

1 I. NEEL CHATTERJEE (SBN 173985)
 nchatterjee@orrick.com
 2 JULIO C. AVALOS (SBN 255350)
 javalos@orrick.com
 3 ORRICK, HERRINGTON & SUTCLIFFE LLP
 1000 Marsh Road
 4 Menlo Park, CA 94025
 Telephone: +1-650-614-7400
 5 Facsimile: +1-650-614-7401

STEPHEN S. SMITH (SBN 166539)
 ssmith@greenbergglusker.com
 WILLIAM M. WALKER (SBN 145559)
 wwalker@greenbergglusker.com
 GREENBERG GLUSKER FIELDS
 CLAMAN & MACHTINGER LLP
 1900 Avenue of the Stars, 21st Floor
 Los Angeles, California 90067-4590
 Telephone: +1-310-553-3610
 Fax: +1-310-553-0687

Attorneys For Defendants STUDIVZ, LTD.,
 HOLTZBRINCK NETWORKS GMBH,
 HOLTZBRINCK VENTURES GMBH

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 7
 8 ANNETTE L. HURST (SBN 148738)
 ahurst@orrick.com
 9 ORRICK, HERRINGTON & SUTCLIFFE LLP
 10 The Orrick Building
 405 Howard Street
 11 San Francisco, CA 94105-2669
 Telephone: +1-415-773-5700
 12 Facsimile: +1-415-773-5759

13 Attorneys for Plaintiff
 FACEBOOK, INC.

14
 15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN JOSE DIVISION

18
 19 FACEBOOK, INC.,
 20 Plaintiff,
 21 v.
 22 STUDIVZ LTD., HOTLZBRINCK
 NETWORKS GmbH, HOLTZBRINCK
 23 VENTURES GmbH, and DOES 1-25,
 24 Defendant.

Case No. 5:08-cv-03468 JF
**STIPULATED [PROPOSED
 PROTECTIVE ORDER**

1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production of
3 confidential, proprietary, or private information for which special protection from public disclosure
4 and from use for any purpose other than prosecuting this litigation would be warranted. Accordingly,
5 the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order.
6 The parties acknowledge that this Order does not confer blanket protections on all disclosures or
7 responses to discovery and that the protection it affords extends only to the limited information or
8 items that are entitled under the applicable legal principles to treatment as confidential. The parties
9 further acknowledge, as set forth in Section 10, below, that this Stipulated Protective Order creates no
10 entitlement to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures
11 that must be followed and reflects the standards that will be applied when a party seeks permission
12 from the court to file material under seal.

13 2. DEFINITIONS

14 2.1 Party: any party to this action, including all of its officers, directors, employees,
15 consultants, retained experts, and outside counsel (and their support staff).

16 2.2 Disclosure or Discovery Material: all items or information, regardless of the
17 medium or manner generated, stored, or maintained (including, among other things, testimony,
18 transcripts, or tangible things) that are produced or generated in disclosures or responses to discovery
19 in this matter.

20 2.3 “Confidential” Information or Items: information (regardless of how generated,
21 stored or maintained) or tangible things that qualify for protection under standards developed under
22 F.R.Civ.P. 26(c).

23 2.4 “Highly Confidential – Attorneys’ Eyes Only” Information or Items:
24 extremely sensitive “Confidential Information or Items” whose disclosure to another Party or non-
25 party would create a substantial risk of serious injury that could not be avoided by less restrictive
26 means.

27 2.5 Receiving Party: a Party that receives Disclosure or Discovery Material from a
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1 Producing Party.

2 2.6 Producing Party: a Party or non-party that produces Disclosure or Discovery
3 Material in this action.

4 2.7 Designating Party: a Party or non-party that designates information or items that
5 it produces in disclosures or in responses to discovery as “Confidential” or “Highly Confidential –
6 Attorneys’ Eyes Only.”

7 2.8 Protected Material: any Disclosure or Discovery Material that is designated as
8 “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only.”

9 2.9 Outside Counsel: attorneys who are not employees of a Party but who are
10 retained to represent or advise a Party in this action.

11 2.10 House Counsel: attorneys who are employees of a Party.

12 2.11 Counsel (without qualifier): Outside Counsel and House Counsel (as well as
13 their support staffs).

