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CASE NUMBER: 14-2-07669-0 SEA

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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,
ERROL SAMUELSON, an individual, and
CURTIS BEARDSLEY, an individual, and
DOES 1-20,

Defendants.

Case No. 14-2-07669-0 SEA

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO SEAL THE
SINGER DECLARATION AND
ATTACHED WHISTLEBLOWER
LETTER**

1 **I. Introduction**

2 Defendants were caught with the reddest of hands and are now feigning this “emergency”
3 to distract from their own wrongdoing. The Special Master (assigned to adjudicate all discovery
4 issues) has already reviewed the whistleblower letter and found it credible enough to
5 immediately order defendants to preserve all evidence related to it. Defendants expressly waived
6 a hearing before the Special Master, who was available today.

7 Over the past three days, defendants have *refused* to meet and confer with plaintiffs over
8 what *specific* portions of the whistleblower letter should be sealed from public view (because the
9 answer is *none*). Instead, defendants insist on redacting large swaths of the letter – the last three
10 paragraphs – that cannot possibly be trade secrets. In these paragraphs, the whistleblower¹
11 merely corroborates plaintiffs’ allegations in this case by describing how defendants are
12 misappropriating plaintiffs’ proprietary data, confidential information and trade secrets. He
13 describes how Zillow is “illegally using” plaintiffs’ data and “stealing” from plaintiffs’ business
14 partners, and he identifies those involved. It is absurd for defendants to rush into this Court
15 (giving plaintiffs less than the statutory minimum amount of time to respond) under the auspices
16 of an “emergency” because the public may learn about the means defendants have used to steal
17 plaintiffs’ and their clients’ proprietary information. These may be Zillow’s dirty secrets, but
18 they are not trade secrets.

19 Defendants also failed to identify the supposed trade secrets in the whistleblower letter
20 with any specificity before running into Court, and they have failed to do so in their motion as
21 they are required to do under Washington state law. If anything, defendants have fatally
22 undermined their own “trade secrets” claim by repeatedly conceding the whistleblower letter is
23 “riddled with inaccuracies” and refusing to identify which sentences of the letter are true, and
24 which are false. If most of the statements in the whistleblower letter are false, then, by
25 definition, they are not trade secrets. At the very least, defendants have failed to demonstrate

¹ For simplicity, the whistleblower will be referred to as “he”.

1 (and cannot demonstrate) the least restrictive means for sealing the whistleblower letter, as they
2 are also required to do because there is *nothing* in the whistleblower letter that should be
3 concealed from the public.

4 Additionally, as Zillow concedes, this lawsuit and the whistleblower letter are matters of
5 great public interest and have already been reported by the news media. Sealing the
6 whistleblower letter from the news media and the public would interfere with unfettered news
7 reporting about this case and would also undermine the public interest in encouraging more
8 whistleblowers to come forward. Respectfully, defendants come nowhere close to meeting their
9 heavy burden for sealing these important public records, and their motion should be denied.

9 **II. Relief Requested**

10 Because defendants have not met their burden for sealing large portions of the
11 whistleblower letter, and because the public interest strongly weighs against sealing it,
12 defendants' motion should be denied. As set forth below, plaintiffs do not object to sealing the
13 phone number and email address of Jessica Manni, one of the witnesses identified in the letter,
14 even though the Court Rules do not require these redactions.

14 **III. Background**

15 **A. Defendants Have Been Caught Destroying Evidence Before**

16 Plaintiffs National Association of Realtors and Move, Inc. operate the realtor.com real
17 estate website. Plaintiffs are suing their biggest competitor, Zillow, Inc. and two former Move
18 executives that Zillow poached in 2014 for misappropriation of trade secrets, tortious
19 interference and breach of fiduciary duty, among other things. On June 30, 2014, the Court
20 issued a preliminary injunction against defendants finding, among other things, that defendant
21 Errol Samuelson misappropriated plaintiffs' trade secrets. The Court also drew negative
22 inferences against defendants because Samuelson took steps to destroy evidence from his
23 computers. On February 11, 2015, Judge Chun issued an Order To Show Cause Re Contempt

1 For Defendants' Violation of The Preliminary Injunction. The contempt proceedings were
2 subsequently settled out of court.

