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10
11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**
13 **San Jose Division**

14 **Federal Trade Commission,**

15 **Plaintiff,**

16 **v.**

17 **Pricewert LLC d/b/a 3FN.net, Triple Fiber**
18 **Network, APS Telecom and APX Telecom,**
19 **APS Communications, and APS**
20 **Communication,**

21 **Defendant.**

Case No. C-09-2407 RMW

██████████ **STIPULATED**
PROTECTIVE ORDER FOR
THIRD PARTY REQUESTS TO
RELEASE DATA STORED ON
DEFENDANT'S DATA SERVERS

22 **STIPULATED PROTECTIVE ORDER FOR THIRD PARTY DATA REQUESTS**

23 To facilitate communication between third parties impacted by the Temporary Restraining
24 Order and Preliminary Injunction and the Receiver, and to protect against the disclosure of
25 protectable information contained in requests by such third parties to the Receiver, the
26 undersigned propose entry of the following Order. The parties acknowledge that this Order does
27 not confer blanket protections on all disclosures or responses to discovery and that the protection
28 it affords extends only to the limited information or items that are entitled under the applicable

██████████ Protective Order on Third Party
Data Requests - No. C-09-2407 RMW

1 legal principles to treatment as confidential. The parties further acknowledge that this Order
2 creates no entitlement to file Protected Material under seal, and that Civil Local Rule 79-5 sets
3 forth the procedures that must be followed for the filing of documents under seal and reflects the
4 standards that will be applied when a party seeks permission from the court to file material under
5 seal.

6 **DEFINITIONS**

7 For the purpose of this order, the following definitions shall apply:

- 8 1. **“Confidential” Information or Items**” means information (regardless of how generated,
9 stored or maintained) or tangible things that qualify for protection under standards
10 developed under Fed. R. Civ. P. 26(c).
- 11 2. **“Counsel** (without qualifier)”: Outside Counsel and House Counsel (as well as their
12 support staffs).
- 13 3. **“Data Center”** means any person or entity that contracts with third parties to house
14 computer servers and associated equipment, and provides the infrastructure to support
15 such equipment, such as power or environmental controls.
- 16 4. **“Day”** shall have the meaning prescribed by and time periods in this Order shall be
17 calculated pursuant to Fed. R. Civ. P. 6(a).
- 18 5. **“Defendant”** means Pricewert LLC also d/b/a 3FN.net, Triple Fiber Network, APS
19 Telecom, APX Telecom, APS Communications, APS Communication, and any other
20 names under which it does business, and any subsidiaries, corporations, partnerships, or
21 other entities directly or indirectly owned, managed, or controlled by Pricewert LLC.
- 22 6. **“Defendant Data Servers”** means computer servers and associated equipment owned,
23 leased, or controlled by the Defendant stored in a Data Center subject to the Temporary
24 Restraining Order, and any data stored on such computer servers or associated equipment.
- 25 7. **“Disclosure or Discovery Material”** means all items or information, regardless of the
26 medium or manner generated, stored, or maintained (including, among other things,
27 testimony, transcripts, or tangible things) that are produced or generated in disclosures or
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1 responses to discovery in this matter.

2 8. **“Document”** is synonymous in meaning and equal in scope to the usage of the term in the
3 Federal Rules of Civil Procedure 34(a), and includes writing, drawings, graphs, charts,
4 Internet sites, Web pages, Web sites, electronic correspondence, including e-mail and
5 instant messages, photographs, audio and video recordings, contracts, accounting data,
6 advertisements (including, but not limited to, advertisements placed on the World Wide
7 Web), FTP Logs, Server Access Logs, USENET Newsgroup postings, World Wide Web
8 pages, books, written or printed records, handwritten notes, telephone logs, telephone
9 scripts, receipt books, ledgers, personal and business canceled checks and check registers,
10 bank statements, appointment books, computer records, and other data compilations from
11 which information can be obtained and translated. A draft or non-identical copy is a
12 separate document within the meaning of the term.

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

19 10. **“House Counsel”** means attorneys who are employees of a Party.

20 11. **“Party”** means any party to this action, including all of its officers, directors, employees,
21 consultants, retained experts, and outside counsel (and their support staff).

22 12. **“Preliminary Injunction”** means the Preliminary Injunction issued by this Court on June
23 15, 2009 in the matter of Federal Trade Commission v. Pricewert, LLC, Case No. C-09-
24 2407 RMW.

25 13. **“Professional Vendors”** persons or entities that provide litigation support services (e.g.,
26 photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing,
27 storing, retrieving data in any form or medium; etc.) and their employees and
28

subcontractors.