14 2.12 Expert: a person with specialized knowledge or experience in a matter pertinent
15 to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a
16 consultant in this action and who is not a past or a current employee of a Party or of a competitor of a
17 Party’s and who, at the time of retention, is not anticipated to become an employee of a Party or a
18 competitor of a Party’s. This definition includes a professional jury or trial consultant retained in
19 connection with this litigation.

20 2.13 Professional Vendors: persons or entities that provide litigation support services
21 (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing,
22 storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

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24 3. SCOPE

25 The protections conferred by this Stipulation and Order cover not only Protected Material (as
26 defined above), but also any information copied or extracted therefrom, as well as all copies, excerpts,
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1 summaries, or compilations thereof, plus testimony, conversations, or presentations by parties or
2 counsel to or in court or in other settings that might reveal Protected Material.

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4 4. DURATION

5 Even after the termination of this litigation, the confidentiality obligations imposed by this
6 Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order
7 otherwise directs.

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9 5. DESIGNATING PROTECTED MATERIAL

10 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party
11 or non-party that designates information or items for protection under this Order must take care to
12 limit any such designation to specific material that qualifies under the appropriate standards. A
13 Designating Party must take care to designate for protection only those parts of material, documents,
14 items, or oral or written communications that qualify – so that other portions of the material,
15 documents, items, or communications for which protection is not warranted are not swept
16 unjustifiably within the ambit of this Order.

17 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
18 shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to
19 unnecessarily encumber or retard the case development process, or to impose unnecessary expenses
20 and burdens on other parties), expose the Designating Party to sanctions.

21 If it comes to a Party’s or a non-party’s attention that information or items that it
22 designated for protection do not qualify for protection at all, or do not qualify for the level of
23 protection initially asserted, that Party or non-party must promptly notify all other parties that it is
24 withdrawing the mistaken designation.

25 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order
26 (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered, material
27 that qualifies for protection under this Order must be clearly so designated before the material is
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1 disclosed or produced.

2 Designation in conformity with this Order requires:

3 (a) for information in documentary form (apart from transcripts of depositions
4 or other pretrial or trial proceedings), that the Producing Party affix the legend “CONFIDENTIAL” or
5 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” at the top of each page that contains
6 protected material. If only a portion or portions of the material on a page qualifies for protection, the
7 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
8 markings in the margins) and must specify, for each portion, the level of protection being asserted
9 (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

10 A Party or non-party that makes original documents or materials available for
11 inspection need not designate them for protection until after the inspecting Party has indicated which
12 material it would like copied and produced. During the inspection and before the designation, all of
13 the material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL –
14 ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants
15 copied and produced, the Producing Party must determine which documents, or portions thereof,
16 qualify for protection under this Order, then, before producing the specified documents, the
17 Producing Party must affix the appropriate legend (“CONFIDENTIAL” or “HIGHLY
18 CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) at the top of each page that contains
19 Protected Material. If only a portion or portions of the material on a page qualifies for protection, the
20 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
21 markings in the margins) and must specify, for each portion, the level of protection being
22 asserted (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
23 ONLY”).

24 (b) for testimony given in deposition or in other pretrial or trial proceedings,
25 that the Party or non-party offering or sponsoring the testimony identify on the record, before the
26 close of the deposition, hearing, or other proceeding, all protected testimony, and further specify any
27 portions of the testimony that qualify as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
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1 ONLY.” When it is impractical to identify separately each portion of testimony that is entitled to
2 protection, and when it appears that substantial portions of the testimony may qualify for protection,
3 the Party or non-party that sponsors, offers, or gives the testimony may invoke on the record (before
4 the deposition or proceeding is concluded) a right to have up to 20 days to identify the specific
5 portions of the testimony as to which protection is sought and to specify the level of protection being
6 asserted (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).
7 Only those portions of the testimony that are appropriately designated for protection within the 20
8 days shall be covered by the provisions of this Stipulated Protective Order.

9 Transcript pages containing Protected Material must be separately bound by
10 the court reporter, who must affix to the top of each such page the legend “CONFIDENTIAL” or
11 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” as instructed by the Party or non-
12 party offering or sponsoring the witness or presenting the testimony.

