

FILED
KING COUNTY, WASHINGTON

MAY 21 2015

KNT
SUPERIOR COURT CLERK

THE HONORABLE SEAN O'DONNELL
Noted For Consideration: June 1, 2015
Oral Argument Requested

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,
CURT BEARDSLEY, an individual, and
DOES 1-20,

Defendants.

No. 14-2-07669-0 SEA

DEFENDANT ZILLOW'S MOTION FOR
LEAVE TO FILE AMENDED ANSWER
AND COUNTERCLAIMS TO
PLAINTIFFS' SECOND AMENDED
COMPLAINT

PUBLIC REDACTED VERSION

DEFENDANT ZILLOW'S MOTION FOR LEAVE TO FILE
AMENDED ANSWER AND COUNTERCLAIMS

56920-0025/LEGAL126151349.1

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I. RELIEF REQUESTED

On April 9, 2015 Plaintiffs' counsel received a document in the mail labeled a "treasure map" (the "Letter"). The Letter contains false allegations of misconduct against Zillow and reveals information about "secret" Zillow programs. At the time, Plaintiffs acknowledged that the Letter must have come from a current or former employee of Zillow. In fact, the Letter was authored by Chris Crocker, who was a Zillow employee who had been relieved of his job duties and placed on administrative leave. Plaintiffs had previously been advised, when they sought to interview Mr. Crocker, that Mr. Crocker had confidentiality obligations to Zillow.

Despite the foregoing, Move simply could not resist yet another opportunity to besmirch Zillow's name and obtain an unfair competitive advantage. Within hours of its receipt, and without any regard to the truth or falsity of the allegations or the potential harm to Zillow, the Letter was given to Move, publicly filed in Court and then distributed to the public. Within a day of its receipt, the Letter was all over the internet where it remains today, and the related news articles have been seen tens of thousands of times. Further, Plaintiffs have resisted and refused every effort made by Zillow to protect its confidential information or to mitigate the harm from its improper disclosure—even after Zillow explicitly advised Move of the confidential nature of the information in the Letter and even after a judicial finding that the Letter contained trade secrets.

Plaintiffs' intentional misappropriation of Zillow's confidential, trade secret information stands in stark contrast to the circumstantial misappropriation case Move has brought against Zillow, which is supported almost exclusively by unsupported innuendo and speculation. Further, compared to the enormous lengths taken by Move in this litigation to protect any public dissemination of Move's information, Plaintiffs' complete and blatant

1 disregard for *Zillow's* confidential and trade secret information is astonishing. Likewise,
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3 Plaintiffs have acted with intentional disregard to the harm that would fall on Zillow by
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5 causing the Letter, with its many false and defamatory statements, to be published and
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7 republished, and then refusing to take any steps to minimize distribution or publication of the
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9 Letter, even after it had been notified of the confidential contents of the Letter and the
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11 Letter's inaccuracies. As Plaintiffs put this Letter, and its origins and veracity, firmly at issue
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13 in the case, and the same Letter gives rise to independent legal claims by Zillow, Zillow
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15 respectfully requests leave pursuant to Rules CR 15 and CR 13(e) to amend its answer to add
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17 affirmative defenses and assert counterclaims against Plaintiffs. For the sake of judicial
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19 efficiency, the amendment should be allowed.

20 21 II. FACTS

22 23 A. Background and Procedural History

24 As the Court knows, this is complex litigation between two of the largest competitors
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26 in the online real estate industry. Plaintiffs primarily contend that, as a result of hiring
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28 former Move employee Errol Samuelson, Zillow misappropriated Plaintiffs' trade secrets.
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30 The Court entered a detailed multi-layered protective order on January 21, 2015 to govern
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32 the confidential and trade secret information that would necessarily be involved in this case.
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34 Dkt. 328A. The protective order specifically provides that, in order to maintain
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36 confidentiality, parties could file documents under seal, which both sides have done
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38 repeatedly over the course of this case. *Id.* ¶ 17. All parties also have a duty to protect the
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40 other parties' trade secrets as well as the ability to designate their own information as
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42 confidential, even after disclosure of the information. *Id.* ¶¶ 2-4.

