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KING COUNTY
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CASE NUMBER: 14-2-07669-0 SEA

THE HONORABLE SEAN O'DONNELL
SET FOR ORAL ARGUMENT: December 11, 2015
9:00 a.m.

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

**DEFENDANT ZILLOW, INC.'S
OPPOSITION TO THE NOVEMBER 5
REPORT AND RECOMMENDATION
OF THE SPECIAL DISCOVERY
MASTER**

ZILLOW'S OPPOSITION TO THE NOVEMBER 5 REPORT AND
RECOMMENDATION OF THE SPECIAL MASTER

56920-0025/128869306.1

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1 Defendant Zillow, Inc. respectfully requests that the Court decline to adopt the November
2
3 5, 2015, Report and Recommendation of the Special Discovery Master on the question of
4
5 whether to “admonish” Defendant Curt Beardsley. For the reasons set forth in Mr. Beardsley’s
6
7 brief (in which Zillow joins), and those summarized below, an admonition would be unfair,
8
9 unnecessary, and inappropriate under the legal standard for imposition of sanctions under
10
11 Washington law.

12 I. RELEVANT FACTS

13 The relevant facts are as follows:

- 14
15 • On September 30, 2015, the Court adopted the Report and Recommendation of the
16
17 Special Master regarding a forensic examination by a Neutral Forensic Expert. Per
18
19 the September 30 Order, Mr. Andrew Reisman was appointed as the Neutral Forensic
20
21 Expert. The Order also adopted a Neutral Protocol to govern the conduct of Mr.
22
23 Reisman’s examination. Declaration of Joseph M. McMillan, Ex. A (Sept. 30, 2015,
24
25 Order, with Neutral Protocol attached).
- 26
27 • On October 14, 2015, pursuant to the Neutral Protocol, the Neutral (or a member of
28
29 his firm) made forensic images of computers and other electronic devices produced
30
31 by Defendants in Seattle. McMillan Decl. ¶ 3.
- 32
33 • On October 20, 2015, the Neutral made forensic images of computers and other
34
35 electronic devices produced by Plaintiffs in Los Angeles. *Id.*
- 36
37 • During the last two weeks in October, in close cooperation with the Neutral, all
38
39 parties produced log-in credentials (*e.g.*, passwords) associated with web-based
40
41 storage accounts under their respective control, in order to provide the Neutral with
42
43 the ability to access and collect data from those accounts. While the Neutral Protocol
44
45 recited that those credentials should be provided “within one week of the appointment
46
47 of the Neutral,” *neither* side strictly complied with that requirement. *See, e.g.*,
McMillan Decl., Ex. B (10/29/15 email from Plaintiffs’ counsel noting that Plaintiffs
were, on that day, providing credentials to a DropBox account under their control).
The Neutral consented to this modified schedule, which did not delay the neutral
forensic examination. McMillan Decl. ¶ 4.
- Throughout October, the parties and their experts participated in telephonic and email
communications with the Neutral to coordinate the data collection and discuss the

1 Plaintiffs' proposed Instruction Set for the Neutral's examination of relevant
2 electronic devices. That process was characterized by cooperation and professional
3 courtesy on all sides, and the issues were being addressed in a substantive, diligent,
4 and timely manner. McMillan Decl. ¶ 5.
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1 intra-family communications, including an ability to make live video contact (via
2 FaceTime) with Mr. Beardsley's 13-year-old daughter. *Id.* at 4-5.
3

