

Nos. 72534-3-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

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,
Respondents,

v.

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

and
DOES 1-20, Additional Defendants.

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COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

REDACTED CORRECTED BRIEF FOR
PETITIONERS ZILLOW AND SAMUELSON

Estera Gordon, WSBA No. 12655
Clemens H. Barnes, WSBA No. 4905
Miller Nash Graham & Dunn LLP
2801 Alaskan Way, Suite 300
Seattle, Washington 98121-1128
(206) 624-8300
Attorneys for Petitioner
Errol Samuelson

Eric D. Miller, WSBA No. 45214
Susan E. Foster, WSBA No. 18030
Kathleen M. O'Sullivan, WSBA No. 27850
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
Attorneys for Petitioner Zillow, Inc.

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INTRODUCTION

Errol Samuelson was an at-will employee of Move, Inc., who left that company to work for Zillow, Inc. Not having asked Samuelson to sign a covenant not to compete, Move nevertheless sought to enjoin him from working for Zillow by bringing this action for an injunction against his disclosure of putative “trade secrets” to Zillow.

The Superior Court granted an injunction, putting Samuelson’s career on hold and preventing him from doing the work Zillow hired him to do. It did so without any evidence of actual or threatened misappropriation of any trade secrets. To the contrary, plaintiffs offered nothing but speculation that trade-secret misappropriation might occur. In effect, the injunction rests on the theory that disclosure of trade secrets will be inevitable if Samuelson is permitted to work for one of Move’s competitors. But Washington has not adopted an inevitable-disclosure theory of trade-secret misappropriation, and with good reason—as applied in this case, the theory has given Move the benefit of a covenant not to compete to which Samuelson never agreed and for which he was never compensated.

The injunction should also be set aside for the independent reason that it was issued in violation of the Due Process Clause. Samuelson was not permitted to attend the hearing at which the court decided to issue the

injunction. He was not permitted to see the key evidence on which Move relied. Indeed, until the injunction was issued, he was not even permitted to see all the terms of the injunction that Move sought. Those restrictions violated the most basic requirement of due process: that a defendant be provided notice of the allegations against him and a meaningful opportunity to be heard in response. Tellingly, Move barely attempted to explain why it was necessary to prevent Samuelson from learning “trade secret” information that, according to Move, he already knows.

Finally, even if an injunction of some kind were appropriate, the Superior Court abused its discretion by entering an injunction that is far broader than necessary to protect any Move trade secrets. Some of its provisions bar Samuelson from discussing general business topics such as “[s]trategic planning regarding advertising displays” or “[d]iscussions of advertising strategy.” Others prohibit him from discussing “secrets” that Move has already publicly disclosed. Still others are so vague—for example, a ban on discussing “industry relations strategy”—that it is difficult to determine what they prohibit. And much of the injunction will last until the Superior Court holds a trial, by which time the covered information will have lost whatever economic value it might once have had. The injunction thus extends well beyond what might be necessary to

protect trade secrets, and it constitutes an impermissible restraint on competition.

ASSIGNMENTS OF ERROR

1. The Superior Court erred in entering a preliminary injunction against petitioners.
2. The Superior Court erred in denying petitioners' motions for reconsideration.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Superior Court abused its discretion in entering an injunction restricting Samuelson's employment activities without substantial evidence of actual or threatened misappropriation of trade secrets.
2. Whether the Superior Court abused its discretion when it entered an injunction against Samuelson based on evidence and requests for relief that Samuelson was not allowed to see, after a hearing from which he was excluded.
3. Whether the injunction represents an abuse of discretion because it is not narrowly tailored to protect specifically identified trade secrets, because it is vague and overbroad, because it prohibits the dissemination of information that is already public, or because it is of excessive duration.

STATEMENT OF THE CASE

A. Errol Samuelson leaves Move and joins Zillow

Errol Samuelson has worked in the real estate industry for more than 20 years. Beginning in 2003, he worked at Move, where he held a variety of positions including, most recently, “Chief Strategy Officer.” CP 33-35, 303, 314. Samuelson was an at-will employee of Move. CP 160. He was not asked to sign, nor did he sign, a covenant not to compete. CP 309. Move had a confidentiality agreement under which employees were asked to protect certain information, but it has been unable to find any copy signed by Samuelson. CP 106-12.

Zillow is an online real estate marketplace that helps homeowners, home buyers, and real-estate professionals find and share information about homes. In 2011, Zillow unsuccessfully tried to recruit Samuelson. CP 310. In late 2013, Zillow again approached Samuelson to discuss possible employment. Samuelson met with Zillow executives in late 2013 and in early 2014, but he did not immediately agree to terms. CP 916-17. In late February, Samuelson and Zillow were still negotiating potential “deal-breaker” terms of Samuelson’s potential employment at Zillow, including performance criteria for stock grants that were an important part of Samuelson’s proposed compensation; indemnity, non-compete, and severance issues; and the risk of double taxation and other tax implications

of Samuelson's living in Canada while working in the United States.
CP 914-15.

Those issues were not fully resolved until March 4, 2014. On March 5, 2014, having agreed to the terms of his employment with Zillow, Samuelson resigned his position at Move. CP 311, 915. The same day, Zillow issued a press release announcing Samuelson's hiring as "Chief Industry Development Officer." CP 266-68, 366.

Before he left Move, Samuelson was concerned about preserving the privacy of personal information, such as financial and tax records and sensitive materials about family, healthcare, and religious matters, that he had stored on Move-issued devices. His plan was to preserve information that would be useful to Move and, separately, to preserve his personal information, and then to erase the devices. He created a copy of his personal information and then worked with Move personnel (Warren Cree and Ryan Green) to copy the Move data to a DVD for Move's use. After several failed attempts, however, they copied the data to a USB drive, which they used to transfer the information to Cree's computer at Move. Samuelson then attempted to delete the Move information from the USB drive, and he returned the work devices to Move. CP 47, 307-09, 918. Samuelson also transferred a phone number from his Move cell phone to a personal phone. CP 47, 309. Samuelson fully disclosed each of those

actions to Move when he resigned. CP 47. During the process of transferring Move's electronically stored information, Samuelson inadvertently retained some of his presentations to industry groups, and he also copied his contact list, which included the names and addresses of his personal and professional contacts. CP 307-09.

After Samuelson resigned, Move inquired about an old laptop that had been replaced several months earlier. Samuelson told Carol Brummer, Executive Vice President of Human Resources at Move, that he had found the computer and would return it to Move after deleting any personal information. Brummer did not direct him not to remove his personal information, and Samuelson transferred the computer to an outside service for processing consistent with their discussion. CP 308.

