HONORABLE SEAN O'DONNELL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

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

Plaintiffs,

vs.

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

Defendants.

Case No. 14-2-07669-0 SEA

LETTER MEMO REQUESTED BY JUDGE O'DONNELL

SEALED PER COURT ORDER
DATED _____

CABLE, LANGENBACH,
KINERK & BAUER, LLP
1000 SECOND AVENUE, SUITE 3500
SEATTLE, WASHINGTON 98104-1048
(206) 292-8800

633 WEST 5TH STREET SUITE 3600 LOS ANGELES CALIFORNIA 90071-2054

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Richard L. Stone
Tel 213 239-2203
Fax 213 239-5199
rstone@jenner.com

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COPY SENT VIA EMAIL TO CHAMBERS

Erica Parkin
Bailiff to the Honorable Sean P. O'Donnell
King County Superior Court
516 Third Avenue, Room C-203
Seattle, Washington 98104
Erica.Parkin@kingcounty.gov

Re: *Move, Inc., et al. v. Zillow, Inc., et al.*, No. 14-2-07669-0 SEA

Dear Ms. Parkin,

On June 5, 2015, the parties appeared before The Honorable Judge Sean P. O'Donnell. At that hearing, Judge O'Donnell requested that the parties file letter memoranda by today, June 25, 2015, regarding potential approaches the Court could take, such as bifurcation, to efficiently manage the *Move v. Zillow* case through trial.

This letter is submitted on behalf of the plaintiffs. As outlined in more detail below, we believe bifurcating trial into separate phases for liability and damages would complicate and prolong the trial, rather than create efficiencies. There are, however, procedural approaches that could result in a more streamlined proceeding. They are addressed below. This letter brief closes with a request for a CR 16(a) conference to determine what pre-trial procedures should be adopted to promote efficiency, as well as to address the lingering question of the trial date.

Brief Case Description

A single nucleus of facts runs through the various liability and damages claims in this case. In late 2013, Errol Samuelson (a top executive at plaintiff Move, Inc.) and Curt Beardsley (who reported to Mr. Samuelson) began executing a scheme to harm the plaintiffs and defect to their primary competitor, Zillow, delivering to Zillow information about the plaintiffs' confidential business strategies, proprietary databases, product information, and secrets regarding potential corporate transactions. In return, Zillow awarded Mr. Samuelson and Mr. Beardsley compensation packages worth millions, as well as a promise to indemnify Mr. Samuelson in case he was accused of misappropriating trade secrets.

The plaintiffs have uncovered substantial evidence of unlawful conduct. While owing fiduciary obligations to the plaintiffs in late 2013, Mr. Samuelson and Mr. Beardsley wrote a plan outlining how they could "attack" the plaintiffs' businesses while covering their tracks. It "probably is best not to send emails (or even text messages) on this topic since someone could, in

hindsight, try to dig up (or subpoena) the emails (or text messages which apparently are archived on my iMac) and make the case that we were not working in the company's best interests," wrote Mr. Samuelson to Mr. Beardsley in November 2013. They used a self-described "burner phone" and multiple cloud email accounts to communicate in secret. They moved hundreds of proprietary documents off company servers and out of company accounts to other locations so they could later access data from Zillow. And they used their influence internally at Move to steer the company away from valuable acquisitions that would have improved Move's competitive position, such as a small company with quality technology called Retsly. Mr. Samuelson's fiduciary obligations as Move's Chief Strategy Officer required him to pursue Retsly for the benefit of Move but, instead, he hid the opportunity so he could save it for Zillow.

While negotiating his platinum compensation and indemnity package, Mr. Samuelson also tipped off Zillow about Move's plans to merge with Trulia. Incredibly, at the precise same time he was supposed to be leading a company-changing transaction with Trulia on behalf of Move, Mr. Samuelson was speaking on his "secret Zillow phone" to Zillow's CEO, providing guidance on Zillow's – not Move's – business strategies. Mr. Samuelson and Mr. Beardsley found humor in their misdeeds, referring to themselves as Thelma & Louise (criminals on the run) and, in a more disturbing email, expressing concern that without a good cover story they would be viewed as "Vichy French" (traitors) by those in the real estate industry.

