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No. 72534-3-I

COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

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,

Respondents,

v.

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

Petitioners.

REDACTED BRIEF OF RESPONDENTS

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A. INTRODUCTION

Errol Samuelson, the Chief Strategy Officer of Move, Inc., (“Move”), had access to a multitude of trade secrets and confidential business strategies of Move and the National Association of Realtors (“NAR”). He conspired with Move’s major competitor, Zillow, Inc. (“Zillow”) for months, in breach of his fiduciary duty to Move, to leave Move and utilize his insider knowledge of confidential business strategies and trade secrets to benefit Zillow. As he left Move, Mr. Samuelson harvested even more information and destroyed evidence of his unlawful conduct. The trial court, after careful examination of voluminous and detailed records, and hearing oral argument, found Mr. Samuelson’s actions very troubling. The trial court took actions common in trade secret litigation, entering a protective order and a time-limited preliminary injunction against Samuelson’s disclosure of those secrets. Both orders designated certain documents “attorney eyes only” (“AEO”).

These interim measures were taken to maintain the status quo until the impending trial on the merits and to prevent Samuelson/Zillow from exploiting Samuelson’s knowledge of Move’s trade secrets in the interim. They are specifically authorized by RCW 19.108.050, a statute Samuelson/Zillow do not even cite.

Rather than address the trial court's *extensive* findings in its preliminary injunction of Samuelson's dishonorable treatment of his former employer, and his entirely suspicious conduct evidencing his intent to disclose and utilize Move's trade secrets, Samuelson/Zillow try to sanitize Samuelson's misconduct by spinning only portions of the evidence to hide the truth of the matter.

Simply put, the trial court had ample evidence of Samuelson's bad faith conduct and his willingness to use trade secret information for Zillow's benefit and to the detriment of NAR and Move. The trial court acted well within its discretion based on trade secrets statutory and decisional authority in entering its preliminary injunction to preserve the status quo until trial, and to deter Samuelson from further attempts at exploiting Move's trade secrets. This Court should affirm the trial court's preliminary injunction.

B. STATEMENT OF THE CASE¹

(1) Samuelson's Access to Sensitive, Confidential Information at Move and His Confidentiality Agreement

Move, Inc. is a publicly traded online real estate company; its co-plaintiff, the National Association of Realtors ("NAR"), is a nationwide

¹ Samuelson/Zillow's statement of the case is argumentative and omits critical facts from the record and the trial court's findings. It does not comply with RAP 10.3(a)(5).

trade association for real estate professionals. CP 1652 (verity). Move's primary competitor in the online real estate industry is Zillow, Inc., another publicly traded corporation. *Id.* (verity).

During his twelve years of employment at Move, Samuelson headed Move's most important business units. *Id.* (verity). Ultimately, Samuelson became the "Chief Strategy Officer" for Move. *Id.* (verity). Samuelson created and had access to all of Move's most important business and strategic information. CP 1653 (verity). Samuelson had numerous strategy sessions with Move and NAR top executives, in which they discussed approaches to various strategies they thought Zillow might launch, as well as other strategies for Move to remain competitive. *Id.* (verity). Samuelson was also the primary contact for Move's close relationship with NAR. *Id.* (verity). In that capacity, he learned substantial secrets about NAR's business initiatives and strategies. *Id.* (verity). He also negotiated confidential agreements between NAR and Move, which influence Move's competitive actions and strategies. CP 32-34. Samuelson's experience with NAR made him privy to non-public written and unwritten agreements and joint strategies between Move and NAR and between related entities. CP 1653 (verity). Much of that material constitutes trade secret information belonging to Move. *Id.* (verity). In the words of one Move executive, Samuelson "had access to

every possible piece of insider information that any company could ever have." CP 1404.

The following specific matters constitute Move undisputed trade secrets to which Samuelson was privy, and all are verities on appeal: Move's/NAR's goals, reasons and strategies to compete with Zillow with regard to [REDACTED] secret merger discussions and strategies, including the identity of the merger partner and the terms; Move's reasons for [REDACTED] non-public data about Move's finances, goals, plans and strategies and the performance of all aspects of their business; Move's strategic analysis of a business opportunity to purchase Point2 Syndication from Yardi; plans and [REDACTED] [REDACTED]; and Move's strategic analysis of a business opportunity to partner with a new business that has not yet been created. CP 1654-75 (verities). All of these trade secrets derive independent economic value for Move/NAR from the fact that they are not known or readily ascertainable by competitors. CP 1656 (verity). Move made reasonable effort to maintain the secrecy of these valuable trade secrets. *Id.* (verity).

Because of Samuelson's high-level access to Move's and NAR's most sensitive strategic trade secrets, he agreed to maintain the confidentiality of those secrets by certifying every quarter that he had read

and was in compliance with Move's Code of Conduct and Business Ethics. CP 1656 (verity), 100-102.² The Code instructs all employees to keep proprietary and confidential information secret both during and after their employment at Move:

As an employee, you will have access to proprietary and confidential information concerning the Company's business and the business of the Company's clients and suppliers. You are required to keep such information confidential during your employment as well as thereafter, and not to use, disclose or communicate that confidential information other than in your role as an employee.

CP 70. The Code explains that unauthorized disclosure of internal information could violate the law and seriously damage Move. *Id.*

(2)

Zillow Secretly Negotiates With Samuelson to Employ Him Even as Samuelson Continues to Access High-Level Trade Secrets

CP 1653 (verity).

Id. (verity). Toward the end of 2013, Samuelson and Zillow secretly renewed previous discussions they had about Samuelson leaving Move for Zillow. CP 1657 (verity). Samuelson was secretly negotiating

² Samuelson/Zillow state in passing that they were unable to find a signed copy of Move's confidentiality agreement, but are careful to avoid saying he did not have a duty to maintain the confidentiality of Move's trade secrets.

with Zillow for a generous compensation package, which included a \$345,000 salary, \$350,000 annual bonus, a \$350,000 “signing bonus,” and restricted stock units worth over \$5,000,000. CP 1973. Samuelson believed that he had a “deal” with Zillow’s CEO no later than February 19, 2014. *Id.*

Samuelson consulted with an employment litigation attorney on February 19, and 25, 2014. *Id.* (verity). On February 28, 2014, Samuelson raised with Zillow the possibility that he might disclose Move’s information to Zillow. *Id.* (verity). Zillow allayed his concerns by indemnifying him in the event he told Zillow any or all of Move’s trade secrets. *Id.* (verity). Zillow also agreed to pay Samuelson one year’s salary and bonus (about \$700,000) if he was terminated. CP 1977.

During the same time in which Samuelson was negotiating employment with Move’s primary competitor, Samuelson continued to work for Move and access even more trade secrets. From late 2013 to March 2014, Move was finalizing its Annual Operating Plan, budget and strategic business plans for the year. Samuelson participated in that process in meetings and was provided the related documents.³ CP 1070-72.

³ APP 340 (Berkowitz Dec. ¶ 26); APP 353-355 (Berkowitz sealed Dec. ¶ 16(a)-(f)).

Samuelson disclosed Move's trade secret information even while still employed at Move. CP 1659 (verity). He also made a misrepresentation while negotiating a deal on Move's behalf. *Id.* That misrepresentation caused the deal to fail. CP 1660 (verity).

(3) Samuelson's Abrupt Departure and Mishandling of Move's Technology and Electronically Stored Information

Two days before he resigned from Move, "using deception," Samuelson improperly used Move's business license and caused Move employees to transfer his Move-issued phone line to his personal possession. CP 1657 (verity). He also erased the memory from his Move-issued tablet and phone, and took steps to erase data from his Move-issued computer. *Id.* (verity). He retained one of Move's computers, a Dell laptop, claiming it had personal information on it. *Id.* (verity).⁴

Samuelson utilized a subordinate's computer, and transferred a slew of highly confidential information on to that computer. CP 163-64, 182, 1658. The subordinate was not someone who should have been in possession of this secret information. *Id.* He took Move information on a

⁴ Samuelson/Zillow appear to be challenging this finding in their brief at 21, but they do not challenge the facts of what occurred. They only challenge the finding of any inference that Samuelson's actions were inappropriate. Br. of Appellants at 21.

USB drive. CP 1035. Samuelson “copied” “address book/contact information” from Move and took it with him to Zillow. CP 1658, 1035. Samuelson then attempted to erase or delete various files and media. He took devices to a third party vendor, without safeguarding Move’s electronically stored information. CP 1658 (verity). Samuelson’s disregard for Move’s information violated instructions that Samuelson received from Zillow’s in-house counsel. CP 1980.⁵

In the days before his departure from Move, even though he knew he was leaving to work for Move’s chief competitor, Samuelson continued to initiate communications that resulted in his acquiring even more trade secret information. CP 1657-78 (verity). On the afternoon of March 4, approximately 18 hours before he resigned, he rekindled a previous secret strategic discussion with NAR. CP 1658 (verity). Because he did not disclose his intention to resign, NAR executives entrusted him with additional trade secret information. *Id.* (verity).

At 9:00 a.m. on March 5, 2014, Samuelson telephoned Move’s head of Human Resources and stated he was resigning, effective immediately. CP 46. *Thirty minutes later*, Samuelson commenced employment as Zillow’s Chief Industry Development Officer. CP 47.

⁵ The trial court drew “negative inferences from [Samuelson’s] handling of electronic information prior to and after his resignation,” particularly because Samuelson had consulted with an employment attorney immediately beforehand. CP 1657 (verity).

Zillow stated that it had hired Samuelson for his “insights.” CP 1659 (verity). Both immediately before and right after Samuelson’s change of allegiance, Zillow made statements about Move that implied it had new information about Move’s business. CP 1660 (verity). On March 3, 2014, Move’s CFO Rachel Glaser told Samuelson about [REDACTED]

[REDACTED]

The next day, Zillow’s CEO made the bold claim that Zillow is more valuable to ListHub than ListHub is to Zillow. This was a stark change in direction for Zillow; it had discussed its relationship with ListHub on other occasions but never before suggested it was in a position of power in that relationship. CP 173. Then, on March 10, 2014, a [REDACTED] [REDACTED] repeated some information he said he had heard about one of Move’s primary business-to-business products. CP 1209-10. The information he repeated had never been discussed publicly by Move. The [REDACTED] also revealed he had spoken with members of the Zillow executive team just before [REDACTED]. *Id.*

In sum, Zillow [REDACTED], and then sought [REDACTED] access to all of that competitor’s trade secrets by luring away its chief strategist. Samuelson, who knew or had access to every confidential trade secret his employer owned, engaged in long-term secret negotiations with his employer’s direct competitor for a

lucrative and risk-free contract, to work for that competitor in a similar role, and continued to work and gather trade secrets long after he knew he was going to change loyalties. Because he and Zillow knew he possessed trade secrets, Zillow agreed to indemnify him for any legal action resulting from his wrongdoing. On the eve of his departure, he surreptitiously copied massive quantities of Move's electronic data, and even kept possession of Move-issued electronic devices. Then, after legal action began, Zillow and Samuelson continued to show disregard for Move's trade secrets, and Samuelson made deceptive statements to the trial court.

(4) Procedural History and the Trial Court's Findings Regarding Trade Secrets and Samuelson's Conduct

Move and NAR filed a complaint for violations of the Uniform Trade Secrets Act, chapter 19.108 RCW, ("UTSA") on March 17, 2014. CP 1-16. Ten days later, Move moved for entry of a two-tiered protective order. CP 221.⁶ One tier would be used for "confidential" information and a second, higher tier would restrict information to attorneys only. Zillow agreed with the concept of a protective order, and agreed with a two-tiered order, but proposed its own form. CP 244-62.

Samuelson did not oppose the motion or file any pleading concerning the form of the proposed protective order. On April 4, the trial

⁶ Move also moved for a preliminary injunction on March 27, but that first motion was denied. CP 229.

court entered the protective order presented by Zillow with input from Plaintiffs' counsel; the Protective Order includes the right to identify certain material as Attorneys Eyes Only ("AEO"). CP 342-52.

Having failed to file any opposition to Move's motion or Zillow's agreed order, two weeks later, Samuelson moved the court to modify the protective order. CP 390. The trial court denied the motion on April 24, 2014 and Samuelson did not seek review of that decision by this Court. CP 438.

In May 2014, Move moved for a preliminary injunction. CP 2309-18. In doing so, they moved the court to seal some evidence and parts of the motion, citing the protective order and RCW 19.108.050. Samuelson again moved the court to remove the AEO designations from both evidence and the motion. CP 459-62. The court entered a detailed order granting Samuelson some relief. CP 651-53. It specified, by page and line number, the material that would continue to be designated AEO. *Id.* As a result of the trial court's order, from which Samuelson did not seek review by this Court, Samuelson saw lightly redacted versions of three declarations, along with twenty-five other declarations that had *no* redactions.⁷ No protective order entered in this case was categorical, and

⁷ Krishan CP 199-205; Brummer (1-3) CP 45-70, 419-25, 444-56; Green CP 181-83; Hernandez CP 195-98; Lovejoy (1-5) CP 206-10, 440-43, 680-89, 694-710, 801-04; Hanauer CP 189-94; Mann CP 211-15; El-Khoury (1-3) CP 167-71, 383-86, 1231-35;

Samuelson had access to a great deal of Move/NAR's evidence in support of the preliminary injunction. The redactions of declarations and of the proposed injunction were specific and limited down to a word-by-word level. *See, e.g.*, CP 651-53, 685-86.

Samuelson and Zillow's litigation conduct called into question their credibility and reliability. For example, when opposing injunctive relief, Samuelson testified that an injunction would be financially crippling to him and his family. CP 912-18. But Samuelson omitted material details that demonstrated he was not being accurate in his statements. CP 1660 (verity), 167-71, 383-86. The trial court concluded that Samuelson's testimony about his finances was misleading, calling his credibility into question. CP 1660. (verity).

