

FILED
KING COUNTY, WASHINGTON

SEP 15 2015

SUPERIOR COURT CLERK
BY David Witten
DEPUTY

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

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

Defendants.

No. 14-2-07669-0 SEA

ORDER ADOPTING AUGUST 26, 2015
REPORT AND RECOMMENDATIONS OF
SPECIAL MASTER RE: 1) DEFENDANT
CURT BEARDSLEY'S MOTION FOR
PROTECTIVE ORDER RE:
INADVERTENT EMAIL; 2) PLAINTIFFS'
EMERGENCY APPLICATION FOR AN
OMNIBUS PRESERVATION ORDER; 3)
PLAINTIFFS' MOTION FOR IMMEDIATE
DISCOVERY AND OTHER RELIEF

Special Master Hilyer filed his "Special Master Discovery Report" dated August 26th,
2015 regarding the above-referenced issues.

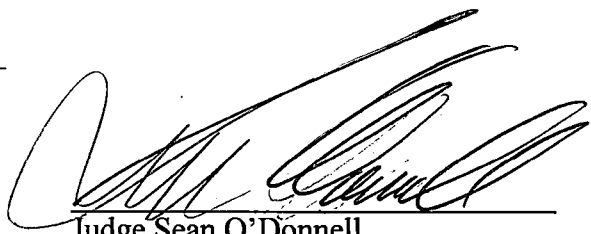
The matter is now before me. See CR 53.3 and this Court's June 15, 2015 Order Re:
Amendment to Order Appointing Special Master.

Having reviewed the Special Master's report and recommendations, the Court ADOPTS
Special Master Hilyer's August 26th, 2015 Report and Recommendations.

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IT IS SO ORDERED.

DATED: Sept 11, 2015



Judge Sean O'Donnell
King County Superior Court

DISCOVERY MASTER
THE HONORABLE BRUCE HILYER (RET.)

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

Defendants.

Case No. 14-2-07669-0 SEA

**REPORT AND RECOMMENDATION
FOR IMMEDIATE ENTRY OF
PRESERVATION ORDER AGAINST
DEFENDANT CURT BEARDSLEY**

THIS MATTER came before the Discovery Master on the Plaintiffs' Emergency Application for a Preservation Order. The Discovery Master reviewed the Plaintiffs' application and supporting exhibits and finds that Defendant Beardsley has admitted initiating file deletion programs on two computers which may have caused the loss of evidence in this case, and has discarded a hard drive and cannot locate several storage devices which raise the same concerns, while under a production of records subpoena.

**REPORT & RECOMMENDATION FOR
IMMEDIATE ENTRY OF PRESERVATION
ORDER AGAINST DEFENDANT CURT
BEARDSLEY - Page | 1**

Hilyer Dispute Resolution
1000 Second Ave 30th Floor
Seattle, Washington 98101
T: (206) 623-0068


1 NOW THEREFORE, it is RECOMMENDED:

2 1. Plaintiffs' Emergency Application for a Preservation Order against Defendant
3 Beardsley is GRANTED.

4 2. Defendant Beardsley shall maintain all data related to the deletion of any files
5 on any electronic device or cloud account or the destruction or discarding of any hard drive or
6 other electronic storage device, which may contain evidence pertinent to this case.

7 3. Defendant Beardsley shall refrain from any further file deletion, discarding of
8 potential evidence on computer devices, including all forms of e-storage, which may contain
9 evidence pertinent to this case.

10 IT IS SO RECOMMENDED this 14 day of August 2015, at Seattle, Washington.

11 
12 The Honorable Bruce Hilyer (Ret.)
13 Special Discovery Master

DISCOVERY MASTER
THE HONORABLE BRUCE HILYER (RET.)

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,

v.

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

Defendants.

NO. 14-2-07669-0 SEA

~~STIPULATION~~ RE: LIMITED
DEPOSITION OF DEFENDANT
CURT BEARDSLEY

~~STIPULATION~~
ORDER

~~FOLLOWING FULL BRIEFING AND A HEARING ON THIS~~
~~Plaintiffs Move, Inc., RealSelect, Inc., Top Producer Systems Company, National~~
~~Association of Realtors®, and Realtors® Information Network, Inc. ("Plaintiffs") and~~
~~Defendant Curt Beardsley stipulate:~~ AS FOLLOWS:

1. Plaintiffs shall be permitted to depose Mr. Beardsley for no more than three (3) hours for the purpose of addressing the subject matter set forth in paragraph 2 below (the

1 "limited deposition"). The time used to conduct the limited deposition shall not count against
2 or be deducted from the time permitted for deposition under LCR 26(b)(3).