B. Move Sues Zillow and Samuelson

Less than two weeks after Samuelson's resignation, Move, the National Association of Realtors (NAR), and other affiliated entities (collectively, "Move") brought this action against Samuelson and Zillow, alleging misappropriation of trade secrets, breach of fiduciary duty, and breach of contract. Move sought a preliminary injunction barring Samuelson's employment at Zillow. CP 229-243.

Move relied on the "inevitable disclosure" theory of trade-secret misappropriation, a doctrine adopted by some states—but not by

Washington—under which a plaintiff may obtain an injunction preventing an employee from working for a competitor by demonstrating that the employee would inevitably disclose the former employer’s trade secrets if he or she were permitted to work for the new employer. Asserting that “[t]his is a paradigm inevitable disclosure case” because “Samuelson cannot work for Zillow without relying upon trade secret information,” Move argued that “the court should enjoin him from employment or consulting with Zillow.” CP 241. The Superior Court denied the requested injunction. CP 387-89.

Two weeks later, Move renewed its motion for an injunction. Relying on “[n]ew evidence”—principally, the erasure of information from Samuelson’s computers—Move asserted that Samuelson had acquired Move trade secrets “using improper means” and had engaged in “unauthorized copying of Move information, disclosures of secrets, and spoliation of evidence.” CP 1051.

C. Move designates parts of its motions and supporting evidence as “Attorneys’ Eyes Only”

Soon after the complaint was filed, the Superior Court entered a Protective Order under which materials could be designated as “Confidential” or “Attorneys’ Eyes Only” (AEO). CP 342-55. When it became apparent that Move sought to use AEO designations to prevent

Samuelson from learning what Move was accusing him of doing and what information Move claimed as a trade secret—information that, according to Move, Samuelson already possessed and was threatening to disclose—Samuelson moved to modify the protective order. CP 390-93. The Superior Court denied the motion. CP 437-39.

When Move renewed its motion for an injunction, it relied on AEO-designated evidence (including Samuelson’s own emails) and redacted as AEO significant portions of its motion. CP 1066-1230, 1360-63. Samuelson immediately moved for relief from the AEO designations. CP 690-93. This time, the court partially granted the motion, but only after Samuelson had filed his opposition to the motion for an injunction. CP 651-53. The court’s ruling still withheld from Samuelson key portions of the motion and supporting materials. *Id.* Two days later, the court heard Move’s motion for an injunction. Samuelson was ordered to leave the courtroom before the hearing. CP 673. The court orally ruled that it would enter an injunction, and it invited Move to submit a proposed order. *Id.*

When Move submitted its proposed order, the document included AEO designations that redacted many of the proposed restrictions and the proposed findings supporting them. CP 1683, 1712-29. Samuelson and Zillow submitted responses to Move’s proposed order, but, as a result of the AEO designations, they did so without the benefit of Samuelson’s

input about his access to and knowledge of the alleged trade secrets while at Move; about the confidentiality, strategic value, and shelf life of the information; and about whether his position and responsibilities at Zillow—particularly the responsibilities and activities that Move sought to restrict—were related to the alleged trade secrets. CP 1682-1709.

Samuelson moved for relief from the AEO designations, but the relief was denied except that Samuelson—but not Zillow—was allowed to see the unredacted findings, conclusions, and injunction terms *after* they were entered. CP 761-62.

D. The Superior Court issues an injunction against Zillow and Samuelson

On June 30, the Superior Court entered Move’s proposed injunction with just a few interlineations. The injunction bars Samuelson from “directly or indirectly, using, disclosing, or relying on [Move’s] Trade Secret Information” until the conclusion of the litigation. CP 1649, 1662. It states that “‘Trade Secret Information’ includes non-public information learned by Samuelson about [Move’s] 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.”

CP 1653.

As “examples” of trade secrets, the injunction identifies “non-public data” about Move’s finances and performance, and a variety of “plans,” “strategies,” “reasons,” and “goals” related to certain Move products and generic categories of activities, such as “Move’s plans and strategies relating to how it will [REDACTED]” “Move’s goal to [REDACTED] [REDACTED]” and “NAR’s strategies for achieving competitive advantages for realtor.com through [REDACTED] [REDACTED]” CP 1653-55.

In addition to prohibiting the use or disclosure of Move’s “trade secret information,” the injunction also contains numerous conduct restrictions. For example, pending final adjudication of the case, Samuelson is prohibited from participating in or discussing a variety of activities related to real estate listings and leads. CP 1663-64. For twelve months from the issuance of the injunction, he is prohibited from engaging in “[d]iscussions or efforts pertaining to top level domains.” CP 1662. For nine months, he is prohibited from engaging in “[e]fforts to obtain, use, or display information about listing for rental properties,” “about listings for real estate outside of the United States,” or “about listings for commercial

real estate.” CP 1665. And for six months, he is prohibited from engaging in “[d]eveloping products that create websites for real estate agents,” “[d]eveloping contact relationship management tools,” “purchasing or obtaining leads from third parties,” or “discussions of advertising strategy.” CP 1662-63.

E. Zillow and Samuelson seek reconsideration

Zillow and Samuelson promptly moved for reconsideration of the preliminary injunction. CP 1670-81, 1732-44. They argued that the injunction prohibited conduct that exceeded the scope of any alleged trade secrets. They also explained that the injunction prohibited Samuelson from participating in essentially every aspect of Zillow’s business, even those unrelated to his responsibilities at Move, and that because Zillow was unable to engage Samuelson in any productive activities, it had placed him on leave. CP 1736, 1748.

Zillow and Samuelson further explained that many of the restrictions in the injunction are overbroad in that they protect supposed “trade secrets” that were not confidential as of the injunction hearing, or that plaintiffs publicly disclosed afterwards. Zillow offered a redlined injunction to allow the court to correct the errors of overbreadth. CP 1669-81, 1732-44, 1767-1813. For example, the injunction sought to prohibit any “efforts to obtain, use or display information about listings for real

estate outside the United States.” CP 1665. Zillow noted that the only evidentiary support for that prohibition referred to a [REDACTED] and it therefore proposed limiting the injunction to prohibit that specific method of obtaining international listings. CP 1774, 1811.

Although Samuelson still was not allowed to see many of the underlying declarations and documents, he was able, for the first time, to provide targeted evidence in support of his motion for reconsideration that addressed the alleged trade secrets plaintiffs asserted and the specific injunction terms. He provided descriptions of and links to publicly available information about many of plaintiffs’ purported trade secrets. CP 1682-1709.