13 (c) for information produced in some form other than documentary, and for
14 any other tangible items, that the Producing Party affix in a prominent place on the exterior of the
15 container or containers in which the information or item is stored the legend “CONFIDENTIAL” or
16 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” If only portions of the information or
17 item warrant protection, the Producing Party, to the extent practicable, shall identify the protected
18 portions, specifying whether they qualify as “Confidential” or as “Highly Confidential – Attorneys’
19 Eyes Only.”

20 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
21 designate qualified information or items as “Confidential” or “Highly Confidential – Attorneys’ Eyes
22 Only” does not, standing alone, waive the Designating Party’s right to secure protection under this
23 Order for such material. If material is appropriately designated as “Confidential” or “Highly
24 Confidential – Attorneys’ Eyes Only” after the material was initially produced, the Receiving Party,
25 on timely notification of the designation, must make reasonable efforts to assure that the material is
26 treated in accordance with the provisions of this Order.

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1 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

2 6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party’s
3 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary
4 economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive its
5 right to challenge a confidentiality designation by electing not to mount a challenge promptly after the
6 original designation is disclosed.

7 6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating
8 Party’s confidentiality designation must do so in good faith and must begin the process by conferring
9 directly (in voice to voice dialogue; other forms of communication are not sufficient) with counsel for
10 the Designating Party. In conferring, the challenging Party must explain the basis for its belief that the
11 confidentiality designation was not proper and must give the Designating Party an opportunity to
12 review the designated material, to reconsider the circumstances, and, if no change in designation is
13 offered, to explain the basis for the chosen designation. A challenging Party may proceed to the next
14 stage of the challenge process only if it has engaged in this meet and confer process first.

15 6.3 Judicial Intervention. A Party that elects to press a challenge to a confidentiality
16 designation after considering the justification offered by the Designating Party may file and serve a
17 motion under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) that
18 identifies the challenged material and sets forth in detail the basis for the challenge. Each such motion
19 must be accompanied by a competent declaration that affirms that the movant has complied with the
20 meet and confer requirements imposed in the preceding paragraph and that sets forth with specificity
21 the justification for the confidentiality designation that was given by the Designating Party in the meet
22 and confer dialogue.

23 The burden of persuasion in any such challenge proceeding shall be on the
24 Designating Party. Until the court rules on the challenge, all parties shall continue to afford the
25 material in question the level of protection to which it is entitled under the Producing Party’s
26 designation.

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1 7. ACCESS TO AND USE OF PROTECTED MATERIAL

2 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed
3 or produced by another Party or by a non-party in connection with this case only for prosecuting,
4 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to the
5 categories of persons and under the conditions described in this Order. When the litigation has been
6 terminated, a Receiving Party must comply with the provisions of section 11, below (FINAL
7 DISPOSITION).

8 Protected Material must be stored and maintained by a Receiving Party at a location
9 and in a secure manner that ensures that access is limited to the persons authorized under this Order.

10 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise
11 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose
12 any information or item designated CONFIDENTIAL only to:

13 (a) the Receiving Party’s Outside Counsel of record in this action, as well as
14 employees of said Counsel to whom it is reasonably necessary to disclose the information for this
15 litigation and who have signed the “Agreement to Be Bound by Protective Order” that is attached
16 hereto as Exhibit A;

17 (b) the officers, directors, and employees (including House Counsel) of the
18 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed
19 the “Agreement to Be Bound by Protective Order” (Exhibit A);

20 (c) experts (as defined in this Order) of the Receiving Party to whom
21 disclosure is reasonably necessary for this litigation and who have signed the “Agreement to Be
22 Bound by Protective Order” (Exhibit A) ;

23 (d) the Court and its personnel;

24 (e) court reporters, their staffs, and professional vendors to whom disclosure
25 is reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by
26 Protective Order” (Exhibit A);

27 (f) during their depositions, witnesses in the action to whom disclosure is
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1 reasonably necessary and who have signed the “Agreement to Be Bound by Protective Order”
2 (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected
3 Material must be separately bound by the court reporter and may not be disclosed to anyone except as
4 permitted under this Stipulated Protective Order.

5 (g) the author of the document or the original source of the information.