After nearly a half year of planning and transferring stolen data, Mr. Samuelson and Mr. Beardsley defected to Zillow in March 2014. They erased large swaths of electronic evidence across multiple Move devices -- they actually had a "to do" list with an entry "wipe computers." On his very first full day at Zillow, Mr. Samuelson contacted Retsly on behalf of Zillow. Zillow went from having no interest in Trulia [redacted] Within months of his arrival, Zillow acquired both Retsly and Trulia, overpaying enormously for Trulia to block the Move-Trulia merger that would have created a formidable competitor to Zillow.

On the operations front, Mr. Beardsley began using stolen Move databases to shore up Zillow's well-known problem of securing real estate listings feeds from brokers and MLSs. As explained by Zillow's former Vice President, Chris Crocker, Zillow's poor quality databases and industry intelligence were hampering Zillow's ability to get listing feeds and were its "Achilles Heel." Zillow's former Vice President also testified that Mr. Beardsley had brought the remedy with him from Move: the plaintiffs' stolen data. At first, the defendants branded Mr. Crocker a disgruntled, lying former employee. But Mr. Crocker's whistleblowing was vindicated just a few weeks ago when the defendants revealed they have copies of highly confidential Move databases.[1]

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[1] The defendants possession of the databases is a smoking gun discovery in this case. It reveals the defendants' repeated statements that they do not have any of the plaintiffs' confidential information have been false. It also evidences yet another violation of the Court's Preliminary Injunction Order. That Order, signed by Judge Linde on June 30, 2014, required the return of all the plaintiffs' confidential information to the plaintiffs by July 7, 2014. PI p. 17 ¶ 10.

On these facts and others, the plaintiffs have pled multiple claims against Zillow, Mr. Samuelson, and Mr. Beardsley.[2] The claims include fiduciary duty and business tort claims, based on the defendants' misappropriation of confidential and proprietary information including, but not limited to, trade secrets. The claims require evidence of damage or harm to the plaintiffs, and the trade secret cause of action will additionally require as part of the liability presentation evidence regarding the value of the misappropriated trade secrets. The plaintiffs also have a claim for unjust enrichment, seeking recovery of the benefit Zillow received from its unlawful conduct in receiving and using misappropriated information – both trade secret and non-trade secret – that rightfully belonged to the plaintiffs. The evidence in support of the unjust enrichment claim will focus on the existence and amount of the cost savings and benefits related to Zillow's acquisitions, as well as its use of stolen business plans, product information, and databases. Liability evidence will include detailed information related to financial issues, such as cost savings and other aspects of the two corporate transactions at issue.

Efficient Case Management Tools

There are a number of other procedural approaches that would result in the efficient management of the case and a streamlined trial. The plaintiffs propose the following case management suggestions for the Court's consideration.

Separate Expert Discovery

Expert depositions begin on July 15, 2015. Most of the key fact depositions will occur ***after*** that date, however, and the parties will likely still be engaged in at least some document discovery (discovery motions are not likely to be fully decided by July 15). Scheduling expert discovery to occur after fact discovery would allow expert witnesses to develop their opinions on a more fulsome record and result in more streamlined expert depositions.

Limit Expert Witnesses

Zillow identified more than a dozen testifying experts in its recent witness disclosure. Many of the subject areas identified for these witnesses overlap. For example, Zillow may offer testimony from as many as three real estate industry experts (Stephen Murray, Jack Miller, and Bud Fogel); three computer forensics experts (Andrew Crain, Bruce Hartley, and Vladimir Kamenev); and a whopping seven damages experts (Mark Glick, Kenneth Lehn, Christine Brotosan, Susan Athey, John Curran, Mark Newton, and Peter Nickerson). The depositions and trial testimony of Zillow's experts alone would consume months of the parties', the Court's, and the jury's time, not including all of the motion practice that will likely result from more than a dozen experts.

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[2] Technically, the Second Amended Complaint pleads ten counts: (1) violations of the Washington Trade Secrets Act; (2) conspiracy to violate the Trade Secrets Act; (3) Breach of Contract; (4) Breach of Fiduciary Duty; (5) Aiding and Abetting Breach of Fiduciary Duty; (6) Tortious Interference with Business Expectancy; (7) Tortious Interference with Contract; (8) Unjust Enrichment; (9) Trespass to Chattel; and (10) Conversion.

