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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

MOVE, INC., a Delaware corporation,)	No. 14-2-07669-0 SEA
REALSELECT, INC., a Delaware corporation,)	
TOP PRODUCER SYSTEMS COMPANY, a)	DEFENDANT SAMUELSON'S MOTION
British Columbia unlimited liability company,)	TO MODIFY PROTECTIVE ORDER
NATIONAL ASSOCIATION OF)	
REALTORS®, an Illinois non-profit)	
corporation, and REALTORS®)	
INFORMATION NETWORK, INC., an Illinois)	
corporation,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
ZILLOW, INC., a Washington corporation,)	
ERROL SAMUELSON, an individual, and)	
DOES 1-20,)	
)	
Defendants.)	

I. RELIEF REQUESTED AND GROUNDS

Defendant Samuelson asks the court to modify paragraph 8 (“attorneys’ eyes only”) and paragraph 9 (“persons allowed access to ‘confidential’ information”) of the Protective Order herein, entered April 4, 2014, to allow Samuelson himself (not just his lawyer) to have access to any documents or information plaintiffs contend is confidential or trade secret information supporting their claim that Samuelson possesses or knows confidential or trade secret information belonging to plaintiffs which Samuelson has used or disclosed, or inevitably will use or disclose, in his new position with Zillow.

1 Plaintiffs' lawyer writes in a letter this morning, April 15, to Samuelson's counsel:
2 "Unless the Court modifies its Protective Order, Mr. Samuelson will be excluded from any
3 deposition where the trade secrets of a plaintiff may be discussed, he will be excluded from
4 viewing any 'Attorneys' Eyes Only' documents, and he will be excluded from any Court
5 proceeding where trade secrets of a plaintiff may be discussed." That can't be allowed to
6 happen.

7 Fairness requires that if plaintiffs say Errol Samuelson has or knows trade secret and
8 confidential information which justifies putting him out of work, he cannot be precluded from
9 learning what those supposed secrets and confidential information are, in order to defend
10 himself.

11 **II. STATEMENT OF FACTS**

12 The Amended Complaint claims that Errol Samuelson has been exposed to "confidential
13 information" and "trade secrets" which he has used or disclosed, or will use or disclose, in his
14 new job with Zillow. We have discussed with plaintiffs' counsel the need to show "Attorneys'
15 Eyes Only" documents to Samuelson, so he can defend himself, but in his letter this morning,
16 quoted above, he says this will not be allowed without modification of the Order.

17 **III. STATEMENT OF ISSUES**

18 Are plaintiffs entitled to seek an injunction putting Samuelson out of work, on the basis
19 of alleged trade secrets and confidential information they claim he possesses and will inevitably
20 disclose, but refuse to let him see this supposed secret and confidential information, in order to
21 assist in his defense?

22 **IV. EVIDENCE RELIED ON**

23 Declaration of Clemens H. Barnes, and the letter from attorney Jack Lovejoy attached
24 thereto as Exhibit A, filed contemporaneously with this motion.

1 **V. ARGUMENT AND AUTHORITY**

2 Plaintiffs can't have it both ways. They can't say that Errol Samuelson has trade secret
3 and confidential information justifying putting him out of work, then preclude him from seeing
4 it. Although "Attorneys' Eyes Only" provisions are not uncommon in trade secret litigation,
5 there are times when only access to the information by the defendant himself will allow him to
6 effectively assist his counsel in defending him.

7 Keeping the trade secret away from the client seems reasonable and workable
8 when counsel can consult with experts who can serve as surrogates for the client
9 in explaining to counsel the significance of the disclosure, but there may be cases
in which only the client can provide the attorney with the guidance (he) needs to
make use of the disclosure.

10 Wright & Graham, 26 *Federal Practice and Procedure: Evidence* § 5652 (1992). This is such a
11 case.

12 This request does not seek access to "information" or "secrets" except "information and
13 secrets" plaintiffs contend Samuelson already knows. Samuelson does not seek personal access
14 to any other "secrets," just to what plaintiffs contend he already has or knows. And this request
15 does not seek similar access by Zillow. This solution strikes the proper balance between
16 protecting plaintiffs' secrets from Zillow, and Samuelson protecting himself.

17 The current provision for access to "Attorneys' Eyes Only" materials authorizes
18 disclosure of such documents or information to:

19 (d) Any person that a document, on its face, indicates has previously seen, or
20 has been sent the confidential information, such as authors, drafters, recipients
and copyholders of the documents or information . . .

21 This provision partly protects Samuelson, but it should be expanded to also include, as to
22 Mr. Samuelson himself, "any other such documents or information plaintiffs contend amount to
23 trade secrets or confidential information they claim Samuelson has and may wrongfully use or
24 disclose."

25 Paragraph 9 of the Protective Order provides that persons allowed access to
26 "confidential" information, include:

1 (c) Witnesses and prospective witnesses to the extent deemed necessary by
2 counsel to prepare for or give testimony regarding facts at issue in this litigation,
or to assist counsel in performing work in this litigation.

3 This provision, too, already appears to protect Samuelson, but should be modified by
4 inserting “including Mr. Samuelson,” after the words “prospective witnesses.”

5 Errol Samuelson has the right and need to see confidential or trade secret information that
6 plaintiffs will rely on to make their case against him. It’s his due process right:

7 The right to a hearing embraces not only the right to present evidence, but also a
8 reasonable opportunity to know the claims of the opposing party and to meet
them.

9 *Morgan v. U.S.*, 304 U.S. 1 (1938).

10 If it is information that he has not seen before, or that plaintiffs do not rely on to support
11 their claims, the proposed revisions to the Order do not apply. But Samuelson’s lawyers will
12 need his assistance in evaluating whether trade secrets or confidential information are actually
13 involved, whether it’s already public knowledge, and whether it has a relationship to his duties at
14 Zillow such that it will “inevitably” be used or disclosed. Samuelson needs to help his counsel
15 evaluate plaintiffs’ contentions.

16 VI. FORM OF PROPOSED ORDER

17 A form of the proposed Order is attached to the working copies of this motion provided
18 to the court, and is provided to plaintiffs’ counsel.

19 DATED this 15th day of April, 2014.

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