

KING COUNTY
 The Honorable Sean C. Donnell
 Superior Court Clerk
 Noted for Consideration: June 8, 2015
 CASE NUMBER: 14-2-07669-0 SEA
 ORAL ARGUMENT REQUESTED

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' RENEWED MOTION TO
 UNSEAL THE WHISTLEBLOWER
 LETTER**

CONTAINS OCEO INFORMATION

REDACTED

1 RELIEF REQUESTED

2 The six sentences of the Whistleblower Letter sealed by court order on May 12,
3 2015 must be unsealed. New evidence reveals that [REDACTED]

4 [REDACTED] The Court sealed the six sentences because Zillow claimed they
5 disclosed Zillow's proprietary, trade-secret programs. Sealing was necessary, Zillow
6 argued, to protect its proprietary interest in its secret programs and prevent its
7 competitors from copying them. Then, with the sealing order safely in hand, [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 With the rationale for the sealing order now revealed to have been a sham, there
14 is no basis for keeping the Letter under seal.² Zillow cannot fall back on the Protective
15 Order to keep the sealing order in place. Zillow never had any right to designate the
16 Letter as confidential under the Protective Order. The Protective Order, by its plain
17 terms, does not cover documents obtained outside the discovery process. Nor could it,
18 since Protective Orders that purport to restrict litigants' rights to discuss and
19 disseminate information obtained outside the court's discovery processes violate the
20 First Amendment. In any event, [REDACTED]

21 [REDACTED]. Although we do not believe the Protective
22 [REDACTED]

23 ¹ Declaration of Amy Gallegos ("Gallegos Decl."), Ex. 1.

² To the extent Zillow contends the sealing order cannot be revisited, it is incorrect. *See* CR 54(b) (a court order other than a final judgment "is subject to revision at any time before the entry of judgment").

1 Order does apply or should ever have applied, to the extent the Court deems Zillow's
2 initial designation of the Letter as sufficient to bring it within the Protective Order,
3 Plaintiffs respectfully request that the Court de-designate the Letter pursuant to
4 Paragraph 18 of the Protective Order. Fundamental fairness requires this result – [REDACTED]

5 [REDACTED]
6 [REDACTED]. Allowing the Letter
7 to remain sealed at this point would reward Zillow's gamesmanship.

8 STATEMENT OF FACTS

9 A. Defendants' Theft Of Plaintiffs' Trade Secrets And Destruction Of Evidence.

10 This lawsuit – dubbed by the media as a “battle between online listings giants”³ –
11 involves allegations that former Move executives Samuelson and Beardsley disclosed
12 large amounts of Move's confidential and trade secret information to Move's largest
13 competitor, Zillow, in exchange for millions of dollars in compensation. In June 2014,
14 the Court found that Plaintiffs were likely to succeed on their claims, and issued a
15 Preliminary Injunction barring Defendants from any further misappropriation of
16 Plaintiffs' trade secrets. PI Order, ¶¶ 1-10. The Court made specific findings that
17 Samuelson stole data from Move and destroyed evidence to cover his tracks. PI FOF
18 ¶¶ 16-17, 20-21, 23. On February 11, 2015, Judge Chun issued an OSC re contempt
19 against Defendants. 2/11/15 OSC.⁴ Both the trade press and mainstream media
20 (including CNBC and The Seattle Times) have reported on this case.⁵ Zillow has been
21 aggressively litigating this case in the press, telling reporters that Plaintiffs' allegations
22 are “hogwash” and calling Move a “crappy company.”⁶

23 ³ Gallegos Decl., Ex. 2.

⁴ The contempt matter was subsequently settled.

⁵ See, e.g., Gallegos Decl., Ex. 3.

⁶ Gallegos Decl., Ex. 4.

