THE HONORABLE SEAN O'DONNELL
Noted for Hearing: February 5, 2016 at 9:00 a.m.
With Oral Argument

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

**DEFENDANT CURT BEARDSLEY'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING COMMON LAW CLAIMS FOR ALLEGED MISAPPROPRIATION OF INFORMATION**



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Mr. Beardsley joins in Zillow's reply in support of partial summary judgment regarding UTSA preemption. The fact-based inquiry articulated in *Thola v. Henschell*, 140 Wn. App. 70, 79, 164 P.3d 524 (2007), is the standard in Washington and in the majority of jurisdictions. Accordingly, RCW 19.108.900 preempts all of Plaintiffs' common-law claims to the extent they are based on facts supporting their UTSA claims.

Plaintiffs assert two common-law claims against Curt Beardsley: (1) conspiracy and (2) breach of fiduciary duty. Plaintiffs have failed to identify any facts that would support an independent claim of conspiracy—they don't even try. Regarding the fiduciary-duty claim, the scant "facts" Plaintiffs point to as independent of their UTSA claim—even were they true— do not state such a claim. Thus, both claims are preempted and should be dismissed.

**A. There Are No Independent Facts to Support a Conspiracy Claim.**

Plaintiffs' argument that the claim for conspiracy to violate the UTSA should not be preempted relies entirely on cases in the minority applying the additional-elements test to determine UTSA preemption. But under the majority view adopted in Washington, a claim for civil conspiracy to misappropriate trade secrets, which is merely another remedy for the alleged misappropriation, is preempted under the UTSA. *E.g.*, *Thermodyn Corp. v. 3M Co.*, 593 F. Supp. 2d 972, 990 (N.D. Ohio 2008) (applying factual-overlap test and dismissing conspiracy claim); *see Thola*, 140 Wn. App. at 82. Here, Plaintiffs do not argue that their civil-conspiracy claim is based on independent facts. The claim is therefore preempted.

**B. There Are No Independent Facts to Support a Breach of Fiduciary Duty Claim.**

Mr. Beardsley joins in Section A of Samuelson's reply in support of partial summary judgment regarding UTSA preemption ("Samuelson Reply"). Plaintiffs have not identified an actual conflict between Washington and Delaware law regarding the duties of officer-employees. This case is not about the internal affairs of a corporation: it is a case against former employees and their current employer for allegedly using confidential information.

Under the majority factual-overlap test for UTSA preemption applied in Washington, Plaintiffs' claim for breach of fiduciary duty against Beardsley can survive preemption only



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if—and then only to the extent that—it is supported by facts independent of the UTSA claim. Plaintiffs have failed to point to such facts. To the contrary, the "independent" facts that Plaintiffs rely on either relate to the UTSA claim or would not, even if proved, amount to a breach of fiduciary duty.

**1. Talking to Errol Samuelson was not a breach of fiduciary duty.**

Beardsley and Samuelson were friends. Thus, as Samuelson considered the possibility of leaving Move, he consulted Beardsley. In those communications, Beardsley reflected on the changes in and the future of the industry, whether Move would remain a viable long-term employment option, and the problem of how a move to Zillow might be perceived. (Thomas Decl. Exs. R, LL & C.) Beardsley also commented on the compensation package offered by Zillow to Samuelson. (*Id*. Exs. QQ & RR.)[1]

But planning to change jobs—even to compete with one's current employer—is not a breach of fiduciary duty. To the contrary, the black-letter law is that an employee may resign at any time to work for a competing enterprise and, before doing so, is "free to make arrangements or preparations for the competing business." LAW OF CORP. OFFICERS & DIR.: INDEM. & INS. § 1:32 (2015); *see also* 2 CALLMANN ON UNFAIR COMP., TRADEMARKS & MONO. § 16:26 (4th ed. 2015) (hereinafter "CALLMANN") (noting that, "prior to leaving the current employment relationship, the employee has a right to seek and prepare for alternative employment"); Restatement (Third) of Agency § 8.04 (2006) (hereinafter "Restatement") (noting that an employee may "prepare for competition following termination of the agency relationship"). It is only where planning turns into actual action—such as active solicitation of customers for a competing enterprise—that the potential for an independent breach arises. *See*, *e.g*., *Kforce Inc. v. Oxenhandler*, 2015 WL 1880450, at *5 (W.D. Wash. Apr. 24, 2015) (noting that the plaintiff could "rely on evidence of Defendants soliciting Kforce employees and