The court directed Move to respond to the motion for reconsideration. Move opposed reconsideration, and it submitted five declarations, all of which were designated AEO. CP 1955-57, 1995-2001, 2003-08. Samuelson again moved for relief from the AEO designations, and the Superior Court again denied the motion. CP 866-68.

The Superior Court denied reconsideration without issuing an opinion or modifying the injunction in any respect. CP 887-89.

F. This Court grants discretionary review

Zillow and Samuelson sought discretionary review, CP 890-903, 2089-2117, which this Court has granted. The Commissioner noted that “[t]he preliminary injunction order was based at least in part on evidence Samuelson was not allowed to see, and there is a serious question whether the restriction was necessary,” and further stated that “some of the restrictions imposed by the preliminary injunction appear unnecessarily broad.” 11/19/14 Ruling Granting Discretionary Review 11. The Commissioner concluded that “the court committed a probable error that substantially limits [Zillow and Samuelson’s] freedom to act.” *Id.* at 2.

ARGUMENT

An injunction in a trade-secret case must be based on evidence of actual or threatened misappropriation of an identifiable trade secret, not mere speculation that the defendant might, at some point, improperly use or disclose something that might be deemed confidential. The injunction in this case is invalid because it was based only on speculation, not on substantial evidence of actual or threatened misappropriation. Worse, the evidence on which the court relied was tainted by the court’s refusal to allow Samuelson to see the key evidence against him. That refusal violated Samuelson’s due-process rights and prevented Samuelson from adequately defending himself, and it provides an independent basis for

setting aside the injunction. Finally, even if an injunction of some kind were appropriate in this case, the Superior Court's injunction must be set aside because it is impermissibly overbroad.

A. Standard of review

A trial court's decision to grant a preliminary injunction is reviewed for abuse of discretion. *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998). A trial court necessarily abuses its discretion when it bases its ruling on an error of law. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

B. The Superior Court erred in entering an injunction without evidence of actual or threatened misappropriation of trade secrets

1. Because Washington has not adopted an inevitable-disclosure theory, an injunction must be based on evidence of misappropriation, not mere speculation

An injunction must be based on factual findings that are supported by substantial evidence. *Fed. Way Family Physicians, Inc. v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 266-67, 721 P.2d 946 (1986). Speculation is not substantial evidence. *Little v. King*, 160 Wn.2d 696, 705, 161 P.3d 345 (2007). Thus, a trade-secret injunction must be based on substantial evidence of actual or threatened misappropriation of trade secrets—not mere speculation that a defendant might at some point disclose something that the former employer considers confidential.

Some states have adopted a more permissive rule under which a plaintiff may obtain an injunction preventing an employee from working for a competitor by showing that the employee would necessarily disclose trade secrets if permitted to work at his or her new job. *See, e.g., PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995). But other states have refused to apply such an “inevitable disclosure” doctrine, reasoning that it “creates a de facto covenant not to compete” that “is imposed *after* the employment contract is made and therefore alters the employment relationship without the employee’s consent.” *Whyte v. Schlage Lock Co.*, 125 Cal. Rptr. 2d 277, 292-93 (Cal. Ct. App. 2002) (internal quotation marks and citation omitted); *accord IBM Corp. v. Seagate Tech., Inc.*, 941 F. Supp. 98, 101 (D. Minn. 1992); *see also H & R Block E. Tax Servs., Inc. v. Enchura*, 122 F. Supp. 2d 1067, 1076 (W.D. Mo. 2000) (criticizing the “unspoken assumption that exposure to trade secrets creates an inference of inevitable disclosure”).¹ Courts in those states have recognized that an injunction predicated on an inevitable-disclosure theory would make it impossible for an employee to leave his or her employer and work for a competitor. *Whyte*, 125 Cal. Rptr. 2d at 293.

¹ In California, where Move is located, covenants not to compete are unenforceable. Cal. Bus. & Prof. Code § 16600.

Washington has not adopted the inevitable-disclosure theory. *See Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 512-13, 278 P.3d 197 (2012). To the contrary, because Washington has established a policy of “promot[ing] free competition in the marketplace for the ultimate benefit of the consumer,” Washington courts carefully scrutinize restraints that inhibit competition. *Murray Publ’g Co. v. Malmquist*, 66 Wn. App. 318, 324, 832 P.2d 493 (1992) (internal quotation marks and citation omitted). For example, an employer may not use a covenant not to compete to protect itself against legitimate competition from a former employee who acquired skills and expertise while working for the employer. *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 846-47, 100 P.3d 791 (2004) (Madsen, J., concurring) (“Noncompete agreements are . . . unreasonable whenever they are used to secure employers against employees’ lawful use of labor and skills.”); *Copier Specialists, Inc. v. Gillen*, 76 Wn. App. 771, 774, 887 P.2d 919 (1995); Restatement (Second) of Contracts § 188, cmt. (b) (1981). It follows *a fortiori* that where, as here, an employee has *not* signed a covenant not to compete, an inevitable-disclosure injunction should not be issued to prevent the employee from working for a competitor.

In its initial motion for an injunction, Move invoked the inevitable-disclosure theory, asserting that “[t]his is a paradigm inevitable disclosure

case.” CP 241; *see* CP 371 (Move alleged in its complaint that “[i]f Mr. Samuelson undertakes the tasks for which he was hired by Zillow, the unauthorized disclosure or use of plaintiffs’ trade secrets, by Mr. Samuelson and Zillow, is inevitable.”). Move’s renewed motion for an injunction, however, did not rely on that theory, and Move has now abandoned it. 11/14/14 Tr. of Hr’g on Mot. for Discretionary Review 26 (Move’s counsel answered “No” in response to the Commissioner’s question, “Are you relying on this inevitable disclosure theory?”). Accordingly, the injunction can stand only if it is supported by evidence of actual or threatened misappropriation. As shown below, it is not.

