

FILED
KING COUNTY WASHINGTON

MAY 27 2016

SUPERIOR COURT CLERK
BY Susan Bone
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 GRANTING IN PART
DEFENDANT’S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON TRULIA
CLAIMS WITH RESPECT TO ACTUAL
DAMAGES

I. BACKGROUND

This matter comes before the Court on defendants’ motion for partial summary judgment regarding plaintiffs’ claims related to Trulia. The Court has heard oral argument from all of the parties and has carefully reviewed the records in this matter, including:

1. Defendant’s Motion for Partial Summary Judgment on Trulia claims
2. Declaration of David J. Burman in Support of Defendant’s Motion for Partial Summary Judgment on Trulia claims, and accompanying exhibits
3. Declaration of Peter Flint in Support of Defendant’s Motion for Partial Summary Judgment on Trulia claims

- 1 4. Declaration of Errol G. Samuelson in Support of Defendants' Motion for Partial
- 2 Summary Judgment on Trulia claims and accompanying exhibits
- 3 5. Declaration of Gary Waldorf in Support of Defendant's Motion for Partial Summary
- 4 Judgment on Trulia Claims
- 5 6. Declaration of Paul Levine in Support of Defendant's Motion for Partial Summary
- 6 Judgment on Trulia Claims
- 7 7. Plaintiffs' Opposition and supporting documents
- 8 8. Defendant's Reply and supporting documents
- 9 9. The 3rd Declaration of David J. Burman in support of defendants' motion for partial
- 10 summary judgment
- 11 10. The other accompanying motions for summary judgment, the opposition to those
- 12 motions, and all of the attendant declarations and exhibits

12 II. ANALYSIS

13 The primary focus of the Court's analysis in this memorandum opinion and order is
14 causation, and whether plaintiffs have shown a causal link between defendants' alleged conduct
15 and plaintiffs' actual damages as related to the Trulia claims.

16 It is undisputed that Move and Trulia ceased merger discussions in February 2014. It is
17 undisputed that there was, in February 2014, the potential for those discussions to resume at
18 some point in the future (possibly later in 2014, but there was no date certain).

19 It is undisputed that Move and Trulia continued to discuss other possible, non-merger,
20 collaboration between the companies and that these discussions continued into the spring of
21 2014.

22 It is undisputed that in discussing a merger, the parties did not agree to any terms, had not
23 sought their respective boards' approval and, from Move's position, had not sought the approval
24 of the National Association of Realtors (NAR). While NAR had no say in the negotiated price, it
25 could object and thereby kill the merger.

1 It is undisputed that at least one of the parties considered this collaboration to be a
2 possible first step towards an eventual merger.

3 It is undisputed that there was no offer from Trulia to acquire Move and it is undisputed
4 that contemporaneous notes from Trulia at the time indicated that Trulia was “not proceeding”
5 with the merger but that it would “keep the door open.”

6 It is undisputed that Move’s CEO Steve Berkowitz testified that “there weren’t any
7 certainties” that Move and Trulia would ever do a merger deal. It is undisputed that Move board
8 member Joe Hanauer also testified that there was “no way to know” whether Trulia would have
9 acquired Move.

10 It is undisputed that plaintiffs’ expert, Mr. Foster, has testified that he believed an
11 eventual merger between Move and Trulia would be “likely” although he did not qualify that
12 likelihood.

13 In order for a merger to occur, it is undisputed that significant steps, both independent
14 and interdependent of one another, would need to be taken by both companies to realize their
15 union. These have been outlined, in part, above.

16 While the principles of ‘but-for’ causation to be applied here are consistent with a
17 negligence claim, in many respects the facts involved in the possible merger of corporate entities
18 like Move and Trulia, are distinctly different from the common experience found in tort. Share
19 price, unseen forces in the marketplace, board approvals, independent third parties upon whom
20 the decision may rest, the personalities of the companies’ leadership, timing, and other factors
21 would all would affect the outcome of a deal.