14. **“Protected Material”** means a Third Party Data Request. Information contained in a Third Party Data Request that is publicly available or obtained by lawful process independent of the Receivership order shall not be considered Protected Material.
15. **“Outside Counsel”** means attorneys who are not employees of a Party but who are retained to represent or advise a Party in this action.
16. **“Receiver”** means the temporary receiver appointed in this Order and any deputy receivers that may be named by the temporary receiver.
17. **“Receivership Order”** means the Order appointing a Temporary Receiver issued by this Court on June 15, 2009 in the matter of Federal Trade Commission v. Pricewert, LLC, Case No. C-09-2407 RMW.
18. **“Receiving Party”** means a Party that receives Protected Material, including the Receiver.
19. **“Temporary Restraining Order”** means the Temporary Restraining Order issued by this Court on June 2, 2009 in the matter of Federal Trade Commission v. Pricewert, LLC, Case No. C-09-2407 RMW.
20. **“Third Party Data Request”** means documents submitted by third parties to the Receiver or the Court for the purpose of identifying data for release pursuant to Section V.B of the Receivership Order.
21. **“Third Party Data Request Provider”** means a third party who submitted a Third Party Data Request.
22. **“Upstream Service Provider”** means any entity that provides the means to connect to the Internet, including, but not limited to, the subleasing of Internet Protocol addresses.

DURATION

§ I.

Even after the termination of this litigation, the confidentiality obligations imposed by this

1 Order shall remain in effect until a Third Party Data Request Provider agrees otherwise in writing
2 or a court order otherwise directs.

3 ACCESS TO AND USE OF PROTECTED MATERIAL

4 § II.

5 A. **Basic Principles.** A Receiving Party may use Protected Material that is disclosed
6 or produced by a Third Party Data Request Provider in connection with this case only for
7 prosecuting, defending, attempting to settle this litigation or related litigation, or for disputing any
8 claim made by the Third Party Data Request Provider. Such Protected Material may be disclosed
9 only to the categories of persons and under the conditions described in this Order.

10
11 B. **Disclosure of Protected Material.** Unless otherwise ordered by the Court or
12 permitted in writing by the Third Party Data Request Provider, a Receiving Party may disclose
13 Protected Material only to:

- 14 1. The parties in this action including the executives or other personnel of
15 such party who are participants with respect to policy decisions for the trial
16 or pretrial preparations with reference to this action and any personnel
17 having a good-faith, reasonable need for obtaining access to Protected
18 Material.
- 19 2. FTC Commissioners and other employees or consultants of the FTC, the
20 parties' respective counsel of record in this action, including the associates,
21 paralegal, secretarial, clerical and other regular and temporary employees
22 of such counsel assisting such counsel and including employees of any firm
23 retained to reproduce or store the Protected Material for use in accordance
24 with this Order.
- 25 3. The independent experts or consultants retained or consulted by the parties
26 in this action, including the employees of such experts or consultants who
27 are assigned to assist such experts or consultants.

4. The Court and related officials involved in this litigation or any other proceeding in which the Protected Material is used, including judges, magistrates, commissioners, referees, jurors, and other personnel of the Court.
5. Any person designated by the Court in the interest of justice, upon such terms as the Court deems proper.
6. The Receiving Party's Outside Counsel of record in this action, as well as employees of said Counsel to whom it is reasonably necessary to disclose the information for this litigation and who have signed the "Agreement to Be Bound by Protective Order" that is attached hereto as Exhibit A.
7. The officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A).
8. Experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A).
9. Court reporters, their staffs, and professional vendors to whom disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A).
10. During their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the "Agreement to Be Bound by Protective Order" (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Stipulated Protective Order.
11. The author of the document or the original source of the information.

12. The Receiver and its employees, agents, and professional vendors to whom disclosure of Protected Material is reasonably necessary.
13. Data Centers in possession of Defendant Data Servers, and their employees, agents, and professional vendors to whom disclosure of Protected Material is reasonably necessary.
14. The Defendant's Upstream Service Providers, and their employees, agents, and professional vendors to whom disclosure of Protected Material is reasonably necessary.
15. Foreign and domestic law enforcement authorities, including attorneys for the Department of Justice and their staff.

PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION.
§ III.

A. If a Receiving Party is served with a subpoena or an order issued in other litigation that would compel disclosure of any Protected Information, the Receiving Party must:

1. So notify the Third Party Data Request Provider, in writing immediately and in no event more than three court days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order; and
2. The Receiving Party must immediately inform in writing the Party who caused the subpoena or order to issue in the other litigation that some or all the material covered by the subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must deliver a copy of this Stipulated Protective Order promptly to the Party in the other action that caused the subpoena or order to issue.

B. The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to afford the Third Party Data Request Provider in this case

1 an opportunity to try to protect its confidentiality interests in the court from which the subpoena
2 or order issued. The Third Party Data Request Provider shall bear the burdens and the expenses
3 of seeking protection in that court of its Protected Material – and nothing in these provisions
4 should be construed as authorizing or encouraging a Receiving Party in this action to disobey a
5 lawful directive from another court.