2. The Superior Court’s findings are not supported by the evidence

To the extent the court made findings to justify issuing the injunction, those findings are not supported by the evidence.² Crucially, the court identified no direct evidence of misuse or disclosure. And the circumstantial evidence on which the court relied was less indicative of

² In the circumstances of this case, a particularly searching review of the court’s findings is warranted because the court adopted, nearly verbatim, the proposed findings of fact submitted by Move. As the Ninth Circuit has observed, such “findings leave much to be desired in light of the function of the trial court” and “call for more careful scrutiny.” *Photo Elecs. Corp. v. England*, 581 F.2d 772, 777 & n.4 (9th Cir. 1978) (internal quotation marks and citation omitted); *see Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (noting the “potential for overreaching and exaggeration on the part of attorneys preparing findings of fact”); *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1204 (9th Cir. 1989).

misappropriation than of a legitimate effort on Samuelson's part to ensure a smooth transition as he changed jobs. Although the court did not use the words "inevitable disclosure," the record reveals that the injunction was premised on a view that Samuelson could not do his job at Zillow without using or disclosing confidential Move information. That legal error tainted all of the court's findings.

The court adopted some of Move's findings about actual or threatened misappropriation, but those findings are also unsupported. For example, Move asserted—and the court found—that Samuelson disclosed information to Zillow during negotiations. CP 1659. That finding was based entirely on a statement by Samuelson to Zillow in December that [REDACTED] [REDACTED] CP 917, 1051. While Move suggested that the statement necessarily "disclosed confidential [REDACTED] [REDACTED]" CP 1051, that is a non sequitur—if anything, the vagueness of the statement reflects an effort *not* to disclose confidential information. Yet the court adopted the proposed finding verbatim, without any refinement or revision.

Similarly, the court adopted findings that condemned Samuelson's coordination with Zillow on the announcement of his departure and suggested that Samuelson might have been engaged in misappropriation

because, “while still an executive officer of Move, [he] prepared notes about people he intended to contact after joining Zillow.” CP 1659. As noted above, however, because Move never asked for or obtained a covenant not to compete there was nothing improper about Samuelson’s decision to leave Move and accept a job with one of its competitors. And since Samuelson could lawfully take another job, he was also within his rights to seek another job, to talk to prospective employers, to negotiate over the terms of his future employment, and to make plans for announcing his transition. It is hardly surprising that a departing employee would want to let people know about his new job once it was public, and preparing to do so is not evidence of misappropriation. *See* Restatement (Third) of Agency § 8.04 (2006) (while still employed, employee may plan to compete with employer after leaving employment); *Mercer Mgmt. Consulting, Inc. v. Wilde*, 920 F. Supp. 219, 234-35 (D.D.C. 1996) (stealth in preparing for post-employment competition does not constitute breach of fiduciary duty). The court’s evident hostility to ordinary job-switching activities reveals what this case is really about: plaintiffs’ effort to use a trade-secret injunction to make it impossible for one of their employees to work for a competitor.

The court also adopted Move’s proposed finding that Samuelson had a “deal” with Zillow to accept employment no later than February 19,

2014, and that he kept working at Move while “harvest[ing] additional trade secret information.” CP 1657. The record provides no support for that finding. Samuelson met with Zillow executives in late 2013 and in the early months of 2014 to discuss possible employment, but he did not agree to final terms of employment until early March. CP 916-17. In late February, for example, Samuelson and Zillow were still negotiating potential “deal-breaker” terms of Samuelson’s employment at Zillow, including [REDACTED] that were an important part of Samuelson’s [REDACTED]

[REDACTED]

[REDACTED]

CP 914-15. As soon as he was satisfied that he had agreed to terms of his employment with Zillow, Samuelson resigned his position at Move. CP 311, 915. Any suggestion that he remained at Move in order to gather confidential information is further contradicted by Move’s own assertion that Samuelson missed important meetings “including the quarterly business review and generally avoided any detailed discussions that weren’t pre-scheduled,” CP 37—alleged behavior that is inconsistent with a desire to obtain confidential information before departing. Moreover, as discussed below, the court allowed Move to hide the alleged evidence of

“harvesting” so that Samuelson was unable to rebut the inferences that Move persuaded the court to accept.

Finally, the court faulted Samuelson for his treatment of his Move-issued computer devices. CP 1658-59. The record reflects that Samuelson was concerned about his privacy and wiped the devices, but there is no evidence that he did so surreptitiously; rather, he worked with Move personnel to preserve data that would be useful to Move and fully disclosed what he had done. Similarly, when he discussed the return of the old laptop, he notified Move that he planned to erase its hard drive. Move did not direct him to do otherwise, and Samuelson sent the laptop to a third-party computer specialist consistent with his stated intent. CP 47, 308. The record provides no support for an inference that Samuelson was seeking to hide his activities or use Move information on behalf of Zillow. In the end, all that the court was able to point to is that Samuelson “took an electronic version of his contact lists without authorization” and inadvertently retained several of his own presentations, CP 1658—hardly evidence of a plot to steal Move’s trade secrets, especially given the absence of any evidence that Samuelson’s contact list constituted a Move trade secret, *see Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wn.2d 427, 440-42, 971 P.2d 936 (1999) (customer list qualifies for trade-secret protection only if it meets statutory criteria); *MP Medical, Inc. v. Wegman*, 151 Wn.

App. 409, 420-21, 213 P.3d 931 (2009) (affirming summary judgment for defendant because there was no evidence that customer list qualified for trade-secret protection). The case for misappropriation is entirely speculative.

C. The Superior Court erred in entering a preliminary injunction without allowing Samuelson to see the allegations against him

The Superior Court's injunction is invalid for the independent reason that it effectively eliminates Samuelson's ability to pursue meaningful employment commensurate with his skills and experience on the basis of evidence that he was not allowed to see and a hearing he was not allowed to attend. Due process requires meaningful notice of the claims asserted and a meaningful opportunity to be heard, both of which were lacking here. That procedural error by the Superior Court requires reversal of the injunction.

1. The Due Process Clause requires notice and an opportunity to be heard

Both the United States Constitution and the Washington Constitution protect life, liberty, and property from deprivation without due process of law. U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3. The Supreme Court has repeatedly held that "[t]he core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998);

see also Wash. State Att'y Gen.'s Office v. Wash. Utils. & Transp. Comm'n, 128 Wn. App. 818, 831, 116 P.3d 1064, 1071 (2005); Henry J. Friendly, "Some Kind of Hearing," 123 U. Penn. L. Rev. 1267, 1280-81 (1975). And Washington courts have likewise held that prejudgment relief requires, at a minimum, a process that includes "the right to appear personally at the hearing" and "the right at the hearing to confront and cross-examine [any] adverse witness." *Rogoski v. Hammond*, 9 Wn. App. 500, 506, 513 P.2d 285 (1973).