Zillow's expert list is obviously excessive. Zillow's objectives are equally obvious: first, to evaluate who among their duplicative experts makes the best presentation and offers the fewest damaging concessions; second, to the extent Zillow already knows some or all of the experts it will actually use, Zillow seeks to hide its true expert case among a cast of "dummy" experts; and, third, to force plaintiffs to spend valuable time and money deposing experts that the rule against cumulative testimony will prevent Zillow from ever using. No court rule entitles Zillow to litigate the case in this manner. To the contrary, ER 403 grants the Court discretion to exclude cumulative evidence. Courts in Washington and elsewhere have repeatedly held that expert testimony is ripe for management to avoid duplicative presentations. *See, e.g., Miller v. Peterson*, 42 Wn. App. 822, 827 (1986); *Sunstar, Inc. v. Alberto-Culver Co.*, No. 01 C 0736, 2004 WL 1899927, at *25 (N.D. Ill. Aug. 23, 2004) (limiting multiple defendants to just one expert per subject to avoid cumulative testimony and the unfair possibility that jurors would resolve competing expert testimony by "counting heads" rather than evaluating the credibility of the testimony); *Merrill Lynch Bus. Fin. Servs., Inc. v. Gray Supply Co.*, No. 91 C 1449, 1991 WL 278305, at *3 (N.D. Ill. Dec. 23, 1991) (defendants had three experts on banking and loan matters, but court limited them to one per side per subject).

We suggest Zillow be instructed *now* to identify one expert per subject. We suggest a revised expert disclosure be required three weeks prior to the commencement of expert discovery, so that the depositions of the actual trial experts can be scheduled in an efficient manner. This will streamline expert depositions, expert-related motions, and expert testimony at trial. It will also avoid unnecessarily cumulative testimony at trial. This simple step will result in great efficiencies and avoid disputes just before and at trial regarding experts, including motions relating to Zillow's apparent plan to attempt to win by the sheer quantity of experts.

Early Analysis of Evidence Destruction Issues

The defendants destroyed a lot of evidence related to this case, even while knowing litigation was likely and planning for it. Their spoliation is already impacting the case in a significant way, and will further affect the proceedings going forward. Indeed, this is one of the few cases in which the Court may find that severe consequences, such as the striking of pleadings or default sanctions, are appropriate.

The plaintiffs suggest the Court schedule proceedings, after expert discovery but before jury instructions and other trial management issues are addressed, to analyze the appropriate response to the defendants' willful destruction of evidence. Those proceedings could impact liability issues, motions in limine, and jury instructions.

Early Motions in Limine

The defendants have frequently attempted to distract from the core issues in the case – how they harmed the plaintiffs and used stolen information – by creating irrelevant side issues. The Court can expect a large number of pre-trial motions in limine. A briefing schedule to address motions in limine could be set out several months before trial, giving the parties and the

Court an adequate framework in which to address important admissibility and other evidentiary issues. Orders on these issues well in advance of trial would result in more streamlined trial presentations. Decisions on motions in limine could also reduce the number of proposed jury instructions and other pre-trial issues, making this stage helpful to subsequent proceedings.

Regular Status Conferences

In addition to the CR 16(a) conference to address the trial date and the issues raised by this submission and the corresponding defense submission, a periodic status conference would allow the parties to identify potential problems and receive guidance from the Court for resolving them, avoiding logjams with an eye towards the goal of an efficient pre-trial and trial schedule. A final pretrial conference approximately one month before trial, with required submissions addressing all outstanding issues, would further allow the Court to manage trial preparation so the trial begins on time and proceeds expeditiously.

Trial Presentation Limits

With motions in limine, jury instructions, and expert limitations decided in advance, the parties would be well positioned to deliver efficient presentations to the jury. To help the parties present organized cases, the Court could establish time limitations on each side. For example, each side could be allocated 60 hours total for all direct and cross-examinations.

Mediation Deadline

The parties attended a mediation earlier this year. It failed because the existing protective order does not allow the plaintiffs to view most of the evidence in this case. The parties were at least, at that mediation, able to resolve the Court's Order to Show Cause re Contempt, resulting from Zillow's violations of Judge Linde's preliminary injunction order. The plaintiffs suggest another mediation be set after discovery is completed but sufficiently in advance of trial. This would allow the parties to fully evaluate their various claims and defenses. It would also allow time for follow-up discussions before trial if mediation fails again but the parties wish to continue discussions.