Some of Samuelson's publicly filed statements in the litigation demonstrated a continued lack of concern for Move's trade secrets. *Id.* (verity). Zillow similarly disclosed trade secret information in a brief it filed in open court. Despite the Court's string of orders sealing documents and the painstaking care Move and NAR took to protect trade secret information in correspondence with defendants and in their submission to

Smith CP 216-20; Glaser CP 172-75; Goldberg CP 176-80; Greenspan CP 184-88; Cree CP 162-66; Berkowitz CP 31-44; Stenhouse (1-3) CP 921-1022, 1253-1359, 1641-48.

the Court, Zillow filed [REDACTED] in open court [REDACTED] that exposed Move and NAR trade secret information [REDACTED] CP 1380-90, 1986. Move and NAR scrambled that day to obtain an order sealing Zillow's [REDACTED] but it was already too late. CP 743-47, 1986. Move received an email [REDACTED] who said she had retrieved Zillow's brief from the Court's electronic system and had questions about a previously undisclosed business initiative of Move that she had read about in Zillow's brief. CP 2007-15.

The trial court granted Move's motion for a preliminary injunction. Because the proposed findings, conclusions, and injunction contained detailed material designated as AEO under the protective order, the trial court sealed portions of the proposed form of injunction. CP 763-69. Samuelson again moved for relief from the AEO provisions of the protective order. CP 459,750. On June 30, 2014, the trial court denied Samuelson's motion as to the proposed findings and conclusions, but granted it as to the final findings and conclusions. CP 761-62. Samuelson did not seek reconsideration or review.

On June 30, 2014, the trial court entered its detailed preliminary injunction with extensive findings of fact and conclusions of law, with footnotes to the evidentiary record. CP 1650-786. The trial court

concluded that Move/NAR have a substantial likelihood of success on their claims. CP 1660 (verity). The court concluded that Samuelson misappropriated and threatened misappropriate of Move/NAR's trade secret information. CP 1660-81 (verity). It concluded they had a right to injunctive relief under RCW 19.108.020(1) and/or RCW 7.40.020. *Id.* (verity). The trial court concluded that Move/NAR will suffer "actual and substantial injury, and will suffer irreparable harm" without the injunction. *Id.* (verity). It concluded that the balance of equities favored protecting Move/NAR's trade secrets. *Id.* (verity). It concluded that Samuelson/Zillow's objections to Move/NAR's evidence went to its weight, not its admissibility. *Id.* (verity).

Having viewed the unredacted findings and conclusions, Zillow and Samuelson both moved for reconsideration, and introduced new evidence. CP 1669-81, 1732-45. Samuelson moved again for relief from the AEO designations in the protective order, and was again denied. CP 866-67, 2582-83. After seeking and receiving a response from Move and a reply from both movants, with more additional evidence, the court denied reconsideration of the preliminary injunction. CP 887-88. Both movants then sought discretionary review of the court's preliminary injunction, which a Commissioner of this Court granted. CP 890, 2089.

C. ARGUMENT

(1) Standard of Review

The standard of review for grant or denial of a preliminary injunction is abuse of discretion. *Washington Fed'n of State Employees, Council 28 v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983); *Miller v. Campbell*, 137 Wn. App. 762, 769, 155 P.3d 154 (2007). The duration and scope of an injunction are decided on the facts of each case at the trial court's discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 63, 738 P.2d 665 (1987); *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986). The trial court's decision exercising that discretion will be upheld *unless it is based upon untenable grounds, or is manifestly unreasonable, or is arbitrary*. *Washington Fed'n of State Employees, Council 28 v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160 (1994).

This Court reviews challenged findings of fact for substantial evidence, and determine whether the findings support the conclusions of law.⁸ *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). “Evidence is substantial when it is enough to persuade a fair-minded

⁸ Conclusions of law are reviewed de novo. *State v. Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013).

person of the truth of the stated premise. *Id.* The challenging party must demonstrate “why specific findings of the trial court are not supported by the evidence and [must] cite to the record to support that argument.” *In re Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (emphasis added); *In re Estate of Palmer*, 145 Wn. App. 249, 264–65, 187 P.3d 758 (2008).⁹

Unchallenged findings of fact are verities that are binding on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992) The scope of a given appeal is determined by the notice of appeal, the assignments of error, and the substantive argumentation of the parties. *Clark Cnty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wn.2d 136, 144, 298 P.3d 704 (2013). Neither parties nor courts are obligated to guess at which findings they deem to be unsupported to guess at which findings they deem to be unsupported. *See In re Marriage of Stern*, 57 Wn. App. 707, 710, 789 P.2d 807, *review denied*, 115 Wn.2d 1013 (1990).

(2) Background on the UTSA, Preliminary Injunctions, and Misappropriation of Trade Secrets

⁹ Samuelson/Zillow aver that this Court’s review should be “particularly searching” and that heightened scrutiny is required because Move drafted the findings and conclusions. Br. of Appellants at 17 n.2. However, Samuelson/Zillow rely on federal cases for this proposition. In Washington, there is no heightened scrutiny of findings drafted by a party. It is a routine matter for trial courts to ask the prevailing party to prepare findings and conclusions for the court’s review and approval. *See, e.g., MacKay v. MacKay*, 55 Wn.2d 344, 347, 347 P.2d 1062, 1064 (1959); *WESCO Distribution, Inc. v. M.A. Mortenson Co.*, 88 Wn. App. 712, 716, 946 P.2d 413 (1997).

Disclosure of trade secrets is an irreversible act that, once done, cannot be undone. The purpose of the preliminary injunction is to maintain the status quo until factual disputes are resolved. *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 98 P.2d 680 (1940).

A key purpose of trade secrets laws is to maintain and promote standards of commercial ethics and fair dealing in protecting those secrets. *Boeing*, 108 Wn.2d at 58, 738 P.2d 665 (citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481–82, 94 S. Ct. 1879, 40 L.Ed.2d 315 (1974)). The UTSA was adopted in Washington in 1981 to codify the common law and provides a cause of action for misappropriation of trade secrets. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 46, 738 P.2d 665 (1987); *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 324, 828 P.2d 73 (1992); *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 438, 971 P.2d 936 (1999); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993).

The UTSA defines a “trade secret” as “information” that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.108.010(4). Information has “independent economic value” under the UTSA not simply because it might be used to harm a competitor if known, but because it takes effort and expense to generate the information. *Ed Nogrowski*, 137 Wn.2d at 438, citing Gale R. Peterson, *Recent Developments in Trade Secret Law in an Information Age, in* patents, Copyrights, Trademarks & Literary Property (PLI Handbook Series No. G4-4042, Feb. 1998).

Because the continued use of trade secrets can cause ongoing harm to the owner, *see 3M v. Pribyl*, 259 F.3d 587, 607 (7th Cir. 2001), the UTSA authorizes permanent and preliminary injunctions against disclosure of trade secrets cases as primary remedy. RCW 19.108.020. Injunctions are not unusual in trade secrets cases, under the UTSA they are “the standard remedy for misappropriation of a trade secret.” Malla Pollack, *Litigating Misappropriation of Trade Secret*, 127 Am. Jur. Trials 283 (2012); RCW 19.108.020-.030.

In fact, the UTSA *requires* a trial court to protect alleged trade secrets during litigation by issuing various kinds of orders, including orders preventing persons from disclosing trade secrets:

In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include...ordering any person involved in the

litigation not to disclose an alleged trade secret without prior court approval.

RCW 19.108.050. Preliminary injunctions are designed to preserve the status quo until the trial court has the opportunity to assess the plaintiff's claims and resolve disputed factual issues. *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 98 P.2d 680 (1940). In a trade secrets case, preliminary injunctions are critical because once secret information is disclosed, the harm from that disclosure cannot be reversed. *See Lemelson v. Carolina Enters., Inc.*, 541 F.Supp. 645 (S.D.N.Y. 1982); *M & T Chems., Inc. v. Int'l Bus. Machs. Corp.*, 403 F.Supp. 1145 (S.D.N.Y. 1975) (general disclosure of a trade secret "totally destroys" any value it may have), *aff'd* 542 F.2d 1165 (2d Cir. 1976).

An employment relationship imposes a *duty* on current and former employees not to use or disclose the employer's trade secrets. *Ed Nogrowski*, 137 Wn.2d at 439. An employer does not need to obtain an express non-compete or confidentiality agreement in order to have the right to trade secret protection. *By-Buk Co. v. Printed Cellophane Tape Co.*, 163 Cal. App. 2d 157, 163, 329 P.2d 147, 151 (1958) (cited with approval in *Ed Nogrowski*).

Under the UTSA, the new employer of a person who possesses another employer's trade secrets can be vicariously liable for the unlawful

conduct of that employee. *Thola v. Henschell*, 140 Wn. App. 70, 76, 164 P.3d 524 (2007). Common law principles of agency and vicarious liability are not preempted by the UTSA. *Id.* at 81.

A preliminary injunction against disclosure of trade secrets is warranted when there is actual or threatened misappropriation of trade secrets. “Misappropriation means: Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.” RCW 19.108.010(2)(a). The Trade Secrets Act has a nonexclusive definition of “improper means, which includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. RCW 19.108.010(2)(a). “Misappropriation” includes the disclosure or use of a trade secret of another without express or implied consent by a person who knew or had reason to know his or her knowledge of the trade secret was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use. RCW 19.108.010(2); *Ed Nowogroski*, 137 Wn.2d at 439.

One example of actual misappropriation of information is copying it without permission. In one case, the defendant copied computer files “without authority” before he resigned, then deleted files from the server. That was “a theft, and therefore a misappropriation.” *Bond v. Polycycle*,

Inc., 127 Md. 365, 732 A.2d 970, 977 (Md. Ct. App. 1998). In another, the defendant transferred trade secret information from a company laptop to a CD, ostensibly “to retain personal files, such as wedding photographs.” *LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 849 A.2d 451, 466 (Md. Ct. App. 2003). The Maryland Court of Appeals concluded that the defendant “acquired Coinco’s trade secrets by improper means” and enjoined the disclosure of trade secrets. *Id.* at 467.

Threatened misappropriation exists when the court can infer from a defendant’s words or conduct that the defendant will likely misuse trade secrets. *See Edifecs, Inc. v. TIBCO Software*, 756 F.Supp.2d 1313, 1319 (W.D. Wash. 2010). Such conduct can include: rapidly accessing documents before resigning, failing to promptly disclose a similar job with a competitor, or stating an intention to develop a different method to accomplish the same result reached by the trade secret method. *Xantrex Tech.*, 2008 U.S. Dist. Lexis 41206 *52, 2008 WL 2185882 (D. Colo. 2008); *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102, 118 (3rd Cir. 2010); *Technical Indus. v. Banks*, 419 F.Supp.2d 903, 913 (W.D. La. 2006).

- (3) Substantial Evidence and Unchallenged Findings of Fact Support the Conclusion that There Was Actual and Threatened Misappropriation of Trade Secrets

Samuelson/Zillow argue that the trial court abused its discretion in finding that there was any actual or threatened misappropriation of trade secrets. Br. of Appellants at 14-22.¹⁰ They argue that certain circumstantial and direct evidence of Samuelson's deceit is merely speculative. *Id.* at 17-22. Because Samuelson/Zillow did not assign error to the trial court's findings of fact in compliance with RAP 10.3(g), and do not even refer to specific findings of fact by number in the body of their argument, Move is forced to guess which findings of fact are at issue.

Nevertheless, Samuelson/Zillow's brief offers no grounds for this Court to conclude that the trial court abused its discretion in finding misappropriation and threatened misappropriation. The multitude of unchallenged findings of fact are more than sufficient to support the injunction, and the challenged findings, insofar as they can be gleaned, are all supported by substantial evidence.

¹⁰ Samuelson/Zillow begin their argument with a puzzling discussion of the "inevitable disclosure" doctrine in trade secrets law. Br. of Appellants at 14-17. This doctrine, adopted in many other jurisdictions, allows courts in trade secrets cases to enjoin a defendant *entirely* from working at a competitor, on the theory that it would be impossible for the defendant to work for that competitor in any capacity without disclosing trade secrets. *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 512, 278 P.3d 197, 201 (2012).

Samuelson/Zillow's argument is puzzling because, *as they admit in their brief* at 17-18, the trial court did not employ the inevitable disclosure doctrine in this case. It appears that this argument is a red herring to distract this Court from a close analysis of the evidentiary support underpinning the trial court's order.

(a) The Unchallenged Findings Alone Demonstrate that the Trial Court Did Not Abuse Its Discretion in Finding Misappropriation

The trial court's many unchallenged findings paint a picture of a well-orchestrated plan by Zillow and Samuelson to misappropriate Move/NAR's trade secret information for Zillow's use and profit. Samuelson had knowledge of massive amounts of trade secret information that would be highly valuable to its chief competitor. CP 1653 (verity).

[REDACTED]

[REDACTED] *Id.* (verity)

Zillow then [REDACTED]

[REDACTED] – enticing Move's Chief Strategy Officer to change allegiance. CP 1657 (verity). In return, Samuelson would obtain a lucrative employment package and total indemnification from the legal consequences of misappropriating Move/NAR's valuable trade secrets. *Id.* (verities). While negotiating this deal in secret over the course of several months, Samuelson continued to seek out and acquire additional trade secret information, both by initiating discussions on secret matters and by improperly obtaining or retaining that information. CP 1657-78 (verities).

Samuelson's actions reflected not simply disregard for Move/NAR trade secrets, but calculated deception and stealth. *Id.* (verities). Those

deceptive actions continued as he misled the trial court and continued to disclose trade secrets even after Move/NAR took swift action to protect their rights. CP 1660 (verities).

In addition to these findings of conduct supporting threatened misappropriation, there is also evidence of *actual* misappropriation. Samuelson copied, retained, and erased Move's electronic information. CP 1657-78 (verities). He kept possession of a Move-issued laptop even after he started working at Zillow. CP 1658 (verity).

Samuelson/Zillow also do not challenge *any* of the trial court's findings that (1) Move/NAR had a substantial likelihood of success on their claims; (2) Samuelson misappropriated and threatened to misappropriate Move/NAR's trade secret information; (3) Move/NAR had a right to injunctive relief under RCW 19.108.020(1) and/or RCW 7.40.020; Move/NAR will suffer "actual and substantial injury, and will suffer irreparable harm" without an injunction; and (5) the balance of equities favored protecting Move/NAR's trade secrets. CP 1660-81 (verities).

