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KING COUNTY WASHINGTON

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SUPERIOR COURT CLERK
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DEPUTY

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

Move, Inc et al

Plaintiff/Petitioner,

vs.

Zillow, Inc et al

Defendant/Respondent.

NO. 14-2-07669-0 SEA

Unredacted Bifurcation Letter **is attached.**

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June 25, 2015

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VIA E-FILING

FILED UNDER SEAL - OUTSIDE COUNSEL EYES ONLY (DON'T SHOW DEFENDANTS) - SEALED PER COURT ORDER DATED ____________

Honorable Sean P. O'Donnell
Erica Parkin, Bailiff
King County Superior Court
516 3rd Ave, Room C-203
Mailstop: KCC-SC-0203
Seattle, WA 98104

Re: Move, Inc., et al. v. Zillow, Inc., et al.; Case No. 14-2-07669-0 SEA
Bifurcation Proposal

Dear Judge O'Donnell:

During the June 5th hearing, the Court suggested that "there may be some benefit in a bifurcation" of the liability portion and the damages portion of trial in this matter.[1] The Court asked the parties to provide input and thoughts on bifurcation.

I submit this letter on behalf of all defendants—Zillow, Mr. Samuelson and Mr. Beardsley ("Defendants"). Defendants support bifurcation and agree with the Court that bifurcating the liability and damages phase—both for discovery and trial—will benefit all parties, and conserve judicial resources and promote efficiency.

Washington Civil Rule 42 permits this Court to separate trial on liability and damages "in furtherance of convenience" and where "conducive to expedition and economy." Both goals are served here.

First, bifurcating liability and damages will be convenient for the parties, the Court and the jury, particularly because it has the potential to significantly shorten the trial length—from approximately 5 to 6 weeks for liability and damages, to approximately 4 weeks for liability alone.[2]

Second, bifurcation will significantly improve efficiency in this particular case, not only because costly and time-consuming damages discovery and extensive expert damages discovery will be

[1] *See* June 5, 2015 Hearing Transcript at 11:8-9.
[2] This is a rough estimate and assumes a significant narrowing of Plaintiffs' current claims and trade secrets.

avoided if there is *no* finding of liability, but also because the potential damages that may be available in the event of a jury verdict will necessarily be dependent on (1) which of the nearly 200 alleged trade secrets (including subparts) in the case remain at the time of trial and (2) which of those remaining trade secrets (if any) Plaintiffs are able to establish were misappropriated. Requiring the parties to assess damages on a trade-secret-by-trade-secret basis for each of the nearly 200 alleged trade secrets still at issue *now* is inefficient and time-consuming, particularly considering that Plaintiffs themselves have advised the Court that they do not intend to take all of their purported trade secrets to trial. Finally, this case is also particularly well-suited for bifurcation because the evidence on Plaintiffs' purported damages is likely to be wholly distinct from evidence on liability.

A. Current Status of Fact and Damages Discovery

Fact depositions have scarcely begun and the parties have only recently begun to focus on documents necessary for damages discovery. Plaintiffs neglected to even *ask* for the Zillow financial documents that would inform their experts' damages assessments until April 30—six months after the initial discovery cutoff. *See* Plaintiffs' Eighth Set of RFPs (Apr. 30, 2015). Given this timing, it is hardly surprising that to date Plaintiffs have not yet provided any substantive information regarding their damages claims.

Plaintiffs have also objected to interrogatory requests seeking definition of the amounts and categories of damages on the basis that such requests are "premature," *see* Plaintiffs' Response to Samuelson's Revised Interrogatory No. 3 (May 11, 2015), and on the May 26 deadline for disclosing expert opinions claimed that "[a]t this time, a complete summary of [their damages experts'] opinions and the bases therefor is not possible" given the lack of relevant discovery that has occurred to date. *See* Plaintiffs' First Amended Disclosures of Primary Witnesses (May 26, 2015). Although the parties agreed to exchange certain categories of damages-related documents on May 29, those documents have not yet been produced.[3]

Significant discovery, particularly damages discovery, remains. Not only do the parties have yet to produce the damages-related documents contemplated by their May 29 agreement, but they continue to dispute what additional documents must be produced. Claiming that their experts need additional Zillow documents in order to assess their damages claims, Plaintiffs moved to compel on May 29. *See* Plaintiffs' Motion to Compel Zillow to Produce Documents Relating to Plaintiffs' Unjust Enrichment Damages (May 29, 2015). Oral argument on Plaintiffs' motion has not yet occurred, meaning that resolution and any subsequently required production is likely weeks away.

