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THE HONORABLE SEAN O'DONNELL
NOTED FOR CONSIDERATION: January 20, 2016
KING COUNTY
SUPERIOR COURT CLERK
No Oral Argument Requested
FILED

CASE NUMBER: 14-2-07669-0 SEA

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

**PLAINTIFFS' MOTION TO SEAL
(EXHIBITS C, D, E, H, J, K, L, M, N,
O, P, Q, R, V, W, X, Y, AA, CC, FF TO
THE DECLARATION OF SUSAN
FOSTER IN SUPPORT OF
ZILLOW'S MOTION FOR
RECONSIDERATION RE MOTION
TO COMPEL NAR DOCUMENTS)**

INTRODUCTION

In support of its request that the Court reconsider a discovery order that seeks information that is not at all relevant to the issues in this case, Zillow submitted *nearly six hundred pages* of documents—most of which are confidential internal communications and strategies about ongoing competitive business activities. Zillow filed all these confidential documents notwithstanding the fact that it is only relying on a couple of dozen pages *total* in its motion. As an example, Zillow inexplicably filed the plaintiffs’ *entire trade-secret disclosure*, despite the fact that its motion only cites individual snippets of the disclosure. Foster Decl. Ex. C. As another, Zillow filed a 31-page confidential Move presentation, laden with financial information, business strategies, and Move’s analysis of the competitive landscape, and cited that 31-page document for *a single slide*. *Id.* Ex. N; *see also id.* Ex. FF (a 72-slide Move executive team strategy presentation that Zillow cited for two individual slides).

It could not be more obvious that Zillow has decided to use the reconsideration process to try to disclose actual confidential information of the plaintiffs to harm the plaintiffs. It is paradoxical that Zillow has taken this “file all the plaintiffs’ confidential information” strategy while it concurrently asks the Court to reconsider the Discovery Master’s well-reasoned decision that Zillow should not be allowed to take further discovery in an area that is not relevant to the real issues in the case. The Discovery Master’s concerns about Zillow getting access to the plaintiffs’ irrelevant confidential information was right on point—he did not even know when he ruled that Zillow planned to use that access to *unnecessarily* file highly confidential information with the Court. To be clear, many of these documents address projects and strategies that are *the trade secrets that form the ultimate issue in this litigation*.

1 Zillow frequently complains about the treatment of its “confidential” (read: harmful)
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3 information, moving to seal nearly every brief filed in this case that reveals evidence of the
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5 defendants’ theft and other unlawful conduct, their broad evidence destruction, and even their
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7 attempts to avoid creating evidence because they knew what they were doing was wrong.
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9 Zillow’s perspective appears to be that the sealing of evidence of unlawful conduct is appropriate
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11 while the filing of irrelevant highly confidential information is correct.
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13 The information contained in the exhibits the plaintiffs are moving to seal is highly
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15 confidential, and its disclosure would be competitively damaging to the plaintiffs.¹ This is
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17 proven with even a cursory review and confirmed by concurrently filed declarations of the
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19 plaintiffs’ employees. The plaintiffs respectfully request that the Court seal the plaintiffs’ highly
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21 confidential competitive business information.
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23 **RELIEF REQUESTED**

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25 The plaintiffs respectfully request that the Court seal Exhibits C, D, E, H, J, K, L, M, N,
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27 O, P, Q, R, V, W, X, Y, AA, CC, FF to the Declaration of Susan Foster in Support of Zillow’s
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29 Motion for Reconsideration re Motion to Compel NAR Documents, as well as the portions of
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31 Zillow’s motion that go into detail about the plaintiffs’ confidential information.²
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33 **ARGUMENT**

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35 GR 15(c)(2) permits the Court to order that court files and records be sealed or redacted
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37 “if the court makes and enters written findings that the specific sealing or redaction is justified by
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41 ¹ These declarations “state the interests or rights which give rise to” the need to seal the
42 information contained in Zillow’s filing “as specifically as possible without endangering
43 those interests.” *See Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-38 (1982). The information
44 contained in those declarations and in this motion are as detailed as they can be without needing
45 to independently move to seal them, and as the two-day schedule for sealing motions permits.

² The plaintiffs are concurrently submitting a proposed redacted version of Zillow’s motion.

1 identified compelling privacy or safety concerns that outweigh the public interest in access to the
2 court record.” *Accord Rufer v. Abbott Labs.*, 154 Wn.2d 530, 549 (2005) (holding that any
3 document submitted to the Court in support of a motion—either dispositive or nondispositive—
4 may be sealed if there is “a compelling interest which overrides the public’s right to the open
5 administration of justice” in maintaining the confidentiality of the document). Though the
6 Washington Constitution proclaims that “[j]ustice in all cases shall be administered openly,” “the
7 public’s right of access is not absolute, and may be limited to protect other interests.” WASH.
8 CONST. art. 1, § 10; *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36 (1982).

9
10 In determining whether there is a compelling interest that will support the sealing of a
11 court record, the Court must (1) find that the moving party has shown a need for sealing, (2)
12 provide an opportunity for other parties to object, (3) find that sealing is the least restrictive
13 means available to protect the interests at stake and will be effective, (4) weigh the interests of
14 the parties and the public, and (5) find that the sealing is no broader than necessary. *Rufer*, 154
15 Wn.2d at 543 n.7; *Ishikawa*, 97 Wn.2d at 37-39. This analysis must be conducted on a “case by-
16 case basis” and the decision rests firmly within the discretion of the trial court. *Rufer*, 154 Wn.2d
17 at 550.