[1] Exhibits MM and NN have nothing to do with Beardsley. They comprise email correspondence between two Zillow representatives (Frink and Rascoff) about their communications with Samuelson and the deposition testimony identifying the email.



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customers in support of its surviving common law claims"—but only if such evidence did not "involve the theft or misuse of Kforce information").

Here, it is undisputed that Beardsley (and Samuelson) had no duty to remain at Move or not to work for Zillow; going to work for a competitor did not breach any duty. Talking about such a move—and even allegedly "plotting" it—cannot be a breach of any duty either.

**2. Not talking to Move was not a breach of fiduciary duty.**

Like talking about leaving, *not* talking about leaving also does not provide an independent basis for a fiduciary-duty claim. Not only may an employee freely plan to go work for a competitor, but he "has no obligation to disclose to the current employer any intent to become a competitor." CALLMANN § 16:26; *see also* Restatement § 8.04 cmt. c (noting that an agent's duties do not require "disclosure to the principal of an agent's competitive plans"); Samuelson Reply Section B.

Plaintiffs point to two deposition excerpts, one declaration, and their own interrogatory answers concerning a single meeting in which Beardsley—after being promoted—allegedly told an NAR leadership team that he intended to stay. (Thomas Decl. Exs. U, Z, AA & CC.) But according to Plaintiffs' own complaint and interrogatory answers, Beardsley's stay at Move for about ten days after Samuelson departed, attendance at that meeting with NAR leadership, and failure to disclose his alleged intention to leave was all in furtherance of the alleged conspiracy to gain confidential information, that he could then use against Move. (*Id.* Ex. U; SAC ¶¶ 2.89–90, 2.92, 3.7 & 3.21.)[2] These facts are disputed, to be sure, but Plaintiffs' allegations expressly relate to their UTSA claim; a fiduciary-duty claim based on them is therefore preempted.

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[2] Plaintiffs argue that these facts were "amplified" in their own interrogatory answers. (Opp. at 19:19–21.) But on summary judgment, the non-moving party's own statements cannot be accepted at face value in order to raise an issue of fact. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Nor may a party opposing summary judgment "rely merely upon allegations or self-serving statements." *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n*, 184 Wn. App. 593, 605, 337 P.3d 1131 (2014) (internal quotation marks omitted). Other than the specific documents discussed here, Plaintiffs have offered nothing other than their own self-serving hyperbole and innuendo. This is insufficient to defeat summary judgment.



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### 3. Memorializing one's thoughts is not a breach of fiduciary duty.

Plaintiffs' opposition argues that merely writing what they mischaracterize as the "Attack ListHub" memo was a breach of fiduciary duty. (Opp. At 19.) That memo was Beardsley's effort to organize his thoughts about whether he wanted to leave Move and what Zillow might do to further compete against Move if he were to join Zillow. (Thomas Decl. Ex. A.) Beardsley never shared the memo with anyone and deleted its content before he joined Zillow.[3]

As prophetic as Orwell's *1984* in many ways was, *thinking* about something has never been and still is not a breach of fiduciary duty. Not even Plaintiffs go this far. Rather, as both the SAC and Plaintiffs' interrogatory answers make clear, the only significance they attach to this memo is that it allegedly shows the *information* Beardsley knew and his alleged intent to *use* it. (Thomas Decl. Ex. U, at 11:13–16.) Thus, even if Plaintiffs' allegations were true (Defendants submit that, in fact, the information was in the public domain), the evidence of the memo would relate only to their UTSA claim, not an independent common-law tort.

