

**FILED**  
KING COUNTY WASHINGTON

The Honorable Sean P. O'Donnell

DEC 15 2015

SUPERIOR COURT CLERK  
BY DAVID J. ROBERTS  
DEPUTY

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

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

Plaintiffs,

vs.

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

Defendants.

NO. 14-2-07669-0 SEA

**ORDER ADOPTING NOVEMBER 5,  
2015 REPORT AND  
RECOMMENDATION OF SPECIAL  
MASTER RE: PLAINTIFFS'  
EMERGENCY APPLICATION TO  
ENFORCE NEUTRAL FORENSIC  
PROTOCOL**

Pursuant to CR 53.3 and this Court's June 15, 2015 Order Re: Amendment to Order Appointing Special Master, the Discovery Master prepared and submitted to the Court his Report and Recommendation dated November 5, 2015, regarding Plaintiffs' Emergency Application to Enforce Neutral Forensic Protocol. The Court then requested briefing and oral argument on this matter.

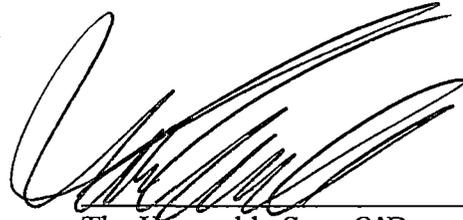
Having now reviewed the Special Master's report and recommendations, and reviewed the submissions of the parties and considered the arguments of counsel, the Court DENIES Plaintiffs' motion to strike Defendant Zillow's submission and ADOPTS the Special Master's

1 report and recommendations dated November 5, 2015. The changing of Mr. Beardsley's  
2 password to his iCloud account password was not warranted under the circumstances. Mr.  
3 Beardsley is admonished not to take unilateral actions to impede or delay or interfere with the  
4 investigation of the neutral forensic expert. So it is clear the admonishment relates only to Mr.  
5 Beardsley and not to Zillow or Mr. Samuelson.

6 That said, the Court notes that this admonishment is intended as a warning, and not as a  
7 discovery sanction. It relates to the process that Mr. Beardsley and his counsel should have  
8 followed and which he and the other parties shall follow in implementing the Protocol  
9 governing the work of the neutral forensic expert. ~~The Court recognizes that the circumstances~~  
10 ~~that arose here were unanticipated and that no evidence was lost.~~ The Court is not making a  
11 finding of a full discovery violation.

12 IT IS SO ORDERED.

13  
14 DATED: December 15<sup>th</sup>, 2015.

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16   
17 The Honorable Sean O'Donnell  
18 Judge, King County Superior Court

19  
20 Presented as to form of order by:

21 **SAVITT BRUCE & WILLEY LLP**

22 By /s/ James P. Savitt

23 James P. Savitt, WSBA #16847  
24 Attorneys for Defendant Curt Beardsley

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

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

Plaintiffs,

vs.

ZILLOW, INC., a Washington corporation,  
ERROL SAMUELSON, an individual, and  
CURT BEARDSLEY, an individual,  
Defendants.

Case No. 14-2-07669-0 SEA

**REPORT AND RECOMMENDATION RE  
PLAINTIFFS' EMERGENCY  
APPLICATION TO ENFORCE NEUTRAL  
FORENSIC INSPECTION PROTOCOL**

1 Pursuant to the Court's orders in this case dated July 15, 2015 and July 28, 2015, regarding  
2 the procedures surrounding discovery motions, contained herein is my Report and  
3 Recommendation to the Court. These matters have been referred by the court and having come  
4 before the Discovery Master ("DM") regarding Plaintiffs' Emergency Application to Enforce  
5 Neutral Forensic Inspection Protocol and Order Against Defendant Curt Beardsley, the DM has  
6 considered all briefing, including: Plaintiffs' Emergency Application to Enforce Neutral Forensic  
7 Inspection Protocol and Order Against Defendant Curt Beardsley; Declaration of David Singer in  
8 support of Plaintiffs' Emergency Application to Enforce Neutral Forensic Inspection Protocol and  
9 Order Against Defendant Curt Beardsley; Defendant Curt Beardsley's Response to Plaintiffs'  
10 Emergency Application to Enforce Neutral Forensic Inspection Protocol and Order Against  
11 Defendant Curt Beardsley; Declaration of Michele Stephen in support of Curt Beardsley's  
12 Response to Plaintiffs' Emergency Application to Enforce Neutral Forensic Inspection Protocol  
13 and Order Against Defendant Curt Beardsley; Defendant Zillow's Joinder In Curt Beardsley's  
14 Response to Plaintiffs' Emergency Application to Enforce Neutral Forensic Inspection Protocol  
15 and Order Against Defendant Curt Beardsley; and Defendant Errol Samuelson's Joinder in Curt  
16 Beardsley's Response to Plaintiffs' Emergency Application to Enforce Neutral Forensic  
17 Inspection Protocol and Order Against Defendant Curt Beardsley.