The governing civil rules reflect that principle by requiring notice to the adverse party before a preliminary injunction may issue. CR 65(a); *accord* Fed. R. Civ. P. 65(a). The purpose of that requirement "is to allow the opposing party a fair opportunity to oppose the preliminary injunction," and injunctions issued without such notice are impermissible. *United States v. Microsoft Corp.*, 147 F.3d 935, 944 (D.C. Cir. 1998).

2. Due process required the Superior Court to balance Move's interest in secrecy with Samuelson's right to know the evidence against him

A trial court has discretion to protect the confidentiality of information by entering a protective order in appropriate cases. Here, for example, the parties did not dispute that a protective order covering some of the information in the litigation could be appropriate. But the application of a protective order to a particular piece of information

requires a specific showing of good cause. *In re Bank One Sec. Litig.*, 222 F.R.D. 582, 586 (N.D. Ill. 2004) (“Once a protective order is entered, a party must continue to show good cause for confidentiality when challenged.”); see *Shingara v. Skiles*, 420 F.3d 301, 305-06 (3d Cir. 2005). And to show good cause, “the party must show that specific prejudice or harm will result” from disclosure. *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 422, 204 P.3d 944 (2009). To make that showing, “[u]nsubstantiated allegations of harm will not suffice”; instead, “[w]here possible, the party must provide specific factual demonstrations supported by affidavits and concrete examples rather than by broad or conclusory allegations of potential harm.” *Id.*

Most of the cases applying the good-cause standard to protective orders have involved orders that merely prohibited *public* disclosure of information at issue in the litigation. In such cases, courts must consider whether a party’s interest in confidentiality outweighs the public interest in free discussion of judicial proceedings. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). But this case involves a protective order restricting disclosure of information *to a party*, and the good-cause standard is accordingly far more demanding because of the due-process requirement that parties have adequate notice of and meaningful opportunity to be heard on the allegations against them.

To determine whether there is good cause to restrict a party's access to information, courts apply the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); see *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 703, 257 P.3d 570 (2011) (recognizing that *Mathews* is the appropriate framework for determining the requirements of the Due Process Clause); *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (plurality opinion) (same). Under *Mathews*, courts weigh three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [opposing party's] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. Application of the *Mathews* framework to this case compels the conclusion that the AEO designations countenanced by the Superior Court constituted a serious violation of Samuelson's due-process rights.

3. The Attorneys' Eyes Only designations in this case were inconsistent with due process

All three of the *Mathews* factors lead to the conclusion that the Superior Court erred in allowing Move to use AEO designations to

prevent Samuelson from seeing key parts of the evidence against him, attending the hearing at which the court decided to enter an injunction, and learning the proposed terms of the injunction before it was entered.

First, Samuelson’s “private interest . . . affected” by the action in this case was substantial—the right to continue to perform meaningful work in his profession. *Mathews*, 424 U.S. at 335. Courts have repeatedly recognized the importance of such an interest. In *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 102-03, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963), for example, the Supreme Court held that due process required that a bar applicant be permitted to appear at a hearing and confront witnesses who testified that he lacked sufficiently good character to practice law. Similarly, in *Greene v. McElroy*, 360 U.S. 474, 508, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959), the Court set aside the revocation of a government contractor’s security clearance because it “severely limited” the contractor’s “work opportunities . . . on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure” in that it did not allow the contractor to confront his accusers. *Accord Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (requiring predeprivation hearing for termination of welfare benefits). Washington courts have also recognized that “[t]he following of a lawful vocation by which one may earn a

livelihood is a property right of which one may not be deprived without due process of law.” *Mahoney v. Sailors’ Union of the Pacific*, 43 Wn.2d 874, 877-78, 264 P.2d 1095 (1953). The deprivation at issue here thus warranted the protection of an adversarial hearing at which Samuelson was permitted to see the evidence against him.

Second, “the risk of an erroneous deprivation of such interest through the procedures used” was substantial, and it was probable that “additional or substitute procedural safeguards” protecting Samuelson’s meaningful opportunity to respond would have made a difference. *Mathews*, 424 U.S. at 335. As the Ninth Circuit has observed, “[o]ne would be hard pressed to design a procedure more likely to result in erroneous deprivations” than reliance on information that was not disclosed to the opposing party. *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 980 (9th Cir. 2012) (internal quotation marks omitted). “[T]he very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error.” *Id.* (internal quotation marks and citation omitted).

In this case, much of the evidence supporting the injunction was designated by plaintiffs as AEO. CP 1066-1230, 1360-63. Although Samuelson theoretically had the ability to respond to Move’s submissions, he lacked a meaningful ability to respond because he did not know what

he was responding to. Basic principles of due process “embrace[] not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.” *Morgan v. United States*, 304 U.S. 1, 18, 58 S. Ct. 773, 82 L. Ed. 1129 (1938). Nor is it sufficient that Samuelson’s counsel had access to the evidence. Counsel lacked Samuelson’s personal knowledge of the facts and was therefore at a severe disadvantage in attempting to respond without his input. *See Doe v. Dist. of Columbia*, 697 F.2d 1115, 1119 (D.C. Cir. 1983) (explaining that “courts must be . . . chary of issuing protective orders that restrict the ability of counsel and client to consult with one another”); *Penn, LLC v. Prosper Bus. Dev. Corp.*, No. 2:10-cv-0993, 2012 WL 5948363, at *5 (S.D. Ohio Nov. 28, 2012) (refusing to enter an AEO order that would prevent a party from viewing documents with its counsel in order to “assist with the preparation of [the] case”).

The risk of error was heightened here because not only the supporting evidence but also significant portions of Move’s proposed injunction were designated as AEO. CP 1683, 1712-30. Samuelson was therefore forced to oppose the injunction without knowing exactly what was sought to be enjoined.

The risk of an erroneous deprivation because of the AEO designations is not merely theoretical. In urging the court to grant an

injunction, Move used AEO designations to prevent Samuelson from seeing Move's allegations that

- Samuelson inappropriately disclosed a "confidential unlaunched strategy" about (a redacted subject) in a presentation he gave on (a redacted date). CP 652, 1058, 1208.
- Samuelson "sabotaged" Move's efforts to partner with (a redacted company) by making (a redacted statement) to (a redacted person at that company), knowing that the statement was false because Samuelson had been provided contrary information in an email on (a redacted date) from (a redacted person). CP 653, 1061, 1216-17.
- The day before he left Move, Samuelson "harvested" trade-secret information by restarting a discussion about (a redacted National Association of Realtors initiative) and urging NAR to (take a redacted action). CP 652, 1055, 1215.
- Shortly after Samuelson started working at Zillow, (a redacted Wall Street analyst) spoke with Move and displayed an awareness of (a redacted Move business), suggesting that Samuelson may have disclosed that confidential information. CP 652, 1059, 1209-10.