Given the unchallenged findings, Samuelson/Zillow cannot credibly claim that the trial court abused its discretion in concluding that a misappropriation of Move/NAR's trade secrets occurred and/or was threatened to occur.

(b) The Challenged Findings, Insofar as They Can Be Identified, Are Supported By Substantial Evidence

As far as Move/NAR can discern, Samuelson/Zillow's argument regarding the trial court's finding of misappropriation centers around seven findings of fact supporting the preliminary injunction: Findings of fact 9.a, b, h, i, n, o, and p. Br. of Appellants at 14-22. Although this Court can affirm the trial court's finding of threatened misappropriation based upon the unchallenged findings, it can also affirm the challenged findings on the grounds that they are supported by substantial evidence.

Finding of fact 9.a: Ernest Graham and Joe Hanauer described the secret reasons and strategies behind [REDACTED] and Move's intended [REDACTED] CP 1250, 1361-62.¹¹ Samuelson knew the product's capabilities, its importance to Move as a competitive tool, and that Move planned to [REDACTED]

[REDACTED] *Id.* Samuelson's knowledge of these strategic

¹¹ Move concedes that once a product is launched, its actual launch date is no longer confidential. However, the injunction does not restrict Samuelson from discussing the date of a completed launch. It enjoins him from discussing the confidential, competitive business strategies behind the product, as well as the strategic reasons why a certain launch date was proposed. These strategic discussions have value to Move's competitors.

¹² [REDACTED]

[REDACTED] could be used to Zillow's advantage. CP 1237-39. The strategy would not be an obvious one to a technology company like Zillow, and was the result of NAR's decades-long relationships with, and knowledge of, [REDACTED]. *Id.* If Zillow wanted to develop its own [REDACTED] presence, it could use NAR's long-cultivated strategic knowledge as a short-cut in that competitive process. *Id.* Also, Zillow could use Samuelson's knowledge of realtor.com's plans for [REDACTED] to display more [REDACTED] to compete, or to thwart Move's own plans to compete, in the [REDACTED] arena. *Id.*

Finding of fact 9.n: Robert Goldberg discussed NAR's plans, strategies, and reasons for its business decisions regarding [REDACTED]. CP 1213-15. He noted that Samuelson's knowledge could allow Zillow to "wreak havoc" for NAR by [REDACTED]. *Id.* Samuelson also had knowledge of NAR's complicated [REDACTED] strategies, which could inform Zillow about NAR's business methods for [REDACTED] not only with respect to the [REDACTED]. *Id.*

Finding of fact 9.o: Goldberg also explained NAR's plans to partner ██████████ to realtor.com to increase the data and product offerings of both. CP 1216. He noted that offering ██████████ data would give realtor.com and Move an advantage over Zillow, because it was a type of data that the competition does not use. *Id.*

Finding of fact 9.p: Pamela Kabati explained NAR's strategies for achieving competitive advantage for realtor.com by ██████████ ██████████ and content related to NAR's ██████████ CP 1246-47. Samuelson's knowledge of the strategies and terms of these agreements could benefit Zillow because it would allow them to quickly close the gap in content regarding ██████████ ██████████ between Zillow and realtor.com. *Id.*

The trial court's findings of fact, insofar as Samuelson/Zillow appear to challenge them, are based upon substantial evidence that could persuade a reasonable person. As such, they must be upheld on appeal.

(4) The Trial Court Also Did Not Abuse Its Discretion In Crafting Specific, Targeted Provisions Enjoining Samuelson from Disclosing Trade Secrets Based Upon Substantial Evidence

Samuelson/Zillow challenge particular subsections of the injunction on four varied grounds: overbreadth, vagueness, lack of secrecy, and excessive duration. Br. of Appellants at 37-43.

Many of Samuelson/Zillow’s arguments pertain to sections of the injunction that are already expired and are moot, because they have expired and this Court can no longer provide effective relief. *See Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 597, 694 P.2d 1078, 1080 (1985). *See also, LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1153 (9th Cir. 2006); *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1119 (11th Cir. 1995) (“[T]his court has consistently held that the appeal of a preliminary injunction is moot where the effective time period of the injunction has passed.”). The specific moot provisions are detailed in the corresponding sections *infra*.

The other challenges are to specific, narrowly-tailored provisions based upon substantial evidence and/or upon unchallenged findings of fact that are verities on appeal.

(a) The Five Subsections Challenged as Overbroad – Two of Which Have Now Expired – Are Actually Narrow and Based Upon Substantial Evidence

Samuelson/Zillow aver that five subsections of the preliminary injunction are too “broadly stated” and “have no apparent connection to any information that might enjoy trade-secret protection.” Br. of Appellants at 36-37. They claim that subsections 4(a), 4(g), and 6(h)-(j)

fit this category. *Id.*¹³ They point to no evidence supporting their assertions, and they do not address Move's evidence cited in conjunction with these restrictions.

Section 4 of the preliminary injunction expired on December 30, 2014. Samuelson/Zillow's challenge to subsections 4(a) and 4(g) is therefore moot.

Assuming *arguendo* that a challenge to Section 4 is not moot, the trial court narrowly tailored the provisions in question and did not abuse its discretion. The challenged subsections enjoin Samuelson from using his confidential knowledge of Move's upcoming business strategies regarding efforts to sell leads or develop or market products that gather and sell leads to real estate professionals. CP 1662-83. The declarations cited in support of this provision state that Samuelson was privy to Move's confidential strategies with respect to lead generation and lead [REDACTED] CP 1071, 1209-10. In particular, Samuelson knew the nature of the lead [REDACTED] Move's Tigerlead business, and could use that confidential knowledge if he were allowed to participate in

¹³ Samuelson/Zillow begin their argument in this section by questioning "many" of the restrictions and citing subsection 6 "[f]or example." Br. of Appellants at 36. However, they only raise argument with respect to these five subsections. Neither Move/NAR nor this Court are responsible for guessing at what other subsections they find objectionable, as Samuelson/Zillow are required to support their challenges with argument and authority.

Zillow's own lead generation strategies and efforts. CP 1209-10. This evidence demonstrates that Samuelson/Zillow were in a position to exploit Samuelson's intimate knowledge of Move's short-term confidential strategies for competing with Zillow with respect to efforts to gather and sell leads. *Id.* The trial court was well within its discretion to impose a modest six-month restriction on Samuelson's ability to use Move's confidential trade secrets against it to benefit Zillow.

Subsections 6(h)-(j) prevent Samuelson from being involved in Zillow's efforts regarding obtaining or increasing data feeds, including strategies with respect to Lithub. CP 1664. The evidence supporting these provisions demonstrates that Zillow hired Samuelson after failing to acquire data feeds, [REDACTED] CP 1067-71, 1208. It also demonstrates that Samuelson was privy to numerous of Move's trade secrets with respect to its successful data feed strategies, [REDACTED] *Id.*

Samuelson/Zillow's general allegations that these are "well-known industry strategies," without evidence, do not demonstrate that the trial court abused its discretion. Br. of Appellants at 37. The particular information Samuelson misappropriated regarding *Move's secret strategies* is what it at issue. The purpose of the preliminary injunction is

to prevent Samuelson from violating his confidentiality agreement and disclosing Move's secret business strategies to Zillow. Move demonstrated the need for these provisions by offering substantial and highly specific evidence. The trial court's narrowly-tailored provisions are valid.

(b) The Four Subsections Challenged As Vague Are All Expired, They Are Also Specific, Clear, and Supported By Substantial Evidence

Samuelson/Zillow challenge four subsections of the injunction – 4(c), 4(d), 5(a), and 5(c) – as “impermissibly vague.” Br. of Appellants at 38-39. They apparently ask this Court to find that these four subsections are *facially* invalid, as they do not cite to any evidence in support of their arguments. *Id.* They also claim that the redacted version of the injunction is vague because it does not adequately apprise *other Zillow employees* of what topics they may or may not raise with Samuelson. *Id.* at 39.

There are two threshold problems with Samuelson/Zillow's vagueness challenges. First, Sections 4 and 5 of the preliminary injunction expired on December 30, 2014. CP 1662-83. Samuelson/Zillow's challenge to those subsections is therefore moot. *LGS Architects*, 434 F.3d at 1153. Second, Sections 4 and 5 in the preliminary injunction expressly apply only to Samuelson, not to Zillow employees, who do not yet possess the trade secrets in question (unless Samuelson is

admitting he already violated the law by disclosing them to Zillow).¹⁴ Whether Zillow employees are privy to the restraints on Samuelson is irrelevant to this Court's analysis. Under the injunction, *Samuelson* is responsible for refraining from disclosure of Move's trade secrets.

Substantively, Samuelson/Zillow's vagueness challenge fails because the provisions in question, when effective, were supported by substantial evidence and are not an abuse of discretion. A provision in a preliminary injunction is vague only if "an enjoined party may unwittingly and unintentionally transcend its bounds." *Corning Inc. v. PicVue Electronics, Ltd.*, 365 F.3d 156, 158 (2d Cir. 2004). Trial courts must endeavor to identify protected secrets and prohibitions with specificity the acts sought to be restrained. *Id.*

Subsection 4(c) prevented Samuelson from developing contact relationship management ("CRM") tools. CP 1663. Samuelson had confidential trade secret information regarding Move's CRM tools and strategies for improving them. CP 1132, 1170-88. He was prevented for six months from using that strategic information in developing Zillow's own CRM tools. Subsection 4(d) prevented Samuelson from engaging in

¹⁴ Zillow appears to contend that the preliminary injunction is "vague" unless all Zillow employees have access to all of the specific trade secret information listed in the injunction, so that they know what trade secrets they are not allowed to learn from Samuelson. Br. of Appellants at 39. This is an absurd proposition that, if adopted, would render the entire UTSA moot.

purchasing or obtaining leads from third parties. CP 1663. Samuelson/Zillow complain that this activity is “central” to Zillow’s business, but does not explain how this claim – even if supported by evidence – renders the provision vague. Br. of Appellants at 38. Because Samuelson/Zillow admit that they know what “purchasing and obtaining leads” activities are, they cannot argue the provision is vague.

Subsection 5(c) does *not*, as Samuelson/Zillow misleadingly suggest, prevent Samuelson from generally discussing industry relations strategy. Br. of Appellants at 38. It prevents him from discussions of “*Move’s*, budget, advertising spend, or industry relations strategy.” CP 1663 (emphasis added). This is specific and not vague. Subsection 5(a) likewise prohibits Samuelson from engaging in strategic planning regarding advertising displays on Zillow’s website. CP 1663. Samuelson/Zillow attempt to render this provision vague by offering three hypothetical examples: writing ad copy, making key-word placements for advertisers, and deciding to advertise on billboards. None of these examples, on their face, constitutes “strategic planning regarding advertising displays on Zillow’s website.” Br. of Appellants at 38. Samuelson/Zillow, sophisticated businesspersons, should not be allowed to avoid the injunction by claiming to be ignorant of the meaning of the term “strategic planning” or “website.” The provision is not vague.

(c) The Fact That a Particular Product Is Public Does Not Mean the Underlying Business Strategies Are Public; Substantial Evidence Supports the Seven Challenged Findings that the Business Strategies, Reasons, and Proposals Are Secret

Samuelson/Zillow challenge several subsections of the injunction as either having been publicly disclosed, or having never been secrets at all. Br. of Appellants at 40-42.¹⁵ They specifically identify seven findings of fact regarding trade secrets that they claim are not secret or were secret but have been made public: Findings of Fact 9.a, b, h, i, n, o, and p. *Id.* These findings all relate to business plans and strategies to which Samuelson was privy during his tenure at Move. *Id.* Samuelson/Zillow allege that because some of these plans have been executed, or because the products involved are known to the public, they are not trade secrets. *Id.*¹⁶

Protectable trade secrets include not only final products or decisions that have not yet been made public, but also the business reasons for pursuing a particular course, refraining from a particular action, or even the negative consequences of a business strategy or decision. *Morton*

¹⁵ Again, Samuelson/Zillow use the phrase “for example” numerous times, suggesting they believe that this Court’s review is a plenary, *de novo* proceeding. Br. of Appellants at 40-41. Appellants are required to identify the specific trial court errors they are challenging on appeal, rather than relying on this Court to undertake that task.

¹⁶ The seven challenged findings, and the substantial evidence to support them, has already been discussed *supra* Section 3(b). This section responds to Samuelson/Zillow’s more generalized arguments that Move made their secret business strategies public merely launching the particular products that resulted from those strategies.

v. Rank Am., Inc., 812 F. Supp. 1062, 1073 (C.D. Cal. 1993). In *Morton*, the Director of the Hard Rock Licensing Corporation, which enforced the trademark rights to a popular restaurant chain, left Hard Rock to found Planet Hollywood, Hard Rock's chief competitor. *Id.* at 1064. The plaintiffs claimed, *inter alia*, that information readily available to the public, such as the locations of restaurants, decor, fixtures, personnel, music, food, merchandise and souvenirs, were nonetheless trade secrets because Hard Rock had secret information as to why these choices "proved successful in operating such businesses and should be adopted in operating similar such businesses and those that have proved unsuccessful and should be avoided." *Id.* at 1073. Hard Rock also averred that its supplier list was a trade secret, even though the identity of each individual suppliers was known to that supplier and thus not a trade secret. *Id.* at 1073. The defendant countered that such information – observable by the general public – could not constitute a trade secret, and moved to dismiss the complaint.

The district court in *Morton* concluded that even though the suppliers' identities may have been public, Hard Rock's supplier list could be a trade secret if Hard Rock had expended time and money to develop it. *Id.* The court also said that "negative" research – the conclusion that one strategy is less successful than another – can be a trade secret. *Id.* In other

words, the fact that Hard Rock located a restaurant in a particular neighborhood in Chicago is obviously not a secret, but the strategic *choice* of that location may be.

