge, or is otherwise defective.
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3 *See Powell v. Rinne*, 71 Wn. App. 297, 857 P.2d 1090 (1993) (affirming trial court’s disregard of
4 appraisal information where unsworn statement was submitted to court shortly before hearing and
5 party moved to strike the statement); accord Karl B. Tegland, *Washington Practice: Rules*
6 *Practice* § CR 7 (6th ed. 2015) (discussing that for regular motion practice, “[t]he proper
7 procedure for attacking a noncompliant affidavit or declaration is a motion to strike” and
8 collecting cases).

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15 *First*, the local rules discourage the submission of supplemental materials after motion
16 practice has closed. Plaintiffs cite to King County Local Court Rule 7(b)(4)(G) to justify their
17 supplemental submission. But this rule states any material being offered after the applicable
18 deadlines “will *not* be considered by the court over objection of counsel, except upon the
19 imposition of appropriate terms, unless the court orders otherwise.” (emphasis added). Zillow
20 does object. No reasons have been provided, nor do any exist, to justify the introduction of these
21 allegations into motions challenging the Special Master’s decision to limit subpoenas issued to
22 third parties.³

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Second, the anonymous letter lacks any evidentiary support and is inadmissible. It is an
unsigned, uncertified letter. *Cf. Wilkerson v. Wegner*, 58 Wash. App. 404, 408 n. 3, 793 P.2d 983
(1990) (“The certifications considered by the trial court were not signed under penalty of perjury
nor were they sworn statements. . . . [W]e do not consider such ‘certifications’ to be competent
proof . . .”). It has not been authenticated. *See* ER 901; *State v. Payne*, 117 Wn. App. 99, 106,

³ Analogously, CR 12(f) allows a party to move to strike “from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” This rule “is intended to provide the trial court with adequate means to protect defendants from meritless attacks where the plaintiff maliciously alleges facts without probable cause.” *King Cnty. Dep’t of Adult & Juvenile Det. v. Parmelee*, 162 Wn. App. 337, 360, 254 P.3d 927 (2011). Although Plaintiffs are not filing a supplemental pleading, the reasoning behind CR 12(f) applies with equal force here: an irrelevant but prejudicial filing based on unsworn and unverified allegations has no place in the course of measured judicial adjudication.

1 69 P.3d 889 (2003) (“Authentication is a threshold requirement designed to assure that evidence
2 is what it purports to be.”). It is hearsay. *See* ER 801 (c) (“‘Hearsay’ is a statement, other than
3 made by the declarant while testifying at the trial or hearing, offered in evidence to prove the
4 truth of the matter asserted”) & ER 802 (making hearsay inadmissible). It is not based on
5 personal knowledge. ER 602 (requiring any witness to testify based on “personal knowledge”).
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10 Most importantly, the letter is also wholly irrelevant to the issues presented to the Court in
11 Plaintiffs’ motions to revise the Special Master’s orders concerning subpoenas. Plaintiffs have
12 filed two motions challenging the Special Master’s reasonable limitation on the extent of
13 discovery allowed into the files of third-parties that contain Zillow’s protected and highly
14 confidential business materials and trade secrets. That decision should not be influenced in any
15 way by allegations in this letter. “The law disapproves of visiting serious consequences upon
16 parties on the basis of only unsworn evidence.” *Metcalf v. State, Dep’t of Motor Vehicles*, 11 Wn.
17 App. 819, 821-22, 525 P.2d 819 (1974) (citing *In re Ross*, 45 Wn.2d 654, 277 P.2d 335 (1954)).
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27 **C. The letter is wholly irrelevant to the specific issues raised by Plaintiffs in their**
28 **motions to revise the Special Master’s orders.**
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30 Even if every word of this anonymous letter were true, which is not the case, and even if it
31 were properly submitted under penalty of perjury, which it was not, the letter *still* has no bearing
32 on the motions before the Court. The letter does not discuss Trulia or the merger between Trulia
33 and Zillow; it does make any specific reference to what Samuelson may or may not have
34 wrongfully disclosed with respect to those matters; and it contains no discussion of J.P. Morgan
35 or Goldman Sachs. And contrary to Plaintiffs’ histrionic argument that the letter somehow proves
36 vast efforts at spoliation, the letter does not in fact accuse any defendant of destroying evidence.⁴
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45 ⁴ Defendants have repeatedly countered with hard evidence Plaintiffs’ allegations about missing or
46 destroyed evidence. For example, Mr. Samuelson has explained at length the circumstances surrounding
47 his return of his Move-issued devices and the steps he took to delete *personal* and *private* information
while working with Move employees to preserve the remaining data. *See, e.g.*, Declaration of Errol