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19 **A. There is a Compelling Need for Sealing.**

20 For the Court’s convenience—and because of space considerations—this motion and the
21 attached declarations have grouped the documents at issue by their subject matter. As explained
22 below, and as the concurrently filed declarations confirm, each subject is information about a
23 confidential and valuable strategy or business plan. Washington courts recognize a compelling
24 need to seal privileged information, proprietary trade secrets, and business strategies, as well as
25 other types of sensitive, confidential information. *See, e.g.*, RCW 19.108.050 (instructing courts
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1 to preserve secrecy of trade secrets by sealing); *Clearly Food & Beverage Co. v. Top Shelf*
2 *Beverages, Inc.*, No. C13-1763JLR, 2015 WL 1926503, at *19 (W.D. Wash. Apr. 28, 2015)
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4 (sealing exhibits containing “confidential financial projections, marketing strategies, and
5 business plans, all of which could be used against Clearly Food by competitors”); *Omax Corp. v.*
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7 *Flow Int’l Corp.*, No. C04-2334RSL, 2007 WL 3232540, at *1 (W.D. Wash. Oct. 31, 2007)
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9 (finding compelling showing and sealing documents that reflected “long-term strategic plans,
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11 proprietary software, control methodology and cutting models, and/or customer and competitor
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13 research, the disclosure of which would put them at a competitive disadvantage”); *Bennett v.*
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15 *Smith Bundy Berman Britton, PS*, 176 Wn.2d 303, 313, 291 P.3d 886 (2013) (under *Ishikawa*
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17 there is no automatic right to see all documents filed with the court, especially privileged, trade
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19 secret, or otherwise sensitive information); *Woo v. Fireman’s Fund Ins. Co.*, 137 Wn. App. 480,
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21 485-494, 154 P.3d 236 (2007) (recognizing propriety of sealing trade secret information, but
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23 finding insurance company claims manuals did not meet definition of trade secret); *see also*
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25 *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 822 n.1 (9th Cir. 2011) (recognizing
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27 interest in sealing proprietary business information and strategies).
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31 We address each in turn.

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33 ListHub/Platform Strategy.³
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35 The Foster Declaration attaches a number of documents related to Move’s ListHub and
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37 platform strategy. *See* Glass Decl. ¶ 5. Exhibits P and Q to the Foster Declaration are
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39 presentations regarding Move’s ListHub strategy that contain confidential information. *Id.* ¶ 6.
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41 Public disclosure of this information would be harmful to Move and be helpful to Move’s
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43 competitors, including Zillow. *Id.* ¶ 8. Disclosure would reveal confidential information
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³ Foster Decl. Exs. P, and Q.

1 regarding Move's strategies, capabilities, priorities, and finances to competitors, including
2 Zillow, as well as other industry participants with whom Move does business. *Id.* The
3 information could be used by Move's competitors and other parties in the online real estate
4 business to gain competitive and unfair advantage against Move. *Id.*

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9 Upstream (Move).⁴

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11 The Foster Declaration contains confidential Move information related to Project
12 Upstream. *Id.* ¶ 12. Project Upstream is a business initiative led by a group of the country's
13 leading real estate brokers. *Id.* The Foster Declaration attaches documents related to a request
14 for proposal received by Move from Project Upstream and Move's response to that request for
15 proposal. *Id.* As such, these documents contain highly sensitive and confidential information
16 regarding Move's business strategies, finances, technical capabilities, and competitive analyses
17 of the online real estate market. *Id.* The details of Move's Project Upstream bid proposal are
18 among the claimed trade secrets that are at issue in this case. The specific exhibits related to
19 Project Upstream are as follows:

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30 • Exhibits H and J to the Foster Declaration consists of the confidential request for
31 proposal to ListHub and ListHub's confidential response to that request. *Id.* ¶ 13.

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33 • Exhibits K, L, O, R, and AA to the Foster Declaration are confidential Move
34 emails discussing details of Move's response to the request for proposal from Project Upstream.
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36 *Id.* ¶ 14.

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38 • Exhibits M, N and FF to the Foster Declaration are confidential presentations
39 regarding the Project Upstream request for proposal, Move's response to the request, and the
40 implications of Project Upstream for the online real estate industry. *Id.* ¶ 15.

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⁴ Foster Decl. Exs. H, J, K, L, M, N, O, R, AA, and FF.