Trade secrets defendants frequently claim that because a particular product is available to the public, or a process is based on “industry knowledge,” the plaintiffs’ processes, methods, research, and/or strategies are no longer protected. *See, e.g., Hertz v. Luzenac Grp.*, 576 F.3d 1103, 1109 (10th Cir. 2009); *Salsbury Laboratories v. Merieux Laboratories*, 908 F.2d 706, 711-12 (11th Cir. 1990); *BBA Nonwovens Simpsonville, Inc. v. Superior Nonwovens, LLC*, 303 F.3d 1332, 1340 (Fed. Cir. 2002). These claims are seldom availing when there is substantial evidence that the underlying process was developed through the investment and research of the company and efforts were made to keep the specific knowledge secret. *Id.*

Like the defendant in *Morton*, Samuelson/Zillow focus their claims of public knowledge on the top-level execution of a particular business decision, while ignoring that the *strategies, reasons, risks, and benefits* of pursuing those decisions may remain secret, valuable information. Samuelson/Zillow also provide *no* evidence that the strategies, proposals, and other secret transactional information that the trial court sought to protect has been made public. The injunction protects the “reasons and

strategies” behind Move’s actions with respect to [REDACTED], not the product itself. CP 1653. It protects Move’s “plans...reasons and strategies” behind its modifications to [REDACTED] not the product itself. CP 1654. It protects the “terms” of Move’s agreement with [REDACTED]. *Id.*¹⁷ The injunction protects NAR’s “strategies for achieving competitive advantages” through acquiring [REDACTED] not the fact that the listings exist. CP 1655. It protects NAR’s “plans, strategies, and reasons for its plans and strategies” with respect to [REDACTED] not the fact that some of those [REDACTED]. CP 1655. It protects NAR’s “plans to partner [REDACTED] with realtor.com to increase the data and products offerings of both,” not the general fact that [REDACTED] sometimes engages such “integration.” *Id.* It protects NAR’s “strategies for achieving competitive advantages for realtor.com” with respect to [REDACTED] content, not the fact that realtor.com includes [REDACTED] content. CP 1655.

Samuelson/Zillow do not correctly represent what information is truly protected by the injunction. The fact that a particular result or product is made public has no bearing on whether information, strategies, research, and other secret, valuable information underlying that decision is

¹⁷ The proposed agreement, which contains sensitive information about the transaction, is not public. CP 1204-05.

not still a protectable trade secret. An examination of the actual language of the findings reveals that they protect information that is not public.

Also, Samuelson/Zillow offer no argument as to how the findings of fact are not supported by substantial evidence.¹⁸

(d) Substantial Evidence Supports Enforcing Parts of the Injunction Until This Matter Is Adjudicated; Business Strategies, Analysis, and Other Information Can Be Valuable to Competitors No Matter When It Is Disclosed

Samuelson/Zillow generally allege that some of the provisions of the injunction are of “excessive duration.” Br. of Appellants at 42-43. They do not identify any specific provision as being of excessive duration, nor do they argue that any provision regarding duration is not supported by substantial evidence. They concede that six months of protection was reasonable, but claim any longer duration is unwarranted because of the “fast-paced” nature of the online real estate business. *Id.* They also claim that secret business strategies, including the competitive reasons behind those strategies, are no longer worthy of protection because the business products themselves have been implemented. *Id.*

¹⁸ In fact, Samuelson conceded below that many provisions were appropriate to protect trade secrets: CP 1511-15 (Samuelson concedes that many elements of the injunction are appropriate; objects to others *not* on the grounds that they do not relate to trade secrets, but that they relate to Zillow’s “core business” and would be too great an impediment to his job duties).

The fact that a business strategy has been implemented does not render the knowledge acquired to support that strategy less valuable as a trade secret, nor does the mere passage of time. *See, e.g., SEC v. Coldicutt*, 258 F.3d 939, 942 (9th Cir. 2001); *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 661 F. Supp. 2d 548, 556 (E.D. Va. 2009). Top level business strategies that explain the strengths and weaknesses of a business *vis-a-vis* its competitors provide valuable insight that can be used to develop counter-strategies. The problem for Move is not simply that Zillow could “predict” what Move will do, but that it could capitalize on Move’s secret strategic reasoning and tailor its own business plan to that end.

Samuelson/Zillow’s argument is based upon the erroneous assumption that the secret business strategies of a direct competitor are only valuable before they have been implemented. Br. of Appellants at 43. They suggest that the only competitive value these secret business strategies offer is to provide Zillow with the ability to “predict” what Move will do. *Id.* They offer no evidence or argument to support this assertion, they simply state it as if it were unassailable fact.

On the contrary, the evidence demonstrates that the trade secrets involve high-level strategic decisions that could harm Move for years to come. For example, as explained in the declaration supporting the

provision, finding of fact 9.i. was necessitated because NAR's successful strategies for [REDACTED] included the confidential terms of the agreements with [REDACTED] CP 1237-39. Such terms, if disclosed, could give Zillow a competitive advantage far into the future by poaching those partners with an offer of better terms. Finding of fact 9.p protects NAR's strategies for achieving competitive advantages by incorporating content [REDACTED] which, if known by Zillow, could be leveraged to help Zillow "catch up" with realtor.com as a competitor. CP 1246-47.

The preliminary injunction's purpose is to maintain the status quo in advance of trial, when the trial court will be able to finally resolve all of the many detailed and disputed factual issues. The injunction's duration serves that purpose, and provides more modest restrictions where the trial court felt appropriate. Nothing in Samuelson/Zillow's argument or evidence demonstrates that the trial court abused its discretion or issued an injunction of excessive duration. It is supported by substantial evidence.

(5) The Trial Court Did Not Violate Samuelson's Due Process Rights

Samuelson/Zillow contend that the trial court's designation of certain materials AEO and his exclusion from certain proceedings violated Samuelson's procedural due process rights. Br. of Respondent at 22-32.

In so doing, they only offer this Court very general procedural due process principles and misapply them in any event. In this case, however, Samuelson waived any due process claim below in initially failing to oppose the protective order his confederate, Zillow, actually proposed. If Samuelson did not waive his due process concerns, Samuelson/Zillow *ignore* a significant array of trade secrets cases in which AEO designation on materials was deemed to be *routine* in the trade secrets setting and the trial court's application of GR 15 as to such materials. Finally, Samuelson's exclusion from certain proceedings by the trial court after compliance with the requirements of article I, § 10 of the Washington Constitution did not violate Samuelson's due process rights.

(a) Samuelson Waived Any Due Process Argument as to AEO Designations

Washington law is well-settled that a party may waive a constitutional right such as the state constitutional right of a criminal defendant to be present at trial. *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003) (criminal defendant may waive right to be present at trial; waiver implied from defendant's absence); *In re Detention of Reyes*, 176 Wn. App. 821, ___,¹⁹ 315 P.3d 532, 543 (2013) (failure to assert right to

¹⁹ The pinpoint citation for the Washington reporter was not available on Westlaw.

open court proceedings in civil case; sex offender lacked standing to assert public right to open courtroom).

Specifically in the AEO context, the Tenth Circuit has held that a party who agreed to AEO designation of materials in a consent decree waived any due process argument concerning AEO designations. *Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1202-03 (10th Cir. 2014). The Court concluded that the right to see confidential, protected information is not “so fundamental as to be unwaivable.” *Id.*

Here, Samuelson/Zillow’s conduct below and in this Court constitutes a waiver of his due process argument that *any* AEO designations are a due process violation. Zillow *agreed* that a protective order was warranted, and agreed with a two-tiered order, but proposed its own form. CP 245, 320-32. Samuelson did not oppose Move’s motion for a protective order, nor did he file any pleading concerning the form of the proposed protective order.²⁰ Samuelson did not timely seek discretionary review of that order. CP 890.

²⁰ It was not until two weeks after the entry of the protective order that Samuelson moved to modify it. CP 390-93. The trial court denied it. CP 438. Also, this Court should bear in mind that Samuelson now works for Zillow and has been indemnified by his new employer. A concession that Zillow should not access trade secrets calls into question whether Samuelson can reasonably sustain the opposite argument.

The order itself demonstrates that full due process was afforded, it referenced RCW 19.108, GR 15, and CR 26, defined trade secrets, and it established an *extensive* process for addressing AEO documents. CP 342-55, *see* Appendix. At every stage of the proceeding, when Move sought to redact certain information, Samuelson was afforded the opportunity to object and expand Move's disclosures under the terms of the protective order. The trial court repeatedly and extensively examined and re-examined Samuelson's requests for great access to Move and NAR's information. CP 398-401, 437-39, 651-53, 752-53, 761-62, 866-68. The trial court heard his arguments, and in some cases, granted him relief.

Thus, the record below documents that Zillow *agreed* to the concept of AEO designations in the protective order, and Samuelson did not timely exercise his opposition. Then, when trial court made subsequent, specific redactions to documents *predicated* upon the AEO designation in the protective order, he objected on general due process grounds.

Samuelson/Zillow also have not assigned error to either the initial protective order or any of the subsequent orders sealing documents. Br. of Appellants at 3. They make no argument that the trial court's GR 15/RCW 19.108.050 findings in its various sealing decisions was in any way erroneous. Their failure to timely challenge the original protective

order and or to even assign error to it constitutes a waiver of any due process claim.

(b) The United States Supreme Court Has Concluded Protective Orders in Trade Secrets Cases Do Not Generally Violate Due Process; Courts Have Been Using the AEO Designation for Decades

Zillow/Samuelson's suggestion that any AEO designation here constitutes a general due process violation is untenable.²¹ Their argument suggests that AEO designations in trade secrets cases can *never* satisfy due process. Br. of Appellants at 23-27. It also suggests that AEO designations are out of the ordinary or unusual. *Id.*

First, the United States Supreme Court has rejected the notion that constraining a trade secrets defendant in his or her ability to defend his case by restricting disclosures implicates due process. *E. I. Du Pont De Nemours Powder Co. v. Masland*, 244 U.S. 100, 37 S. Ct. 575, 61 L. Ed.

²¹ It is anomalous for Zillow to be a party to a brief suggesting AEO designations in materials in a trade secrets case violates due process, given its acquiescence below. As to Zillow, any argument that AEO designations violates Samuelson's due process rights is invited error, at best. Invited error is present when a party's action creates the error, which may not thereafter be complained of on appeal. *E.g., In re Marriage of Morris*, 176 Wn. App. 893, 309 P.3d 767 (2013) (strategic decision not to challenge support award as to one child prohibited appellant from complaining of it on appeal). The principle also applies when a party takes affirmative and voluntary action that induces the trial court to take the action that that party later challenges on appeal. *E.g., Ensberg v. Nelson*, 178 Wn. App. 879, 320 P.3d 97 (2013), *review denied*, 180 Wn.2d 1012, 325 P.3d 913 (2014) (appellant invited error by affirmatively asking court to dismiss a claim so that summary judgment order could be appealed). Even constitutional error may be invited. *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999) (invited error doctrine applied to request WPIC subsequently ruled unconstitutional).

1016 (1917). In *Masland*, the trial court only allowed counsel, and not any experts or witnesses, to know what plaintiff's alleged trade secrets were. *Id.* at 102. The defendant objected to this procedure on the grounds that it violated his due process right to defend himself in the case. *Id.*

The Supreme Court in *Masland* upheld the lower court's decision to restrict the defendant from disclosing the information, even though it might hamper his case:

The case has been considered as presenting a conflict between a right of property and a right to make a full defense; and it is said that if the disclosure is forbidden to one who denies that there is a trade secret, the merits of his defense are adjudged against him before he has a chance to be heard or to prove his case. ...Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be. *Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them.*

Id. (emphasis added) Thus, the Supreme Court balanced the defendant's admitted former position of confidence with the plaintiff against the defendant's claimed due process right of a full defense, and concluded that the plaintiff's confidences could not be violated to allay the defendant's generalized due process concerns.

This balancing of interests has continued with the use of AEO designations. In the key trade secrets case in the Ninth Circuit, that court

rejected a defendant's claim of due process violations based on an AEO protective order. *Brown Bag Software*, 960 F.2d at 1471-72. The court noted that a party claiming a due process right must make a showing that the order at issue could have or did prejudice that party's ability to participate in the motion before the trial court. *Id.* The Court observed that the defendant had failed to appoint an expert who could view the trade secrets in his stead – an available process. *Id.*²² See generally, *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984).

Second, AEO designations in trade secrets litigation are *routine*. The AEO designations have been used for decades in trade secret, patent, and other intellectual property litigation. See, e.g., *Procter & Gamble Co. v. Nabisco Brands, Inc.*, 111 F.R.D. 326, 327 (D. Del. 1986). Such designations can be included in orders sealing or protecting sensitive documents. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1178 (9th Cir. 2011). It does not prevent free communication between counsel and the party.

As the Tenth Circuit observed with respect to AEO designations, “The disclosure of confidential information on ‘attorneys’ eyes only’ basis is a routine feature of civil litigation involving trade secrets.” *Paycom*

²² Samuelson did not hire an independent expert to work with his attorney to review the documents and prepare a defense on his behalf.

Payroll, 758 at 1202-03. Similarly, the Second Circuit in *In re City of New York*, 607 F.3d 923, 935-36 (2d Cir. 2010), citing Fed. R. Civ. P. 26(c)(1)(G)), stated: “The purpose of this form of limited disclosure is to prevent a party from viewing the sensitive information while nevertheless allowing the party’s lawyers to litigate on the basis of that information.” The United States Court of Appeals for the Ninth Circuit in *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1471 (9th Cir. 1992) has also upheld such a designation in a protective order.²³

Samuelson/Zillow cite only one case that actually addresses AEO designations in trade secret cases, an unpublished Ohio federal district court case, *Penn, LCC supra*.²⁴ The district court there did not conclude that AEO designations violated due process per se. Rather, it required the party seeking such a designation to provide particularized facts regarding the harm that will be experienced without it. *Penn* at *4.²⁵ This standard

²³ In utilizing such a designation, the Ninth Circuit indicated that an evidentiary hearing should be conducted in which the court weighs the risks of disclosure against the potential impairment of the defendant’s case. *Id.* A trial court should inquire into the specific factual circumstances of each party’s conflicting interests, and fashion an order that is appropriate to those circumstances. *Id.*

²⁴ *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540 (6th Cir. 2004) is a personal injuries case cited by Samuelson and Zillow at 30 that addresses protective orders generally, not AEO designations.