3 In short, this is not an ordinary case with ordinary defendants. The Court has already
4 concluded they destroyed evidence. Experts have confirmed they destroyed evidence. Electronic
5 devices, such Samuelson's self-described "secret" burner cell phone, are still missing. And
6 plaintiffs have complained for months that defendants are systematically hiding evidence in
7 secret non-Zillow email accounts and file-sharing services. Defendants have denied the claims,
8 deriding them as "silly" conspiracy theories and claimed they have produced their documents,
9 even from non-Zillow emails and file sharing services.

9 **B. A Whistleblower Has Revealed That Defendants Continue To Hide Evidence**
10 **And Misappropriate Trade Secrets**

11 Last Thursday, however, an anonymous letter was received by the plaintiffs'
12 counsel. Zillow now confirms the letter is authentic and was written by a former Zillow
13 employee. The two-page whistleblower letter corroborates plaintiffs' allegations in this case and
14 provides more details about defendants' misappropriation and other unlawful conduct. The letter
15 also confirms that defendants have stolen multiple documents and entire databases, are using the
16 stolen information, and are hiding evidence on non-Zillow electronic services. The plaintiffs'
17 worst fears appear to be true. The whistleblower identifies specific individuals, specific
18 documents, and specific locations to search for evidence of defendants' unlawful conduct.

17 **C. Because The Whistleblower Letter Is Relevant To Pending Motions,**
18 **Plaintiffs Promptly Shared It With The Court And Opposing Counsel**

19 On Friday, April 10, 2015, plaintiffs brought a motion with the Special Master seeking an
20 emergency preservation order. Plaintiffs argued that, based on their history of evidence
21 destruction in this matter, defendants are likely to immediately destroy evidence when they learn
22 it has been compromised. The Special Master granted plaintiffs' request and issued a
23 preservation order. The Special Master also proposed a hearing regarding the whistleblower

1 letter, but defendants refused. At the time, defendants did not claim the whistleblower letter was
2 confidential. Declaration of Brent Caslin (“Caslin Decl.”), ¶ 3, Ex. 1.

3 Also on Friday, April 10, at 10:00 a.m., plaintiffs submitted the whistleblower letter to
4 this Court as further evidence of defendants’ ongoing misappropriation and related cover-up.
5 This new evidence is relevant to two pending motions regarding the scope of third-party
6 document subpoenas. A courtesy copy of the supplemental filing and the whistleblower letter
(Dkt. Nos. 536 and 537) are being provided to the Court along with this opposition brief.

7 **D. Since Friday, Zillow Has Been Refusing To Identify The Alleged Trade**
8 **Secrets In The Whistleblower Letter Because There Are None**

9 More than four hours after Plaintiffs filed the whistleblower letter, Zillow claimed for the
10 first time that it supposedly contained proprietary information but, inconsistently, was also filled
11 with inaccuracies. Zillow insisted that plaintiffs agree to seal the last three paragraphs of the
12 whistleblower letter (nearly half of its contents), even though those paragraphs contain nothing
13 more than a description of how “Zillow illegally uses” the data from plaintiffs’ website and how
14 defendants “also illegally access” real estate listing data “stolen from agent websites.” *See*
15 Caslin Decl., Exs. 2 & 3. These are serious claims about Zillow’s unlawful misappropriation of
16 plaintiffs’ and their clients’ proprietary data. As discussed below, the whistleblower’s
17 revelations may be embarrassing now that Zillow has been caught, but they are *not* trade secrets.

18 Over the past few days, plaintiffs have asked defendants to specify which portions of the
19 last three paragraphs constitute protectable trade secrets or proprietary information, and which
20 portions are supposedly inaccurate (and thus, not protectable). Caslin Decl., Exs. 2 & 3.
21 Defendants *refused* to provide any more specificity than the blanket assertion that the last three
22 paragraphs contain “proprietary information.” *Id.* Plaintiffs repeated their request for proposed,
23 specific redactions, but defendants could not come up with any. *Id.*

1 **IV. Defendants Do Not Even Come Close To Meeting The Standard For Sealing Court**
2 **Filings About Matters of Public Interest**