1 The Motion to Revise the Trulia Subpoena requires the Court to assess whether a third-
2 party competitor must turn over all of its confidential files regarding the most significant
3 corporate transaction in its history, or whether the Special Master, after carefully considering
4 three months' of briefing and hours of argument, appropriately balanced Plaintiffs' need for
5 discovery into their alleged theory of misappropriation with Zillow's need to protect its trade
6 secrets. Zillow submits the Special Master appropriately limited Plaintiffs' subpoena to
7 investigate those theories of misappropriation that they allege (and in fact granted Plaintiffs
8 broader rights to documents than Plaintiffs had originally requested). Similarly, the Motion to
9 Revise the Goldman/Morgan Subpoenas requires consideration of how much of the confidential,
10 strategic documents generated by Zillow's and Trulia's investment advisors may be requested by
11 Plaintiffs to hunt down their theory of misappropriation. Plaintiffs' supplemental argument and
12 supporting declaration do not elucidate these issues and any new argument based on the letter was
13 never raised to the Special Master.
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26 VI. CONCLUSION

27 Zillow objects to Plaintiffs' submission of "supplemental support" and requests the Court
28 disregard the filing during its consideration of whether to revise the Special Master's discovery
29 orders related to third party subpoenas.
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45 Samuelson (filed April 2, 2014), Dkt. No. 48; *see also* Samuelson's Response to Plaintiffs' Motions to
46 Revise Special Master Orders on Trulia-Related Subpoenas (addressing allegations regarding the "secret
47 phone" and personal emails) (filed April 13, 2015).

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DATED: April 13, 2015

s/Mary P. Gaston

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Facsimile: 206.359.9000

Attorneys for Defendant Zillow, Inc.

CERTIFICATE OF SERVICE

On April 13, 2015, I caused to be served upon counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

ZILLOW’S OBJECTION AND MOTION TO STRIKE PLAINTIFFS’ SUPPLEMENTAL SUPPORT.

<p>Jack M. Lovejoy, WSBA No. 36962 Lawrence R. Cock, WSBA No. 20326 Cable, Langenbach, Kinerk & Bauer, LLP Suite 3500, 1000 Second Avenue Building Seattle, WA 98104-1048 Telephone: (206) 292-8800 Facsimile: (206) 292-0494</p> <p>jlovejoy@cablelang.com LRC@cablelang.com kalbritton@cablelang.com jpetersen@cablelang.com</p>	<p><input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via E-filing <input checked="" type="checkbox"/> Via E-mail</p>
<p>Clemens H. Barnes, Esq., WSBA No. 4905 Estera Gordon, WSBA No. 12655 K. Michael Fandel, WSBA No. 16281 Miller Nash Graham & Dunn LLP Pier 70 2801 Alaskan Way, Suite 300 Seattle, WA 98121-1128 Telephone: (206) 624-8300 Facsimile: (206) 340-9599</p> <p>clemens.barnes@millernash.com connie.hays@millernash.com estera.gordon@millernash.com michael.fandel@millernash.com robert.mittenthal@millernash.com</p>	<p><input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-filing <input checked="" type="checkbox"/> Via E-mail</p>