²⁵ In fact, in a case subsequent to *Penn*, federal district courts in Ohio approved of the use of AEO designations in discovery. *Stout v. Remetronix, Inc.*, 298 F.R.D. 531, 535-36 (S.D. Ohio 2014) (court found good cause existed for AEO designation as to trade secrets where litigant in wage class action identified harm in the business context from disclosure of information with particularity).

for entry of a protective order is consistent with Washington's. *See, e.g., Rufer v. Abbott Labs.*, 154 Wn.2d 530, 114 P.3d 1182 (2005), *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P.2d 370 (1991).

Here, the trial court heard and weighed each party's interests and based its protective order on substantial evidence. There was significant evidence that Samuelson had disclosed or threatened to disclose Move's valuable trade secrets to Zillow. The trial court noted that Samuelson continued to harvest additional trade secret information in his high-level position at Move while he secretly conspired to obtain a lucrative new job at Zillow. CP 1657. Even *Zillow* agreed that an AEO protective order was appropriate.²⁶ The trial court accepted and entered an AEO protective order. After considering Samuelson's belated objections to the order and his supporting evidence in two different motions, the trial court modified the AEO order giving Samuelson access to more information than was agreed to by Zillow.

The trial court was not overzealous in its assessment of the evidence nor was it oblivious to the scope and effect of its actions; it was sensitive to Samuelson's concerns and addressed them. Samuelson was

²⁶ It is important that Zillow supported the AEO provisions, because Zillow's and Samuelson's interests in this litigation are not adverse. Zillow has agreed to indemnify Samuelson in this matter. Thus, it is in Zillow's interests to ensure that the trial court does not overstep its bounds.

represented by able counsel with whom he could freely communicate on his position. Those attorneys had access to the AEO-designated materials. If Samuelson really wanted to access the materials he could have availed himself of an intermediary expert procedure. He chose not to do so.

(c) The Trial Court Followed the Procedures and Made the Requisite Findings in Compliance with GR 15

In making the AEO designation as to certain materials, the trial court made the requisite determination under GR 15 in its orders to seal and in its protective orders. *See* Appendix. Similarly, in deciding to exclude Samuelson from certain proceedings, it made the requisite determination under article I, § 10 of the Washington Constitution²⁷ that a closed courtroom *as to Samuelson* was necessary.

Following the court rules and protecting confidential information from opponents is *not* a general due process violation, even when certain evidence is shielded from opponents. In *Penberthy Electromelt Int'l Inc. v. U.S. Gypsum Co.*, 38 Wn. App. 514, 521, 686 P.2d 1138, 1142 (1984), the plaintiff in a breach of contract case sought to admit photographs that were under seal and elicit testimony regarding a trade secret at trial. *Penberthy*, 38 Wn. App. at 520. When the defendant sought to cross-examine the witness, the witness refused to answer on the grounds that it

²⁷ Article I, § 10 states: "Justice in all cases shall be administered openly, and without unnecessary delay."

would reveal sensitive information. *Id.* The defendant argued *in camera* that the plaintiff had waived any right to prevent the defense from accessing trade secret information by introducing the exhibit at trial. *Id.* This Court rejected that argument, holding that the trial court had “broad discretion” to balance the interests of the defendant’s ability to present a defense against the plaintiff’s right to protect its information. *Id.* at 521.

Due process is a flexible concept whose exact contours are determined by the particular factual situation. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct 893, 47 L. Ed.2d 18 (1976); *In re Detention of Morgan*, 180 Wn.2d 312, 320, 330 P.3d 774 (2014). In *Mathews*, the United States Supreme Court indicated that due process is not a technical conception with a fixed content, but rather is a flexible concept whose procedural protections require consideration of the time, place, and circumstances of the particular situation. *Id.* at 334. The Court further noted that three well-known factors that must generally be considered.²⁸ These due process criteria are not exact to the controversy at issue here where a court is adjudicating the interests of two sets of private parties.

²⁸ “(1) The private interest to be affected by the official action, (2) the risk of an erroneous deprivation of such an interest through the procedure employed and the probable value, if any, of other additional or alternative procedural safeguards, and (3) the governmental interest including any fiscal or administrative burdens the additional or alternative procedural safeguards would entail.” *Mathews*, 424 U.S. at 335.

However, it is clear that Samuelson/Zillow's discussion of the *Matthews* criteria is severely truncated. Br. of Appellants at 25-32.

Regarding the first factor, *id.* at 26-27, Samuelson/Zillow discuss Samuelson's interest and neglect to treat Move's obvious and highly significant interest in preserving trade secrets, a public policy firmly recognized in RCW 19.108. Move's significant property interests, and Samuelson's fiduciary duty to preserve them, are simply ignored.

As for the second factor, br. of appellants at 27-30, Samuelson/Zillow fail to articulate how the *court process* contemplated by RCW 19.108.050 to provide interim relief until trial, was procedurally defective and would enhance any risk of an erroneous weighing of the parties' respective interests in the trade secrets setting.²⁹ Rather, they

²⁹ The various federal due process authorities Samuelson/Zillow cite are not helpful for their position. For example, *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 106, 83 S. Ct. 1175, 10 L.Ed.2d 224 (1963) and *Goldberg v. Kelly*, 397 U.S. 254, 255, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970), cited by Samuelson/Zillow in their brief at 26-27, no hearing was held at all. *Greene v. McElroy*, 360 U.S. 474, 479, 79 S. Ct. 1400, 3 L.Ed.2d 1377 (1959) is also inapposite because the party there was not represented by counsel, and so neither he nor any representative was allowed to see the confidential evidence against him. *Greene* does not stand for the proposition that any order based upon evidence not personally viewed by the defendant automatically violates due process.

The Washington authorities Samuelson cites general due process principles are equally unavailing. In *Rogoski v. Hammond*, 9 Wn. App. 500, 513 P.2d 285 (1973), a prejudgment attachment hearing was held but both the plaintiff and defendant voluntarily participated only through counsel. *Rogoski*, 9 Wn. App. at 509. On appeal, this Court concluded that the trial court's findings were unclear, and "the importance of according to the debtor a hearing complying with due process requirements is such that we should not affirm the order... unless we are certain the court made the determination of probable validity constitutionally required." *Id.* at 511. In other words, this Court did not reverse the trial court's order based on the defendant's absence from the hearing, but on "the rule

complain of the trial court's *result*. The only apparent "alternative procedure" they offer is no AEO designation *at all*. They certainly do not offer any specifics as to how a trial court can prevent a person like Samuelson, who was found by the trial court to have used his key strategic position at his former employer to utilize trade secrets gleaned there to benefit his new employer in breach of his fiduciary duty, to *further exploit* trade secrets in the period until trial.

Finally, Samuelson/Zillow address the third *Matthews* factor, br. of appellants at 30-32, by largely misstating it. They focus on Move's interest, rather than *the government's* interest in the procedure employed. Again, they ignore RCW 19.108.050 and the Legislature's determination of the need to preclude a party privy to trade secrets from freely disclosing them to the former employer's extreme prejudice.³⁰

requiring remand in cases of inadequate findings." *Id.* In *Mahoney v. Sailors' Union of the Pacific*, 43 Wn.2d 874, 264 P.2d 1095 (1953), a union member made remarks about the union's conduct at a Seattle meeting for which he was expelled from the union at a San Francisco trial he could not attend.

³⁰ In discussing § 5 of the UTSA, on which RCW 19.108.050 was based, 14 *Uniform Laws Annotated*, Master Edition, states as to that section:

If reasonable assurances of maintenance of secrecy could not be given, meritorious trade secret litigation would be chilled. In fashioning safeguards of confidentiality, a court must ensure that a respondent is provided sufficient information to present a defense and a trier of fact sufficient information to resolve the merits. In addition to the illustrative techniques specified in the statute, courts have protected secrecy in these cases by restricting disclosures to a party's counsel and his or her assistants and by appointing a disinterested expert as a

Here, the threat is real and obvious. Samuelson was not a low-level Move employee. He was its Chief Strategic Officer, privy to every key business strategy of Move. He conspired with Zillow *for months*, unbeknownst to Move, to go to Zillow. In those months, he acquired added trade secrets from Move. RCW 19.108.050 appropriately contemplated restrictions on Samuelson's ability to further exploit his breach of his fiduciary duty to Move, to benefit Zillow.

The trial court did not violate Samuelson's right to due process where it is *undisputed* that in entering the protective order with the AEO designations in it, it complied not only with RCW 19.108.050, but it complied with GR 15 on the sealing of records. The trial court also made the requisite findings under GR 15 to seal a portion of the record in decisions subsequent to the protective order. Where the trial court complied with the *specific* procedures in Washington law governing the sealing of records, Samuelson/Zillow cannot claim a *general* due process violation.

(d) The Trial Court Acted Properly in Excluding Samuelson from Certain Proceedings

Samuelson contends that his due process rights relating to the preliminary injunction motion were violated because he did not have

special master to hear secret information and report conclusions to the court.

access to all of the documents designated as AEO and because he was not allowed to be personally present at the preliminary injunction hearing.

Assuming he has not waived the issue, most of the authority Samuelson cites in support of this argument are not trade secrets cases, nor do they involve protective orders. They are otherwise factually distinguishable, particularly where the trial court here made the requisite Washington Constitution, article I, § 10 determination that excluding Samuelson was appropriate.

In this case, not even mentioned by Samuelson/Zillow, the trial court was careful at the May 9, 2014 hearing on the preliminary injunction to specifically address the requisite balancing of interests for excluding the public from a court hearing.³¹ The trial court initially stated:

So I want to – I want to tread carefully here, but I do – my understanding of the specific circumstances here compels me to answer that Mr. Samuelson should not be present for the argument.

That doesn't mean that he is permanently excluded from these discussions or that he can't have access to information at some point. But because we're at the stage where the Court is making this decision and it is a trade secrets, allegedly trades [sic] secrets case, I think that the balancing test that the Court has to enter into in making any kind of decision about closing, partially closing, or sealing, or partially sealing proceedings, I think the balance tips in favor of preserving the status quo and not potentially revealing information that makes the plaintiff's case really moot.

³¹ Samuelson was present at the trial court's April 14, 2014 hearing on the preliminary injunction. RP (4/4/14): 6.

So in other words, I'm going to rule that Mr. Samuelson should absent himself and we'll proceed with the argument.

RP (5/14/14) (unsealed): 8-9. The court then noted that Samuelson could have access to the transcript of the hearing, after specific trade secret information could be identified and redacted:

So the Court will order that the proceedings, from the point I call on the counsel to begin their arguments, the recording will be made, we'll have an open recording of this court proceeding, we're not closing or locking the courtroom, but we are -- but I have excluded Mr. Samuelson. And the recording will be sealed subject to further court order, which I anticipate will be in the next few weeks in any event to unseal most of it, but to fine-tune what will remain sealed if there are secrets that should remain sealed because they're trade secrets.

Id. at 12-13.

It is not a general due process violation under Washington law for a court to restrict the dissemination of materials. Our Supreme Court in *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 654 P.2d 673 (1982), *aff'd subnom.*, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984), upheld the constitutionality of a protective order restricting the use defendants could make of material obtained in discovery, despite its features of "prior restraint," in order to preserve the integrity of the discovery process, noting that a similar public policy applies to trade secrets. *Id.* at 234. The Court specifically commented that there was no public policy supporting the general dissemination to the

public of information gleaned in discovery. *Id.* at 235. The Court approved of the need to recognize privacy interests in discovery and noted that such protection could be achieved by restricting parties attending depositions or sealing them. *Id.* at 242-43.

Indeed, in certain circumstances, courts have exercised discretion to exclude even criminal defendants from certain proceedings upon the application of the principles set forth in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982) and *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).³² Here, Samuelson never invoked article I § 10. In any event, the trial court undertook the appropriate balancing on the record to close the courtroom as to Samuelson. Samuelson's general right to due process was not violated where his specific right to an open court was not violated.

Finally, even assuming the trial court abused its discretion, Samuelson failed to bear his burden to demonstrate any actual prejudice,

³² The standard of article I § 10 as to public court proceedings applies to civil cases. *Cohen v. Everett City Council*, 85 Wn.2d 385, 388-89, 535 P.2d 801 (1975). The standard applies in certain circumstances to documents filed in court. *Reyes*, 315 P.3d 543. Moreover, the exclusion of a witness from a deposition or a hearing where that witness can exploit or misuse such proceedings is not unusual. For example, where a party's attendance of a deposition will harass or intimidate another witness, exclusion is proper. See, e.g., *Galella v. Onassis*, 487 F.2d 986, 997 (2nd Cir. 1973) (court properly excluded paparazzi that had been stalking Jacqueline Onassis Kennedy from attending her deposition); *Deluca v. Gateways Inn. Inc.*, 166 F.R.D. 266, 267 (D. Mass. 1996) (court excluded individual defendants from attending deposition of plaintiffs psychologist where attendance at deposition would have the potential to "embarrass and intimidate the plaintiff.")

as the Ninth Circuit mandated in *Brown Bag Software*, 960 F.2d at 1471-72. It is important to note that at all times during the process of considering the preliminary injunction, Samuelson was represented by able counsel. Samuelson's defense is that some of the information protected by the injunction is now public. If that is true, his counsel is capable of ascertaining that independently, without Samuelson.

The trial court's AEO orders, that were not timely challenged by Samuelson and *agreed* to by Zillow, were entered after a proper and normal process contemplated by RCW 19.108.050 and case law in the trade secrets context, and were based upon substantial evidence. Samuelson has not shown that application of the AEO designation to certain documents, or his exclusion from a hearing where he was represented by counsel, raise due process concerns.

D. CONCLUSION

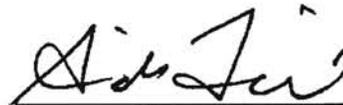
Samuelson/Zillow ignore the trial court's findings in its preliminary injunction, findings that are supported by substantial evidence and document Samuelson's dishonorable conduct here in breach of his fiduciary duty to Move as its former chief strategic officer. Samuelson was privy to Move's most secret strategic intentions and other trade secrets. Samuelson fully intended to exploit such insider knowledge, to Move's detriment, for Zillow's benefit.