- 4
- 5 • Mr. Beardsley's counsel also raised a question concerning the *scope* of the Neutral's
6 collection from Mr. Beardsley's iCloud account; specifically, whether the Neutral
7 Protocol – which expressly excluded the collection of web-based email messages (*see*
8 McMillan Decl., Ex. A – Neutral Protocol at ¶ 4) – also excluded the collection of
9 similar communications such as iMessages. McMillan Decl. ¶ 10.
10
 - 11 • In light of (1) the unexpected intrusion into real-time family communications, and
12 (2) the legitimate question concerning the scope of data collection under the Neutral
13 Protocol, Mr. Beardsley's counsel *requested* (she did not “order,” “direct,” “demand,”
14 or “instruct”) that there be a brief halt to the collection of data from the iCloud
15 account until counsel could address the issue to see if an agreement could be reached.
16 Plaintiffs' counsel objected and urged the Neutral to proceed. The Neutral, exercising
17 the discretion afforded to him under the Neutral Protocol (at ¶ 8), agreed to halt the
18 collection from the iCloud account until the issue could be resolved, as it would not
19 create any genuine delay in the forensic examination (*i.e.*, the Instruction Set for
20 analyzing the *devices* had not even been finalized, much less an Instruction Set for
21 analyzing the *accounts*). As noted above, Plaintiffs have still not even *proposed*
22 Instructions relating to web-based accounts. McMillan Decl. ¶ 11.
23
 - 24 • The Neutral's willingness to work with counsel to sort out technical issues relating to
25 data collection from the iCloud account is evident from an email he sent shortly after
26 the October 28 teleconference ended. In that email, the Neutral confirmed that, as a
27 technical matter, he was able to collect targeted portions of the iCloud account, rather
28 than being forced to take everything in an “all-or-nothing” manner. McMillan Decl.,
29 Ex. G (10/28/15 email string).
30
 - 31 • Mr. Beardsley's counsel, Ms. Stephen, promptly responded (copy to all parties),
32 thanking the Neutral for his time and efforts, noting that she would be conferring with
33 Plaintiffs' counsel on the scope of collection, and confirming that “we understand that
34 collection [from the iCloud] account won't proceed until you've heard back from us.”
35 *Id.*
36
 - 37 • Later that evening, while conferring with Mr. Beardsley regarding these issues, Mr.
38 Beardsley's counsel informed him that, in light of the Neutral's agreement to
39 temporarily suspend data collection from the iCloud account, it would be permissible
40 for him to change the account password. McMillan Decl., Ex. H (transcript of Nov. 2
41 telephonic hearing) at 20-21.
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- That same evening, Ms. Stephen send an email notifying the Neutral and all parties that “Mr. Beardsley is changing his iCloud password tonight.” McMillan Decl., Ex. I (10/28/15 email). The email explained that the new password would be provided to the Neutral once the scope-of-collection issues were resolved, and informed Plaintiffs’ counsel (David Singer) that Ms. Stephen would be in touch with him “in the very near term.” *Id.*
 - Neither the Neutral nor Plaintiffs communicated any objection to the understandings or actions proposed by Ms. Stephen in her October 28 emails. On the contrary, on the morning of October 29, the Neutral emailed all counsel an updated status sheet, followed in the early afternoon by an email on the “cloud accounts.” McMillan Decl., Ex. J (11:10 a.m. email); Ex. K (12:27 p.m. email). The latter email noted that action on the Beardsley iCloud account was “on hold pending counsel discussions / resolution” and closed by saying “Thanks everyone for your cooperation!” Thus, to all appearances – at least to Defendants’ counsel and the Neutral – everything was proceeding normally. McMillan Decl. ¶ 15.
 - At 2:47 p.m. on October 29, however, without any prior communication on the issue, Plaintiffs’ counsel sent an email to the parties saying Plaintiffs intended to file a motion on shortened time seeking “an order enforcing the neutral forensic examination protocol.” McMillan Decl., Ex. L (10/29/15 email string).
 - Defendants’ counsel were surprised and perplexed by this email. Counsel for Mr. Samuelson (Brian Esler) immediately sent an email asking Plaintiffs’ counsel, “what is this about?” *Id.*
 - Plaintiffs’ counsel (an attorney who had not been on the October 28 call with the Neutral or involved in any of the joint communications about the Neutral Protocol) responded,¹ characterizing the situation as follows: “Mr. Beardsley *ordered* the neutral to halt a part of the forensic review and then changed a password, *cutting off* the neutral’s access to his iCloud account.” *Id.* (emphases added). He went on to state: “We’re seeking an order to restore the neutral’s access to that account and get the forensic review *back on track.*” *Id.* (emphasis added).
 - About an hour later (4:06 p.m. on October 29), Ms. Stephen informed Plaintiffs’ counsel that the new password had actually been provided to the Neutral that very afternoon, and that he had been advised he could proceed with data collection from