22 In tort actions, issues of negligence and causation are questions of fact not usually
23 resolved on summary judgment. It is well settled, however, that a party resisting summary
24 judgment cannot satisfy their burden merely by relying on conclusory allegations, speculative
25 statements, or argumentative assertions to prove causation. The nonmoving party must set forth
26 specific facts demonstrating a genuine issue of fact. Proof of causation must be more than just a

1 possibility in order to guard against speculation. Proof of causation must be probable under the
2 fact, inferences and circumstances presented.

3 Although circumstantial and direct evidence are given the same weight in Washington,
4 when plaintiff's case depends on a theory to provide liability, Washington courts have cautioned
5 against attaching liability when equally persuasive theories are present, and one of those theories
6 does not result in liability:

7
8 The facts relied upon to establish a theory by circumstantial evidence must be of
9 such a nature and so related to each other that it is the only conclusion that fairly
10 or reasonably can be drawn from them. A verdict cannot be founded on mere
11 theory or speculation. If there is nothing more tangible to proceed upon than two
12 or more equally reasonable inferences from a set of facts, and under only one of
13 the inferences would the defendant be liable, a jury will not be allowed to resort to
14 conjecture to determine the facts.

15 Schmidt v. Pioneer United Dairies, 60 Wn. 2d 271, 276, 373 P.2d 764, 767 (1962)

16 The necessity for causal proof in the form of probability, versus possibility, is even more
17 acute when the presence of a third party decision-maker is an intervening factor, breaking the
18 causal chain. In this instance, it is undisputed that the third party decision maker in any
19 prospective agreement between Move and Trulia is NAR and that, independent of the decision
20 between Move and Trulia, NAR could overrule their deal.

21 Taking all of the foregoing into account, there are disputed material facts and reasonable
22 inference therefrom which do not support summary judgment on the issue of whether Move's
23 discussions with Trulia were protected trade secrets. The same is true with respect to whether
24 the defendants misappropriated those secrets.

25 But the undisputed facts and inferences flowing from those facts with respect to causation
26 are speculative regarding the future of a Move and Trulia merger once their discussions ended in
February 2014. In other words, at the time of the alleged theft of these secrets, the undisputed
evidence (and the reasonable inferences flowing therefrom) supports multiple, equally plausible,

1 paths forward for Move and Trulia: merger, no merger, closer partnership, no partnership, etc.
2 The causal link is even more speculative with NAR's involvement.

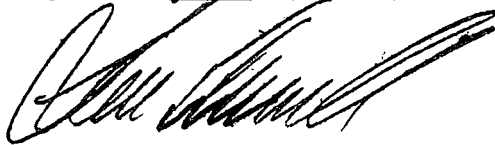
3
4 If the facts and inferences presented at summary judgment support plausible alternatives
5 to plaintiffs' inferential theory, and those alternative theories do not result in defendant's
6 liability, then plaintiff have not met their burden in showing causation. Schmidt v. Pioneer
7 United Dairies, 60 Wn. 2d 276. That is the case here.

8 Plaintiffs' hypothesis of Move and Trulia's future merger after February 2014, absent
9 Zillow's intervention, is speculative. The presence of an independent intervening factor, NAR,
10 makes the speculation even more acute. There are equally plausible, but equally speculative,
11 theories that these facts support which do not result in defendants' liability for actual damages.
12 Given the foregoing, causation has not been established and summary judgment is appropriate on
13 this issue.

14 III. ORDER

15 The motion for summary judgment with respect to plaintiffs claim for actual damages as a
16 result of the alleged misappropriation of Trulia related trade secrets is GRANTED given
17 plaintiffs failure to establish causation; but the motion is otherwise DENIED with respect to
18 dismissing the Trulia claim altogether. Plaintiffs may pursue damages for Trulia related matters
19 under RCW 19.108.030(1)'s unjust enrichment prong.¹

20 Signed this 27th day of May, 2016.

21
22 

23 JUDGE SEAN P. O'DONNELL

24
25 ¹ See, e.g., Kelley v. Microsoft, 2009 WL 413509 (2009 (holding that unjust enrichment does not require proof of
26 causation); Baillie Communications, Ltd. V. Trend Business Systems, Inc., 61 Wn.App. 151, 160, 810 P.2d 12 (1991).