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44 Although the case had been pending for a year, Plaintiffs recently filed a Second
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46 Amended Complaint (on March 16, 2015), adding a new party (Curt Beardsley) and new
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1 claims against the previously-named defendants. Dkt. 499M. Zillow filed its Answer,
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3 Defenses and Affirmative Defenses to Plaintiffs' Second Amended Complaint on March 26,
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5 2015. Dkt. 518D.
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7 **B. Plaintiffs Publicly Disclosed an "Anonymous" Letter Sent to Them that**
8 **Revealed Confidential Zillow Information**
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10 On April 9, Plaintiffs' California counsel received an anonymous letter in the mail
11 (the "Letter") in their Los Angeles office. Dkt. 536. While the Letter contains false
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13 statements about Zillow, it also contains information about confidential business strategies of
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15 Zillow. Rather than investigate the veracity of the allegations, or appropriately protect
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17 Zillow's confidential information, Plaintiffs instead immediately publicly disclosed the Letter
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19 in its entirety.
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21 The first Zillow knew of the Letter was when Zillow's counsel received a copy of an
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23 Emergency Motion for a Preservation Order, presented to the Special Master, followed
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25 within minutes by a "supplemental" filing in Superior Court that included a copy of the entire
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27 Letter. Dkt. 536.¹ Next, before the Letter even appeared on the King County Superior
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29 Court's Electronic Court Records ("ECR") system, a copy of the entire filing, including the
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31 Letter, was available online. Gaston Decl. in Supp. of Zillow's Mot. for Leave to File Am.
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33 Answer and Countercls. ("Gaston Decl.") ¶ 2. Some of the news articles reporting on the
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35 Letter included comments from a spokesperson for Move. In its comments on the Letter,
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37 Move necessarily implied that Zillow had destroyed evidence. *Id.* ¶¶ 3-4, Ex. A. Defendants
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39 did not make the Letter public, nor was it available for download from the Court's ECR
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41 system. *Id.* ¶ 2. It is therefore reasonable to conclude that Plaintiffs distributed the Letter to
42
43 the public. To this day, Move's entire filing, including the Letter, is posted on several
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46 ¹ The Letter was filed as purported support for two pending motions, but was struck by the
47 Court because the information therein was not relevant to the pending motions. Dkt. 607A.

BEST IMAGE POSSIBLE

1 websites reporting on the litigation, garnering tens of thousands of “views” and Plaintiffs
2 have made no known effort to get it removed. Gaston Decl. ¶ 5.
3

4
5 Zillow immediately sought to protect its trade secrets. First, Zillow requested and
6 then demanded Plaintiffs stipulate to the filing of the Letter under seal. Plaintiffs refused.
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8 Dkt. 539, Ex. A. Zillow then moved to seal the confidential trade secret portion of the Letter
9 the next court day on an emergency basis. Dkt. 539D. Plaintiffs opposed the motion. Dkt.
10 538. Zillow also has demanded that Plaintiffs make an effort to retrieve the unredacted
11 Letter from their own organizations and from all other third parties to whom it was
12 distributed. Plaintiffs refused. Gaston Decl., Ex. B, p. 2; ¶ 6. Plaintiffs have fought every
13 effort Zillow has made to keep the trade secret information confidential and have gone so far
14 as to request this Court to unseal those portions of the Letter sealed by Judge O’Donnell as
15 trade secrets. Dkt. 606B. On May 19, 2015, Special Master Hilyer ordered that Plaintiffs
16 comply with the Second Amended Protective Order but despite Zillow’s efforts, the
17 unredacted Letter remains available on several websites, where it continues to cause damage
18 to Zillow. Gaston Decl. ¶¶ 5-6.
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30 C. The Letter Discloses Zillow’s Highly Confidential and Trade Secret Information

31 The proposed Amended Answer and Counterclaims, filed herewith, details the ways
32 in which the Letter discloses Zillow confidential, trade secret information. In particular, two
33 of the last three paragraphs, although containing inaccuracies, provide details about
34 confidential business strategies of Zillow, which enable it to better compete with Move and
35 others in the online real estate industry.
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- 42 • The Letter discusses Zillow’s efforts to maintain accurate listings on its
43 website. Listing data is dynamic and comes from hundreds of different
44 Multiple Listing Services (“MLSs”).
45 [REDACTED]
46 [REDACTED]
47 [REDACTED]

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[REDACTED]

• [REDACTED]

• [REDACTED]

All of these strategies are kept strictly confidential by Zillow and were known to only a tiny fraction of Zillow employees. Moreover, Zillow spent considerable resources developing and implementing these strategies. Plaintiffs' deliberate and calculated disclosure of the Letter was intended to and did in fact cause harm to Zillow by allowing Move and other competitors insight into Zillow's confidential strategies. Zillow's competitors would not have gained this knowledge absent Plaintiffs' decision to publicly disclose the Letter.