The trial court was properly sensitive to the obvious implications of Samuelson/Zillow's conduct designed to fully advance the interests of Zillow, Move's chief competitor. The trial court did not abuse its discretion in entering such its routine, time-sensitive preliminary injunction with certain materials designated AEO. Such a preliminary injunction was expressly authorized by RCW 19.108.050 and case law on trade secrets from Washington and elsewhere in the United States. It was necessary to avoid allowing Samuelson/Zillow to further exploit Samuelson's misconduct until the May 2015 trial date on the merits.

This Court should affirm the trial court's preliminary injunction. Costs on appeal should be awarded to Move.

DATED this 26th day of January, 2015.

Respectfully submitted,



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Attorneys for Respondents

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the Brief of Respondents, Motion to File Over-length Brief of Respondents, and Motion to Seal Move's Brief of Respondents in Court of Appeals Cause Nos. 72534-3-I and 72535-1-I to the following parties:

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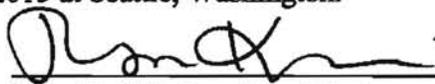
Kathleen M. O'Sullivan
Eric D. Miller
Susan E. Foster
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Original and one copy (of brief) delivered by legal messenger for filing with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-1176

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

Dated: January 26th, 2015 at Seattle, Washington.



Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick/Tribe

APPENDIX

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FILED
2014 APR -3 11:12:00
CLERK OF COURT

THE HONORABLE BARBARA LINDE

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, and
DOES 1-20,

Defendants.

No. 14-2-07669-0 SEA

~~ZILLOW'S [PROPOSED] PROTECTIVE
ORDER~~

~~AS MODIFIED BY PLAINTIFFS~~

~~ZILLOW'S [PROPOSED] PROTECTIVE
ORDER - 1~~

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PROTECTIVE ORDER

IT IS HEREBY ORDERED that the parties shall follow the procedures set forth below with respect to information, documents or things produced, or otherwise disclosed by any party or third party in this litigation:

1. Scope. This Order shall be applicable to and govern all depositions, documents, information or things produced in response to requests for production of documents, answers to interrogatories, responses to requests for admissions and all other discovery taken pursuant to Washington's Rules of Civil Procedure, and other information which the disclosing party designates as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" hereafter furnished, directly or indirectly, by or on behalf of any party or any non-party witness or third party in connection with this action. As used herein, "disclosing party" or "producing party" shall refer to the parties to this action or to any third parties who give testimony or produce documents or other information.

2. Designation as "Confidential" or "Attorneys' Eyes Only" Material. Documents, information, or tangible items shall be designated CONFIDENTIAL or ATTORNEYS' EYES ONLY (collectively "Confidential Information") within the meaning of this Protective Order in the following ways:

- (a) In the case of documents and the information contained therein, by placing on the document the designation "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" on each page containing information to which the designation applies (or in the case of computer medium on the medium and its label and/or cover). To the extent practical, the legend shall be placed near the Bates number identifying the material. If a document has more than one designation, the more restrictive or higher confidential designation applies.

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(b) In the case of tangible items, designation shall be made by visibly marking the item "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY."

3. Duty to Designate Certain Information Confidential. Each party agrees that it may mark as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" its own materials, and will mark as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" another party's materials containing trade secret information that is subject to protection under the Uniform Trade Secrets Act; information protected by a written non-disclosure or confidentiality agreement; information protected from disclosure by any state or federal securities law or regulation; and information protected from disclosure by any court order.

4. Designating Materials Produced by Another Party. If a party produces or files a document or materials without designating them Confidential or Attorney's Eyes Only, any other party may, within 30 days of the documents being produced or filed, designate them as Confidential Information.

5. Access to Confidential Information Limited. With respect to all documents, information, or tangible items, produced or furnished by any party or third party during this litigation, which are designated as Confidential Information by the producing party, such information shall be kept confidential and shall not be given, shown, made available, discussed, or otherwise communicated in any manner ("disclosed"), either directly or indirectly, to any person not authorized to receive the information under the terms of the Protective Order. The recipient of any documents, information, or tangible items that are designated as Confidential Information under this Order shall maintain such information in a secure and safe area and shall exercise the same standard of due and proper care with respect to the storage, custody, use, and/or dissemination of such information as is exercised by the recipient with respect to its own proprietary information.

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6. Depositions. If, in the course of this proceeding, depositions are conducted which involve Confidential Information, counsel for witness or the producing party may designate, on the record, the portion of the deposition which counsel believes may contain confidential information. The producing party shall have until fourteen (14) days after receipt of the final deposition transcript within which to inform the parties to the action of the portions and the deposition court reporter of the portion of the transcript (by specific page and line reference) to be designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY. Unless otherwise agreed by counsel, the right to make such designation shall be waived unless made within the fourteen (14) day period. Prior to such designation, or expiration of the fourteen (14) day period, the entire deposition transcript shall be deemed Confidential Information. Transcripts of testimony, or portions thereof, or documents containing the Confidential Information shall be filed only under seal as described in Paragraph 13, until further order of the Court.

7. Trade Secrets. Any Confidential Information disclosed which contains trade secrets or other highly confidential and proprietary information may be designated in writing as "ATTORNEYS' EYES ONLY." The term "trade secrets" as used herein means information that derives economic value, actual or potential, from not being generally known to other persons who can obtain competitive advantage or economic value from its disclosure or use. "Trade secrets" also means sensitive financial or business information integral to the operations of a producing party for which the producing party has a compelling interest in avoiding disclosure. Examples of types of information that may be designated as ATTORNEYS' EYES ONLY include: (a) proprietary information containing trade secrets; (b) confidential marketing and other sensitive commercial information; and/or (c) private personnel records of persons not party to this action. Other categories of

1 ATTORNEYS' EYES ONLY information may exist. The producing party agrees to
2 designate information as CONFIDENTIAL or ATTORNEYS' EYES ONLY on a good faith
3 basis and not for purposes of harassing the receiving party or for purposes of unnecessarily
4 restricting the receiving party's access to information concerning the lawsuit.
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9 8. Persons Allowed Access to "ATTORNEYS' EYES ONLY" Material.

10 Except as permitted by further order of this Court or by subsequent written agreement of the
11 producing party, and subject to Paragraph 12 below, disclosure of ATTORNEYS' EYES
12 ONLY documents or information, including summaries thereof, but not including
13 documents with the confidential portions redacted, shall be limited to:
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- 18 (a) The parties' counsel of record or specifically identified outside counsel and
19 associate attorneys and paralegal and clerical employees working directly
20 with such counsel on this litigation;
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22 (b) This Court;
23
24 (c) Consultants or experts retained by the parties to consult or testify in the case,
25 subject to the terms and conditions of Paragraph 12;
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27 (d) Any person that a document, on its face, indicates has previously seen, or has
28 been sent the confidential information, such as authors, drafters, recipients
29 and copyholders of the documents or information; and
30
31 (e) Court reporters performing necessary duties in this action, upon executing the
32 form attached hereto as Exhibit A.
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34 (f) Two members of a party's in-house legal department, but only after
35 following the disclosure procedure outlined in paragraph 12, and with the
36 disclosure limited to only that necessary for purposes of the litigation.
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9. Persons Allowed Access to "Confidential" Information. Disclosure of information designated as CONFIDENTIAL, including summaries thereof, shall, subject to Paragraphs 10 - 11 below, be limited to: (a) the person and entities identified in Paragraph 8; (b) in-house counsel (including their paralegals and clerical staff); and (c) witnesses and prospective witnesses to the extent deemed necessary by counsel to prepare for or give testimony regarding facts at issue in this litigation, or to assist counsel in performing work in this litigation. Disclosure of Confidential Information to any expert or consultant shall be limited to that Confidential Information necessary for the witness' preparation to testify. Witnesses who are provided or shown documents or materials constituting or containing Confidential Information shall not be permitted to retain such documents or materials.

10. Procedure for Disclosures to Consultants and Experts. Before disclosure of any information subject to this Protective Order is made to any consultant or expert retained by any party, counsel for the party disclosing the information shall obtain a written affidavit, in the form attached hereto as Exhibit A, from each consultant or expert to whom disclosure is to be made, acknowledging that any document, information, or tangible item that has been designated as confidential is subject to this Protective Order, that the person has read this Protective Order, and that such person agrees to comply with and be bound by this Protective Order. The affidavits shall be provided to counsel for the producing party ten (10) business days in advance of the first disclosure of any confidential information to such person. If no objection is made to such person receiving confidential information within such ten (10) business day period, then Confidential Information may be disclosed to such person. If objection is made, then the party seeking to disclose such information may bring the Court the question of whether the particular confidential information may be disclosed to such person, and the party requesting such disclosure shall have the burden of establishing

1 before the Court the necessity for such disclosure. All signed affidavits shall be maintained
2 through the conclusion of this action. Confidential Information received by any of the
3 persons in the above-enumerated categories shall be used only for purposes of this litigation
4 and for no other purpose. If a producing party in good faith believes that a consultant or
5 expert is a competitor (or an employee of a competitor) of the producing party, then the
6 producing party, within seven days following the disclosure to its counsel of the consultant's
7 or expert's affidavit, may request the receiving party to provide a curriculum vitae of the
8 person together with the following information:
9

- 10 1. business address;
- 11 2. business title,
- 12 3. business or profession;
- 13 4. any previous or current relationship (personal or professional) with any of the
14 parties: and
- 15 5. a listing of other cases in which the individual has testified (at trial or
16 deposition), and all companies for which the individual has consulted or been
17 employed by, within the past four years.

18 If, after receiving the requested information, the producing party in good faith
19 concludes that the consultant or expert is a competitor (or the employee of a competitor), the
20 producing party may object to provision of its Confidential Information to the consultant or
21 expert in accord with the procedure set forth in Paragraph 17 below.
22

23 11. Procedure for Disclosures to Employees, Officers and Directors. If it
24 becomes necessary for counsel for a party to disclose Confidential Information to an
25 employee, officer or director of the party to maintain, defend or evaluate this litigation,
26 counsel for the party disclosing the information shall obtain a written affidavit, in the form
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ZILLOW'S ~~PROPOSED~~ PROTECTIVE
ORDER - 7

56920-0025/LFGAL120385444.1

Perkins Coie LLP
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Seattle, WA 98101-3099
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1 attached hereto as Exhibit A, from each such person to whom disclosure is to be made,
2
3 acknowledging that any document, information, or tangible item that has been designated as
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5 confidential is subject to this Protective Order, that the person has read this Protective Order,
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7 and that such person agrees to comply with and be bound by this Protective Order. The
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9 party's counsel shall retain such affidavit for the duration of the litigation, but need not
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11 disclose it to the counsel for the producing party absent further agreement or a court order.

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13 12. Procedure for Disclosures to Other Persons. If it becomes necessary for
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15 counsel for a party receiving ATTORNEYS' EYES ONLY information to seek the
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17 assistance of any other person, other than those referred to in Paragraph 8(a-e), such as an
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19 employee of the receiving party, and to disclose ATTORNEYS' EYES ONLY information
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21 to such person in order to properly prepare this litigation for trial, the following procedures
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23 shall be employed:

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25 (a) Counsel for the receiving party shall notify, in writing, counsel for the
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27 producing party of their desire to disclose such ATTORNEYS' EYES ONLY
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29 information and shall identify the person(s) to whom they intend to make
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31 disclosure;
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33 (b) If no objection to such disclosure is made by counsel for the producing party
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35 within ten (10) business days of receipt of such notification, counsel for the
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37 receiving party shall be free to make such disclosure to the designated
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39 person(s); provided however, that counsel for the receiving party shall serve
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41 upon counsel for the producing party, prior to disclosure, an affidavit in the
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43 form attached hereto as Exhibit A, whereby such person agrees to comply
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45 with and be bound by this Protective Order;
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(c) If the producing party objects to such disclosure, the party wishing to make such disclosure may bring before the Court the question of whether the particular ATTORNEYS' EYES ONLY information can be disclosed to the designated person(s) and the party requesting such disclosure shall have the burden of establishing before the Court the necessity for such disclosure.

13. Inadvertent Failure to Designate. If, through inadvertence, the producing party provides any confidential information pursuant to this litigation without marking the information as CONFIDENTIAL or ATTORNEYS' EYES ONLY information, or provides any information subject to a claim of attorney-client privilege, attorney work product or other privilege or immunity, the producing party may inform the receiving party of the CONFIDENTIAL or ATTORNEYS' EYES ONLY or privileged or immune nature of the disclosed information, and the receiving party shall, as applicable, treat the disclosed information as CONFIDENTIAL or ATTORNEYS' EYES ONLY information under this Protective Order, and shall return all copies of asserted privilege or immune documents (and destroy all summaries of same) within five (5) business days of receipt of written notice from the producing party, and to the extent the receiving party has already disclosed this information, the receiving party shall promptly notify the producing party as to the specific recipients of such information and shall take all reasonable steps to remove such information from said recipients unless, with respect to CONFIDENTIAL and ATTORNEYS' EYES ONLY information, they are otherwise entitled to disclosure under this Protective Order.