1 Disclosure of the Confidential Information contained in Exhibits H, J, K, L, M, N, O, R,
2 AA, and FF to the Foster Declaration would seriously prejudice Move and cause Move
3 considerable harm. *Id.* ¶ 16. Disclosure would provide Move's competitors with insights into
4 Move's strategies, capabilities, and finances, knowledge of which would provide those
5 competitors with an unfair advantage in this highly competitive marketplace. *Id.* Disclosure of
6 this Confidential Information would also provide the entire industry with confidential
7 information regarding Project Upstream's plans and strategies, thus harming the business
8 interests of the real estate brokers who are behind Project Upstream. *Id.*
9 Upstream (NAR).⁵

10 The Foster Declaration also includes exhibit containing confidential information related
11 to Realtors Property Resource ("RPR") and Project Upstream. Goldberg Decl. ¶ 4. RPR is a
12 wholly-owned subsidiary of NAR. *Id.* ¶5. RPR is separately incorporated and is a legally
13 distinct entity from NAR with, among other things, its own Board of Directors and executives.
14 *Id.* RPR and Project Upstream have entered into an ongoing business relationship related to an
15 online real estate initiative that is in the process of being created and which has not yet been
16 publicly launched. *Id.* ¶ 6.

17 Exhibits V, W, X, Y, and CC contain a considerable amount of confidential information
18 related to NAR, RPR and Project Upstream. The specific exhibits are as follows:

19 • Exhibit V to the Foster Declaration consists of excerpts from the transcript of
20 Robert Bemis's deposition in this case. These transcript excerpts discuss sensitive and
21 confidential details regarding the Project Upstream initiative, including how Project Upstream
22 will use and distribute data, how it would interface with other technologies, and how it would
23 compete with third parties including Zillow and Trulia. *Id.* ¶ 7.

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⁵ Foster Decl. Exs. V, W, X, Y, and CC.

1 • Exhibits W and Y to the Foster Declaration are email communications with
2 attachments discussing confidential details about the confidential business relationship between
3 Project Upstream and RPR. The exhibits contain a summary and discussion of a confidential
4 meeting between Project Upstream, RPR, and NAR. The exhibits contain Confidential
5 Information related to the technical details of the Project Upstream initiative, including the
6 system architecture, data management and security, and development methodology. They also
7 contain Confidential Information related to the business strategy behind the initiative and the
8 timeline for the project's rollout. *Id.* ¶ 8.

9 • Exhibits X to the Foster Declaration is an internal NAR email discussing meetings
10 between NAR, RPR, and Project Upstream. The emails contain Confidential Information
11 regarding business objectives and strategies, RPR's technological capabilities, analyses of
12 competing products and services, and key benchmarks for the initiative. *Id.* ¶ 9.

13 • Exhibit CC is an internal email discussing RPR's attempt to partner with Project
14 Upstream. Exhibit CC contains Confidential Information related to business objectives, RPR's
15 capabilities, financing for the project, and the business strategy behind the initiative. *Id.* ¶ 10.

16 Disclosure of Exhibits V, W, X, Y, and CC to the Foster Declaration would be highly
17 prejudicial and would harm NAR. *Id.* ¶ 11. Competition for the Project Upstream initiative was
18 intense, and there the online real estate market is competitive. *Id.* ¶ 11. The details of RPR's
19 partnership with Project Upstream are commercially sensitive, and any information regarding
20 that relationship would be beneficial to competitors and other industry participants. *Id.* ¶ 11.
21 The disclosure of this information would be even more valuable to NAR's competitors who
22 could use the information to, among other things, develop or improve competing products and
23 services. *Id.* ¶ 11.

24 Trade-Secret Disclosure⁶

25 ⁶ Foster Decl. Ex. C.

1 As the plaintiffs recently explained, the Trade-Secret Disclosure is the product of a
2 lengthy process. *See* 1-12-16 Mot. to Strike or Seal. The Trade-Secret Disclosure filed with the
3 Court was served two weeks ago. In order to avoid needing to seal this sealing request, the
4 plaintiffs will only describe it at a high level, but, as an example, it goes into profound detail
5 about the plaintiffs' unique business strategies—including Move's platform strategy, which was
6 one of the key initiatives that Mr. Samuelson was involved in before his defection to Zillow—
7 including diagrams, flowcharts, graphics, and pages and pages of Move's specific plans. In
8 addition, the Trade-Secret Disclosure describes Move's actual and contemplated corporate
9 mergers and acquisitions, as well as strategic thinking behind the decisions. The document is the
10 literal embodiment of the trade-secret case that the plaintiffs intend to present at trial. There
11 should be no question that sealing it is appropriate. Indeed, the Uniform Trade Secrets Act
12 specifically addresses the need to seal trade secrets in case like this. RCW 19.108.050
13 (instructing courts to preserve secrecy of trade secrets by sealing). That may be the reason why
14 Zillow did not oppose the plaintiffs' recent motion to seal the Trade-Secret Disclosure pending
15 the formal adjudication of the confidentiality of the information described in it, in conjunction
16 with the termination of this litigation.

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33 Other Confidential Information.⁷
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35 Exhibits D and E to the Foster Declaration contain other data and information
36 confidential to Move. Specifically, Exhibit D to the Foster Declaration is a email between Curt
37 Beardsley and Errol Samuelson, attaching an important strategy document, that was written
38 while both Mr. Beardsley and Mr. Samuelson were still employed by Move. The email and its
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⁷ Foster Decl. Exs. A, D, and E.