Protective Order Repair

The Second Amended Protective Order was requested by Zillow and entered by the Court over the plaintiffs' objection. In its request Zillow said it would use the protective order's designations "sparingly." Zillow has nevertheless designated more than 90% of its document production as either Attorneys' Eyes Only or Outside Counsel's Eyes Only. The obviously improper over-designations have caused tremendous inefficiencies in the management of this case. The plaintiffs are required by the existing protective order, for example, to request sealing of nearly every motion filed with the Court because most of the evidence relates to Zillow and Zillow has designated 90% of it under the protective order. Indeed, although nothing in this letter brief is really a secret, it will have to be filed under seal because it quotes documents Zillow over-designated under the protective order.

In addition to the document management / sealing problems caused by Zillow's over-designations, there is little chance of a successful mediation or settlement discussion in this situation where the plaintiffs are unable to review 90% of the evidence and even their in-house lawyers are restricted from seeing most of the key evidence. The plaintiffs suggest the Court repair the Second Amended Protective Order. A more evenhanded approach to sealing and confidentiality would greatly decrease existing inefficiencies that currently exist because of Zillow's over-designations. We do not see how the case can be tried under Zillow's view that 90% of its documents are so secret that the plaintiffs can't even see them.

Bifurcation Would Result in Inefficiencies

Bifurcating complex cases into liability and damages phases sometimes results in efficiencies. Here, however, bifurcation would have the opposite effect because so much of the evidence relates to both liability and damages issues. Bifurcated trials would require duplicate presentations and could result in inconsistent findings from the same facts.

Liability and Damages Concepts are Interwoven

Decisions from Washington and across the country instruct that damages and liability questions should be bifurcated only where they are clearly separable. *See, e.g., Brown v. Gen. Motors Corp.*, 67 Wn. 2d 278, 282, 407 P.2d 461, 463-64 (1965) (the court's discretion to bifurcate trials "should be carefully and cautiously applied . . . piecemeal litigation is not to be encouraged"); *Odermann v. Carefusion 303, Inc.*, No. C12-5126 BHS, 2013 WL 1414745, at *2 (W.D. Wash. Apr. 8, 2013) (denying motion to bifurcate because of "the additional expense and time that will attend bifurcation on liability and damages"). Bifurcation is inappropriate where "the issue of liability is intertwined with the issue of damages . . .." *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 511 (9th Cir. 1989) (remanding on separate grounds while urging review of bifurcation order because, "the issue of liability is intertwined with the issue of damages since the trier of fact can find liability only if it first finds that the plaintiff suffered" particular harm).

Here, the plaintiffs' liability and damages claims are factually interwoven. For example, evidence regarding the financial aspects of Zillow's Trulia and Retsly acquisitions relate to both damages and liability issues. The jury will learn of the financial motivations behind the defendants' misconduct as part of the liability case. Indeed, the liability story regarding the Trulia merger will detail Zillow's financial considerations—that is, the risk Zillow perceived of a Move/Trulia merger, the potential financial benefit to the plaintiffs from a Move/Trulia merger, and the financial impact of Zillow acquiring Trulia. The damages evidence, if presented in a bifurcated proceeding, would overlap significantly. In addition, discussions of Zillow's financial incentives for stealing Move operations data will be relevant to both liability and damages. Move spent years creating databases of confidential information, only to have Mr. Samuelson and Mr. Beardsley bring that information to Zillow. The time and money spent by the plaintiffs, and the time and money saved by Zillow, are relevant to both liability and damages analyses. Finally, because the law requires that trade secrets have value as part of a liability presentation,

and damages calculations depend heavily on valuations, evidence related to nearly all of the plaintiffs' misappropriated trade secrets will be relevant to both damages and liability issues.

With respect to the breach of fiduciary duty claims, the jury must understand the extent to which Mr. Samuelson's and Mr. Beardsley's conduct harmed the plaintiffs to appreciate the severity of their fiduciary breaches. Context matters. These were not mistakes by otherwise well-intentioned departing employees who took a few items as they left for a new job. These were sophisticated, well-planned schemes executed over nearly a half year with severe financial consequences. The defendants communicated about the importance of not creating evidence, destroyed evidence, lied repeatedly to those who trusted them, and created indemnities for the expected litigation because they knew the potential consequences of their actions. Presenting these claims to a jury necessitates a discussion of the size of the harm caused by the defendants, for both liability and damages. Under "the circumstances presented by this [case] the issues of liability and damages, exemplary or normal, are not so distinct and separable that a separate trial of the damage issues may be had without injustice." *United Air Lines*, 286 F.2d at 306.