14. Unauthorized Disclosures. If Confidential Information is disclosed to any person other than in the manner authorized by this Order, the person responsible for the disclosure must immediately bring all pertinent facts relating to such disclosure to the attention of counsel for the producing party and, without prejudice to any other rights and

1 remedies of the parties, make every effort to prevent further disclosure by it or by the person
2 who was the recipient of such information.
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5 15. Use of Materials Limited to This Litigation. No person or party shall directly
6 or indirectly utilize or disclose any CONFIDENTIAL or ATTORNEYS' EYES ONLY
7 information obtained pursuant to pretrial discovery in this action, except for the purpose of
8 this action and any appeals and retrials only in accordance with any further order issued by
9 the Court.
10

11
12 16. Filing Under Seal. Any party or third-party discovery respondent ("Filing
13 Party") seeking to file with the Court a document that contains CONFIDENTIAL Material
14 or ATTORNEYS' EYES ONLY Material shall, pursuant to King County LCR 26(c), move
15 to obtain the Court's permission to file that document under seal. The Filing Party shall
16 GR 15 & LCR 15(c) & with
17 comply with all procedures ordered by the Court with respect to such motions, but under no
18 circumstances shall the Filing Party file the document not under seal prior to the Court's
19 ruling on the motion to seal. If the Court grants the motion to seal, the Filing Party shall
20 ensure that the document is filed pursuant to LCR 15 and King County LCR 79(d)(6),
21 including but not limited to ensuring that the document to be sealed contains in its caption
22 the words "SEALED DOCUMENT PER [DATE] COURT ORDER" and is placed into a
23 manila envelope that is stamped with the legend "SEALED DOCUMENT" and bears a
24 statement substantially in the following form: "This envelope contains CONFIDENTIAL or
25 ATTORNEY'S EYES ONLY Material filed in this case by (name of Party) and is not to be
26 opened nor the contents thereof displayed or revealed except by order of the Court presiding
27 over this matter." If any Filing Party fails to file the material under seal, the producing party
28 or any party claiming confidentiality for the material may move the Court to place the filing
29 under seal in accordance with LCR 15 and LCR 26(c).
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ZILLOW'S [PROPOSED] PROTECTIVE
ORDER - 10

56920-0025/LEGAL\120385444.1

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17. Disputes. If the party receiving any document or information disagrees with a designation and marking by any producing party of any material as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY," then the parties to this Stipulation shall first try to resolve such disputes on an informal basis. If agreement cannot be reached between counsel, then such dispute may be presented to the Court by motion or otherwise.

18. Non-Waiver of Objections to Production. This Protective Order shall be without prejudice to the right of the producing party to oppose production of any information on the grounds other than confidentiality.

19. Further Proceedings. This Protective Order shall not prevent any party or third-party from applying to the Court for relief therefrom or from applying to the Court for further or additional protective orders, or from agreeing among themselves to modify or vacate this Protective Order, subject to the approval of the Court.

20. Return of Materials. At the conclusion of this action, including any appeals, all CONFIDENTIAL information and all ATTORNEYS' EYES ONLY information furnished pursuant to this Protective Order, and all copies thereof, shall be returned to counsel for the producing party, or, at the producing party's option, destroyed by counsel for the receiving party. Counsel for the parties shall inform counsel for the producing party no more than thirty (30) days after the case has been resolved, and counsel for the producing party shall have seven (7) days to inform the parties if they want the documents destroyed or returned. Upon receipt of said notice, counsel for the parties shall either destroy or return all documents within seven (7) days. The provisions of this Protective Order insofar as it restricts the disclosure, communication of, and use of, CONFIDENTIAL information and ATTORNEYS' EYES ONLY information produced hereunder shall continue to be binding after the conclusion of this action.

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21. Intentional Violations. An intentional and knowing violation of the terms of this Order shall be treated as contempt of Court and punished as such.

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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____, of [print or type full address] _____, declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the King County Superior Court, in the State of Washington, on _____ in the case of *Move, Inc., et al. v. Zillow, Inc. and Errol Samuelson*, Case No. 14-2-07669-0 SEA. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the King County Superior Court in the State Washington for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action.

Date

City and State where sworn and signed

Printed name

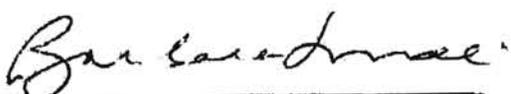
Signature

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ORDER OF THE COURT

Good cause having been demonstrated to the satisfaction of the Court, the foregoing Protective Order is hereby confirmed as an Order of the Court.

IT IS SO ORDERED.

Dated: 4-4-14 
THE HONORABLE BARBARA LINDE

Presented by:

PERKINS COIE LLP

By s/ Bruce Michael Cross
Bruce Michael Cross, WSBA #356
James Sanders, WSBA #24565
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1201 Third Avenue, Suite 4900
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Telephone: 206.359.8000
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Attorneys for Defendant Zillow, Inc.

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KING COUNTY
SUPERIOR COURT

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HONORABLE BARBARA LINDE
NOTED FOR HEARING: May 28, 2014
WITHOUT ORAL ARGUMENT

JUL 01 2014

SUPERIOR COURT CLERK
BY DANIEL THOMAS

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,

Defendants.

Case No. 14-2-07669-0 SEA

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND PRELIMINARY
INJUNCTION ~~PROPOSED~~

DATED 6-30-14

Redacted [RCW 19.108.050]

This matter is before the Court on Plaintiffs Move, Inc., RealSelect, Inc., Top Producer Systems Company, National Association of Realtors®, and Realtors® Information Network, Inc.'s ("Plaintiffs") Motion for Preliminary Injunction against Defendants Zillow, Inc. and Errol Samuelson ("Defendants"). This document constitutes the court's findings and conclusions pursuant to Civil Rule 52.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - I
[CASE NO. 14-2-07669-0 SEA] ATTORNEYS' EYES ONLY
Redacted [RCW 19.108.050]

CABLE, LANGENBACH,
KINERK & BAUER, LLP
1000 SECOND AVENUE, SUITE 3300
SEATTLE, WASHINGTON 98104-1048
(206) 292-8800

1 In making its decisions, the Court considered the following:

- 2 1. Plaintiffs' Motion for Preliminary Injunction;
- 3 2. Declaration of Oussama R. El-Khoury, Supplemental Declaration of El-Khoury,
4 and third (sealed) Declaration of El-Khoury;
- 5 3. Declaration of Carol Brummer, Second Declaration of Brummer, Third
6 Declaration of Brummer (exhibits filed under seal);
- 7 4. Declaration of Jack M. Lovejoy;
- 8 5. Sealed Declaration of David Stenhouse;
- 9 6. Sealed Declaration of Janet Brantton;
- 10 7. Sealed Declaration of Ernest Graham;
- 11 8. Sealed Declaration of Joe Hanauer;
- 12 9. Sealed Declaration of Pamela Kabati;
- 13 10. Declaration of Rachel Glaser and Sealed Declaration of Rachel Glaser;
- 14 11. Declaration of Robert Goldberg and Sealed Declaration of Robert Goldberg;
- 15 12. Declaration of Steven Berkowitz and Sealed Declaration of Steven Berkowitz;
- 16 13. Defendant Zillow's Opposition to Plaintiff's Motion for Preliminary Injunction;
- 17 14. Declaration of Bruce Michael Cross in Support of Zillow's Opposition to
18 Plaintiffs' Motion for Preliminary Injunction ^{(31) including sealed} (except for Exhibits D, E, K and N);
- 19 15. Declaration of Spencer Rascoff in Support of Zillow's Opposition to Plaintiffs'
20 Motion for Preliminary Injunction;
- 21 16. Defendant Samuelson's Opposition to Plaintiffs' Motion for Preliminary
22 Injunction;
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7. In 2013, [REDACTED]

[REDACTED]

[REDACTED]

8. In his capacity as employee and executive officer of Move and president of realtor.com, Samuelson was Move's primary contact with NAR and all high level strategy, budgeting, and planning communications flowed through Samuelson to Move. Samuelson had access to and gained knowledge of material, non-public information belonging to all of the Plaintiffs. Much of this material, non-public information constitutes trade secret information belonging to Plaintiffs.

9. In this order, the term "Plaintiffs' Trade Secret Information" includes non-public information learned by Samuelson about Plaintiffs' budgets, finances, marketing plans, product and technology development plans, competitive strategy and strategic plans, agreements and relationships with strategic partners, contact lists, vendors and customers, technological capabilities, and strategies that are planned, in process, and/or not yet launched. Specific examples of Plaintiffs' Trade Secret Information are contained in testimony in and exhibits accompanying the declarations filed under seal, such as

a. The reasons and strategies behind [REDACTED]

[REDACTED]

[REDACTED] See the sealed Declaration of Ernest Graham and the sealed Declaration of Joe Hansauer,

- 1 b. Move's plans to [REDACTED]
2 [REDACTED] the specifics of the [REDACTED] the reasons and strategies
3 behind those [REDACTED] See the sealed Declaration of Joe Hanauer;
4 c. Move's goal to [REDACTED]
5 [REDACTED] and the reasons and strategies
6 behind [REDACTED] and the manner in which Move [REDACTED] See the
7 sealed Declaration of Joe Hanauer;
8 d. Move's plans and strategies relating to how it will [REDACTED]
9 See the sealed Declaration of Joe Hanauer;
10 e. The fact that Move [REDACTED]
11 [REDACTED]
12 [REDACTED] See the sealed Declaration of
13 Steve Berkowitz;
14 f. Move's reasons for [REDACTED]
15 [REDACTED] See the sealed Declaration of Steve Berkowitz;
16 g. The non-public data about Move's finances, budget, goals, plans, and strategies,
17 and the non-public data about the performance of Move and realtor.com's various
18 business lines, products, and functions across multiple platforms in the documents
19 pertaining to Move's Quarterly Business Review. See the sealed Declaration of
20 Steve Berkowitz, Exhibits 6-8;
21 h. The fact of Move's [REDACTED] and the
22 [REDACTED] See the sealed Declaration of Steve Berkowitz,
23 Exhibit 11;
24

1 i. NAR's strategies for achieving competitive advantages for realtor.com through

2 [REDACTED]

3 [REDACTED] See the sealed Declaration of Janet Branton;

4 j. Move's strategic analysis of the

[REDACTED]

5 [REDACTED] See the sealed Declaration of Carol Brummer, Exhibits 5 and 6;

6 k. Move's and NAR's

[REDACTED]

7 [REDACTED] See the sealed
8 Declaration of Carol Brummer, Exhibit 7;

9 l. Move's

[REDACTED]

10 [REDACTED]

11 [REDACTED] See the sealed Declaration of Rachel Glaser;

12 m. Move's strategic analysis of

[REDACTED]

13 [REDACTED]

14 [REDACTED] See the sealed Declaration of Rachel Glaser;

15 n. NAR's plans, strategies, and reasons for its plans and strategies with respect to

16 [REDACTED] See the sealed Declaration of Robert Goldberg;

17 o. NAR's plans to

[REDACTED]

18 [REDACTED] See the sealed Declaration
19 of Robert Goldberg;

20 p. NAR's strategies for achieving competitive advantages for realtor.com by

21 [REDACTED]

22 [REDACTED] See the sealed declaration of Pamela Kabatl.

1 10. The information just identified derives independent economic value for Plaintiffs
2 from the fact that it is not known or readily ascertainable by competitors who could derive
3 economic value from it.

4 11. Given the absence of any time between Mr. Samuelson's resignation from Move
5 and the commencement of his employment with Zillow, Samuelson likely retained^s much of
6 Plaintiffs' Trade Secret Information ^(s) ~~through memoranda~~ ^(s) ~~Samuelson's~~ declarations evidence
7 the retention of substantial information.

8 12. Plaintiffs make reasonable efforts under the circumstances to protect the secrecy
9 of the information discussed above. Those efforts include, but are not limited to the following:

10 a. Move requires officers to certify each quarter their compliance with
11 Move's Code of Ethics. The Code of Ethics requires the certifying officers to comply with the
12 Move Confidentiality Agreement. Both the Code of Ethics and the Confidentiality Agreement
13 require Move's officers to maintain the secrecy of Move's confidential and trade secret
14 information.

15 b. Move issues computers to employees and requires employees to certify,
16 each time they log on to a Move computer, that the information contained in the computer
17 belongs to Move.

18 c. Move generally requires non-disclosure agreements during negotiations
19 with strategic partners, vendors, customers, and possible merger partners.

20 d. Move limits its budget, finance, and strategic planning discussions to [REDACTED]
21 ^(s) ~~which included Samuelson~~ Discussions of possible mergers and acquisitions are limited
22 to [REDACTED] ^(s) ~~which includes Samuelson~~ Many strategy-setting
23 discussions were limited to [REDACTED]
24

1 13. Samuelson and Zillow had discussed employment before 2013 and renewed their
2 discussions toward the end of 2013. On January 11, 2014, Samuelson sent Zillow a "term sheet"
3 outlining the employment terms to which he would agree.

4 14. Samuelson and Zillow agreed to a "deal" about Samuelson's employment with, ^{(b) (most terms ok)}
5 and stock grants in Zillow on or before February 19, 2014. Samuelson did not disclose the
6 negotiations or the agreement to Plaintiffs, Samuelson then stayed on as an executive officer of
7 Move for two more weeks, during which he harvested additional trade secret information.

8 15. In a February 28, 2014 chat message with the CEO of Zillow, Samuelson stated
9 the possibility that he could unintentionally or inadvertently disclose Move's information to
10 Zillow. Samuelson's deal with Zillow included an indemnification agreement. Samuelson
11 insisted upon, and received, indemnification for unintentional or inadvertent disclosure of
12 Move's information.

13 16. On March 3-4, 2014, using deception, Mr. Samuelson improperly used Move's
14 business license and caused Move employees and Bell telephone to switch his Move phone
15 number from Move to him personally.

16 17. On March 4, 2014, Samuelson erased the memory from his Move-issued iPad and
17 iPhone, and took steps to erase data from his Move-issued Apple computer. The court draws
18 negative inferences from defendant's handling of electronic information prior to and after his
19 resignation, especially because Mr. Samuelson consulted with an employment litigation attorney
20 in Seattle on February 19 and 25, 2014.

21 18. On March 3-4, 2014, at a time that Mr. Samuelson knew he would resign from
22 Move and join Zillow, Mr. Samuelson received additional information on several sensitive ^{(b) (Confidential and)}
23
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1 strategies being pursued by Move and NAR. Mr. Samuelson obtained some of this information in
2 response to communications he initiated.

3 19. Late in the afternoon on March 4, 2014, after Mr. Samuelson had decided to
4 resign from Move, he rekindled a conversation with NAR about secret strategies for a NAR
5 initiative. Because Mr. Samuelson did not disclose his intention to resign, NAR, RIN, and Move
6 all entrusted Samuelson with additional trade secret information. See, e.g., Goldberg Sealed
7 Dec., Ex. 2, Brummer Sealed Dec., Ex. 7, Berkowitz Sealed Dec., ¶ 16.

8 20. Samuelson copied computer data without authorization on to a USB drive and
9 then on to the computer of a Move employee (the employee should not have been in possession
10 of the information because of the employee's job title/status).