Because only Samuelson could know whether those allegations were false and explain what actually happened, the AEO designations made it impossible for him to present a targeted defense. And at the hearing where the allegations formed a cornerstone of Move's argument, Samuelson was excluded. CP 673; 5/9/14 Sealed Tr. 7-10, 17-18.

The likely value of additional procedural safeguards is further demonstrated by the centrality of the information to the case. Indeed, the Superior Court specifically referred to the AEO allegations and evidence

in explaining its decision to grant an injunction it had initially denied:
“[I]n light of the . . . depositions and the documents that have been filed,
many of them partially or completely under seal, some of them for
Attorneys’ Eyes Only, . . . the Court finds that there is a very different
picture than there was at the hearing a month ago.” 5/9/14 Tr. 15. And that
evidence was critical to several of the court’s findings of fact. CP 1659-60.
The court should have permitted Samuelson to see that evidence so that he
could respond to it.

Third, Move’s countervailing interest in keeping its evidence from
Samuelson was minimal. Because AEO designations are so restrictive,
“[a] party seeking this designation must describe the alleged harm it will
suffer from any disclosure ‘with a particular and specific demonstration of
fact, as distinguished from stereotyped and conclusory statements.’” *Penn,
LLC*, 2012 WL 5948363, at *4 (internal quotation marks omitted); *see id.*
at *5 (“The mere presence of ‘trade secrets’ does not automatically entitle
the producing party to an AEO protective order.”); *see also Nemir v.
Mitsubishi Motors Corp.*, 381 F.3d 540, 550 (6th Cir. 2004). Here, neither
Move nor the Superior Court made any effort to explain why particular
AEO designations were appropriate. Instead, Move relied on the
generalized assertion that “Samuelson should not have access to Plaintiffs’
trade secrets.” CP 715. That is far from sufficient to carry Move’s burden.

In fact, many of the AEO designations had nothing to do with trade secrets. For example, Move never suggested that the names of the persons to whom Samuelson allegedly disclosed confidential information, or the dates on which he did so, constitute trade secrets. CP 712, 1068-69. Disclosing that information could have allowed Samuelson to rebut Move's allegations; keeping it secret did nothing to protect any legitimate interest of Move's. Moreover, as revealed by even a cursory review of the injunction—much of which was subject to AEO designations—many of the designations protected only descriptions of trade secrets, not secrets themselves. CP 1653-55 (defining "Plaintiffs' Trade Secret Information").

In addition, all of the alleged trade secrets in this case constitute information that, according to Move, Samuelson already knows. Indeed, the designations even covered Samuelson's own email correspondence. *See, e.g.*, CP 1224. For that reason, the AEO designations did nothing to protect Move against disclosure of its trade secrets. Although Move attempted to justify the designations by asserting that it did not want to re-expose Samuelson to the information, the alleged secrets do not involve information that Samuelson might plausibly have forgotten in the three months between the time he left Move and the time the injunction was entered. They do not, for example, involve technical data or the details of a complex industrial process. Instead, they involve general concepts of

business strategy. Move utterly failed to explain how allowing Samuelson to know what information it claimed was secret would have risked disclosing anything legitimately confidential. Instead, the effect of the AEO designations was to hide from Samuelson the nature of the alleged trade secrets, crippling his ability to respond.

D. The injunction is impermissibly overbroad

Even assuming that an injunction of some kind was appropriate in this case, the injunction the Superior Court entered cannot stand because its restrictions are overly broad, vague, and excessive in duration.

1. In trade-secret litigation, injunctions must be narrowly tailored to ensure that they do not prohibit legitimate competition

A preliminary injunction should be issued only when the party who seeks relief shows “(1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.” *Kucera v. State Dep’t of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000) (internal quotation marks and citation omitted). Civil Rule 65 requires that an injunction be “specific in terms” and “describe in reasonable detail . . . the act or acts sought to be restrained.” CR 65(d). Under that rule, “[i]njUNCTIONS must be tailored to remedy the specific harms shown rather than to enjoin all possible

breaches of the law.” *Kitsap Cnty. v. Kev, Inc.*, 106 Wn.2d 135, 143, 720 P.2d 818 (1986). See *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992) (“An overbroad injunction is an abuse of discretion.”).

Those principles apply with special force to injunctions against the disclosure of trade secrets. Recognizing that broad trade-secret injunctions can inhibit legitimate competition, Washington law limits trade-secret protection to information that “[d]erives independent economic value . . . 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 that is “the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” RCW 19.108.010(4). A plaintiff has the burden of establishing the existence of a trade secret, and it may not rely on generalized assertions to do so. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 49, 738 P.2d 665 (1987). Instead, the plaintiff must “describe the subject matter of the trade secret with *sufficient particularity* to separate it from matters of general knowledge in the trade or of special knowledge of those persons . . . skilled in the trade.” *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1164-65 (9th Cir. 1998) (internal quotation marks and citations omitted) (requiring identification of specific dimensions and tolerances of device rather than general reference to its

design); *see also* *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 426, 204 P.3d 944 (2009) (plaintiff must provide “concrete examples to illustrate how [the information was] materially different from those of its competitors.”); *Woo v. Fireman’s Fund Ins. Co.*, 137 Wn. App. 480, 489, 154 P.3d 236 (2007).

Even if a plaintiff has established the existence of trade secrets, a trial court must carefully tailor the injunction to the specific trade secrets at issue, and it may not enjoin unobjectionable conduct. *Amazon.com, Inc. v. Powers*, No. C12-1911RAJ, 2012 WL 6726538, at *5-7 (W.D. Wash. Dec. 27, 2012); *see SI Handling Sys., Inc. v. Heisley*, 753 F.2d 1244, 1265-66 (3d Cir. 1985). For example, the Washington Supreme Court has held that “a former employee may use general knowledge, skills and experience acquired during the prior employment in competing with a former employer.” *Ed Nowogroski Ins., Inc.*, 137 Wn.2d at 450. An injunction therefore may not prohibit the employee from using such knowledge and skills. Injunctions are routinely denied (or reversed) when they are overbroad and seek to prevent fair competition as opposed to the use or disclosure of genuine trade secrets. *See, e.g., 3M v. Pribyl*, 259 F.3d 587, 595 n.2 (7th Cir. 2001) (“Because the purpose of trade secret law is to encourage innovation and development, protection should not extend beyond the limits needed to protect genuine trade secrets.”); *E.W. Bliss*

Co. v. Struthers-Dunn, Inc., 408 F.2d 1108, 1112-13 (8th Cir. 1969) (protection of trade secrets “is not a sword to be used by employers to retain employees by the threat of rendering them substantially unemployable in the field of their experience should they decide to resign”); *A Place for Mom, Inc. v. Leonhardt*, No. C06-457P, 2006 WL 2263337 (W.D. Wash. Aug. 4, 2006).