¹ Indeed, consistent with his lack of personal involvement in the process, Plaintiffs’ attorney failed to use the agreed-upon email circulation list for matters relating to the Neutral Protocol. McMillan Decl. ¶ 16.

1 the iCloud account. *Id.*

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- In that same email, Ms. Stephen objected to any motion being filed in the absence of a meet-and-confer on the relevant issues, and requested a meet-and-confer should Plaintiffs persist in their belief that a motion was necessary. *Id.*
 - Plaintiffs ignored the request for a meet-and-confer and the information that the Neutral had been provided the new iCloud password, and at 4:26 p.m. on October 29, filed an “Emergency Application” to enforce the Neutral Protocol. McMillan Decl., Ex. M (Pls.’ 4:26 p.m. email submission to Special Master). Plaintiffs’ “emergency” motion was filed on shortened time, and sought an order “mandating that Mr. Beardsley (1) immediately provide the neutral with his new iCloud password and (2) allow the Neutral to continue doing his work without further obstruction.” McMillan Decl., Ex. N (Pls.’ Emergency Application) at 6.
 - Plaintiffs’ “Emergency Application” contained alarmist rhetoric and unsupported allegations, including, for example, the assertions that that Mr. Beardsley “knowingly destroyed evidence while under subpoena” and “could potentially be deleting . . . information before the Neutral has a chance to analyze [the] contents [of the iCloud account].” McMillan Decl., Ex. N at 4.
 - The Special Master set a telephonic hearing for Monday, November 2. Prior to the call, Mr. Beardsley’s counsel filed a Response to Plaintiffs’ motion, explaining the circumstances, noting that the password and data collection issues had been resolved, and objecting to Plaintiffs’ unjustified haste in filing a motion without a meet-and-confer, despite ample communication from Mr. Beardsley’s counsel indicating that they were diligently addressing the issues, and their express request for a meet-and-confer. *See* McMillan Decl., Ex. F (Beardsley 11/2/15 Response to Pls.’ Emergency Application) at 4-7. The other Defendants joined in Mr. Beardsley’s Response.
 - In light of the mootness of Plaintiffs’ requested relief (*i.e.*, the access/scope-of-collection issue was fully resolved and the new password in the Neutral’s hands), Plaintiffs abruptly changed their tactics, demanding new and different relief for the first time during the November 2 teleconference with the Special Master. Specifically, Plaintiffs’ counsel stated: “I guess in terms of what relief we can ask for now that they appear to allow the Neutral to continue his work, the relief would be some kind of admonition that, you know, again as stated in the [Neutral Protocol], Mr. Beardsley can’t use his password and access to the account to hold over the neutral’s head.” McMillan Decl., Ex. H (11/2/15 hearing transcript) at 7.