6 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”

7 Information or Items. Unless otherwise ordered by the court or permitted in writing by the
8 Designating Party, a Receiving Party may disclose any information or item designated “HIGHLY
9 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

10 (a) the Receiving Party’s Outside Counsel of record in this action, as well as
11 employees of said Counsel to whom it is reasonably necessary to disclose the information for this
12 litigation and who have signed the “Agreement to Be Bound by Protective Order” that is attached
13 hereto as Exhibit A;

14 (b) Experts (as defined in this Order) (1) to whom disclosure is reasonably
15 necessary for this litigation, (2) who have signed the “Agreement to Be Bound by Protective Order,”
16 (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4, below, have been followed;

17 (c) the Court and its personnel;

18 (d) court reporters, their staffs, and professional vendors to whom disclosure
19 is reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by
20 Protective Order” (Exhibit A); and

21 (e) the author of the document or the original source of the information.

22 7.4 Procedures for Approving Disclosure of “HIGHLY CONFIDENTIAL –
23 ATTORNEYS’ EYES ONLY” Information or Items to “Experts”

24 (a) Unless otherwise ordered by the court or agreed in writing by the
25 Designating Party, a Party that seeks to disclose to an “Expert” (as defined in this Order) any
26 information or item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
27 ONLY” first must make a written request to the Designating Party that (1) sets forth the full name of
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1 the Expert and the city and state of his or her primary residence, (2) attaches a copy of the Expert's
2 current resume, and (3) identifies the Expert's current employer(s).

3 (b) A Party that makes a request and provides the information specified in the
4 preceding paragraph may disclose the subject Protected Material to the identified Expert unless,
5 within five court days of delivering the request, the Party receives a written objection from the
6 Designating Party. Any such objection must set forth in detail the grounds on which it is based, and
7 must provide times during which the Designating Party is available to meet and confer on the issue
8 during the succeeding three business days.

9 (c) A Party that receives a timely written objection must meet and confer with
10 the Designating Party (through direct voice to voice dialogue) to try to resolve the matter by
11 agreement. If no agreement is reached, the Party seeking to prevent the disclosure to the Expert may
12 file a motion within three court days of the meet and confer as provided in Civil Local Rule 7 (and in
13 compliance with Civil Local Rule 79-5, if applicable) seeking an order prohibiting the disclosure. No
14 disclosure shall be made pending the Court's resolution of the motion or withdrawal of the objection
15 by the Designating Party. Failure to bring the motion within the required time period shall be deemed
16 a withdrawal of the objection. Any such motion must describe the circumstances with specificity, set
17 forth in detail the reasons for why the disclosure to the Expert presents a risk of harm and why the
18 protection of this Order would not suffice to ameliorate such risk. In addition, any such motion must
19 be accompanied by a competent declaration in which the movant describes the parties' efforts to
20 resolve the matter by agreement (i.e., the extent and the content of the meet and confer discussions).
21 In any such proceeding the Party opposing disclosure to the Expert shall bear the burden of proving
22 that the risk of harm that the disclosure would entail (under the safeguards proposed) outweighs the
23 Receiving Party's need to disclose the Protected Material to its Expert.

24
25 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER**
26 **LITIGATION.**

27 If a Receiving Party is served with a subpoena or an order issued in other litigation
28 that would compel disclosure of any information or items designated in this action as

1 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” the Receiving
2 Party must so notify the Designating Party, in writing (by fax, if possible) immediately and in no
3 event more than three court days after receiving the subpoena or order. Such notification must include
4 a copy of the subpoena or court order.

5 The Receiving Party also must immediately inform in writing the Party who caused
6 the subpoena or order to issue in the other litigation that some or all the material covered by the
7 subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must deliver
8 a copy of this Stipulated Protective Order promptly to the Party in the other action that caused the
9 subpoena or order to issue.

10 The purpose of imposing these duties is to alert the interested parties to the existence
11 of this Protective Order and to afford the Designating Party in this case an opportunity to try to protect
12 its confidentiality interests in the court from which the subpoena or order issued. The Designating
13 Party shall bear the burdens and the expenses of seeking protection in that court of its confidential
14 material – and nothing in these provisions should be construed as authorizing or encouraging a
15 Receiving Party in this action to disobey a lawful directive from another court.