1 attachment contain highly confidential information regarding Move's strategic plans related to
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3 Move's ongoing business relationships with MLSs, brokers and agents. Glass Decl. ¶ 17.
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5 Exhibit E to the Foster Declaration is an internal Move email chain discussing a
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7 confidential business transaction. The email contains sensitive information regarding Move's
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9 business strategies and capabilities. *Id.* ¶ 18.
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11 Disclosure of the Confidential Information contained in A, D, and E to the Foster
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13 Declaration would seriously prejudice Move and cause Move considerable harm. Disclosure
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15 would provide Move's competitors with valuable information regarding Move's strategies,
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17 market position, performance, capabilities, and relationships. *Id.* ¶ 19. Disclosure of the
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19 information could also harm Move's ongoing relationships with MLSs, brokers, and agents. *Id.*
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21 **B. Opportunity to Object.**
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23 The plaintiffs are not aware of any party or nonparty that objects to sealing. Any party
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25 may do so in opposition to this motion.
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27 **C. Least Restrictive Means.**
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29 Redacting the (largely unnecessary) materials that Zillow put before the Court is the least
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31 restrictive means of protecting the plaintiffs' rights. As Mr. Glass and Mr. Goldberg explained,
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33 the information contained in those exhibits was kept confidential and its disclosure would be
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35 competitively harmful.
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37 **D. Balancing the Interests.**
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39 As explained above, the plaintiffs have a strong interest in maintaining the confidentiality
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41 of the information contained in the exhibits at issue. Conversely, the public has relatively little
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43 interest in the confidential information the plaintiffs seek to redact. The Court must balance these
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45 competing interests on a case-by-case basis, considering any alternative methods suggested, and

1 should articulate its consideration in the findings of fact and conclusions of law accompanying
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3 its decision. *Dreiling*, 151 Wn.2d at 915; *Ishikawa*, 97 Wn.2d at 37-39. The potential harm to the
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5 plaintiffs significantly outweighs any minor harm to the public, which will not be deprived of its
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7 ability to understand and evaluate the issues being adjudicated. As explained above, most of the
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9 information *is not even cited in Zillow's motion*. Zillow's inexplicable decision to file so much of
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11 the plaintiffs' confidential information only reveals one of the many reasons why the Discovery
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13 Master decided Zillow should not be allowed to take further discovery into an irrelevant separate
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15 and new business initiative of the plaintiffs that has nothing to do with the actual issues in this
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17 case. Only Zillow, which is apparently seeking to use this process to disclose the plaintiffs' trade
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19 secrets, and the plaintiffs' competitors would benefit from the public disclosure of the plaintiffs'
20
21 confidential product and business information.

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23 **E. Sealing is No Broader than Necessary.**

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25 The confidential information contained in the exhibits at issue will remain confidential in
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27 the foreseeable future. There is no date certain when the plaintiffs will no longer have a
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29 compelling interest in protecting their internal strategies and programs. Accordingly, it is not
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31 appropriate to place durational limits on the sealing order. *See State v. Richardson*, 177 Wn.2d
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33 351, 362 (2013) (explaining the fifth *Ishikawa* factor requires the trial court to consider
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35 durational limits "where appropriate").⁸

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37 The plaintiffs therefore respectfully request that the sealing order remain in effect
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39 indefinitely. GR 15(e) includes procedural safeguards, providing procedures for bringing
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41 motions to unseal court records in the event sealing is no longer justified. If the Court requires a
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44 ⁸ The sole exception is the plaintiffs' trade secret disclosure. The confidentiality of that information is one of the
45 key issues in this case. If that information is adjudicated after trial to not be confidential information / trade secrets
of the plaintiffs then that information would not be appropriate for sealing after trial.

1 specified time period, however, the plaintiffs request that the document(s) be sealed for the
2 duration of this litigation and that at the conclusion of this case, but before the Court file is
3 administratively closed, the plaintiffs be permitted an opportunity to show why the sealed
4 documents should remain sealed to protect confidential information. *See Crane Helicopter*
5 *Servs., Inc. v. United States*, 56 Fed. Cl. 313, 314 (Fed. Cl. 2003) (approving a similar order).
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11 The scope of the sealing request is an issue caused directly by the defendants. There was
12 no legitimate reason to file most of the information that the defendants filed with this Court.
13 Indeed, the Discovery Master already ruled that the areas in which the defendants are headed
14 with discovery demands is inappropriate—irrelevant side issues of ongoing
15 competitive/confidential information—such that further discovery into those areas is not even
16 warranted. Discovery in those areas has been stopped precisely because they are irrelevant and
17 confidential. Ignoring that the Court has already found these areas to be both confidential and
18 irrelevant, the defendants decided to file that very information *including much of it that is not*
19 *even necessary to their reconsideration requests* in a public court filing. In short, the scope of
20 the requests is a direct result of the defendants’ inexplicable decision to suddenly file such a
21 large amount of irrelevant yet highly confidential information with the Court.
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33 Finally, with regard to the scope of the plaintiffs’ request, it is worth noting that the
34 plaintiffs’ have in this case been very constrained when it comes to sealing requests. As the
35 Court instructed in June, the plaintiffs’ sealing requests have been narrow and only made when it
36 “really hurts.” Allowing Zillow to use this filing stunt to make public—including to Zillow’s
37 own executives who currently are unable to see most of this information because of the
38 protective order in the case—highly confidential information from the plaintiffs would “really
39 hurt.” We request that the Court seal the information as requested.
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CONCLUSION

For the foregoing reasons, the plaintiffs respectfully request that the Court seal Exhibits C, D, E, H, J, K, L, M, N, O, P, Q, R, V, W, X, Y, AA, CC, FF to the Declaration of Susan Foster in Support of Zillow's Motion for Reconsideration re Motion to Compel NAR Documents, as well as the portions of Zillow's motion that go into detail about the plaintiffs' confidential information.