3 2. The limited deposition shall be restricted to the following subject matter:

4 (1) The use, contents, location, and/or disposition of the following devices:

5 (a) SanDisk Cruzer USB device with serial number
6 4C330300221117101305;

7 (b) SanDisk Cruzer USB device with serial number
8 20052242801E0E900E9E;

9 (c) general USB Flash Disk USB device with serial number
10 0000000000015AA;

11 (d) general UDisk USB device with serial number
12 1104090309500035117100; and

13 (e) WD 1600BEV External USB device with serial number
14 5758453330384A3432333337;

15 (2) The use, contents, location and/or disposition of other computers or storage
16 devices that have been connected to any other computer or device containing
17 Move's data, proprietary, or business information including, but not limited to,
18 any computer or laptop used in connection with Move or Zillow business;

19 (3) Mr. Beardsley's use of file cleanup programs on devices containing Move-
20 or Zillow-related documents or data, including the launching of a program
21 entitled "cleanup.bat" and the "Disk Cleanup" program incorporated in
22 Windows' operating system (a/k/a "cleanmgr.exe") on Mr. Beardsley's home
23 office desktop computer and Zillow laptop;

24 (4) Declaration of Curt Beardsley, dated July 31, 2015; and

25 (5) Mr. Beardsley's knowledge regarding the deletion, destruction, or loss of
26 data, devices, or files related to the claims and defenses in this case.

27 3. This limited deposition shall occur within 30 days of the date of this stipulation, *PROVIDE
DEP. SHALL RECEIVE HIS MOVE COMPUTER DEVICES 5 BUSINESS DAYS*


4. Except as herein noted, the limited deposition shall be conducted in accordance

with the Washington Civil Rules and the Local Civil Rules.

*IN ADVANCE FOR HIS DEPOSITION PREPARATION, BUT
NO FORENSIC EXAMINATION SHALL BE UNDERTAKEN UNLESS
AFTER HE HAS CERTIFIED THE ACCURACY OF HIS DEPOSITION TRANSCRIPT.*

BWA

1 IT IS SO RECOMMENDED this 14 day of August 2015, at Seattle, Washington.

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4 The Honorable Bruce Hilyer (Ret.)
5 Special Discovery Master
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H | D | R
HILYER DISPUTE RESOLUTION

August 26, 2015

Judge Sean O'Donnell
KCSC, Judge's Mailroom #C-203
516 Third Avenue
Seattle, WA 98104
E: parkin.eric@kingcounty.gov

Re: *Move et al. v. Zillow et al.*, KCSC No. 14-2-07669-0 SE; Special Discovery Master Report and Recommendation on (1) Defendant Curt Beardsley's Motion for Protective Order re Inadvertent Email; (2) Plaintiffs' Emergency Application for Omnibus Preservation Order in Light of Evidence of Defendants' Destruction of Hard Drive and Deletion of Computer Files During Discovery; and (3) Plaintiffs' Motion for Immediate Discovery and Other Relief in Light of Evidence of Destruction of Hardware and Deletion of Computer Files During Discovery.

Dear Judge O'Donnell:

Pursuant to your Orders in this case dated July 15, 2015 and July 28, 2015, regarding the procedures surrounding discovery motions, contained herein please find one of several of my Reports and Recommendations to you. These matters having been referred by the court and having come before the Discovery Master ("DM") regarding Defendant Curt Beardsley's Motion for Protective Order re Inadvertent Email, the DM has considered all briefing, including Defendant Curt Beardsley's Motion for Protective Order Regarding Plaintiffs' Improper Use of Privileged Materials; [Proposed] Report and Recommendation re: Defendant Curt Beardsley's Motion for Protective Order Regarding Plaintiffs' Improper Use of Privileged Materials; Defendant Zillow Inc.'s Joinder in Defendant Curt Beardsley's Motion for Protective Order re Inadvertent Email; Plaintiffs' Opposition to Motion for Protective Order Regarding Allegedly Privileged Email; [Proposed] Report & Recommendation Denying Defendant Curt Beardsley's Motion for Protective Order Regarding Allegedly Privileged Email; Zillow, Inc.'s Reply in Support of Defendants' Motion for Protective Order Regarding Plaintiffs' Improper Use of Privileged Materials; Reply in Support of Defendant Curt Beardsley's Motion for Protective Order Regarding Plaintiffs' Improper Use of Privileged Materials.