3 The Washington Supreme Court applies a five-factor test for sealing records. *Seattle*
4 *Times Co. v. Ishikawa*, 97 Wn.2d 30 (1982); *Rufer v. Abbott Labs*, 154 Wn.2d 530, 549-550
5 (2005). **First**, the moving party “must make some showing of the need therefor” and must “state
6 the interests or rights which give rise to that need as specifically as possible without endangering
7 those interests.” *Rufer*, 154 Wn.2d at 549-550. “The burden of persuading the court that access
8 must be restricted to prevent a serious and imminent threat to an important interest shall be on
9 the proponent” *Id.*

10 **Second**, the moving party must state “the grounds for the motion with reasonable
11 specificity” to provide “potential objectors” with “sufficient information to be able to appreciate
12 the damages which would result from free access to the proceeding and/or records.” *Id.*

13 **Third**, the requested sealing should be “the least restrictive means available.” *Id.*

14 **Fourth**, “The court must weigh the competing interests of the defendant and the public
15 and consider the alternative methods suggested” and its findings “should be as specific as
16 possible rather than conclusory.” *Id.* (citations and internal quotation marks omitted).

17 **Fifth**, a sealing order “must be no broader in its application or duration than necessary to
18 serve its purpose.” *Id.* at 39 (citations and internal quotation marks omitted).

19 All of these factors weigh heavily against sealing any portion of the whistleblower letter.
20 Defendants have not identified any specific information in the whistleblower letter that is a trade
21 secret or legitimate proprietary information, nor have they identified with any specificity how
22 they will be harmed by the letter’s disclosure other than the truth coming out about their
23 misconduct. Defendants rely solely on the barebones declaration of Erin Coningsby which
conclusorily states, without any support or details, that the information in the last three
paragraphs of the whistleblower letter is a trade secret. Ms. Coningsby does nothing more than
repeat that the whistleblower letter contains “many inaccuracies” but, at the same time,

1 “discusses various proprietary systems and business information of Zillow that are highly
2 sensitive and trade secret information of Zillow.” *See* Coningsby Decl. ¶ 2. She fails to identify
3 any particular trade secret, or offer any concrete explanation of why anything in the last three
4 paragraphs of the whistleblower letter needs to be filed under seal. Much of her declaration is
5 not even based on personal knowledge, but simply her “inform[ation] and belie[f].” *Id.* ¶ 4. She
6 provides no explanation whatsoever how the disclosure of the whistleblower letter will harm
7 Zillow competitively other than the fact that the world will know that Zillow is engaged in unfair
8 competition. Indeed, the only conceivable harm to Zillow is that would be stopped from
engaging in unlawful conduct. That is no harm at all.

9 Ms. Coningsby’s declaration completely ignores what the letter actually says. The last
10 three paragraphs of the whistleblower letter describe how defendants have been unlawfully
11 accessing and “scraping” plaintiffs’ website for customer lists and other data, which is a
12 violation of plaintiffs’ website terms of use. Dkt. No. 536; Caslin Decl., Ex. 5. They also
13 describe how defendants have been stealing data from MLSs and brokers and their methods for
14 covering their tracks “so it can’t be traced,” and which Zillow employees are involved in
15 defendants’ misconduct. *Id.* The manner in which Zillow has been unfairly competing with
16 plaintiffs, and evidence that corroborates plaintiffs’ allegations, cannot possibly be treated as
17 some sort of “trade secret” any more than a burglar’s methods for picking a lock. In short, the
only thing defendants seek to hide from the public’s view is *how* they have been violating the
rights of plaintiffs’ and their business partners.

18 Defendants have not even attempted to propose narrow redactions that are less restrictive
19 than sealing the entire three paragraphs at issue. Caslin Decl., Exs. 2 & 3. That is because a
20 careful reading of the last three paragraphs at issue contain *no trade secrets at all* but merely
21 describe the steps defendants have taken to unfairly compete with plaintiffs and misappropriate
22 plaintiffs’ proprietary data. Also, defendants claim that the whistleblower letter is “riddled with
23 inaccuracies” but they refuse to say what those are. Mot. at 6, 2 (claiming the whistleblower

1 letter has “many inaccuracies”); Caslin Decl., Exs. 2 & 3. Defendants specifically assert that the
2 supposedly confidential details of Zillow’s business “strategies” are “inaccurately stated in the
3 letter.” Mot. at 6, 2. They claim the last paragraph contains information about Zillow’s strategy
4 to compete with Move, but “it is not fully accurate.”² If the supposed business information
5 described in the letter is not even true, how can it possibly be a trade secret? Rather than
6 specifically identifying any trade secrets contained in the letter, defendants have done the
7 opposite: they have confirmed that the whistleblower letter contains no trade secrets at all.