### 4. Deleting information is not a breach of fiduciary duty.

Plaintiffs allege that Beardsley erased memory from electronic devices before leaving Move. (SAC ¶ 3.46.) But Plaintiffs cite no authority recognizing a duty to have preserved information, much less that such would be a fiduciary duty. As discussed in opposition to Plaintiffs' motion for spoliation sanctions, Washington law imposes no general duty to preserve evidence. *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 470, 360 P.3d 855 (2015).[4] Nor do Plaintiffs make any claim that the information was important or unique such that deleting it

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[3] Mr. Beardsley's deposition testimony regarding this document is attached as Exhibit E to the Declaration of Michele L. Stephen, submitted January 25, 2016 in opposition to Plaintiff's motion for spoliation sanctions ("Stephen Decl."). Testimony addressing the document is at pages 49–57. A copy of Exhibit E is attached to the Court's working copy of this reply for convenience. *See also* Supplemental Declaration of Estera Gordon Supporting Samuelson's Preemption Reply, Ex. C.

[4] Indeed, Move's own document-retention policy required deletion of such material. *See* Exhibit K to the Declaration of Leslie Costello, submitted January 29, 2016 in support of Mr. Beardsley's motion for partial summary judgment, at 15–16. A copy of Exhibit K is attached to the Court's working copy of this reply for convenience.



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could possibly have harmed Move; thus, the mere fact that Beardsley may have erased it does not support an independent claim for breach of fiduciary duty.[5]

**C. Plaintiffs Fail to Make the Requisite CR 56(f) Showing to Delay This Motion.**

Tacitly conceding the weakness of their position on the law and their inability to point to facts establishing claims independent of the UTSA claim, Plaintiffs ask the Court to delay this motion under CR 56(f) in the hope that further discovery might turn something up.

A party requesting a delay under CR 56(f) must state the specific "facts essential to justify his opposition." This requires more than mere speculation; rather, the party seeking CR 56(f) relief must provide an affidavit stating "what evidence the party seeks and how it will raise an issue of material fact to preclude summary judgment." *Durand v. HIMC Corp.*, 151 Wn. App. 818, 828, 214 P.3d 189 (2009). A court may deny a CR 56(f) motion when any one of the following is true: "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact." *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992) (quoting *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)) (internal quotation marks omitted).

Plaintiffs rely on the Singer declaration to support the CR 56(f) request. (Opp. at 24.) But the Singer declaration merely describes the fact that discovery is ongoing—and it is. Plaintiffs make no attempt to identify what evidence they expect to establish through the additional discovery or how it would raise a genuine issue of material fact regarding preemption. The Court should therefore deny the request to delay resolution of this matter.

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[5] Plaintiffs also suggest that the sole factual allegation that Mr. Beardsley sold Move stock options before his departure (SAC ¶ 2.84) states a claim for breach of fiduciary duty. (Opp. at 19:28–21:1.) But this is at odds with Plaintiffs' own complaint. Insider trading is not among the counts in the SAC here; nor is the alleged conduct identified as constituting a breach of fiduciary duty. (SAC ¶¶ 3.45–3.47.) Thus the allegation relates to the alleged misuse of confidential information and it not independent of Plaintiffs' UTSA claim.



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RESPECTFULLY SUBMITTED: February 1, 2016.

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## CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2016, I served the documents described below:

- **DEFENDANT CURT BEARDSLEY'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING COMMON LAW CLAIMS FOR ALLEGED MISAPPROPRIATION OF INFORMATION**

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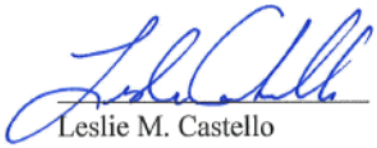
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED on February 1, 2016 at Seattle, Washington.



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