DATED: January 21, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2016, 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:

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1 I declare under penalty of perjury under the laws of the State of Washington that the
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3 foregoing is true and correct.
4

5 DATED at Sierra Madre, CA on January 21, 2016.
6
7

8 s/Chris Ward
9

10 Chris Ward, Legal Assistant

11 **JENNER & BLOCK**

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13 Los Angeles, CA 90071

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

Defendants.

Case No. 14-2-07669-0 SEA

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION TO SEAL
(EXHIBITS C, D, E, H, J, K, L, M, N, O, P,
Q, R, V, W, X, Y, AA, CC, FF TO THE
DECLARATION OF SUSAN FOSTER IN
SUPPORT OF ZILLOW'S MOTION FOR
RECONSIDERATION RE MOTION TO
COMPEL NAR DOCUMENTS)**

1 This matter came before the Court on the Plaintiffs' Motion to Seal (the "Motion"). The
2 Court has considered the briefing in support of and in opposition to the Motion. The Court
3 deems itself fully advised.

4 NOW THEREFORE, it is hereby ORDERED: The Motion is GRANTED.

5 The Court makes the following findings of fact and conclusions of law:

6 FINDINGS OF FACT

- 7 1. Plaintiffs have a legitimate need to protect from public disclosure each of the
8 documents that are identified in Defendant Zillow 's Motion to Seal.
- 9 2. Plaintiffs provided an opportunity for all interested parties to object.
- 10 3. Sealing is the least restrictive means available to protect the interests at stake and
11 will be effective in protecting those interests.
- 12 4. The interests of Plaintiffs in protecting the documents at issue from public
13 disclosure outweigh the public's interest in having access to those documents.
- 14 5. The sealing of the record requested by Plaintiffs is no broader than necessary to
15 protect its legitimate interests.

16 CONCLUSIONS OF LAW

- 17 1. Plaintiffs have a "compelling interest" in maintaining the confidentiality of each
18 of the documents that are the subject of its motion and this "compelling interest"
19 overrides the public's interest in and right to the open administration of justice.
- 20 2. With respect to each of the documents that are the subject of its motion, Plaintiffs
21 have satisfied the standard for sealing of court records set forth in *Rufer v. Abbott*
22 *Laboratories*, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005), and *Dreiling v. Jain*,
23 151 Wn.2d 900, 913-15, 93 P.3d 861 (2004).

Therefore, it is

ORDERED that the Court Clerk shall file the following documents under seal:

- 24 1. Exhibits C, D, E, H, J, K, L, M, N, O, P, Q, R, V, W, X, Y, AA, CC, FF to the
25 Declaration of Susan Foster in Support of Zillow's Motion for Reconsideration re
26 Motion to Compel NAR Documents.
- 27 2. Zillow's Motion for Reconsideration re Motion to Compel NAR Documents. The
28 Clerk is directed to publicly file the redacted version attached hereto.

DATED this ____ day of _____, 2015.

HONORABLE SEAN O'DONNELL

THE HONORABLE SEAN O'DONNELL
NOTED FOR CONSIDERATION: January 27, 2016
ORAL ARGUMENT REQUESTED

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MOVE, INC., et al., 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 SEA

**DEFENDANT ZILLOW, INC.'S
MOTION FOR RECONSIDERATION RE
MOTION TO COMPEL NAR
DOCUMENTS**

**CONTAINS INFORMATION
PROTECTED BY PROTECTIVE
ORDER**

OCEO (Don't Show Defendants)

**SEALED PURSUANT TO COURT
ORDER DATED**

DEFENDANT ZILLOW, INC.'S MOTION
FOR RECONSIDERATION

129233272.5

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I. INTRODUCTION

Defendant Zillow, Inc. (“Zillow”) moves the Court to reconsider its Order adopting the Special Master’s November 14, 2015 Report and Recommendation on Zillow’s Motion to Compel Plaintiff National Association of Realtors (“NAR”) to Produce Documents (“the Order”). The Order adopts the Special Master’s recommendation that certain documents Zillow requested from co-Plaintiff NAR are not relevant to this litigation. But as Plaintiffs’ own documents and deposition testimony clearly establish (much of which has been obtained since briefing the underlying motion), the documents sought are critical to Plaintiffs’ claims (including damages) and Zillow’s defenses.

There are three overarching themes to Plaintiffs’ sprawling trade secret allegations, and two of them relate to Plaintiff Move, Inc.’s (“Move”) plans to build an all-in-one “real estate platform”—which Move believed would be “*the*” platform for the industry.¹ Plaintiffs’ theory is that Defendants are to blame for Move’s failure to build its platform because Defendants allegedly misappropriated Move’s trade secrets. And based on that theory, Plaintiffs have sought (and obtained) substantial discovery from Zillow. But Plaintiffs’ documents show one basis for Move’s failure to implement its platform strategy was something altogether different. Specifically, a third party (Upstream) decided to build the platform with co-Plaintiff NAR. While they may be co-Plaintiffs in this case, Move and NAR have been competing to build the real estate platform Move wanted to build.