[3] Moreover, Plaintiffs served a protective order acknowledgment of a new damages expert (Gordon Klein) just last Friday. *See* Gordon Klein Protective Order Acknowledgment and Agreement to Be Bound, dated June 18, 2015.

Even if the production and review of Move and Zillow's documents were complete, the parties' experts would likely be unable to competently opine on various damages-related issues until the depositions of most key fact witnesses have taken place. To date, only 6 depositions have occurred since deposition discovery opened in May and only 6 of the at least 30-40 remaining fact witness depositions have even been scheduled. And, as Plaintiffs failed to significantly narrow the case by the end of May as previously promised, not only will many more depositions be likely, but the need for substantial motion practice to narrow the claims is almost certain. And, of course narrowing the case before proceeding with extensive damages discovery is both prudent and necessary.

Given the pace of discovery, the parties' damages experts' work is well behind schedule. Although Plaintiffs were required to provide a summary of their experts' opinions and the basis therefore on May 26 (Primary Witness Disclosures), Plaintiffs have taken the position that doing so is "not possible" and they have not even been able to inform Zillow as to when they *might* be able to provide those opinions. Until Plaintiffs' experts' opinions are provided, Zillow's damages experts will continue to be unable to prepare their rebuttal opinions. And once that has finally occurred, the parties will still need to schedule and take the depositions of at least a half dozen damages experts on each of the more than 200 alleged trade secrets and claims that remain. At the current pace, it is inconceivable that damages discovery will be concluded by the September 8 discovery cutoff.

Finally, while the parties have thus far been able to work cooperatively regarding most damages discovery issues and Defendants hope that will continue to be true, the parties may nonetheless encounter disputes about upcoming depositions and expert reports that could require the Court's time and attention if the parties are not able to reach agreement.[4]

B. Bifurcation is Appropriate for the Convenience of the Court, Parties and Jury

The Washington Supreme Court has approved bifurcation when "the possibility of a substantial saving in trial time, expense, and convenience to the court and to the respective parties was clearly discernible." *Brown v. General Motors*, 67 Wn.2d 278, 407 P.2d 461 (1965) (affirming bifurcation where damages would be significantly more complicated and lengthy to try than liability, which was questionable under the facts of the case). The decision to bifurcate is discretionary. *Meyers v. The Boeing Co.*, 115 Wn.2d 123, 140, 794 P.2d 1272 (1990). This Court has authority to stay or bifurcate discovery, pursuant to its authority to manage the litigation before it. *See Doe v. Puget Sound Blood Center,* 117 Wn.2d 772, 777–78, 819 P.2d

[4] Indeed, the parties have already litigated nearly 80 motions regarding discovery disputes, including motions before the Special Master. If damages and liability are not bifurcated, additional motion practice on damages discovery threatens to consume further Court and party time and resources.

370 (1991) (describing the broad scope of the trial court's authority, and noting, "it is the proper function of the trial court to exercise its discretion in the control of litigation before it").

Bifurcation would promote convenience because "[i]t is clearly convenient to await consideration of relief where a finding of liability is a *sine qua non* for such damages or other award." *Evans v. Conn.,* 168 F.R.D. 118, 120-21 (D. Conn. 1996) (bifurcating liability and damages phases of trial and noting "that proceedings concerning damages could have been superfluous absent a finding for plaintiff on liability").

Particularly in a complex case such as this one where trial is predicted to last well over a month if liability and damages are not bifurcated, bifurcation will allow the Court to more easily schedule its calendar around a trial date, improve the likelihood of empaneling jurors who are able to endure the disruption to their lives of an already-lengthy trial, and benefit counsel and parties on all sides in finding a mutually-agreeable trial date.