In addition, because it restricts speech, an injunction against the disclosure of alleged trade secrets is subject to scrutiny under both the First Amendment and Article I, Section 5 of the Washington Constitution. An injunction against such speech is a classic prior restraint, *see Alexander v. United States*, 509 U.S. 544, 550, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993), and it therefore carries “a heavy presumption of unconstitutionality.” *In re Marriage of Suggs*, 152 Wn.2d 74, 81, 93 P.3d 161 (2004). While an injunction narrowly limited to prevent disclosure of trade secrets is proper, an injunction that prohibits dissemination of information that is already publicly available is invalid—not only because publicly available information does not qualify for trade-secret protection but also because such an injunction cannot satisfy First Amendment scrutiny. Courts have therefore struck down such injunctions. *See, e.g., Sigma Chem. Co. v. Harris*, 794 F.2d 371, 375 (8th Cir. 1986) (remanding injunction so that defendant could “use that information which is already

in the public domain”); *In re Smith*, 310 S.W.3d 908, 918 (Tex. Ct. App. 2010) (“[A]n injunction that grants protection to information that is not confidential or proprietary is impermissibly overbroad.”).

Similarly, a vague injunction—one that may or may not reach protected speech—cannot survive First Amendment scrutiny. *In re Marriage of Suggs*, 152 Wn.2d at 84 (vacating order because it was overbroad, lacked the specificity required by the First Amendment, and “chill[ed] all of [defendant’s] speech about [plaintiff], including that which would be constitutionally protected, because it is unclear what she can and cannot say”); *see also Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994) (injunction that burdens speech must be “no broader than necessary to achieve its desired goals”).

2. The injunction fails to comply with the standards governing trade-secret injunctions

a. The prohibitions of the injunction are not tied to particular trade secrets

Although trade secrets must be defined with particularity, many of the restrictions in the injunction are broadly stated and have no apparent connection to any information that might enjoy trade-secret protection. Instead, they serve to act as a prohibition against fair competition. For example, Paragraph 6 of the injunction prevents Samuelson from engaging

in *any* activity that relates to the acquisition of listings, a touchstone of Zillow's business. CP 1663-64. Paragraphs 6(h), (i), and (j) prevent Samuelson from engaging in efforts to obtain direct feeds from multiple listing services, real-estate brokers, and others, even though Samuelson knew many of the relevant individuals long before he joined Move, and Zillow has been engaged in obtaining direct feeds for years. CP 1663-64. Similarly, Paragraph 4(a) prevents Samuelson from "efforts to sell leads" (Move and Zillow sell tools that agents can use to purchase or otherwise obtain leads that allow them to connect with buyers or sellers of real estate), and Paragraph 4(g) prohibits Samuelson from even "discussing the distribution or sale of leads" without distinguishing between proprietary methods of selling leads and publicly available methods of doing so, and without referring to any specific trade secrets that would be threatened by Samuelson's involvement in such broad efforts. CP 1662. In short, the injunction does not bar specific tactics that might constitute trade secrets but instead prohibits Samuelson from engaging in conduct that involves well-known industry strategies, including strategies previously used by Zillow. The order constitutes an improper use of a trade-secret injunction as an anticompetitive restraint.

b. The injunction is impermissibly vague

Many of the prohibitions in the injunction are so vague that it is impossible to tell what specific speech or conduct is prohibited. For example, Paragraph 5(c) seeks to prevent discussion of “industry relations strategy,” a term that could encompass almost anything an executive in the real-estate industry does. CP 1663. Paragraph 4(c) prevents Samuelson from “developing contract relationship management tools.” CP 1663. “Contract relationship management” is a broad term with numerous definitions, and hundreds of contract relationship management tools exist and are available to the public. CP 1686. The injunction does not specify what kind of tools it prohibits, much less what trade secrets could possibly justify such a restriction. Similarly, Paragraph 5(a) prohibits “[s]trategic planning regarding advertising displays on Zillow’s website.” CP 1663. That could mean anything from writing copy for banner ads to making key-word placements for advertisers to deciding that Zillow should abandon online advertising and rent space on billboards instead.

Likewise, Paragraph 4(d) prevents involvement with “purchasing or obtaining leads from third parties.” CP 1663. Zillow’s website, however, collects leads from consumers, and such leads are central to its business. It is therefore unclear whether Samuelson can participate in any activities related to Zillow’s core business.

The vagueness of the injunction is compounded by the Superior Court's restrictive sealing order. Even after the injunction was issued, significant portions of the injunction remained sealed and AEO as to Zillow. Only Samuelson and two other Zillow employees are permitted to see the entire injunction. CP 346, 399, 761-62. Other Zillow employees who might interact with Samuelson have no way of knowing, based on the version of the injunction they are allowed to see, whether they are impermissibly engaging Samuelson in, for example, "[d]iscussions of realtor.com's [REDACTED]," "[e]fforts to purchase or partner with [REDACTED]," or "[d]iscussions or efforts to develop or improve any product, service, or functionality that [REDACTED]." CP 785. That uncertainty greatly broadens the effective scope of the injunction by deterring even communications that fall outside the injunction's literal terms. *See Grayned v. City of Rockford*, 408 U.S. 104, 109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) (explaining that vague prohibitions "inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked") (internal quotation marks and ellipsis omitted). Such vague restraints are neither supported by Washington trade-secret law nor permitted by the First Amendment. *See In re Marriage of Suggs*, 152 Wn.2d at 83-84; *see also Reno v. ACLU*, 521 U.S. 844, 871-72, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (noting that a

vague prohibition “raises special First Amendment concerns because of its obvious chilling effect on free speech”).

c. Many of the alleged trade secrets have already been publicly disclosed or were never confidential

Many of the purported “trade secrets” covered by the injunction have been publicly disclosed and therefore cannot justify ongoing injunctive relief. For example, the injunction prohibits Samuelson from discussing “[REDACTED]” even though Move’s investment in Ylopo was publicly disclosed by the founder of Ylopo on his LinkedIn page. CP 846, 2050. Similarly, the injunction prohibits Samuelson from discussing the [REDACTED] [REDACTED] as well as the [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] CP 1653, 1738-39. Likewise, Samuelson is not permitted to discuss “Move’s plans to [REDACTED] [REDACTED]” CP 1654, even though [REDACTED] [REDACTED], and its features and pricing details are now public, CP 1691, 1703.