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- As he delivered his ruling during the telephonic hearing, it was clear that the Special Master was under the highly significant misimpression that, on the evening of October 28, Mr. Beardsley had acted *entirely on his own initiative* in changing the password to his iCloud account.
 - Specifically, the Special Master stated: “I think Mr. Beardsley should understand that he is not authorized to unilaterally take actions such as the action that he took.”
“And the argument that there’s no harm, no foul may be true in the ultimate sense in this case, but I want to be clear to him that *he is not to take measures himself and then tell his lawyers after the fact what he’s done*. He has lawyers and we have a process here in which he can get to my attention pretty quick. That’s the remedy. Not for someone to say, ‘I’ve done this on my own.’” . . .
“I am going to enter an order admonishing Mr. Beardsley not to take unilateral actions or impede or interfere with the neutral’s investigation.” McMillan Decl., Ex. H at 19–20 (emphasis added).
 - After the Special Master delivered his ruling and asked counsel to prepare a written order containing an admonition, counsel for Mr. Beardsley immediately informed the Special Master of “a very important clarification that [she] needed to make.” She went on to clearly explain that Mr. Beardsley had not acted without conferring with his counsel on the evening of October 28. On the contrary, he had discussed it with counsel, asked whether he could temporarily change the password, and been “advised [that] because the Neutral had already said he was ceasing collection, that was okay.” McMillan Decl., Ex. H at 20-21.
 - Despite this important clarification – which undercut the only reason identified by the Special Master for issuing the admonition – he declined to modify his position. *Id.* at 21. On November 5, he issued a Report and Recommendation saying “I recommend the Court enter an order admonishing Mr. Beardsley not to take unilateral actions to impede or delay or interfere with the Neutral’s investigation. The actions that Mr. Beardsley and his counsel took were not warranted under the circumstances.” McMillan Decl., Ex. O (11/5/15 R&R) at 4.

II. ARGUMENT AND AUTHORITY

The Court should decline to adopt the Special Master’s November 5, 2015, Report and Recommendation because an admonition of Mr. Beardsley for conduct based on the reasonable

1 advice of counsel is unfair, unnecessary, and inappropriate under the governing legal standard
2
3 for imposition of sanctions.
4

5 **A. Standards for Imposition of a Discovery Sanction**

6 An admonition is a sanction. *See Grider v. Keystone Health Plan Cent., Inc.*, 2006 WL
7 7353319 at *5 (E.D. Pa. Mar. 30, 2006) (“an admonishment to refrain from further violations of
8 a Stipulated Protective Order would certainly constitute a sanction”). Under Washington law,
9 “the purpose of sanctions generally are to deter, to punish, to compensate, to educate, and to
10 ensure that the wrongdoer does not profit from the wrong.” *Washington State Physicians Ins.*
11 *Exch. & Ass’n. v. Fisons Corp.*, 122 Wn.2d 299, 355-56 (1993). Under CR 37(b)(2), “if a party
12 fails to obey an order entered under rule 26(f) [implementing a discovery plan], the court in
13 which the action is pending may make such orders in regard to the failure *as are just.*” CR
14 37(b)(2) (identifying potential sanctions) (emphasis added). One of the “guiding principles” of
15 Washington law in this area is that “the court should impose the least severe sanction that will be
16 adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines
17 the purpose of discovery.” *Burnett v. Spokane Ambulance*, 131 Wn.2d 484, 495-96 (1997).²
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31 **B. A Sanction Is Not Warranted in this Instance**

32 Under the circumstances present here, the standard for imposition of a sanction is not
33 met. Rather, sanctioning Mr. Beardsley on the facts described above would unjustly obscure the
34 reality of the neutral examination process. That reality – which Defendants believe the Neutral
35 would readily confirm, if he were consulted – is that all Defendants, *including Mr. Beardsley*,
36 have been taking their responsibilities with the utmost seriousness and have fully cooperated at
37 every step of the way. Defendants have *not* been resisting a neutral examination of the forensic
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45 ² Courts generally employ sanctions sparingly. *See, e.g., Nat. Gas Pipeline Co. of Am. v. Energy*
46 *Gathering, Inc.*, 86 F.3d 464, 467 (5th Cir. 1996) (sanctions under the court’s inherent powers “must be used with
47 great restraint and caution” and “only if essential to preserve the authority of the court”).