1 **B. A Whistleblower Came Forward.**

2 On April 10, 2015, Plaintiffs' counsel received an anonymous letter from a
3 whistleblower concerned about illegal activity he had witnessed at Zillow. Gallegos
4 Decl., Ex. 5. The Letter confirmed that Samuelson and Beardsley stole trade-secret data
5 from Move, and it directed Plaintiffs' counsel to additional evidence that Defendants
6 had hidden. *Id.* [REDACTED]

7 [REDACTED]
8 [REDACTED]. *Id.*
9 Stealing data and scraping data from websites without authorization is illegal.⁷ [REDACTED]

10 [REDACTED]
11 [REDACTED]. PI
12 Order ¶ 6(k) (enjoining "efforts to circumvent ListHub").⁸ Several print and online news
13 outlets reported on the whistleblower's allegations, and a copy of the Letter was posted
14 on Geekwire.com, where it remains to this day.⁹

15 **C. Zillow Obtained An Emergency Sealing Order By Persuading This Court That**
16 **The Letter Disclosed Its Trade Secrets.**

17 Plaintiffs submitted the Letter to the Court in support of its motion to revise a
18 ruling by the Special Master limiting third-party discovery, to illustrate that third-party
19 discovery was needed because Defendants were hiding evidence. Zillow panicked. It
20 raced into court and demanded that the last three paragraphs of the Letter, which
21 described its illegal conduct, be immediately sealed. In support of its motion, Zillow
22 [REDACTED]

23 ⁷ See *Craigslist Inc. v. 3Taps, Inc.*, 964 F. Supp. 2d 1178, 1181-84 (N.D. Cal. 2013) (scraping data from
website after access has been revoked violates the federal Computer Fraud and Abuse Act); *eBay, Inc. v.*
Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1069-71 (N.D. Cal. 2000) (unauthorized website scraping is a tort).

⁸ [REDACTED]
⁹ See, e.g., Gallegos Decl., Ex. 2; see also <http://www.geekwire.com/2015/anonymous-letter-filed-in-trade-secrets-case-accuses-zillow-execs-of-illegal-conduct/>, last visited May 29, 2015.

1 argued that these activities – [REDACTED] – were its
2 “proprietary systems” and “strategies . . . to ensure quality listings on its website.”
3 Zillow Mot. to Seal at 2. And it told the Court that public disclosure of this information
4 “will cause significant competitive harm to Zillow.” *Id.*

5 This Court, sitting in for Judge Chun, rejected most of Zillow’s arguments.
6 However, it did seal seven sentences, concluding that they revealed Zillow’s
7 proprietary information. Specifically, the Court held that [REDACTED]
8 [REDACTED] “reveal Zillow’s confidential strategies to ensure
9 quality listing data on its website.” 4/14/15 Order, p. 2. And it held that [REDACTED]
10 [REDACTED]
11 “contain[] information about Zillow’s strategy to compete with Move, Inc.” *Id.*

12 **D. Judge Chun Affirmed The Emergency Order.**

13 This Court’s emergency order stated that the parties could re-raise the sealing
14 issues with Judge Chun, which both parties did.¹⁰ In a declaration filed in support of
15 Plaintiffs’ motion to unseal the letter, Chris Crocker, a former Zillow Vice President,
16 revealed himself to be the whistleblower, confirmed the veracity of the Letter, and
17 explained that he sent it anonymously because he feared retaliation by Zillow. 4/20/15
18 Crocker Declaration, pp. 2-3. Zillow, for its part, [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED] Zillow Opp. to Mot. to Unseal, pp. 1, 7-8; 4/24/15 Bietel Decl., ¶ 7.

22 On May 12, Judge Chun issued an order partially granting and partially denying
23 both motions. In the order, Judge Chun unsealed one sentence because the information
in it regarding Zillow’s use of Tableau software – [REDACTED]

¹⁰ See Plaintiffs’ Mot. to Unseal, filed 4/20/15, and Zillow’s Opp. and Cross-Mot., filed 4/24/15.

1 [REDACTED]¹¹– was actually publicly available
2 on the Internet. Order Re: Crocker Letter, pp. 1-2; *see also* Singer Declaration in Support
3 of Mot. to Unseal, Ex. 21. Other than that single revision, Judge Chun held that the
4 emergency order issued by this Court “remains in effect.” *Id.*, p. 1. At Zillow’s request,
5 Judge Chun also ordered Plaintiffs to “treat the redacted material [i.e., the six sealed
6 sentences] as confidential under the protective order.” *Id.*, p. 2.

