

FILED
KING COUNTY WASHINGTON

JUN 02 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 ON DEFENDANTS' MOTION TO
EXCLUDE TESTIMONY OF DAMAGES
EXPERT BRADFORD CONRNELL
RELATING TO 'VALUE OF DAMAGES
TO REALTOR.COM' AND 'COSTS TO
DEVELOP TRADE SECRET AND
CONFIDENTIAL INFORMATION'

I. BACKGROUND

This matter comes before the Court on Defendants' motion to exclude the testimony of damages expert Bradford Cornell as that testimony relates to the two issues captioned above. The Court has heard oral argument from all parties has carefully reviewed the records in this matter, including:

1. Defendants' Motion to Exclude
2. Plaintiffs' Response
3. Defendants' Reply

ORDER ON MOTION FOR PARTIAL SUMMARY
JUDGMENT ("VALUE OF DAMAGES, ETC") -- 1

The Honorable Sean P. O'Donnell
516 Third Avenue, W-817
Seattle, WA 98104
(206)477-1501

1 4. Supporting Declarations to all of the briefing immediately outlined above

2 5. The other pleadings and declarations submitted in this case

3
4 II. ORDER

5 Now, being fully briefed and advised on the foregoing, the Court orders as follows:

6 **i. Realtor.com Damages**

7 The motion to exclude Prof. Cornell's testimony with respect to his opinion concerning
8 the value of damages to Realtor.com is GRANTED.

9 Dr. Cornell's opinion, in salient part, rests almost exclusively on the information
10 provided to him by Move employee Bryan Charap. Mr. Charap in turn rests his opinion with
11 respect to Zillow's supposed one year head start, provided to Professor Cornell, on unsupported
12 assumptions. For example, in his estimate of Zillow's "one year" head start in closing the so-
13 called listing gap, Mr. Charap admitted that this was an assumed number. He also acknowledged
14 that he had never worked in the industry relations group or ever undertook any analysis to
15 estimate how long it would take to obtain a fixed number of direct feed agreements (this is not
16 surprising, as each agreement would be dependent on considerations peculiar to the parties
17 involved). Mr. Charap also never participated in obtaining a direct feed agreement. Thus, both
18 the information on which he relied and the scope of his experience severely undercut the
19 reliability of this assumption.

20 The information that Mr. Charap provided to Professor Cornell on how long it would take
21 close the listing gap was also based on Mr. Charap's assumptions – assumptions untethered to
22 any real data or analysis, but instead Mr. Charap's experience. Moreover, Mr. Charap's
23 testimony is directly contradicted by his fellow employee, Luke Glass (also Mr. Charap's
24 superior at Move) who opined, prior to litigation commencing, that 60% of content would be
25 back on publisher sites within one week of Zillow not renewing with ListHub. This casts a
26 significant cloud on the information upon which Professor Cornell relied.

Professor Cornell also assumed a linear relationship between the number of listings on a
website and the number of a page views in calculating his damage estimate. But even Mr.
Charap recognized that the relationship was not linear, and testified that page views would
depend on other factors such as consumers knowing about the site, the site's brand, etc. Mr.

1 Charap, in fact, testified there was no direct relationship between the number of listings on
2 Zillow and the page views on Realtor.com.

3 Finally, Mr. Charap's testimony concerning the reasons behind, and the time delay
4 associated with, a consumer reaction to the listing gap is equally speculative. Mr. Charap
5 assumed that it would take 90 days for consumers to recognize the gap, using repeat visitation
6 metrics to derive that number. There is no correlation, at least not one that Mr. Charap explained
7 or that this Court can see based on the evidence presented, between the number of times a
8 consumer will visit the same website and their recognition of a listing gap.

9 Taking all of this into consideration, the Court finds that Professor Cornell's testimony
10 regarding damages to Realtor.com as a result of alleged misappropriation of trade secrets is
11 speculative and therefore not helpful to the jury. See ER 703.

12 **ii. Costs to Develop Trade Secrets**

13 The motion to exclude Professor Cornell's testimony with respect to the costs associated
14 with developing trade secrets is DENIED.

15 However, Dr. Cornell must be able to provide some nexus between the supposed costs
16 expended and the alleged misappropriated trade secret. This is particularly true when Professor
17 Cornell, at Move's direction, assumes costs for the secret's development are linked to ordinary
18 business expenses. A general reference to NAR royalties, MLS Fees, generic expenses for
19 "industry relations" and the like provide the jury with little, if any, ability to properly analyze the
20 damages associated with a particular secret. This issue becomes even more acute if the jury
21 finds, for example, that trade secret A is not, in fact, a secret as plaintiffs allege. Otherwise, the
22 jury is being asked to speculate.¹

23 This is not to say that plaintiffs must provide absolute certainty with respect to the cost of
24 each secret – but some specificity, grounded in fact, is required.

25 Accordingly, the requisite foundation must be established prior to the professor opining
26 on damages with respect to costs associated with the development of trade secrets.

¹ For example, when Dr. Cornell posits in his May 18, 2016 supplemental report that NAR Royalties "helped develop" certain trade secrets which he lists, he must be able to explain the basis for that opinion and subscribe some percentage or other measure to afford the jury an opportunity to analyze the costs as it relates to the secret.

1 **iii. Defendant's MIL #4 – Excluding Testimony of Bryan Charap**

2
3 In light of the Court's analysis in section (i), above, the motion to exclude Bryan
4 Charap's testimony on these subjects is GRANTED.

5 Signed this 2nd day of June, 2016

6
7
8 
9 JUDGE SEAN P. O'DONNELL