These matters having been referred by the court and having come before the Discovery Master ("DM") regarding Plaintiffs' Emergency Application for Omnibus Preservation Order in Light of Evidence of Defendants' Destruction of Hard Drive and

Deletion of Computer Files During Discovery, the DM has considered all briefing, including Plaintiffs' Emergency Application for Omnibus Preservation Order in Light of Evidence of Defendants' Destruction of Hard Drive and Deletion of Computer Files During Discovery; Declaration of Ethan Glickstein in Support of Plaintiffs' Emergency Application for Omnibus Preservation Order in Light of Evidence of Defendants' Destruction of Hard Drive and Deletion of Computer Files During Discovery; [Proposed] Report and Recommendation for Immediate Entry of Preservation Order; Defendant Zillow's Opposition to Plaintiffs' Emergency Application for Omnibus Preservation Order; Declaration of Katherine G. Galipeau in Support of Defendant Zillow's Opposition to Plaintiffs' Emergency Application for Omnibus Preservation Order in Light of Evidence of Defendants' Destruction of Hard Drive and Deletion of Computer Files During Discovery; Declaration of John H. Gray in Support of Defendant Zillow's Opposition to Plaintiffs' Emergency Application for Omnibus Preservation Order; Declaration of Susan E. Foster in Support of Defendant Zillow's Opposition to Plaintiffs' Emergency Application for Omnibus Preservation Order; [Proposed] Report and Recommendation Denying Plaintiffs' Emergency Application for Omnibus Preservation Order; Defendant Curt Beardsley's Response to Plaintiffs' Emergency Application for Omnibus Preservation Order; Declaration of Duffy Graham in Support of Defendant Curt Beardsley's Response to Plaintiffs' "Emergency Application" For Omnibus Preservation Order; [Proposed] Report and Recommendation re: Plaintiffs' Request for Preservation Order; Plaintiffs' Reply in Support of Emergency Application for Omnibus Preservation Order in Light of Evidence of Defendants' Destruction of Hard Drive and Deletion of Computer Files During Discovery.

These matters having been referred by the court and having come before the Discovery Master ("DM") regarding Plaintiffs' Motion for Immediate Discovery and Other Relief in Light of Evidence of Destruction of Hardware and Deletion of Computer Files During Discovery, the DM has considered all briefing, including Plaintiffs' Motion for Immediate Discovery and Other Relief in Light of Evidence of Destruction of Hardware and Deletion of Computer Files During Discovery; Declaration of Amy Gallegos in Support of Plaintiffs' Motion for Immediate Discovery and Other Relief in Light of Evidence of Destruction of Hardware and Deletion of Computer Files During Discovery; Declaration of John Lee in Support of Plaintiffs' Motion for Immediate Discovery and Other Relief in Light of Evidence of Destruction of Hardware and Deletion of Computer Files During Discovery; [Proposed Report and Recommendation for Immediate Discovery and other Relief in Light of Evidence of Destruction of Hard Drive and Deletion of Computer Files During Discovery; Defendant Zillow, Inc.'s Opposition to Plaintiffs' Motion for Immediate Discovery and other Relief; Declaration of Joseph M. McMillan in Support of Defendant Zillow, Inc.'s

