

# EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION



REMBRANDT SOCIAL MEDIA, LP

PLAINTIFF,

v.

FACEBOOK, INC. and  
ADDTTHIS, INC.

DEFENDANTS.

CIVIL ACTION NO. 1:13-CV-158(TSE/TRJ)

**AGREED PROTECTIVE ORDER** *WITHOUT SEALING PROVISIONS*

*pf*

To expedite the flow of discovery information, to facilitate the prompt resolution of disputes over confidentiality of discovery information, to adequately protect information the parties are entitled to keep confidential while ensuring that only information the parties are entitled to keep confidential is subject to such treatment, to ensure that the level of protection is consistent with the level of sensitivity of the information, and to permit reasonably necessary uses of protected information by the parties in preparation for and conduct of trial, pursuant to Fed. R. Civ. P. 26(c), it is HEREBY ORDERED THAT:

**A. PROTECTED INFORMATION**

Protected Information shall mean all information provided by a Producing Party (whether a party to the action or a non-party) to a Receiving Party in this action, which is so designated by the Producing Party in accordance with Section C. Protected Information includes all such information or items, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things, testimony, transcripts, and tangible things). Protected Information includes (1) any information copied or extracted from designated

information; (2) all copies, excerpts, summaries, or compilations of designated information; and (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal designated information. A party may designate information as Protected Information only to the extent such information is confidential and should be subject to restricted use and access in accordance with one of the levels of protection set forth in Section B.

## **B. LEVELS OF PROTECTION**

This Order provides four levels of protection. The Producing Party shall designate the level of protection it believes in good faith is justified by the sensitivity of the information in accordance with sections C and D and I. A party to this action (the Receiving Party) may object to the designation in accordance with section E. The levels of protection are as follows:

### **1. Confidential**

Protected Information that qualifies for protection under Federal Rule of Civil Procedure 26(c) may be designated CONFIDENTIAL in accordance with Section C. Protected Information marked CONFIDENTIAL shall be made available by the Receiving Party only to the following persons and only after qualification in accordance with Section F:

(a) outside litigation counsel of record, who are not employees of a party to this action but are retained to represent or advise a party to this action, and their support personnel to whom it is reasonably necessary to disclose the information for this litigation;

(b) technical advisors and experts (consulting and testifying) and their support personnel to whom it is reasonably necessary to disclose the information for this litigation;

(c) independent litigation-support personnel providing services such as translation, graphics, design, photocopying, document processing, jury consulting, and trial consulting, as well as mock jurors, so long as each mock juror signs a non-disclosure agreement.

(d) up to three in-house counsel for each party and their support personnel to whom it is reasonably necessary to disclose the information for this litigation;

(e) up to three senior management level employees for each party who are assisting counsel or making decisions in connection with this action to whom it is reasonably necessary to disclose the information for this litigation;

(f) up to two in-house technical analysts for each party and one in-house financial analyst for each party to whom it is reasonably necessary to disclose the information for this litigation;

(g) court personnel, court reporters, videographers, and mediators;

(h) with respect to a particular document, any person shown on the face of the document (or who is otherwise established) to have been an author or recipient of the document or have personal knowledge of the document's contents.

## **2. Confidential Outside Counsel Only**

Protected Information designated CONFIDENTIAL OUTSIDE COUNSEL ONLY shall be available only to the persons who are qualified for access to CONFIDENTIAL information under sections B(1)(a),(b),(c),(g), or (h). Protected information may also be designated CONFIDENTIAL OUTSIDE COUNSEL ONLY – SOURCE CODE or CONFIDENTIAL – OUTSIDE COUNSEL ONLY – SUBJECT TO PROSECUTION BAR. Materials designated CONFIDENTIAL OUTSIDE COUNSEL ONLY – SOURCE CODE and CONFIDENTIAL – OUTSIDE COUNSEL ONLY – SUBJECT TO PROSECUTION BAR are a type of CONFIDENTIAL OUTSIDE COUNSEL ONLY material; however, mock jurors shall not have access to CONFIDENTIAL OUTSIDE COUNSEL ONLY – SOURCE CODE materials.

**Exclusions.**

Material and/or information contained therein is not Confidential or Confidential Outside Counsel Only if it is disclosed in a publically available printed publication (e.g., advertising materials), is otherwise known to the general public, was disclosed in a document submitted to any governmental entity without a request for confidential treatment, was known to the recipient without obligation of confidentiality before the producer disclosed it, or is or becomes known to the recipient without obligation of confidentiality by means not constituting a breach of this Order.

If the accuracy or truth of publicly available rumors or speculation may be confirmed or denied only through the review of Protected Information, then the accuracy or truth of the publicly available rumor or speculation shall not be considered to be in the public domain. For example, unsubstantiated media speculations about a new product or service that are confirmed to be accurate through access to Protected Information does not mean that the confirmation is public information. Such confirmatory information is explicitly included in the definition of "Protected Information" set forth above.

**C. DESIGNATION OF PROTECTED INFORMATION**

**1. How to Designate**

In order to invoke the protection provided by this Order the Producing Party shall designate Protected Information as follows:

- a. Mark documents or things containing the Protected Information with the level of protection (CONFIDENTIAL or CONFIDENTIAL OUTSIDE COUNSEL ONLY or CONFIDENTIAL OUTSIDE COUNSEL ONLY – SOURCE CODE or CONFIDENTIAL –

OUTSIDE COUNSEL ONLY – SUBJECT TO PROSECUTION BAR) claimed at the time of production, or, if not practicable to mark, otherwise notify the receiving party in writing.

b. State the level of protection on the record in a deposition. If no designation is stated on the record, the deposition testimony shall be deemed as CONFIDENTIAL OUTSIDE COUNSEL ONLY for ten days after the deposition, during which time the Producing Party may designate a different level of protection in writing.