1 record. On the contrary, it was Defendants who *proposed* the appointment of a neutral forensic
2 expert, in motion practice before the Special Master in June 2015. Defendants, including Mr.
3 Beardsley, *welcome* that examination because they believe a court-appointed Neutral will
4 provide a highly credible rebuttal to the sweeping, unsupported claims advanced by Plaintiffs in
5 this complex area of the litigation.
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10 None of the purposes of a sanction – to deter, punish, compensate, educate, or ensure that
11 the wrongdoer does not profit from the wrong – would be advanced by sanctioning Mr.
12 Beardsley. No “deterrence” or “education” is needed, as Mr. Beardsley (like the other
13 Defendants) recognizes the importance of the neutral examination and has an interest in moving
14 it forward swiftly to completion. Likewise, no “punishment” is appropriate, as Mr. Beardsley’s
15 conduct was taken on the advice of counsel, based on counsel’s reasonable assumption that the
16 action was consistent with the Neutral’s consent to the brief stay in data collection from the
17 iCloud account. It was done in a fully transparent manner, as part of a diligent effort directed
18 towards a speedy resolution of a legitimate issue. Significantly, the Neutral himself did not
19 consider the action inappropriate, much less a sinister act of willful obstruction. *See* McMillan
20 Decl., Ex. K (Neutral’s October 29 email, the day after the change of password, saying “Thanks
21 everyone for your cooperation!”).
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34 Finally, no “compensation” or action to prevent Mr. Beardsley from profiting is
35 appropriate because there was neither prejudice to Plaintiffs (*i.e.*, no delay in examining the web-
36 based accounts, as Plaintiffs have not even issued an Instruction Set for such an examination),
37 nor unfair advantage gained by Mr. Beardsley (*i.e.*, he provided the password and unrestricted
38 access and collection rights to the Neutral on October 29, less than 24 hours after changing the
39 password and before Plaintiffs even filed their “Emergency Application”).
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1 In sharp contrast to the lack of need for, or purpose served by a sanction, the unfair
2 prejudice that would result is real and highly significant. Indeed, in this case, where genuine
3 evidence of misappropriated trade secrets is scant or non-existent, Plaintiffs' primary litigation
4 strategy has been to disparage Defendants, with an eye towards convincing the finders-of-fact
5 that they are unethical, and have destroyed all evidence of their alleged misdeeds. In this
6 context, a sanction will be used to unfairly pillory Mr. Beardsley as a party who tried to obstruct
7 the neutral forensic examination. The truth of the matter is that Mr. Beardsley has done no such
8 thing. Entry of an order admonishing Mr. Beardsley under these circumstances is the antithesis
9 of the CR 37(b)(2) directive that only "just" orders regarding alleged discovery misconduct
10 should issue.
11

12 Moreover, the injustice of sanctioning Mr. Beardsley would be aggravated by the
13 inevitable carry-over effect it would have on the other Defendants in this case, Zillow, Inc. and
14 Mr. Samuelson, neither of whom played any role in the decision to change the iCloud password.
15 As has unfortunately occurred too often in this litigation, Plaintiffs are unlikely to be precise and
16 discriminating in their future use of such an order. Rather, any sanction is likely to be held up as
17 an instance of "Defendants'" alleged misconduct. *See Bates v. Thomas*, 806 So. 2d 650 (La.
18 2002) (reversing order imposing discovery sanction and remanding to trial court for
19 consideration of less drastic sanction that would not adversely affect other defendants).
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37 **C. Defendants Were Not Given a Meaningful Opportunity to Respond to Plaintiffs'**
38 **Last-Minute Demand for a Sanction**

39 Finally, it is highly significant that the request for a sanction was not included in
40 Plaintiffs' "Emergency Application" filed on October 29. Instead, it was only during the
41 telephonic hearing on November 2 that Plaintiffs raised the issue for the first time. *See*
42 McMillan Decl., Ex. H (hearing transcript) at 7 ("I guess in terms of what relief we can ask for
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1 now that they appear to allow the Neutral to continue his work, the relief would be some kind of
2 admonition that, you know, . . . Mr. Beardsley can't use his password and access to the account
3 to hold over the neutral's head."'). This demand for a ruling with very serious implications came
4 out of the blue, and Defendants were not afforded a meaningful opportunity to address it.
5 Specifically, Defendants had no opportunity to bring to the Special Master's attention the
6 relevant standards for entry of such a sanction, or to fully explain the significance of it in the
7 context of the current case.³ Under these circumstances, where the decision was taken on
8 shortened time and Defendants lacked the opportunity to adequately address the issue, the Court
9 should decline to adopt the recommendation to admonish Mr. Beardsley.⁴
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19 III. CONCLUSION