7 **E. The Special Master Ordered Plaintiffs To Claw Back The Letter.**

8 Zillow sent Judge Chun’s ruling to the Special Master and argued that it proved
9 Plaintiffs had disclosed Zillow’s trade secrets and violated the Protective Order. In
10 reliance on Judge Chun’s order, the Special Master ordered Plaintiffs to take certain
11 steps to prevent further dissemination of the Letter by any third parties, including,
12 necessarily, news organizations who had reported on the Letter. 4/19/15 Special
13 Master Revised Order. Specifically, the Special Master’s order compels Plaintiffs to
14 inform anyone who received the Letter that the six sentences had been “adjudicated to
15 be confidential,” and to “take all reasonable steps to obtain the return or removal of
16 such information from said recipients.” *Id.* at p. 2.

17 **F. Sealing Order In Hand,** [REDACTED]
18 [REDACTED] -

19 By representing that the Letter disclosed its trade secrets, Zillow obtained orders
20 from two courts shielding the Letter from public view and barring Plaintiffs from
21 speaking about it. Then, with those orders safely in hand, [REDACTED]
22 [REDACTED]
23 [REDACTED]

[REDACTED]. *See* Gallegos Decl., Ex. 1.

¹¹ Gallegos Decl., Ex. 6 at 12:12-13:15.

1 [REDACTED]

2 [REDACTED]. *E.g., id.* at ¶¶ 17-21.

3 **ARGUMENT AND AUTHORITIES**

4 **A. The Letter Does Not Disclose Zillow’s Trade-Secret Information.**

5 Establishing the Letter discloses trade secrets was, and is, Zillow’s burden.
6 *Spokane Research & Def. Fund v. City of Spokane*, 96 Wash. App. 568, 577 (1999). [REDACTED]

7 [REDACTED]. Zillow therefore has no right to hide the Letter from public view. *See*
8 RCW 19.108.010(4). Zillow will likely contend that the sealed sentences qualify for
9 trade-secret protection because [REDACTED]

10 [REDACTED] That does not help Zillow. *See U.S. Gypsum Co. v. Lafarge N. Am., Inc.*,
11 508 F. Supp. 2d 601, 647 (N.D. Ill. 2007) (no liability for misappropriating trade secrets
12 where the information disclosed was inaccurate).

13 The Court is required to make specific findings to support sealing any part of
14 the letter. *See* GR 15(c)(2). To assist the Court, we detail below [REDACTED]

15 **Sentence 1:** [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED] *See* RCW 19.108.010(4). [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

██████████ Judge Chun has already held that Zillow’s use of Tableau software

to create listing quality reports is not a trade secret. 5/12/15 Order at 1:21-2:4. [REDACTED]

Alderson v. United States, 719 F. Supp. 2d 1186 (C.D. Cal. 2010).

. *Alderson v. United States*, 718 F. Supp. 2d 1186 (C.D. Cal. 2010),

Goodman v. Genworth Fin. Wealth Mgmt., 881 F. Supp. 2d 347, 355 (E.D.N.Y. 2012).

[REDACTED]

[REDACTED] See RCW 19.108.010(4).

Sentences 4-6:

[REDACTED]

[REDACTED]. See RCW 19.108.010. [REDACTED]

B. The Letter's "Confidential" And "OCEO" Designations Must Be Removed.

Zillow will likely contend that its designation of the Letter as OCEO mandates that the Letter be filed under seal. But this is incorrect. The Protective Order only applies to material produced in discovery in this lawsuit. See Protective Order, ¶ 1. The Whistleblower Letter was not produced in discovery. It was mailed to Plaintiffs'