NAR announced last year that its wholly-owned subsidiary, Realtors Property Resource (“RPR”), was launching a new initiative, the Advanced Multi-list Platform

¹ The three overarching issues in this case relate to (i) Zillow’s decision to acquire Trulia, (ii) Zillow’s success in sourcing its listings data directly from Multiple Listing Services (“MLSs”), and (iii) Move’s plans to build a real estate platform (a central repository for information, distribution, and products). But all three overlap.

1 (“AMP”), and that it was using AMP to partner with a coalition of brokerages called
2
3 “Project Upstream.” Move itself tried to partner with Project Upstream but Project
4
5 Upstream’s founders rejected Move (twice), and chose to partner only with NAR. And now
6
7 NAR and Upstream are building the very real estate platform Move alleges Zillow
8
9 misappropriated. But as Move’s own documents acknowledge, there can only be one real
10
11 estate platform controlling the industry’s data—if NAR builds it, then Move cannot. NAR
12
13 successfully beating out Move for the Upstream partnership was a death knell for Move’s
14
15 strategy.² The best Move could hope for was to compete with Upstream.

16
17 NAR (and Upstream) beat Move to the punch, which is fatal to Move’s allegations
18
19 because if NAR is building what Move wanted to build, then Zillow cannot be blamed for
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21 Move’s setbacks, or be on the hook for Move’s damages. That’s why the documents Zillow
22
23 requested—which narrowly focus on NAR’s AMP initiative and its partnership with Project
24
25 Upstream—are so important. The Special Master’s conclusion that these documents are not
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27 relevant was reversible error, because it prevents Zillow from obtaining discovery relating to
28
29 a key aspect of Plaintiffs’ trade secret claims and Zillow’s defense. Zillow respectfully
30
31 requests that the Court reconsider the Order.

32 **II. STATEMENT OF FACTS**

33 **A. Move Blames Zillow for Its Failure to Build a Real Estate Platform.**

34
35 Move operates Realtor.com, a consumer-facing real estate website that displays
36
37 listings.³ For most of its existence, Realtor.com was the most visited real estate website in
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41

42 ² Move has admitted that it is no longer building the platform. But the question is this: is
43 *Zillow* to blame or is *NAR* to blame? Plaintiffs’ theory is the former, and Zillow’s theory is the latter.
44 Both sides should have the opportunity to test their theories through discovery.

45 ³ Move operates Realtor.com on behalf of its co-Plaintiff NAR. But this relationship is
46 fraught with difficulty and tension, and in the context of the real estate platform, it is also
47 characterized by NAR’s competition with Move.

1 the industry. But in 2011, Zillow, a Seattle-based startup founded in 2006, overtook
2 Realtor.com in traffic, and has been the #1 website ever since, nearly doubling Realtor.com
3 by 2014.⁴ Later, in March 2012, Trulia, a San Francisco-based startup founded in 2007,
4 overtook Realtor.com in traffic, pushing the longtime incumbent to third place overall.⁵
5 Ever since, Move has struggled to get Realtor.com back on top.
6
7
8
9

10 One of Move's ideas to turn the company around and reestablish its dominance in
11 the industry involved the creation of a "real estate platform." For years, agents and brokers
12 have pined for a centralized database of aggregated and normalized real estate data. As it
13 stands, each of the 800+ MLSs has its own database, and most save their data in different
14 ways. This fragmentation has made it impossible (i) to create a consolidated database of
15 real estate information and (ii) for third-party developers to build useful applications that
16 work across markets. Consequently, when an application is built in Seattle's MLS, for
17 example, that application is unlikely to work in Phoenix or Chicago because the underlying
18 data is not compatible. The developer has to re-build the application in each market—
19 preventing scale and stifling innovation. Ex. B (DX 1512) at 2. Move's proposed platform
20 would have addressed these issues.
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32 [REDACTED]
33 [REDACTED]
34 [REDACTED]
35 [REDACTED]
36 [REDACTED]
37 [REDACTED]
38 [REDACTED] *First,*
39 through its subsidiary ListHub, Move has long obtained listings from MLSs, and entered
40
41
42
43
44

45 ⁴ Declaration of Susan Foster ("Foster Decl."), Ex. A (MOVE_ESI00357063). All citations
46 to exhibits are to the Foster Declaration.
47 ⁵ *Id.*

1 them into a database where the data is normalized and aggregated.⁶ The listing information
2 is then distributed to third-party websites such as Homes.com (and formerly to Zillow and
3 Trulia).⁷ [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
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31 [REDACTED]
32 [REDACTED]
33 [REDACTED]
34 [REDACTED]

35 ⁶ ListHub is a “syndicator” of real estate listings, which means it collects data from hundreds
36 of MLSs, and then distributes that data to websites (called “publishers”) in its network.