C. Bifurcation of Liability and Damages Will Conserve Resources and Promote Efficiency

"The separation of issues of liability from those relating to damages is an obvious use for Federal Rule 42(b)." Charles Alan Wright, et al. 9A Fed. Prac. & Proc., Civ. § 2390 (3d ed. 2013). Trying liability before damages can increase efficiency because if "the jury determines that the defendant has no liability, the case is at an end and there will be no need to present evidence on the issue of damages." Karl B. Tegland, Wash. Prac., Rules Prac., CR 42 (6th ed. 2013); *see also Witherbee v. Honeywell, Inc.*, 151 F.R.D. 27, 29 (N.D.N.Y 1993) ("Bifurcation of an action is appropriate where, as here, there are complicated issues of liability that must be resolved prior to the assessment of any damages.").[5]

Efficiency counsels toward trying liability first when the damages phase of a trial is expected to be lengthy and complex. *See Brown*, 67 Wn.2d 278 at 281. Bifurcation is especially attractive when "the standards and evidence required to prove liability are entirely different than the evidence required to prove damages." *Goldman v. RadioShack Corp.*, 2005 WL 1155751, *1 (E.D. Pa. 2005); *see also Lagudi v. Long Island R.R. Co.*, 775 F.Supp. 73, 74 (E.D.N.Y. 1991).

Brown provides a useful example of the type of situation suited for bifurcation. 67 Wn.2d at 280. In *Brown* the trial court granted defendant's motion to bifurcate liability and damages issues, a decision affirmed by the Washington Supreme Court. Trial was bifurcated because the evidence on liability was largely discrete from that on damages, and while a damages trial would

[5] Because Federal Rule of Civil Procedure 42 is "nearly identical" to CR 42, "federal case law may be helpful" in interpreting CR 42. Tegland, *supra*, CR 42.

involve seventeen medical witnesses and voluminous medical records, liability could be tried in a relatively short amount of time. *Id.* at 281-82.

Here, damages discovery has barely begun and the parties will benefit greatly from being allowed to focus on fact discovery relating to liability, and deferring damages discovery until after any liability is determined—and the case is potentially significantly narrowed. Plaintiffs have represented that they will be pursuing a much narrower case at trial; but for now, the parties are continuing discovery on virtually all of the claims initially submitted. With a case of this magnitude it is grossly inefficient to proceed with damages discovery (and trial) of claims that Plaintiffs do not intend to pursue or which Defendants can eliminate on motion practice or at trial of this case. Evidence regarding Plaintiffs' purported damages in this case is completely distinct from the damages on liability and therefore no time will be lost if the parties focus solely on liability for the time being.

Also, as might be expected, damages calculations in trade secrets cases like this one are very complex and highly dependent on the outcome of trial on liability claims. The damages issues in this case present a number of complexities. First, the potential damages claims are very wide-ranging. Plaintiffs are presently asserting nearly 200 alleged trade secrets (with subparts) that touch on virtually all aspects of Move and Zillow's businesses and a recent 30(b)(6) of Plaintiffs actual misappropriation claims[6] revealed an intent to pursue claims ranging from: Plaintiffs' launch of Find a Realtor 2.0 last May, to its integration of Five Street, Tiger Lead, Top Producer and ListHub, to its launch of a seller portal tool, to its Collaborative Search software, product plans for Tiger Lead and agent profiles, Move's merger discussions with NewsCorp, Move's merger discussions with Trulia, Move's ListHub strategies including strategies for obtaining direct listings, preventing Zillow from obtaining listings and forcing Zillow to remain dependent on ListHub (thus implicating Zillow's own direct feed efforts), Zillow's launch of the Zillow Data Dashboard, the non-renewal of the Zillow/ListHub syndication agreement, Move's SaaS strategies, Move's plans for using ListHub as a data entry point, Move's plans for pursuing its Real Estate Platform initiatives (including LeadHub and AppHub), Zillow's acquisition of Retsly, Move's plans for pursuing or teaming with Project Upstream to drive a broker portal,[7]