1 counsel by a third party, independent of this Court's discovery procedures. Because
2 Zillow did not produce the letter, it is not the "disclosing party" for the purposes of the
3 Protective Order, and it did not have the right to designate the letter Confidential or
4 OCEO. *See* PO, ¶ 1. If the Protective Order applied to materials obtained outside
5 discovery, then it would violate the First Amendment of the Washington and U.S.
6 Constitutions. *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 944-45 (2d Cir.
7 1983) (issuing writ of mandamus reversing, on First Amendment grounds, protective
8 order that barred a party from disseminating allegedly trade-secret information
9 obtained outside of discovery); *see also Seattle Times v. Rhinehart*, 467 U.S. 20, 37 (1984)
10 (when "a protective order is entered on a showing of good cause as required by Rule
11 26(c), is limited to the content of pretrial discovery, and does not restrict the dissemination of the
information if gained from other sources, it does not offend the First Amendment.")
(emphasis added).¹⁴

12 In any event, [REDACTED] renders the First-Amendment
13 question irrelevant. Even if Zillow did initially have some right to designate the sealed
14 sentences confidential under the Protective Order, the sentences must be de-designated
15 now. [REDACTED]

16 [REDACTED].
17 Thus, nothing in the sealed sentences qualifies for protection under the Protective
18 Order. *See* PO ¶ 3 (only trade secrets, information protected by an NDA, and
19 information protected from disclosure by law or by court order can be designated
20 confidential). The Protective Order allows the Court to resolve disputes about the
21 designation of materials. *Id.*, ¶ 18. In light of Zillow's admissions, Plaintiffs respectfully
22 request that the six sentences be de-designated completely and, once de-designated, the
sealing order should be reconsidered and vacated.

23 ¹⁴ *See also* Pltf. Mot. to Revise 5/19/15 Special Master Order (and authorities cited therein).

1 **C. There Is No Basis To Keep The Letter Sealed.**

2 Courts are presumptively open. *Rufer v. Abbott Labs.*, 154 Wash. 2d 530, 543
3 (2005) (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558–59, 569–70 (1976)). Thus,
4 court records may only be sealed “if the court makes and enters written findings that
5 the specific sealing or redaction is justified by compelling privacy or safety concerns
6 that outweigh the public interest in access to the court record.” GR 15(c)(2); *see also*
7 *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 37–39 (1982). The party who desires to have
8 information sealed – here, Zillow – has the burden of justifying the infringement of the
9 public’s right of access. *Rufer*, 154 Wash. 2d at 543.

10 The Court sealed the six sentences because Zillow strenuously argued they
11 disclosed Zillow’s proprietary trade-secret information. [REDACTED].
12 There is no longer any plausible justification for keeping any part of the Letter under
13 seal. Protecting Zillow from embarrassing allegations is not an interest that justifies
14 sealing a court record. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir.
15 2006) (court records cannot be sealed just because they might embarrass a party or
16 subject it to further litigation); *Kronenberg v. Katz*, 872 A.2d 568, 609 (Del. Ch. 2004)
17 (“The mere fact that a defendant in a business case is accused of wrongdoing and that
18 he would prefer for the public not to know about those accusations does not justify the
19 sealing of the complaint; otherwise, most of this court’s docket would be under seal.”).

20 With the threshold requirement of a “compelling interest” unmet, no part of
21 Washington’s five-part test for sealing a court record can be satisfied. Zillow has no
22 legally-recognized interest in sealing the record. *See Rufer*, 154 Wash. 2d at 543, n.3.
23 Zillow cannot state “the grounds for the motion with reasonable specificity” to provide
“potential objectors” with “sufficient information to be able to appreciate the damages
which would result from free access to the proceeding and/or records.” *Id.* The sealing

1 ordered by Judge Chun is not “the least restrictive means available,” because there is no
2 valid reason to seal any part of the Letter. *Id.*

3 Finally, since Zillow has no valid interest in keeping the Letter sealed, its interest
4 in non-disclosure cannot outweigh the public interest in the Letter. *See Rufer*, 154 Wash
5 2d at 543, n.3. The Letter alleges that [REDACTED]

6 [REDACTED]. Revealing
7 this information will notify Zillow’s victims of its misconduct and allow them to take
8 steps to protect their interests. Moreover, the fact that this lawsuit has been followed by
9 the press – some of whom have moved to intervene in this case – illustrates the public
10 interest in these proceedings. *See Gallegos Decl.*, Exs. 2-4, 11-13.