Duplicate Evidence Presentations

Bifurcation would require duplicative presentations, which is another reason it should not be used. *See Bunch v. Hoffinger Industries, Inc.*, 123 Cal. App. 4th 1278, 1283 (2004) (bifurcation of liability and damages rejected because "multiple witnesses would be testifying regarding both aspects of the trial, resulting in the same evidence being presented twice"). For example, damages experts will rely on testimony from key witnesses about the industry, its competitive landscape, the value of trade secrets, and all of the relevant events and terminology as they lay out their damages theories. If the court were to empanel a separate jury for damages – or even use the same jury in a second phase – much of the same testimony would need to be repeated from the liability phase in order for the jurors to understand and process the testimony from the damages phase. Also, the damage theories will not solely be based on expert testimony, but also on fact witnesses such as Move's former CEO Steve Berkowitz and former CFO Rachel Glaser, as well as the investment bankers who were involved in the thwarted Move-Trulia transaction, Zillow's CEO Spencer Rascoff, and members of Zillow's Board of Directors. If there are two phases, these witnesses (including several non-parties) will need to be called twice and repeat testimony during the damages phase already addressed in the liability phase.

Avoiding Inconsistent Findings

Bifurcation could result in inconsistent findings if decided separately. This is, obviously, a situation the Court and parties should seek to avoid.

Other Practical Considerations Weigh Against Bifurcation

A number of practicalities weigh against bifurcation. Many of the parties and their legal counsel are from out-of-state. The National Association of Realtors is in Illinois. Move is in California. Its ListHub employees are in West Virginia and Virginia. One of the plaintiffs is a British Columbia company and its witnesses will travel from Canada. Mr. Samuelson himself

lives in Canada. A large number of witnesses will be traveling in and out of Seattle for the trial. Two sets of travel for testimony, in separate liability and damages phases would be inconvenient for witnesses and bad for trial efficiency.

Also, trial is likely to involve multiple electronic presentations from expert witnesses, along with technical support for fact witnesses. Setting the electronic equipment up and taking it down multiple times would burden the parties and the Court, and increase costs. It would be more practical to utilize the courtroom once, so it can be returned to its ordinary state after a single proceeding.

* * *

We appreciate the Court's concerns about tightly managing this case through trial. It is no secret that this lawsuit has been contentious, which is due in no small part to defendants' spoliation and refusal to produce relevant evidence. The underlying facts and circumstances of this case are not especially complex. This is not a case about patents, complicated financial arrangements, or advanced accounting. It's a case about greed, deception, and theft. The jury will want to – and should be allowed to – hear the case from beginning to end and determine the appropriate remedy flowing from the defendants' unlawful conduct and their repeated attempts to destroy evidence and hide it from the judicial process.

Applying some or all of the suggestions above will help keep this case moving without prejudicing the parties or misusing time. We appreciate the Court's attention to this matter and request the opportunity to discuss the suggestions above in a CR 16(a) conference.

Sincerely,

S/

Richard L. Stone

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 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.

CM/ECF Participants:

Susan E. Foster
Kathleen M. O'Sullivan
Katherine G. Galipeau
Mary P. Gaston
David A. Perez
PERKINS COIE LLP
Counsel for Zillow, Inc.

Clemens H. Barnes
Estera Gordon
MILLER NASH GRAHAM & DUNN LLP
Counsel for Errol Samuelson

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

David J. Burman
Judith B. Jennison
Joseph McMillan
Ulrike B. Connelly
PERKINS COIE LLP
dburman@perkinscoie.com
jjennison@perkinscoie.com
jmcmillan@perkinscoie.com
uconnelly@perkinscoie.com
Counsel for Zillow, Inc.

K. Michael Fandel
Brian Esler
MILLER NASH GRAHAM & DUNN LLP
michael.fandel@millernash.com
brian.esler@millernash.com
Counsel for Errol Samuelson

James P. Savitt
Duffy Graham
Michele Stephen
SAVITT BRUCE & WILLEY LLP
jsavitt@sbwllp.com
dgraham@sbwllp.com
mstephen@sbwllp.com
Counsel for Curt Beardsley

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 June 25, 2015.

s/Janet Petersen
Janet Petersen, Legal Assistant
Katy Albritton, Legal Assistant
(206) 292-8800 Phone
jpetersen@cablelang.com
kalbritton@cablelang.com