18 Oral argument was held via telephone on November 2, 2015 at 12:00pm. Counsel for all  
19 parties were present. The DM reports and recommends as follows:

20 The Court previously ordered a forensic examination of certain electronic devices and  
21 accounts. The Court has appointed a third party neutral ("the Neutral") to conduct the  
22 examination as an officer of the Court. In the course of the Neutral's examination, a message  
23 appeared on devices which were connected to Mr. Beardsley's iCloud account, indicating those  
accounts were being accessed by the Neutral, but Mr. Beardsley's family contends it did not  
recognize that and instead feared their devices were being "hacked." Subsequently, when made

1 aware of these events, Mr. Beardsley, through counsel, informed the Neutral that he objected to  
2 collection of information from Mr. Beardsley's iCloud account that was interconnected to the  
3 family's devices, and objected to further examination of the Beardsley iCloud account until the  
4 scope of that inquiry could be resolved. The Neutral acquiesced in that objection over Plaintiffs'  
5 objection. Mr. Beardsley then, with advice of counsel, unilaterally decided to change the  
6 password to his iCloud account, thereby blocking the Neutral's access to that account. Mr.  
7 Beardsley did not give advance notice to Plaintiffs, or the Neutral, before deciding to change his  
8 password and thereby block the Neutral's access to his iCloud account. Mr. Beardsley also did  
9 not seek relief from the Court, through the Discovery Master, from Section 6 of the Protocol,  
10 which does not allow Mr. Beardsley to change the password to his iCloud account until after the  
11 Neutral determines that imaging of the account is complete.

12 Plaintiffs then brought the pending motion for an order requiring Mr. Beardsley to allow  
13 the Neutral to continue his investigation including the iCloud account except for web-based  
14 email, and admonishing Mr. Beardsley for violating the Court-ordered protocol governing the  
15 Neutral's examination. In response, Defendants argued that Plaintiffs should have met and  
16 conferred before bringing the instant motion, that the motion was unnecessary, and the issue was  
17 moot because the changed password had later been given to the Neutral.

18 Under the circumstances, and given Mr. Beardsley's unilateral action, and the effect of  
19 the objection by Defendant's Counsel on the Neutral's investigation, I do not find that Plaintiffs  
20 were required to meet and confer any further with Defendants before bringing the instant motion.

21 Mr. Beardsley's initial objection to the scope of the Neutral's examination of his iCloud  
22 account is now moot as Defendants have agreed to an acceptable procedure to complete this task.  
23 The Neutral will be allowed to conduct a review and deletion analysis (as described in the Court-

1 ordered protocol) on all content he is able to image and gather from Mr. Beardsley's iCloud  
2 account, except for the web-based email. Specifically, the Neutral may examine iMessages and  
3 other data stored in cloud accounts in the manner now agreed.

4 The DM is concerned about Mr. Beardsley taking unilateral action to in any way impede  
5 or control the Neutral's investigation. The DM finds that Mr. Beardsley's action in changing the  
6 password to his iCloud account, and thus removing the Neutral's access to that account, was  
7 inconsistent with the Court-ordered protocol for the Neutral's examination. Mr. Beardsley, and  
8 his counsel, should understand that no party is authorized to unilaterally take actions to impede  
9 or otherwise circumscribe the Neutral's investigation. When the Neutral indicated he would  
10 suspend his review, the Neutral was still in control of the process. But once Mr. Beardsley  
11 changed his password, he then was in control of the forensic process, and that is inconsistent  
12 with the Protocol which has the force of a court order.

13 Mr. Beardsley contends he took unilateral action to change his password because the  
14 Neutral may have been able to access information of Mr. Beardsley's family members via the  
15 iCloud account. While Mr. Beardsley's concerns and interests may be important from his  
16 family's perspective, the gravity of those concerns are not equivalent to the more serious  
17 concerns over previous issues such as disclosure of emails containing highly sensitive privileged  
18 attorney-client communications, and there has been no showing that privileged attorney-client  
19 communications were at issue here. The Neutral is an officer of the Court, and the Neutral may  
20 have to look at some family matters in order to complete his investigation.

21 Mr. Beardsley argues that there was no harm, and therefore should be no foul, when he  
22 unilaterally changed his password because the Neutral had already agreed to suspend his  
23 examination of the iCloud account. The DM rejects this argument. The fact that the Neutral had

1 indicated that he was going to hold up on the investigation of the iCloud account in light of Mr.  
2 Beardsley's objection does not excuse the decision by Mr. Beardsley and his counsel to  
3 unilaterally change his password, and thereby assume control of this process, which is the  
4 province of the Court (as administered through the Neutral and the DM), and not Mr. Beardsley.

5 I recommend the Court enter an order admonishing Mr. Beardsley not to take unilateral  
6 actions to impede or delay or interfere with the Neutral's investigation. The actions that Mr.  
7 Beardsley and his counsel took were not warranted under the circumstances.

8 The DM also advises the Neutral that, in the future, before he halts his investigation in  
9 light of an objection from counsel for a party, he may contact the DM for guidance.

10 IT IS SO REPORTED AND RECOMMENDED THIS 5 DAY OF NOVEMBER, 2015.

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12 Judge Bruce W. Hilyer (Ret.)  
13 Special Discovery Master  
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