11 Moreover, the Letter also provides valuable evidence in this case, such as the
12 names of witnesses and locations of hidden evidence. The whistleblower was right to
13 come forward. Yet ever since this Court held that the Letter disclosed trade secrets,
14 Zillow has been harassing him and threatening to sue him for revealing Zillow’s
15 purported trade secrets. *See Gallegos Decl.*, Exs 8-10. These are not idle threats – Zillow
16 is already attempting to use the existing orders relating to the Letter as a predicate to
17 countersue Plaintiffs. Allowing the sealing order to stand [REDACTED]
18 [REDACTED] would violate Washington’s strong public-
19 policy of protecting whistleblowers from retaliation. *See Shaw v. Hous. Auth. of City of*
20 *Walla Walla*, 75 Wash. App. 755, 761-62 (1994) (retaliating against whistleblowers
21 “contravenes a clear mandate of public policy”).

22 **E. The Sealing Order And Special Master’s Order Are Unconstitutional**
23 **Prior Restraints On The Press.**

A court order that seeks to prevent the publication of information already in the
possession of a person or media organization is a prior restraint. *Alexander v. United*

1 *States*, 509 U.S. 544, 550 (1993). Although the Sealing Order does not expressly direct the
2 media to cease publication or return the Whistleblower Letter, it was the catalyst for the
3 Special Master’s 5/19/15 Revised Order which accomplished that result by enlisting
4 Plaintiffs, under threat of contempt, as instrumentalities in imposing a restraint on
5 further publication of the Letter. Indeed, at least one publication has already censored
6 its prior news story on the Whistleblower’s allegations. *See* Gallegos Decl., Exs. 14, 15.

7 Article I, Section 5 of the Washington Constitution “categorically rules out prior
8 restraints on constitutionally protected speech under any circumstances.” *Voters Educ.*
9 *Committee v. Washington State Public Disclosure Commission*, 161 Wash. 2d 470, 493-94
10 (2007); *see also State v. Coe*, 101 Wash. 2d 364, 375 (1984). Prior restraints also violate the
11 U.S. Constitution. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). Demanding
12 that members of the media return documents that they lawfully obtained cannot be
13 used as a device to prevent further dissemination. *See, e.g., FMC Corp. v. Capital*
14 *Cities/ABC*, 915 F.2d 300, 301 (7th Cir. 1990). Prior restraints violate the First
15 Amendment even if they are issued in connection with business litigation between
16 private parties. *See, e.g., Bernard v. Gulf Oil Co.*, 619 F.2d 459, 473 (5th Cir. 1980).

17 Prior restraints may be justified, if at all, only in the most exceptional
18 circumstances, such as to limit dissemination of information about troop movements in
19 wartime. *Near v. Minnesota*, 283 U.S. 697, 716 (1931). Zillow’s desire to keep allegations
20 about its unlawful conduct out of public view is insufficient to overcome the heavy
21 presumption against prior restraints. *See, e.g., Procter & Gamble v. Bankers Trust Co.*, 78
22 F.3d 219, 225 (6th Cir. 1996) (reversing prior restraint against news magazine’s
23 publication of a party’s internal business records filed under seal; “private litigants’
interest in protecting their vanity or their commercial self-interest simply does not
qualify as grounds for imposing a prior restraint”).

The Whistleblower Letter should be unsealed in its entirety.

1 s/ Amy Gallegos

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2015, I electronically filed the foregoing with the Clerk of the Court using the Court's CM/ECF System which will send notification of such filing to the following individuals registered to receive electronic notices by email transmission at the email addresses provided thereto.

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I further certify that I served a copy of the foregoing to the following non-registered CM/ECF attorneys via electronic mail:

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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 May 29, 2015.

s/Katy Albritton

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