Still other supposed trade secrets were never confidential to begin with. For example, NAR's strategies for achieving a competitive advantage by [REDACTED]

[REDACTED] " CP 1655, [REDACTED]
[REDACTED] CP 1701, 1705. [REDACTED]

[REDACTED]

[REDACTED] *Id.* Further, the [REDACTED]

[REDACTED]

[REDACTED]

CP 1701-02, 1705. The plan to [REDACTED]

[REDACTED] which the injunction identifies as a trade secret, CP 1655, is

also publicly known. CP 1702, 1708. NAR's [REDACTED]

[REDACTED] a large part of the NAR plans and strategies

referred to in the injunction, CP 1655, is a matter of public record.

CP 1684-85, 1707-08. And the [REDACTED] CP 1655, is

an example of the type of integration [REDACTED] publicly promotes, and

which was performed by others even before [REDACTED] was created in

2003. CP 1698, 1708.

It is true that in some circumstances public information can be a protected trade secret when it is part of a "compilation." *Boeing Co.*, 108 Wn.2d at 50. But the injunction does not prohibit disclosure of

compilations; it prohibits discussion of basic facts. Once Samuelson was able to see the alleged trade secrets that Move had used to justify the injunction, Zillow and Samuelson provided extensive evidence showing that much of the information that Move had claimed to be secret was, in fact, readily accessible on the Internet or had been specifically disclosed by Move. CP 1738-44. Neither Move nor the Superior Court attempted to explain how that publicly available information could be entitled to trade-secret protection.

d. The restraints are of excessive duration

The injunction is overly broad not only in its subject-matter scope but also in its temporal scope. The Superior Court recognized that some of the alleged trade secrets deserved protection only for six months, and it limited a portion of the injunction to that period. CP 1663. But it also entered an injunction under which many of the alleged trade secrets are protected for nine months, for a year, or “until this matter is adjudicated,” which is likely to be a year or more after the injunction was entered. CP 1662-63. The court provided no explanation of why a longer scope of protection was appropriate for those alleged trade secrets, and none is apparent from the record. To the contrary, Move’s own CEO declared that “Samuelson’s knowledge of confidential information relating to Move’s business” would allow him only “to predict what Move will do *for several*

months in the future.” CP 36 (emphasis added). Likewise, in its submission to the Superior Court, Move emphasized its Quarterly Business Reviews, focusing on the first two quarters of 2014, which concluded on June 30, 2014, the day the injunction was entered. CP 1055-56, 1070-71, 1103-51. Any operational plans discussed in those reviews have been implemented by now, no longer justifying such broad protection. More generally, in light of the fast-paced nature of change for online businesses such as Move or Zillow, there is no justification for restraints extending as long as those imposed here.³

In addition, the injunction also contains no provision indicating that the “trade secrets” it covers will remain classified as such only as long as they remain confidential. Even as more information about Move’s activities becomes public, Samuelson will still be barred from discussing it. Thus, even assuming that the trial takes place in May 2015 as currently scheduled, the injunction will last far longer than reasonably necessary to protect any trade secrets.

³ In November, News Corp, a multinational mass media corporation, acquired Move. News Corp, *News Corp Completes Acquisition of Move, Inc.* (Nov. 14, 2014), <http://newscorp.com/2014/11/14/news-corp-completes-acquisition-of-move-inc>. And just last week, News Corp announced that Steven Berkowitz will step down as CEO of Move in January and will be replaced by Ryan O’Hara. News Corp, *News Corp Announces New Leadership at Move, Inc.* (Dec. 17, 2014), <http://investor.move.com/2014-12-17-News-Corp-Announces-New-Leadership-At-Move-Inc>.

CONCLUSION

The Superior Court's order entering a preliminary injunction should be reversed.

Respectfully submitted.

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GRAHAM & DUNN PC

By: *Estera Gordon / EDG*
Estera Gordon, WSBA No. 12655
egordon@grahamdunn.com
Clemens H. Barnes, WSBA No. 4905
cbarnes@grahamdunn.com

Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
Facsimile: (206) 340-9599

Attorneys for Petitioner Samuelson

PERKINS COIE LLP

By: *Eric D. Miller*
Eric D. Miller, WSBA No. 45214
EMiller@perkinscoie.com
Susan E. Foster, WSBA No. 18030
SFoster@perkinscoie.com
Kathleen M. O'Sullivan,
WSBA No. 27850
KOSullivan@perkinscoie.com

1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Petitioner Zillow, Inc.

CERTIFICATE OF SERVICE

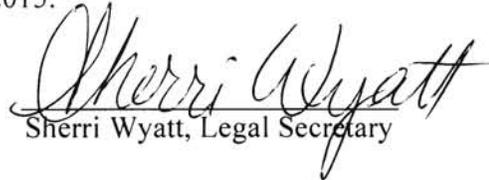
On January 13, 2015, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Jack M. Lovejoy, WSBA No. 36962 Via Hand Delivery
Lawrence R. Cock, WSBA No. 20326 Via U.S. Mail, 1st Class,
Cable, Langenbach, Kinerk & Bauer, LLP Postage Prepaid
Suite 3500, 1000 Second Avenue Building Via Overnight Delivery
Seattle, WA 98104-1048 Via Facsimile
Telephone: (206) 292-8800 Via E-filing
Facsimile: (206) 292-0494 Via E-mail
jlovejoy@cablelang.com
LRC@cablelang.com
kalbritton@cablelang.com
jpetersen@cablelang.com

Philip A. Talmadge, WSBA No. 6973 Via Hand Delivery
Sidney Tribe, WSBA No. 33160 Via U.S. Mail, 1st Class,
Talmadge Fitzprick Postage Prepaid
2775 Harbor Avenue SW Via Overnight Delivery
Third Floor, Suite C Via Facsimile
Seattle, WA 98126 Via E-filing
Telephone: (206) 574-6661 Via E-mail
phil@tal-fitzlaw.com
sidney@tal-fitzlaw.com

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

DATED this 13th day of January, 2015.


Sherri Wyatt, Legal Secretary

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