6 7 **UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

8 **§ IV.**

9 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
10 Material to any person or in any circumstance not authorized under this Stipulated Protective
11 Order, the Receiving Party must immediately (a) notify in writing the Third Party Data Request
12 Provider of the unauthorized disclosures, (b) use its best efforts to retrieve all copies of the
13 Protected Material, (c) inform the person or persons to whom unauthorized disclosures were
14 made of all the terms of this Order, and (d) request such person or persons to execute the
15 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

16 17 **FILING OF PROTECTED MATERIAL**

18 **§ V.**

19 Without written permission from the Third Party Data Request Provider or a court order
20 secured after appropriate notice to all interested persons, a Party may not file in the public record
21 in this action any Protected Material. A Party that seeks to file under seal any Protected Material
22 must comply with Civil Local Rule 79-5.

23 24 **REDACTED FILINGS**

25 **§ VI.**

26 A. **Notice of Filing of Third Party Data Request.** Parties who wish to file without
27 seal Protected Material must provide five (5) days advance notice (a “Notice of Filing”), in
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1 writing to the Third Party Data Request Provider. Such notice shall include a copy of the
2 Protected Material that the Party seeks to file. Parties seeking to file Protected Material shall
3 make a good faith effort to redact information in accordance with Civil L.R. 3-17, and
4 information that appears to be proprietary user name, password, or login information.

5 **B. Obligation of Third Party Data Request Provider Seeking to Protect**

6 **Disclosure.** Any Third Party Data Request Provider in receipt of a Notice of
7 Filing that objects to the proposed filing shall, within five days of receipt of the
8 notice, serve a written response to the Party seeking to file the Protected Material
9 that states its objection to the disclosure. The response shall contain:

- 10 1. A statement justifying why the proposed filing contains
11 Confidential Information or Items;
- 12 2. If applicable, a statement why the Party's proposed redaction is
13 insufficient to protect the Confidential Information or Items;
- 14 3. If reasonable, a redacted version of the proposed filing; and
- 15 4. If it is not reasonable to offer a redacted version of the proposed
16 filing, a statement as to why it would not be reasonable.

17 **C. Disputes.** If, after a making a good faith attempt to resolve a dispute, the Party
18 seeking to file cannot reach an agreement with a Third Party Data Request
19 Provider about the filing, the Party seeking to file may provide a "Final Notice of
20 Intent to File" to the Third Party Data Request Provider. The Third Party Data
21 Request Provider shall have five days to file with the Court an opposition to the
22 proposed filing. The Third Party Data Request provider shall bear the burden of
23 proving why the proposed filing contains Confidential Information or Items that
24 should not be publicly filed subject to redaction. The Party seeking to file shall
25 have the right to respond to the opposition. However, the Party seeking to file
26 shall not make the challenged unsealed filing until the Third Party Data Request
27 Provider's objections are ruled on by the Court.

1 MISCELLANEOUS

2 § VII.

3 A. **Right to Further Relief.** Nothing in this Order abridges the right of any person
4 to seek its modification by the Court in the future.

5 B. **Right to Assert Other Objections.** By stipulating to the entry of this Protective
6 Order no Party waives any right it otherwise would have to object to disclosing or producing any
7 information or item on any ground not addressed in this Stipulated Protective Order. Similarly,
8 no Party waives any right to object on any ground to use in evidence of any of the material
9 covered by this Protective Order.

10
11
12 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

13
14 DATED: July 1, 2009

WILLARD K. TOM, General Counsel

/s Phil Tumminio

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18 Attorney for Third Party New Concept Business, SL

19 PURSUANT TO STIPULATION, IT IS SO ORDERED, this 6th day of

20 July, 2009, at _____ m.

21 

22 RONALD M. WHYTE
23 United States District Judge

1 **EXHIBIT A**

2 **ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND**

3 I, _____ [print or type full name], of _____
4 [print or type full address], declare under penalty of perjury that I have read in its entirety and
5 understand the Stipulated Protective Order that was issued by the United States District Court for
6 the Northern District of California on [date] in the case of FTC v. Pricewert, LLC, No. C-09-2407
7 RMW. I agree to comply with and to be bound by all the terms of this Stipulated Protective
8 Order and I understand and acknowledge that failure to so comply could expose me to sanctions
9 and punishment in the nature of contempt. I solemnly promise that I will not disclose in any
10 manner any information or item that is subject to this Stipulated Protective Order to any person or
11 entity except in strict compliance with the provisions of this Order.

12 I further agree to submit to the jurisdiction of the United States District Court for the
13 Northern District of California for the purpose of enforcing the terms of this Stipulated Protective
14 Order, even if such enforcement proceedings occur after termination of this action.

15 I hereby appoint _____ [print or type full name] of
16 _____ [print or type full address and telephone
17 number]

18 as my California agent for service of process in connection with this action or any proceedings
19 related to enforcement of this Stipulated Protective Order.

20 Date: _____

21 City and State where sworn and signed: _____

22 Printed name: _____

23 [printed name]

24 Signature: _____