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[6] Plaintiffs designated Move's former CEO, Steven Berkowitz as their 30(b)(6) witness. Mr. Berkowitz ceased employment in mid-December of 2014 and he conducted no investigation of the 30(b)(6) topics. Having spoken to no one at Move or NAR about the claims he was unable to speak to key issues involving causation and damages, such as those occasioned by the January 2014 introduction of the Zillow Data Dashboard and the non-renewal of the Zillow/Listhub Syndication agreement.

[7] Last month NAR and Upstream announced that NAR's subsidiary, RPR and Upstream were forming a partnership to pursue this initiative. Plaintiffs have refused to provide discovery on Upstream or these recent events and Defendants have a motion pending on this issue. Mr. Berkowitz was similarly unprepared to respond to whether Move was successful in its efforts to secure the Upstream agreement as part of a broader initiative to ultimately roll up all the MLS's into a single national MLS with Realtor.com as the consumer portal. These factors would clearly affect the damages alleged in this action.

Move's agreements with NRT, Century 21, Douglas Elliman, Brown Harris and others, the advertising restrictions placed on Move under the NAR operating agreement, and even NAR's domain name strategies.

Plaintiffs claim that Defendants' misappropriation of these distinct purported trade secrets caused unspecified and unquantified harm to Move and unjust enrichment to Zillow. Untangling these claims requires careful analysis of complex financial documents from Move and Zillow – documents that the parties largely have yet to produce. Plaintiffs also allege harm and unjust enrichment based on contemplated and consummated mergers and acquisitions that were purportedly impacted by Defendants' alleged misconduct, including Zillow's $3.5 billion acquisition of Trulia. Analyses of each of these transactions, and the but-for worlds that would have existed had the transaction not occurred, is necessarily complex and will require significant work by the parties' damages experts. That complexity is exponentially increased in this case due to the sheer number of transactions alleged by Plaintiffs to be at issue. Indeed; untangling one merger is itself incredibly complicated; untangling multiple such transactions, each interrelated, requires analyses that go well beyond any typical trade secret case.

Finally, bifurcation will simplify the jury instructions and prevent juror confusion. Because the issues of liability and damages are independent of one another, the presentation of extensive evidence regarding the latter could confuse and mislead the jury when it considers the former. *See Brom v. Bozell, Jacobs, Kenyon & Eckhardt, Inc.*, 867 F. Supp. 686, 690 (N.D. Ill. 1994) (noting that bifurcation will prevent the "deliberations regarding liability [from being] sidetracked by extraneous and potentially confusing evidence relating to [the plaintiff's] damages."). By segregating the liability issues from the damages ones, bifurcation could simplify the jury instructions, thereby reducing the possibilities of confusion and error.

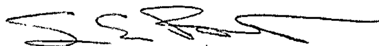
D. Bifurcation Will Not Prejudice Plaintiffs

Even assuming that Plaintiffs do not support bifurcation, they cannot establish that bifurcation will cause them any prejudice. If Plaintiffs prevail on liability on any of their claims, then trial on the damages portion can proceed as quickly as possible afterwards on just those select claims. *See Goldman*, 2005 WL 1155751, *2 (recognizing there was no prejudice to plaintiff from bifurcation where issue of liability and issue of damages were legally distinct).

Moreover, federal authority under the parallel federal rule has repeatedly emphasized the paramount interest of judicial economy in this calculus, overriding the stated preferences of the parties. *See* Charles Alan Wright, et al. 9A Fed. Prac. & Proc. Civ. § 2388 (3d ed.) (when considering bifurcation under Fed. R. Civ. P. 42, "[t]he major consideration, of course, must be which procedure is more likely to result in a just and expeditious final disposition of the litigation").

In sum, bifurcation will benefit all parties, the Court, and the jurors, and serve the interests of convenience and efficiency and Defendants look forward to responding to any questions the Court may have with respect to this issue.

Very truly yours,



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