² For a discussion of the confidential and trade secret nature of the Letter, *see* Dkt. 539D; *see also* Revised Order Re: Crocker Letter, Dkt. 629.

1 **D. The Letter Also Contains False Statements About Zillow**

2 In addition to disclosing Zillow's confidential trade secrets, the Letter contains false
3 and disparaging statements about Zillow. As detailed in the proposed amended answer and
4 counterclaims, the Letter repeatedly accuses Zillow of acting illegally to obtain, use, and
5 benefit from "stolen" information, including confidential information stolen from Move.
6 These are serious allegations that have resulted in countless news articles, which have had
7 tens of thousands of views. Yet Plaintiffs published these false statements without pausing to
8 verify their accuracy and in complete and reckless disregard for the truth and for Zillow's
9 reputation. Zillow is damaged by the publication and republication of these false statements.
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18 As Move itself has recognized, the real estate industry is a relatively small, discrete
19 industry where one's reputation is everything. The harm to Zillow caused by Plaintiffs'
20 actions is real and immediate.
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24 **E. Plaintiffs Knew and Ignored the Fact That the Former Zillow Employee Who**
25 **Wrote the Letter Had Contractual Obligations Not to Disclose Zillow's**
26 **Confidential Information**
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28 Plaintiffs have stated that they knew the Letter came from a current and former
29 Zillow employee and, as such, they knew that it contained confidential information of Zillow.
30 Plaintiffs admitted they knew the Letter was likely written by a Zillow employee when they
31 filed the Letter in open court, stating that it "appears to have been written by a Zillow
32 employee." Dkt. 537. Plaintiffs are well aware that Zillow employees have both statutory
33 and contractual duties of confidentiality to Zillow. For example, during this litigation, they
34 have learned that many Zillow employees sign a Confidential Information, Inventions,
35 Nonsolicitation and Noncompetition Agreement, just like Move employees. Gaston Decl.,
36 ¶ 7. They also know that the Letter contained high-level inside information about Zillow's
37 strategy to compete with Move and others in the marketplace. Finally, Plaintiffs knew that
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1 former Zillow Vice President of Strategic Partnerships Chris Crocker (who acknowledged he
2 authored the Letter after Plaintiffs revealed his identity in an unsealed motion) was on paid
3 administrative leave when the letter was sent, and were aware that he had a duty of
4 confidentiality to Zillow. *See id.* ¶ 8. The timing of the anonymous Letter suggests it was
5 not fortuitous. Plaintiffs had asked Mr. Crocker whether he would discuss the case with
6 Move's attorney, Mr. Singer. Plaintiffs and Mr. Crocker were reminded by Zillow of Mr.
7 Crocker's confidentiality obligations. A few weeks later, an anonymous Letter simply shows
8 up at Mr. Singer's office.
9

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11 Plaintiffs' conduct has resulted in the disclosure of Zillow's trade secrets, the
12 dissemination of false, defamatory information about Zillow, and constitutes interference
13 with Zillow's confidentiality agreement with Mr. Crocker. Zillow therefore respectfully
14 seeks leave to amend its answer and assert counterclaims.
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III. ISSUE

Whether the Court should grant leave to Zillow to amend its answer, in a form substantially similar to that which is attached as Exhibit C?

IV. EVIDENCE RELIED UPON

This Motion is based on the proposed Amended Answer and Counterclaims, attached as Exhibit C to the Declaration of Mary P. Gaston, and the other records and files in this case.