11 21. At the time he resigned from Move, Samuelson took an electronic version of his
12 contact lists without authorization. At the time he resigned, Samuelson had a copy of his
13 presentations prepared while employed by Move, Samuelson has not returned the presentations
14 ~~return~~ ^{to Move.} ^{which} ^{only recently agreed to}

15 22. On March 5, 2014, at approximately 9:00 a.m., Samuelson informed Move that he
16 was resigning effective immediately. Samuelson resigned without notice and had already
17 negotiated employment commencing immediately with a direct competitor.

18 23. At the time he resigned, Samuelson still had a Dell laptop computer belonging to
19 Move which contains Move's confidential and trade secret information. Move demanded return
20 of the computer. Samuelson subsequently gave the Dell laptop to a third party vendor and
21 ~~authorized~~ ^{instructed} the vendor to copy information from the laptop. Asserting that the laptop had personal
22 items on it, Samuelson refused to return the laptop. As of May 9, 2014, Samuelson had not
23
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1 returned Move's Dell laptop computer to Move or copies of any information made from the Dell
2 laptop.

3 24. Zillow, Inc. is the primary direct competitor of Move in the online real estate
4 advertising industry. Zillow's headquarters are in Washington State and Zillow is a Washington
5 corporation.

6 25. Samuelson commenced employment with Zillow at 9:30 a.m. on March 5, 2014.
7 Samuelson joined Zillow as its Chief Industry Development Officer. Samuelson was served with
8 the Summons and Complaint at Zillow's Seattle headquarters, indicating that threatened
9 misappropriation is occurring in Washington. The benefits that would be reaped by defendants
10 from trade secret misappropriation would be received in Washington State.

11 26. Zillow's talking points for Samuelson's employment indicate that Zillow hired
12 Samuelson for his "insights."

13 27. During negotiations for employment in December 2013, Samuelson disclosed
14 information to Zillow.

15 28. In February 2014, while Samuelson was still an executive officer of Move, Zillow
16 identified Samuelson as the part "owner" of a task to prepare a "call down list for multiple listing
17 services." While still an executive officer of Move, Mr. Samuelson prepared notes about people
18 he intended to contact after joining Zillow. While employed by Move, Mr. Samuelson also
19 provided input to Zillow for "talking points" to be used as part of his joining Zillow.

20 29. In February 2014, Samuelson disclosed information about a strategy that he was
21 not authorized to disclose. In February 2014, knowing that he was likely going to work for
22 Zillow, but not disclosing that fact, Samuelson misrepresented an important fact when
23
24

1 negotiating a potential deal with a subsidiary of NAR. The misrepresentation caused the
2 proposed negotiation to stall.

3 30. On March 4, and on or around March 10, 2014, Zillow made statements about
4 Move that implied that it had new information about Move's business. Given the timing of these
5 statements, circumstantial evidence supports a conclusion that Samuelson disclosed trade secret
6 information to Zillow.

7 *Some of* 31. *in this matter has* Samuelson's publicly filed testimony evidenced a lack of care in protecting trade
8 secret information.

9 32. Samuelson's actions, such as taking his contact list while wiping the iPhone he
10 returned to Move, helped Samuelson competitively and hurt Move competitively.

11 33. Samuelson's testimony initially suggested that he would be impoverished if the *such that he wouldn't*
12 court issued an injunction prohibiting him from working. A much fuller picture has emerged *be able to afford his*
13 about Samuelson's financials, calling the accuracy and completeness of his initial testimony into *house*
14 question.

15 34. Move and NAR have a substantial likelihood of success on claims for threatened
16 misappropriation of trade secret information.

17 *Details of* **II. CONCLUSIONS OF LAW**

18 1. Move's and NAR's business plans and strategies, including unlaunched business
19 strategies, and other information identified above and in the court's injunction below constitute
20 trade secret information under RCW 19.108.010(4).

21 2. Samuelson misappropriated Plaintiffs' Trade Secret Information by acquiring it
22 using improper means and by copying information without authorization. Defendant
23
24

1 Samuelson's conduct before and after resigning from Move threatens misappropriation of
2 Plaintiffs' Trade Secret Information.

3 3. Because misappropriation and threatened misappropriation occurred and will
4 occur in Washington State, Washington law applies to this dispute.

5 4. Plaintiffs have a right to injunctive relief under RCW 19.108.020(1) and/or RCW
6 7.40.020.

7 5. Plaintiffs will suffer actual and substantial injury, and will suffer irreparable harm
8 if the court does not enjoin defendants.

9 6. The equities favor protecting Plaintiffs' trade secrets and the balance of the
10 equities favors Plaintiffs.

11 7. Zillow's objections to evidence submitted by Plaintiffs go to weight, not
12 admissibility; Plaintiffs have established a sufficient foundation for testimony and documentary
13 evidence.

14 8. Give the scope of relief the court is granting, an adequate but not excessive, ^(PL)
15 appropriate bond to be posted by Plaintiffs is ~~\$25,000.00~~ ^{\$150,000.00} (one hundred fifty thousand dollars). ^(PL)
16 4.44.470.

17 WHEREAS, pursuant to Civil Rule 65 and RCW 7.40, the court finds there is a threat of
18 disclosure of trade secrets and confidential information of Plaintiffs, which poses a threat of
19 irreparable harm to Plaintiffs, and whereas, in light of all of the circumstances known to the court
20 and upon a balance of the equities, the court concludes that a preliminary injunction should issue,
21 and therefore grants Plaintiffs' motion.

22 **III. PRELIMINARY INJUNCTION**

23 **NOW THEREFORE, IT IS ORDERED:**

1 1. From the date on which this injunction is effective until this matter is adjudicated,
2 defendant Samuelson is enjoined from, directly or indirectly, using, disclosing, or relying on
3 Plaintiffs Trade Secret Information or any Move, Inc. and/or NAR confidential information
4 identified above.

5 2. From the date on which this injunction is effective until this matter is adjudicated,
6 defendant Zillow is enjoined from, directly or indirectly, appropriating or obtaining or seeking to
7 appropriate or obtain from Mr. Samuelson, any of Plaintiffs Trade Secret Information or any
8 Move, Inc. and/or NAR confidential information identified above, or utilizing in any way such
9 information previously obtained.

10 3. For a period of twelve months from the date on which this injunction is effective,
11 Mr. Samuelson is enjoined from directly or indirectly engaging in the following:

12 a. Discussions or efforts pertaining to top level domains, including: [REDACTED]

13 [REDACTED]
14 b. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 4. For a period of ⁽⁶⁾ ~~12~~ ^{SIX} months from the date on which this injunction is effective,

19 Mr. Samuelson is enjoined from directly or indirectly engaging in the following:

20 a. Efforts to sell leads or to develop or market products that gather and sell leads to
21 real estate agents, brokers, or franchisors;³

22 b. Developing products that create websites for real estate agents⁴;

23 ¹ Goldberg ¶5-10, 20.

24 ² Goldberg ¶ 5-20 and Ex. 1.

³ Berkowitz 6:11-17(Ex. 7).Hannauer ¶ 5.

1 c. Developing contact relationship management tools⁴;

2 d. Purchasing or obtaining leads from third parties⁵;

3 e. [REDACTED]

4 [REDACTED]

5 f. Discussing Move's business-to-business lines with Zillow or members of the real
6 estate industry;⁵ and

7 g. Discussing the distribution or sale of leads to real estate agents, brokers, or
8 franchisees.

9 5. For a period of ~~twelve~~ ^{six} months from the date on which this injunction is effective,

10 Mr. Samuelson is enjoined from directly or indirectly engaging in the following:

11 a. Strategic planning regarding advertising displays on Zillow's website;⁹

12 b. Discussions of advertising strategy or allocation of Zillow's advertising spend;¹⁰
13 and

14 c. Discussions of Move's budget, advertising spend, or industry relations strategy.¹¹

15 6. From the date on which this injunction is effective until this matter is adjudicated,

16 Mr. Samuelson is enjoined from directly or indirectly engaging in the following:

17 a. [REDACTED]

18 [REDACTED]¹²

19 b. Efforts to acquire or develop a syndicator of real estate listing data;¹³

20 ⁴ Berkowitz 6:11-17(Ex. 7).

21 ⁵ Berkowitz Ex. 6, p. 30, Ex. 8, 15-33.

22 ⁶ Glaser ¶ 10 and Ex. 3.

23 ⁷ Berkowitz 7:18-24.

24 ⁸ Glaser ¶ 10 and Ex. 3.

⁹ Brummer, Ex. 7.

¹⁰ Hanauer ¶ 6.

¹¹ Hanauer ¶ 6, 7.

¹² Brummer, Exhibits 5-6.

- 1 c. [REDACTED]¹⁴
- 2 d. Efforts to interrupt the flow back to ListHub of leads generated by listings
- 3 syndicated by ListHub;¹⁵
- 4 e. Efforts to obtain access to leads generated by listings syndicated by ListHub;
- 5 f. Discussions or efforts pertaining to the manner in which data is supplied by
- 6 Zillow to ListHub or the scope of data supplied by Zillow to ListHub;¹⁶
- 7 g. Discussions of strategy or public messaging regarding ListHub;¹⁷
- 8 h. Efforts to obtain direct feeds of listing data from Multiple Listings Services, real
- 9 estate brokers, franchisors, or associations;¹⁸
- 10 i. Efforts to influence, interrupt, or prevent the agreements, relationships, or data
- 11 feeds between Multiple Listings Services, real estate brokers, franchisors,
- 12 associations and ListHub;
- 13 j. Efforts to encourage data feeds from Multiple Listings Services, real estate
- 14 brokers, franchisors, associations to parties other than ListHub;¹⁹
- 15 k. Efforts to circumvent ListHub;²⁰ and
- 16 l. [REDACTED]

17 [REDACTED]²¹

19 ¹³ Glaser ¶15.

20 ¹⁴ Berkowitz, 2:18-23; 3:7-9; 16d.

21 ¹⁵ Glaser ¶ 4.

22 ¹⁶ Glaser ¶ 4.

23 ¹⁷ Glaser ¶ 7.

24 ¹⁸ Berkowitz, 2:8, 13, 14, 17; 6:6(Ex. 6, QBR document) (berkowitz open declaration 3.27.14) 7:5-11; Glaser Dec. 7-9.

¹⁹ Berkowitz, 2:8, 13, 14, 17; 6:6(Ex. 6, QBR document) (berkowitz open declaration 3.27.14) 7:5-11; Glaser Dec. 7-9.

²⁰ Berkowitz, 2:8, 13, 14, 17; 6:6(Ex. 6, QBR document) (berkowitz open declaration 3.27.14) 7:5-11; Glaser Dec. 7-9.

²¹ Berkowitz 3:1-2; 5:3-15.

1 7. From the date on which this injunction is effective until March 4, 2015, Mr.
2 Samuelson is enjoined from directly or indirectly engaging in the following:

3 a. Efforts to purchase or partner with [REDACTED]
4 [REDACTED]

5 b. [REDACTED]
6 [REDACTED]

7 8. For a period of six months from the date on which this injunction is effective, Mr.
8 Samuelson is enjoined from directly or indirectly engaging in the following:

9 a. Discussions of realtor.com's [REDACTED]²³

10 b. Discussions or efforts to develop or improve any product, service, or functionality
11 that [REDACTED]

12 [REDACTED]²⁴
13 *9* nine
14 9. For a period of *nine* months from the date of this order, Mr. Samuelson is
enjoined from directly or indirectly engaging in the following:

15 a. Efforts to obtain, use, or display information about listing for rental properties.²⁵

16 b. Efforts to obtain, use, or display information about listings for real estate outside
17 of the United States.²⁶

18 c. Efforts to obtain, use, or display information about listings for commercial real
19 estate.²⁷

22 ²² Goldberg ¶ 21-26.

²³ Graham ¶ 7-11.

²⁴ Hamner ¶ 3-4.

23 ²⁵ Berkowitz 6:6 (Ex. 6)

²⁶ Brenton 2:4-3:8.

24 ²⁷ Brenton 3:10-18.

1 d. Providing information on home ownership and maintenance on Zillow's
2 website(s).²⁸

3 e. Discussing NAR's plans or strategies surrounding realtor.com's integration of
4 NAR's public advocacy initiatives.²⁹

5 10. No later than ~~June 3~~ ^{July 7}, 2014, at 4:00 p.m., Defendants are ordered to return to
6 Plaintiffs all copies of any confidential or trade secret information of Plaintiffs, including without
7 limitation all electronic or paper copies of contact lists, presentations, information stored on the
8 Dell laptop computer Move issued to Samuelson, and any memory devices on which such
9 information is stored.

10 This Preliminary Injunction is binding on defendants, their agents,
11 servants, employees, and attorneys, and those persons in active
12 concert or participation with them who receive actual notice of the
13 order by personal service or otherwise.

14 DATED this 30 day of ~~May~~ ^{June}, 2014, at Seattle, Washington.

15 

16 HONORABLE BARBARA LINDE

23 ²⁸ Kabati ¶ 4-10.

24 ²⁹ Kabati ¶ 11-16.

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Presented By:

CABLE, LANGENBACH, KINERK & BAUER, LLP

/s/ Jack M. Lovejoy
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Attorney for Plaintiffs

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APPROVED AS TO FORM;
NOTICE OF PRESENTATION WAIVED:

PERKINS COIE LLP

By: _____
Bruce M. Cross, WSBA No. 356
James Sanders, WSBA No. 24565
Attorneys for Defendant Zillow, Inc.

GRAHAM & DUNN PC

By: _____
Clemens H. Barnes, WSBA No. 4905
Attorneys for Defendant Errol Samuelson

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the Redacted Brief of Respondents in Court of Appeals Cause Nos. 72534-3-I and 72535-1-I to the following parties:

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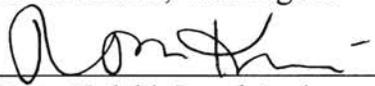
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Original and one copy (of brief) delivered by legal messenger for filing with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-1176

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

Dated: January 27th, 2015 at Seattle, Washington.



Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick/Tribe