8 Finally, it is undisputed that this lawsuit, and the whistleblower letter in particular, are
9 matters of important public interest. Motion 3, n.1 (discussing the “publicity surrounding this
10 lawsuit” and how “Media sources have already reported on” the whistleblower letter). Zillow’s
11 own Chief Executive Officer has been litigating this case in the press and criticizing the merits of
12 plaintiffs’ claims during news interviews, calling the allegations hogwash and Move a “crappy
13 company.” Caslin Decl., Ex. 4. But now that new evidence has come to light, Zillow wants to
14 block the news media’s and the public’s access to the full story, and muzzle plaintiffs’ – or any
15 other witnesses’ – ability to expose Zillow’s wrongdoing. As such, Zillow’s request to seal the
16 whistleblower letter raises serious First Amendment concerns and should be denied on that basis
17 alone.

18 Additionally, Zillow claims the whistleblower is a “terminated employee.” Mot. at 1. By
19 seeking a sealing order, and arguing that the whistleblower did something wrong here, Zillow is
20 using these proceedings to intimidate the whistleblower from disclosing more of Zillow’s
21 wrongdoing and to discourage other whistleblowers from coming forward. But the corroborating
22 statements of whistleblowers are a vital part of the search for truth in these proceedings, and
23 those statements are *absolutely privileged* and immune from threats of prosecution. *Deatherage*

² The last paragraph merely identifies witnesses with knowledge of how Zillow unlawfully tried to circumvent Move’s ListHub syndication service which is also part of plaintiffs’ misappropriation claim in the Second Amended Complaint. Dkt. No. 536 (whistleblower letter); Second Amended Complaint, filed 3/16/15, ¶¶ 2.41-2.44.

1 v. *State Examining Bd. Of Psychology*, 134 Wn.2d 13, 135 (1997), citing Restatement (Second)
2 of Torts § 588 (1977); *see also, Demopolis v. Peoples Nat'l Bank of Wash.*, 59 Wn. App. 105,
3 109 (1990).

4 If anything, the public interest is best served by *encouraging* more whistleblowers to
5 come forward, not discouraging them. Keeping the whistleblower letter open for the public to
6 see may encourage other current or former Zillow employees to come forward and further
7 expose Zillow's misconduct.

8 **V. Although Not Required, Plaintiffs Do Not Object To Redacting One Witness's**
9 **Phone Number And Email Address Contained In The Whistleblower Letter**

10 Under this Court's rules, the *only* personally identifiable information that must be
11 redacted in court filings are social security numbers, financial account numbers, and drivers'
12 license numbers. GR 31(e)(1). As a matter of law, plaintiffs were under no obligation to redact
13 the phone number and email address of the former Zillow employee (Jessica Manni) identified in
14 the letter (and doing so without a court order would arguably have been improper). In any event,
15 even though the individual at issue has not objected and is not before the Court, plaintiffs have
16 no objection to sealing those two pieces of information and will stipulate to do so.

17 **VI. Conclusion**

18 Because defendants do not meet their heavy burden for sealing large portions of the
19 whistleblower letter, and because the public interest strongly weighs against sealing it,
20 defendants' motion should be denied.

21 DATED April 13, 2015, at Seattle, Washington.

22 s/Brent Caslin
Brent Caslin, WSBA No. 36145

23 Rick Stone (*pro hac vice*)
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1 CERTIFICATE OF SERVICE

2 I hereby certify that on April 13, 2015, I electronically filed the foregoing with the Clerk
3 of the Court using the Court's CM/ECF System which will send notification of such filing to the
4 following individuals registered to receive electronic notices by email transmission at the email
5 addresses provided thereto.

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13 I further certify that I served a copy of the foregoing to the following non-registered
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on April 13, 2015.

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