37 ⁷ Until recently, Zillow and Trulia received a substantial portion of their listings from
38 ListHub. But now both receive most of their listings directly from MLSs and brokers.
39 [REDACTED]
40 [REDACTED]
41 [REDACTED]
42 [REDACTED]
43 [REDACTED]
44 [REDACTED]
45 [REDACTED]
46 [REDACTED]
47 [REDACTED]

1 [REDACTED]
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17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 [REDACTED]
27 [REDACTED] And that's the key issue at hand: according to Plaintiffs, Move's failure to build
28 this platform is because Defendants stole Move's trade secrets. But the real reasons are
29 Move's failure to execute when it first conceived the idea in 2011, Move's failure to secure
30 Zillow and Trulia's participation, and Project Upstream.
31
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35 **B. Project Upstream Emerges as a Competitor to Move's Platform Strategy.**

36 [REDACTED]
37 [REDACTED]
38 [REDACTED]
39 [REDACTED] Then, beginning in late 2013, a
40 group of leading brokerages created an initiative that would later become "Project
41 Upstream." Their goal was to create a platform featuring the same elements as Move's
42
43
44

45 [REDACTED]
46 [REDACTED]
47 [REDACTED]

1 platform.¹¹ First, Upstream sought to create a single data-entry point, “upstream” of the
2
3 MLSs, that agents and brokers would use to input their listings—rather than inputting their
4
5 listings directly to the MLSs. Second, Upstream intended for this information to be stored in
6
7 a consolidated database, which would normalize the real estate information. Third,
8
9 Upstream intended to control the distribution of this data to broker websites, MLSs, and real
10
11 estate websites like Realtor.com and Zillow.¹² Project Upstream solicited bids from several
12
13 companies, including Move, NAR and Zillow. [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
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25 [REDACTED]
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34 [REDACTED]
35 [REDACTED]
36 [REDACTED]
37 [REDACTED]
38 [REDACTED]
39 [REDACTED]
40 [REDACTED]

41
42 ¹¹ See generally Ex. G (<http://waves.wavgroup.com/2015/05/14/project-upstream-revealed/>).

43 ¹² [REDACTED]
44 [REDACTED]
45 [REDACTED]
46 [REDACTED]
47 [REDACTED]

[REDACTED]

C. Project Upstream Partners with NAR to Create the Platform Move Claims Zillow Misappropriated.

On May 14, 2015, Plaintiff NAR announced that it was joining forces with Project Upstream to create a real estate platform. Ex. S (5/14 Inman News article). Specifically, Upstream planned “to leverage” NAR-subsiidiary RPR’s “data repository” in order “to store and normalize listing records, agent records, office records, firm records, employee records and customer records.” Ex. G (wavgroup.com post). Upstream’s platform would give brokers control “to send their data wherever they want,” including to MLSs, real estate websites like Zillow and Realtor.com, and other third parties. *Id.* In a follow-up announcement on November 5, 2015, NAR and RPR explained that they are working with Project Upstream to build a “state-of-the art platform for real estate data entry, collection and distribution” that will feature a “single entry point” for brokers to manage and distribute property data to MLSs, real estate websites, and vendors.¹⁸ [REDACTED]

[REDACTED]

[REDACTED]

Ex. T (<http://www.realtor.org/news-releases/2015/11/nar-s-realtors-property-resource-executes-definitive-agreement-with-upstream-begins-development>).

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 And finally, like Move's proposed platform, NAR and Upstream intend to
6 "manage the distribution of information" throughout the industry.²¹
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 **D. Zillow Requests Highly Relevant Documents from NAR.**

19 On August 21, 2015, Plaintiffs produced a set of documents relating to Project
20 Upstream.²³ Those documents revealed just how important NAR and RPR's partnership
21 with Upstream is to Plaintiffs' claims against Zillow. Accordingly, Zillow served follow-up
22 discovery requests on September 22, 2015, narrowly focused on Upstream/AMP, and asking
23 for documents from only three custodians at NAR and RPR: Dale Ross, Marty Frame, and
24 Jeff Young. Ex. BB (Zillow's Ninth Requests for Production). Zillow targeted Ross,
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33
34 [REDACTED]
35 [REDACTED]
36 [REDACTED]
37 [REDACTED]
38 Ex. T (November press release cited above); *see also* Ex. Z
39 (<http://www.inman.com/2015/11/05/nar-and-upstream-sign-revolutionary-deal-for-broker-database/>).
40 [REDACTED]
41 [REDACTED]
42 [REDACTED]
43 [REDACTED]

44 These documents were produced in response to the Court's July 23, 2015, order adopting
45 Special Master Hilyer's July 17, 2015 Report and Recommendations regarding Zillow's Motion to
46 Compel Plaintiffs Move and NAR to produce documents relating to Project Upstream and AMP.
47 Dkt. No. 768D.