20 For the reasons set forth above, the Court should not adopt the November 5, 2015, Report
21 and Recommendation of the Special Master regarding Enforcement of the Neutral Protocol.
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39 ³ In presenting an alternative order for the Special Master's consideration – after he had issued his oral
40 ruling during the November 2 telephonic hearing (which was itself held on shortened time) – Defendants invited the
41 Special Master to contact the Neutral to inquire whether, as Plaintiffs maintained, Mr. Beardsley had truly
42 obstructed the investigation. As far as Defendants are aware, the Special Master did not confer with the Neutral.
43 McMillan Decl., Ex. P (11/3/15 email with Defendants' alternative Proposed Order).

44 ⁴ See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (“sanctions . . . should not be assessed
45 lightly or without fair notice and an opportunity for a hearing on the record”); *In re Stein*, 127 F.3d 292, 294 (2d Cir.
46 1997) (“notice and an opportunity to respond is necessary prior to the imposition of ‘any kind of sanctions’”);
47 *Stewart v. Thomas*, 50 F. App'x 184, 184-85 (4th Cir. 2002) (due process requires “notice and a reasonable
opportunity to respond” before Rule 11 sanctions can be imposed).

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DATED: December 8, 2015

/s/ Joseph M. McMillan

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Attorneys for Defendant
Zillow, Inc.

CERTIFICATE OF SERVICE

On December 8, 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 foregoing document entitled DEFENDANT ZILLOW, INC.'S OPPOSITION TO THE NOVEMBER 5 REPORT AND RECOMMENDATION OF THE SPECIAL DISCOVERY MASTER.

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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 8th day of December, 2015.

/s June Starr
June Starr, Legal Secretary

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THE HONORABLE SEAN O'DONNELL
SET FOR ORAL ARGUMENT: December 11, 2015
9:00 a.m.

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

**[PROPOSED] ORDER REJECTING THE
NOVEMBER 5 REPORT AND
RECOMMENDATION OF THE
SPECIAL DISCOVERY MASTER**

[PROPOSED] ORDER REJECTING THE NOVEMBER 5 REPORT
AND RECOMMENDATION OF THE SPECIAL MASTER

128923345.1

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1 THIS MATTER came before the Court in connection with the Special Discovery
2
3 Master's November 5, 2015, Report and Recommendation Re: Plaintiffs' Emergency
4
5 Application to Enforce Neutral Forensic Inspection Protocol. The Court has reviewed the record
6
7 before the Special Master, considered all pleadings and papers submitted in support of and in
8
9 opposition to the Special Master's Report and Recommendation, and heard the arguments of
10
11 counsel on the matter.

12 BEING FULLY ADVISED, IT IS HEREBY ORDERED that the Court declines to adopt
13
14 the November 5, 2015, Report and Recommendation of the Special Discovery Master.
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18 DATED this _____ day of December, 2015.
19
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23 HONORABLE SEAN O'DONNELL
24
25

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27
28 Presented by:
29

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31 By s/ Joseph M. McMillan
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45 *Attorneys for Defendant Zillow, Inc.*
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[PROPOSED] ORDER REJECTING THE NOVEMBER 5 REPORT
AND RECOMMENDATION OF THE SPECIAL MASTER – 1

128923345.1

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CERTIFICATE OF SERVICE

On December 8, 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 foregoing document entitled [PROPOSED] ORDER REJECTING THE NOVEMBER 5 REPORT AND RECOMMENDATION OF THE SPECIAL MASTER.

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DATED this 8th day of December, 2015.

/s June Starr
June Starr, Legal Secretary