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<p>Brent Caslin, WSBA No. 36145 Richard Lee Stone , (<i>Pro Hac Vice</i>) Nick G. Saros, (<i>Pro Hac Vice</i>) Jennifer Wagman Njathi, (<i>Pro Hac Vice</i>) Ethan A. Glickstein, (<i>Pro Hac Vice</i>) Jeffrey A. Atteberry, (<i>Pro Hac Vice</i>) Jenner & Block LLP 633 West 5th Street, Suite 3600 Los Angeles, CA 90071 Telephone: (213) 239-5150</p> <p>bcaslin@jenner.com rstone@jenner.com nsaros@jenner.com JNjathi@jenner.com eglickstein@jenner.com jatteberry@jenner.com dsinger@jenner.com drozansky@jenner.com avanhoesen@jenner.com</p>	<p><input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail, 1st Class, Postage Prepaid <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via E-filing <input checked="" type="checkbox"/> Via E-mail</p>
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of April, 2015.

s/ June Starr
June Starr, Legal Secretary

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THE HONORABLE JOHN CHUN

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MOVE, INC., a Delaware corporation,
REALSELECT, INC., a Delaware
corporation TOP PRODUCERS
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,

v.

ZILLOW, INC., a Washington corporation,
ERROL SAMUELSON, an individual,
CURTIS BEARDSLEY, and DOES 1-20,

Defendants.

No. 14-2-07669-0

[PROPOSED] ORDER GRANTING
DEFENDANT ZILLOW, INC.'S
OBJECTION AND MOTION TO STRIKE
PLAINTIFFS' NOTICE OF
SUPPLEMENTAL SUPPORT AND
SUPPORTING DECLARATION OF DAVID
SINGER

THIS MATTER came before the Court on Defendant Zillow, Inc.'s Objection and
Motion to Strike Plaintiffs' Notice of Supplemental Support¹ and supporting Declaration of

¹ Plaintiffs filed a "Plaintiffs' Notice of Supplemental Support for: (1) Motion to Revise the
Special Master's Order Quashing Key Portions of the Document Subpoena to Trulia, and (2) Motion

[PROPOSED] ORDER GRANTING
ZILLOW'S OBJECTION & MOTION TO
STRIKE – 1

56920-0025/LEGAL125642728.1

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1 David Singer (“Zillow’s Motion to Strike”). The Court, having reviewed and considered the
2 motion, supporting Declaration of Mary P. Gaston with exhibits, any opposition papers
3 filed, and the record in this matter, and therefore being fully advised in the premises,
4 declares it is hereby:
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8 ORDERED that Defendant Zillow’s Motion to Strike is GRANTED and the Court
9 will not consider Plaintiffs’ Notice of Supplemental Support or the supporting declaration of
10 David Singer.
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19 ENTERED this _____ day of April, 2015.
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23 _____
24 THE HONORABLE JOHN CHUN
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28 **Presented by:**
29

30 **PERKINS COIE LLP**
31 Attorneys for Defendant Zillow, Inc.
32 By s/ Mary P. Gaston
33 Mary P. Gaston, WSNA No. 27258
34 MGaston@perkinscoie.com
35 Kathleen M. O’Sullivan, WSBA No. 27850
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45

46 to Revise the Special Master’s Order re Subpoenas to Goldman Sachs and J.P. Morgan” and a
47 supporting declaration of David Singer with attachments on April 10, 2015.

[PROPOSED] ORDER GRANTING
ZILLOW’S OBJECTION & MOTION TO
STRIKE – 2

56920-0025/LEGAL125642728.1

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CERTIFICATE OF SERVICE

On April 13, 2015, I caused to be served upon counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the following document: **Proposed Order Granting Zillow’s Objection & Motion to Strike.**

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

DATED this 13th day of April, 2015.

/s June Starr

June Starr
Legal Secretary