V. LEGAL ARGUMENT

CR 13(e) specifically allows for an amendment like the one requested here: "[a] claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading." Courts have generally held that permission should be granted to add a counterclaim when it would

1 prevent multiple lawsuits and promote judicial efficiency. See 6 C. Wright, A. Miller & M.
2 Kane, *Fed. Prac. & Proc.* § 1428 (3d ed. 2013) (analyzing nearly-identical federal Rule
3 13(e), and noting that motions for leave to amend will “usually be granted in order to enable
4 the parties to litigate all the claims that they have against each other at one time thereby
5 avoiding multiple actions.”); see also *Cold Metal Prods. Co. v. Crucible Steel Co. of*
6 *America*, 126 F. Supp. 546, 551 (D.N.J. 1954) (“The purpose of [federal] Rule 13(e) is to
7 provide a means for complete litigation in one action of all claims ... and thus avoid a
8 multiplicity of actions.”). Similarly, CR 15(a) provides that leave to amend “shall be freely
9 given when justice so requires” in order to facilitate proper decisions on the merits, to
10 provide parties with adequate notice of the bases for claims and defenses asserted against
11 them, and to allow amendment of the pleadings except where amendment would result in
12 prejudice to the opposing party. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316
13 (1999).

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As Plaintiffs recently argued in moving to file a second amended complaint nearly a
year after filing their original complaint, “[a]s leave to amend is freely given, and
recognizing that the defendants will suffer no prejudice by the amendment, leave to amend
should be granted.” Dkt. 452 (citing CR 15(a)). Courts have recognized that amendments
should be liberally allowed to facilitate a decision on the merits by placing the “real issues”
before the court. *Pawling v. Goodwin (In re Pawling)*, 101 Wn.2d 392, 395, 679 P.2d 916
(1984). Pleadings may be amended under CR 15 at any stage of the litigation. See *Caruso*,
100 Wn.2d at 349 (granting leave to amend complaint five years and four months after it was
originally filed). Leave should therefore be granted unless the proposed amendment lacks
merit and would be futile, *Orwick v. Fox*, 65 Wn. App. 71, 89, 828 P.2d 12 (1992), or would
cause prejudice to the opposing party because of undue delay, unfair surprise or jury

1 confusion, *Wilson*, 137 Wn.2d at 505-06. Prejudice is the “touchstone” for denial of leave to
2 amend. *Id.* at 505; *Del Guzzi Constr. Co. v. Global Northwest, Ltd.*, 105 Wn.2d 878, 888,
3 719 P.2d 120 (1986). In the absence of prejudice, it is an abuse of discretion to deny leave to
4 amend. *Estate of Randmel v. Pounds*, 38 Wn. App. 401, 404, 685 P.2d 638 (1984).
5
6 “[W]here a new claim can be litigated with the same evidence that is already in the case, it
7 may be proper for a trial court to allow an amendment even when the motion to amend is
8 made shortly before trial.” *Karlberg v. Otten*, 167 Wn. App. 522, 529, 280 P.3d 1123
9 (2012).
10

11 Here, leave to amend the answer and to add affirmative defenses³ and counterclaims
12 that have only just matured due to the intentional and reckless actions of Plaintiffs should be
13 granted. The claims are meritorious and they involve the same evidence being used by Move
14 to litigate its claims and Zillow’s defenses. They also go to the heart of Zillow’s unclean
15 hands defense, as well as its request for attorneys’ fees under RCW 19.108.040. After
16 accusing Zillow of misappropriating its trade secrets, Plaintiffs deliberately disclosed the
17 confidential, trade secret information of Zillow, and intentionally interfered with its contract
18 with Mr. Crocker. Plaintiffs also never stopped to consider the truth or falsity of the
19 allegations in the Letter, but merely disclosed the Letter in reckless disregard of the truth.
20 Indeed, despite a court ruling finding certain information in the Letter to be protectable
21 confidential information of Zillow, Plaintiffs have refused to treat the information as
22 confidential and refused to cooperate to mitigate the damage they caused, ignoring requests
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41 ³ Zillow seeks to add two defenses to its answer: privilege and preemption. Both
42 amendments have merit and neither prejudice Plaintiffs, as neither would change existing document
43 discovery or the vast majority of depositions that have not yet begun, and Zillow’s Answer to the
44 Second Amended Complaint was filed only eight weeks ago. The privilege defense arises from a
45 claim not made in the Second Amended Complaint but asserted in interrogatory answers—that Zillow
46 mistakenly disclosed Plaintiffs’ trade secrets in a court filing that was promptly sealed by stipulation
47 of the parties.