Opposition to Plaintiffs' Motion for Immediate Discovery; [Proposed] Report and Recommendation Denying Plaintiffs' Motion for Immediate Discovery; Plaintiffs' Reply to Zillow's Opposition to Motion for Immediate Discovery and Other Relief; Defendant Curt Beardsley's Opposition to Plaintiffs' Motion for Immediate Discovery and Other Relief; Declaration of Duffy Graham in Support of Defendant Curt Beardsley's Opposition to Plaintiffs' Motion for Immediate Discovery and other Relief; Declaration of Michele L. Stephen in Support of Defendant Curt Beardsley's Opposition to Plaintiffs' Motion for Immediate Discovery and other Relief; Declaration of Curt Beardsley; Plaintiffs' Reply to Curt Beardsley's Opposition to Motion for Immediate Discovery and Other Relief; Samuelson's Opposition to Plaintiffs' Motion for Immediate Discovery; Declaration of K. Michael Fandel Supporting Samuelson's Opposition to Plaintiffs' Motion for Immediate Discovery; Plaintiffs' Reply to Errol Samuelson's Opposition To Motion for Immediate Discovery and Other Relief; Declaration of Ethan Glickstein in Support of Plaintiffs' Reply to Errol Samuelson's Opposition to Motion for Immediate Discovery and Other Relief; Plaintiffs' Reply to Curt Beardsley's Opposition to Motion for Immediate Discovery and Other Relief; Plaintiffs' Reply to Errol Samuelson's Opposition to Motion for Immediate Discovery and Other Relief; Declaration of Ethan Glickstein in Support of Plaintiffs' Reply to Errol Samuelson's Opposition to Motion for Immediate Discovery and Other Relief; Plaintiffs' Reply to Zillow's Opposition to Motion for Immediate Discovery and Other Relief; Declaration of A.J. Thomas in Support of Plaintiffs' Reply to Zillow's Opposition to Motion for Immediate Discovery and Other Relief; Defendant Samuelson's Surreply re: Plaintiffs' Motion for immediate Discovery and Other Relief; Declaration of K. Michael Fandel Supporting Samuelson's Surreply re: Plaintiffs' Motion for Immediate Discovery and Other Relief.

Oral argument was held on August 5, 2015, at the offices of Hilyer Dispute Resolution, 1000 - Second Avenue, Suite 3000, Seattle, WA 98104. The DM reports and recommends as follows:

RELIEF REQUESTED ON DEFENDANT CURT BEARDSLEY'S MOTION FOR PROTECTIVE ORDER RE INADVERTENT EMAIL:

"... Mr. Beardsley respectfully requests that this Court enter a protective order directing Plaintiffs to destroy the privileged communication and immediately cease using its contents in this litigation or otherwise."

GRANTED, as specified below.

DM reports and recommends as follows:

The requested Protective Order should be granted as to the email from Defendant Beardsley's attorney Michele Stephen (Savitt Bruce & Willey) to Zillow's attorney Joseph McMillan (Perkins Coie), which is a privileged communication between aligned defense counsel working under a joint defense agreement pertaining to litigation strategy, and upon further review since the 8/5 hearing, it is also attorney-work product. However, the underlying facts (i.e. that Defendant Beardsley ran computer deletion programs) are not privileged. The "screenshot" of a computer deletion program image referenced, but not attached to the email, may be attorney work product and was to be transmitted to the Discovery Master only for an in camera review. Since the hearing 8/5/15, the DM has received a paper copy of the "screenshot" but it is difficult to decipher and the DM requests a declaration from Ms. Stephen for further in camera review explaining how she created the screenshot and what it represents. The DM has considered the argument of Plaintiffs that under *Rambus, Inc. v. Infineon Technologies*, 220 F.R.D. 264 (2004), any privilege has been revoked or waived as it was in furtherance of evidence spoliation, and the DM rejects that analysis as Ms. Stephen was addressing a past event, there is no showing that she was complicit in or aware of any ongoing spoliation effort, and her attorney-to-attorney communication was not in furtherance of any spoliation effort.

RELIEF REQUESTED ON PLAINTIFFS' EMERGENCY APPLICATION FOR OMNIBUS PRESERVATION ORDER IN LIGHT OF EVIDENCE OF DEFENDANTS' DESTRUCTION OF HARD DRIVE AND DELETION OF COMPUTER FILES DURING DISCOVERY:

"...Plaintiffs ask the Discovery Master to enter a Report and Recommendation for the immediate entry of a preservation order directing all defendants (1) to maintain all data related to the deletion of any files on any electronic device or cloud account or the destruction of any hard drive or other electronic storage device, and (2) to ensure that no further destruction of files or devices takes place. "

GRANTED, as specified below.

On July 15, 2015, Mr. Beardsley's counsel, James Savitt informed Plaintiffs' Counsel that Mr. Beardsley (1) ran two "clean up" programs on his home office computer on October 11, 2014, and on his Zillow laptop on September 29, 2014, and November 12, 2014. Further, Mr. Savitt disclosed that "in about late August or September 2014" Mr. Beardsley "disposed of a Western Digital external drive because the device had failed and was no longer functional." Further, Defense Counsel disclosed that three of the USB drives that Mr. Beardsley may have connected to his Move laptop shortly before he left Move to work for Zillow cannot be located.