16
17 **9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

18 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
19 Material to any person or in any circumstance not authorized under this Stipulated Protective Order,
20 the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized
21 disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the
22 person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d)
23 request such person or persons to execute the “Acknowledgment and Agreement to Be Bound” that is
24 attached hereto as Exhibit A.

25
26 **10. FILING PROTECTED MATERIAL.** Without written permission from the Designating
27 Party or a court order secured after appropriate notice to all interested persons, a Party may not file in
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1 the public record in this action any Protected Material. A Party that seeks to file under seal any
2 Protected Material must comply with Civil Local Rule 79-5.

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4 11. FINAL DISPOSITION. Unless otherwise ordered or agreed in writing by the Producing
5 Party, within sixty days after the final termination of this action, each Receiving Party must return all
6 Protected Material to the Producing Party. As used in this subdivision, “all Protected Material”
7 includes all copies, abstracts, compilations, summaries or any other form of reproducing or capturing
8 any of the Protected Material. With permission in writing from the Designating Party, the Receiving
9 Party may destroy some or all of the Protected Material instead of returning it. Whether the Protected
10 Material is returned or destroyed, the Receiving Party must submit a written certification to the
11 Producing Party (and, if not the same person or entity, to the Designating Party) by the sixty day
12 deadline that identifies (by category, where appropriate) all the Protected Material that was returned
13 or destroyed and that affirms that the Receiving Party has not retained any copies, abstracts,
14 compilations, summaries or other forms of reproducing or capturing any of the Protected Material.
15 Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings,
16 motion papers, transcripts, legal memoranda, correspondence or attorney work product, even if such
17 materials contain Protected Material. Any such archival copies that contain or constitute Protected
18 Material remain subject to this Protective Order as set forth in Section 4 (DURATION), above.

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20 12. MISCELLANEOUS

21 12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to
22 seek its modification by the Court in the future.

23 12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective
24 Order no Party waives any right it otherwise would have to object to disclosing or producing any
25 information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no
26 Party waives any right to object on any ground to use in evidence of any of the material covered by
27 this Protective Order.

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IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

I, Annette L. Hurst, am the ECF User whose identification and password are being used to file this **STIPULATED PROTECTIVE ORDER**. Pursuant to General Order 45.X.B., I hereby attest that Stephen S. Smith, counsel for **Defendants**, has concurred in this filing.

Dated: November 21, 2008

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Annette L. Hurst /s/
Annette L. Hurst
Attorneys for Plaintiff
FACEBOOK, INC.

Dated: November 21, 2008

GREENBERG GLUSKER FIELDS CLAMAN &
MACHTINGER, LLP

/s/ Stephen S. Smith /s/
Stephen S. Smith
Attorneys for Defendants
STUDIVZ, LTD., HOLTZBRINCK
NETWORKS GMBH AND HOLTZBRINCK
VENTURES GMBH
Attorneys for Defendant

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: _____

Hon. Howard R. Lloyd
Magistrate Judge

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3
4 I, _____ [print or type full name], of _____ [print
5 or type full address], declare under penalty of perjury that I have read in its entirety and understand
6 the Stipulated Protective Order that was issued by the United States District Court for the Northern
7 District of California on [date] in the case of _____ **insert formal name of the case and**
8 **the number and initials assigned to it by the court**. I agree to comply with and to be bound by all
9 the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so
10 comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise
11 that I will not disclose in any manner any information or item that is subject to this Stipulated
12 Protective Order to any person or entity except in strict compliance with the provisions of this Order.

13 [FOR EXPERTS ONLY: I further agree to submit to the jurisdiction of the United States
14 District Court for the Northern District of California for the purpose of enforcing the terms of this
15 Stipulated Protective Order, even if such enforcement proceedings occur after termination of this
16 action.]

17 I hereby appoint _____ [print or type full name] of
18 _____ [print or type full address and telephone number]
19 as my California agent for service of process in connection with this action or any proceedings related
20 to enforcement of this Stipulated Protective Order.

21 Date: _____

22 City and State where sworn and signed: _____

23 Printed name: _____
24 [printed name]

25 Signature: _____
26 [signature]

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on November 21, 2008.

Dated: _____, 2008.

Respectfully submitted,

/s/ NAME HERE /s/
Name of Attorney