1 to file under seal, making no attempt to retrieve the unredacted Letter from third parties, and
2 continuing to use the letter in violation of the protective order despite two court orders
3 requiring compliance. Instead, Plaintiffs have said they are “not embarrassed” by their
4 decision to disclose the Letter. Gaston Decl., Ex. D. It is Plaintiffs who have squarely
5 injected these claims into the ongoing case, and Zillow merely seeks to amend its answer to
6 conform to the events that Plaintiffs set in motion.
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12 Nor can Plaintiffs claim prejudice by allowing this amendment. The acts giving rise
13 to the claims have just occurred, so Defendants have not delayed in bringing the claims. The
14 counterclaims cannot fairly be said to surprise Plaintiffs, given the extensive motion practice
15 that has resulted from Plaintiffs’ recent decision to publish the Letter without redactions.
16 Indeed, Plaintiffs have already sought voluminous discovery regarding the Letter and the
17 issues raised therein:
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- 25 • The first merits deposition in this case began last Thursday, with the first
26 seven or eight deponents sought by Plaintiffs relating specifically to the Letter
27 and the “secret” programs. (Notably, Plaintiffs’ first deposition was an almost
28 five-hour deposition of Perkins Coie paralegal, Elaine Cherry, who witnessed
29 a ten-minute telephone call with Mr. Crocker). Zillow has issued a 30(b)(6)
30 deposition notice regarding the creation and distribution of the Letter, to
31 which Plaintiffs have objected. Gaston Decl. ¶ 10.
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- 34 • Plaintiffs have issued 43 Requests for Production with respect to the Letter,
35 with many if not most addressed to the “secret” programs at issue in the
36 counterclaims. Zillow has issued two Requests for Production relating to
37 allegations in the Letter. Gaston Decl. ¶ 11, Ex. E.
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- 40 • Plaintiffs have already issued 15 Interrogatories relating to the Letter, while
41 Zillow has issued one Interrogatory. Gaston Decl. ¶ 11, Ex. E. By way of
42 example, Plaintiffs’ Interrogatory No. 11 asks Zillow to describe all of the
43 inaccuracies in the Letter and Interrogatory No. 13 asks for all of the trade
44 secrets disclosed in the Letter.
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1 Therefore, the same evidence that is already in this case will be used to litigate Zillow's
2 counterclaims. *See Estate of Randmel*, 38 Wn. App. at 404. The Letter is already a part of
3 this litigation and discovery on it has commenced. This action is not scheduled for trial for
4 nearly six months, only two depositions out of dozens have taken place, and Plaintiffs were
5 permitted to file an amended complaint two months ago. In the end, leave to amend would
6 incorporate issues already the subject of discovery, involving the parties presently in
7 litigation, and permit them to be resolved in a single proceeding, thus promoting judicial
8 economy and efficiency.
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16 VI. CONCLUSION

17 For the reasons set forth above, Zillow respectfully requests an Order granting leave
18 to amend its answer in substantially the same form as the Proposed Amended Answer and
19 Counterclaims attached as Exhibit C to the Declaration of Mary Gaston.
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s/ Mary P. Gaston

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DEFENDANT ZILLOW'S MOTION FOR LEAVE TO FILE
AMENDED ANSWER AND COUNTERCLAIMS – 12

56920-0025/LEGAL126151349.1

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CERTIFICATE OF SERVICE

On May 21st, 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: DEFENDANT ZILLOW'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND COUNTERCLAIMS TO PLAINTIFFS' SECOND AMENDED COMPLAINT.

Table with 2 columns: Recipient Information and Service Method. Row 1: Jack M. Lovejoy, WSBA No. 36962... Service methods: Via Hand Delivery, Via U.S. Mail, 1st Class, Postage Prepaid, Via Overnight Delivery, Via Facsimile, Via E-filing, Via E-mail. Row 2: Clemens H. Barnes, Esq., WSBA No. 4905... Service methods: Via Hand Delivery, Via U.S. Mail, 1st Class, Postage Prepaid, Via Overnight Delivery, Via Facsimile, Via E-filing, Via E-mail.

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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 21st day of May, 2015.

s/ Sherri Wyatt
Sherri Wyatt, Legal Secretary