While it is premature to conclude that these recently disclosed events prove Plaintiffs' spoliation contention against Mr. Beardsley, they are understandably disturbing to Plaintiffs and they raise a number of material questions about Mr. Beardsley's actions, which Plaintiffs are entitled to explore. While he was not yet a named party when these events occurred, Mr. Beardsley was under a subpoena for production of potential evidence, and it is yet to be determined whether his actions resulted in deleting files constituting evidence in this case. Besides being under a subpoena, Mr. Beardsley was actively involved in many activities pertinent to this lawsuit and he surely was aware of the seminal issues in the case, to wit, that Move was

alleging misappropriation of its trade secrets, and that given this case involves “tech” companies, he would undoubtedly have been aware that computer files would be the likely mechanism for any alleged misappropriation. While Mr. Beardsley has now submitted testimony regarding his asserted privacy interests for his internet searches, his actions lead to a whole host of questions including the timing of the recent disclosures, particularly in light of the DM’s most recent order for forensic examination of computer devices.

Given these recent disclosures and under these circumstances, Plaintiffs have made a sufficient showing for issuance of a Preservation Order as requested and for a discovery deposition of Mr. Beardsley on his recently disclosed file deletion activities.

THE DM REPORTS AND RECOMMENDS AS FOLLOWS: that a Preservation Order be ISSUED against only Defendant Beardsley as the other defendants played no demonstrable role in running any file deletion programs or loss of relevant hardware/storage devices. The form of the Order is attached hereto.

RELIEF REQUESTED ON PLAINTIFFS’ MOTION FOR IMMEDIATE DISCOVERY AND OTHER RELIEF IN LIGHT OF EVIDENCE OF DESTRUCTION OF HARDWARE AND DELETION OF COMPUTER FILES DURING DISCOVERY:

“(1) Defendants should immediately produce the computers, devices, and accounts identified in the Discovery Master’s June 27 R&R to Plaintiffs’ expert for a forensic inspection. At bare minimum, if a neutral performs the inspection, Defendants should bear the cost.

(2) Defendants should immediately produce the screenshots of Mr. Beardsley’s internet searches for information about deleting computer files.

(3) The Discovery Master should authorize an oral deposition of Mr. Crain so Plaintiffs can question him about document preservation, collection, production and destruction."

DENIED, as specified below.

The DM recommends that the request to supercede DM's prior recommendation regarding a neutral forensic expert by allowing direct access and examination by Plaintiffs' expert be DENIED because the serious concerns regarding access to privileged, confidential and private materials remain unchanged. However, the DM recommends modifying DM's previous recommendation such that the parties' experts shall be present when the neutral forensic expert conducts his/her analysis on deleted files or other forms of discarding or covering up electronic data.

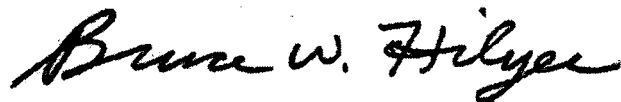
The "screenshot" referenced in the email and motion may be privileged as attorney work product. Defendant's Counsel has now produced the screenshot to DM for an in camera review to determine privilege issues, and the DM has requested an explanatory declaration from Ms. Stephen to complete the in camera review.

Regarding the requested deposition of Mr. Crain and the request at the hearing to depose Mr. Beardsley, DM requested briefs from Counsel and has now received them to determine if a separate deposition of Mr. Beardsley is warranted. Given the acknowledged actions of Mr. Beardsley, which have at a minimum impeded the efficiency of discovery in this case, and at worst may constitute spoliation of potential evidence, a separate 3 hour deposition of Mr. Beardsley on these issues, but not the merits of the case, is warranted. This deposition shall occur within the next 30 days. At least 5 business days prior to this deposition, Plaintiffs shall produce Mr. Beardsley's

Move computer device(s) so that they are available to refresh his recollection and for his counsel to prepare him for being deposed. However, neither Mr. Beardsley's or any other defense counsel shall undertake any forensic examination of any of these devices until after Mr. Beardsley has been deposed and has certified the accuracy of his deposition transcript.

DM also recommends that Plaintiffs be allowed a 2 hour oral deposition of Mr. Crain regarding "file deletions" in this case and Plaintiffs are not confined to asking questions regarding "his work in the case related to document production" as were the prior written deposition questions.

IT IS SO REPORTED AND RECOMMENDED THIS 26th day of August, 2015.



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