1 Frame, and Young because [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]

5 The Special Master denied Zillow's motion to compel,²⁵ concluding that current
6 Upstream activities are not relevant to Move's claims. Ex. DD at 6. The Special Master
7 reasoned that Project Upstream is "unrelated to the parties in this litigation," and that "there
8 is no basis to establish that ListHub and NAR/RPR are competing because . . . their roles are
9 distinct as NAR/RPR is upstream and Move/ListHub is downstream of the MLSs." *Id.* at 5-
10 6. This Court adopted the Special Master's recommendation on January 7, 2016. Dkt. No.
11 988. Zillow now moves to reconsider.
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18 **III. STATEMENT OF THE ISSUE**

19 Whether the Court should reconsider the Order and grant Zillow's Motion to Compel
20 NAR to Produce Documents Responsive to Zillow's Ninth Request for Production.
21
22

23 **IV. EVIDENCE RELIED UPON**

24 Zillow relies on the Declaration of Susan Foster, and papers filed in connection with
25 Zillow's October 19, 2015 Motion to Compel Plaintiff NAR to Produce Documents.
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30 **V. AUTHORITY AND ARGUMENT**

31 Civil Rule 26(b)(1) allows parties to obtain discovery regarding any matter that is
32 "relevant to the subject matter involved in the pending action." "The only limitation is
33 relevancy to the subject matter involved in the action, not to the precise issues framed by the
34
35
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39

40 ²⁴ [REDACTED]
41 [REDACTED]
42 [REDACTED]
43 [REDACTED]
44 [REDACTED]
45 [REDACTED]
46 [REDACTED]
47 [REDACTED]

Zillow is sending the Court the parties' full briefing, including exhibits, on the underlying motion before Judge Hilyer.

1 pleadings.”²⁶ Under this standard, Zillow’s motion to compel should have been granted.

2
3 Reconsideration is appropriate under Civil Rule 59(a) for several reasons.

4
5 *First*, Judge Hilyer’s decision to deny discovery because Move is now obtaining
6 listing data *downstream* from MLSs rather than *upstream* overlooks two key points. The
7 first is that Move claims its intent to obtain data upstream from the MLS as a trade secret
8 misappropriated by Zillow. That NAR is now implementing that plan, and is the cause of
9 Move’s inability to do so, is clearly relevant. Additionally, apart from the *source of data*
10 (which is one aspect of Move’s claims), its remaining claims rely on an aggregated and
11 normalized central database, *regardless of source*.
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19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
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28 [REDACTED]
29 [REDACTED]
30 [REDACTED]
31 [REDACTED]
32 [REDACTED]
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42 ²⁶ *Barfield v. City of Seattle*, 100 Wn.2d 878, 886, 676 P.2d 438 (1984) (quoting *Bushman v.*
43 *New Holland Div. of Sperry Rand Corp.*, 83 Wn.2d 429, 434, 518 P.2d 1078 (1974)).
44 [REDACTED]
45 [REDACTED]
46 [REDACTED]
47 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED] Against this
6 backdrop, Move's decision to scapegoat Zillow, Samuelson, and Beardsley for foiling
7 Move's plans, instantly loses credibility.
8

9
10
11 *Third*, along with Trulia, Move's platform strategy is arguably the central issue in
12 this case—which means Zillow's document requests are not simply tangentially relevant,
13 they are *absolutely critical* to ensuring that Zillow can defend against Plaintiffs' sprawling
14 allegations. These documents would not only show how Move and NAR are competing
15 against each other, but also (and just as importantly) reflect that the platform concepts that
16 Move has identified as trade secrets were and are publicly known—meaning they aren't
17 trade secrets at all. [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28

29 Producing these documents would not prejudice Plaintiffs—after all, the parties have
30 a complex protective order in place. But *withholding them* would be extremely prejudicial
31 to Zillow as it would prevent Zillow from advancing a key defense against Plaintiffs' central
32 claim. On balance, the equities tilt sharply in favor of production.
33
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35

36 Plaintiffs cannot plausibly dispute that documents about NAR and Upstream's plans
37 to develop concepts that mirror Move's own trade secrets—[REDACTED]
38 [REDACTED]
39 [REDACTED]
40 [REDACTED]
41 [REDACTED]
42 [REDACTED]
43 [REDACTED]
44 [REDACTED]

45 *see also* Exs. GG (DX 1698)
46 at 3, 16; HH (DX 1699) at 5-6, 9, 18-20, 27, and throughout; and II (DX 1252) at slide 14 (key
47 exhibits during last week's deposition of NAR/RPR executive Bob Bemis, which show these
concepts are public).

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]. Moreover, these documents are also highly relevant to
6 damages, as they speak to the viability and economic value of Move's alleged trade secrets,
7 given that the industry wanted and ultimately chose a *non-Move* option [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 [REDACTED] Simply put, even assuming liability, Move's
11 damages would be tied to its ability to prove that the industry would have *accepted* and *used*
12 its platform; that brokerages rejected Move (twice) is strong evidence that Move would not
13 have gotten "buy in" from the industry. And, of course, revenue and cost projections are
14 highly relevant to assessing damages attributable to Zillow, as are cost estimates.
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20 VI. CONCLUSION

21 Zillow respectfully requests that the Court reconsider the Order, grant Zillow's
22 Motion to Compel, and order NAR to produce the responsive documents within 10 days of a
23 ruling on the motion.
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/s/ Susan E. Foster

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Attorneys for Defendant
Zillow, Inc.

CERTIFICATE OF SERVICE

On January 19, 2016, 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 following document: DEFENDANT ZILLOW, INC.'S MOTION FOR RECONSIDERATION RE MOTION TO COMPEL NAR DOCUMENTS

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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 19th day of January, 2016.

/s/ Vicki Lynn Babani
Vicki Lynn Babani, Legal Secretary