**2. Inadvertent Failure to Designate**

Inadvertent failure to designate Protected Information may be cured by the Producing Party by promptly taking steps to designate the material upon discovery of the inadvertent failure. Upon being notified of the inadvertent failure to designate, the Receiving Party shall (1) treat the material as designated Protected Information pursuant to this Protective Order, and (2) to the extent that the Protected Information had been disclosed to others, shall take reasonable steps to recall any disseminated copies of the information previously disclosed and to prevent further disclosure of the Protected Information. An inadvertent failure to designate Protected Information is not a waiver.

**D. ACCESS TO SOURCE CODE**

Human readable computer program code files and associated comments and revision histories, as well as documents containing portions of source code, may be designated by a Producing Party as “CONFIDENTIAL OUTSIDE COUNSEL ONLY – SOURCE CODE.” Code files so designated, and authorized excerpts thereof, shall be made available only to persons who are authorized under this Order to receive CONFIDENTIAL OUTSIDE COUNSEL ONLY information or materials, and only under the following restrictions:

1. The code files shall be made available for inspection—upon request of a Receiving Party at least seven business days in advance—on a secured, standalone computer provided by the Producing Party during normal business hours, in a secured room without Internet access or network access to other computers, at the offices of counsel for the Producing Party. The computer shall be equipped with search and review tools as reasonably requested and provided by the Receiving Party, and be connected to a printer.

2. The Receiving Party shall not copy, remove, or otherwise transfer any portion of the source code onto any recordable media or recordable device. The Producing Party may visually monitor the activities of the Receiving Party's representatives during any source code review, but only to ensure that there is no unauthorized recording, copying, or transmission of the source code. All persons viewing Source Code shall sign on each day they view Source Code a log that will include the names of persons who enter the secured room to view the Source Code and when they enter and depart.

3. The Receiving Party may print paper copies of limited portions of source code that are reasonably necessary to attach to filings, pleadings, expert reports, or other papers, or for use as an exhibit at deposition or trial, but shall not print paper copies for the purposes of reviewing the source code other than electronically as set forth in paragraph D(1)-(2) in the first instance. At the end of each reviewing day, the Receiving Party will provide all printed copies to the Producing Party, which shall within two business days return three sets of production copies of the printed source code on colored paper including Bates numbers and the label CONFIDENTIAL OUTSIDE COUNSEL ONLY – SOURCE CODE. The Producing Party may challenge the amount of source code requested in hard copy form pursuant to the dispute resolution procedure and timeframes set forth in Paragraph F whereby the Producing Party is the

“Challenging Party” and the Receiving Party is the “Designating Party” for purposes of dispute resolution. For each printed portion of the Source Code, the Producing Party shall provide the corresponding file path and shall associate that file path with the printed source code.

4. The Receiving Party shall maintain all paper copies of any printed portions of the source code in a secured, locked area. The Receiving Party may request additional paper copies of selected portions of CONFIDENTIAL OUTSIDE COUNSEL ONLY – SOURCE CODE information only when reasonably necessary to replace those copies used in depositions or court filings and proceedings, such that the Receiving Party may maintain up to three paper copies of any portion of the source code at any given time. No electronic copies shall be made.

5. At the conclusion of this action (including any appeals) and unless the Court otherwise orders, printed copies of source code shall be returned to the Producing Party or, at the Producing Party’s choosing, the Receiving Party shall certify that all printed copies of source code have been destroyed.

#### **E. CHALLENGES TO PROTECTED INFORMATION DESIGNATIONS**

1. The Receiving Party may object in writing to any designation of information as Protected Information, thus becoming a “Challenging Party” under this Protective Order and rendering the party that designated the Protected Information the “Designating Party.” The Challenging Party shall initiate the dispute resolution by providing written notice of each designation it is challenging and describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made in accordance with this specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must begin the process by conferring directly (in voice to voice dialogue; other forms of communication are not sufficient) within 5 days of the date of service of notice. In conferring, the Challenging Party must explain



the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. The Challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first or establishes that the Designating Party is unwilling to participate in the meet and confer process in a timely manner.

2. In the event of such an objection, the designation shall remain in effect until the objection is resolved by negotiation or by the Court upon application of the Challenging Party. In the event the matter is put before the Court by the Challenging Party, the Designating Party shall have the burden of justifying the designation.

**F. QUALIFICATION FOR RECEIPT OF PROTECTED INFORMATION**

Before receiving any Protected Information any person entitled to receipt under Sections B(1)(b) or B(1)(d)-(f) above shall qualify as follows:

1. Sign the undertaking attached hereto as Exhibit A.
2. In the case of an employee of a Receiving Party, deliver a copy of the signed undertaking to the Producing Party at least five (5) days before the proposed access is given.
3. In the case of an advisor or expert who is not a party employee ("Expert"), deliver a copy of the signed undertaking to the Producing Party at least five (5) days before the proposed access is given, together with a copy of the expert's curriculum vitae and the following information: (1) the full name of the Expert and the city and state of his or her primary residence, (2) the Expert's current employer(s), (3) the identification of each person or entity from whom the Expert has received compensation or funding for work in his or her areas of expertise or to whom the expert has provided professional services at any time during the preceding five years,

(4) a list of all cases in connection with which the Expert has offered testimony (deposition or trial or declaration) or submitted an expert report during the preceding five years and the party or parties who retained the Expert, and (5) a list of any patents or patent applications in which the Expert is identified as an inventor or applicant, is involved in prosecuting or maintaining, or in which the Expert has any pecuniary interest. If the Expert believes any of this information is subject to a confidentiality obligation to a third party, then the Expert should provide whatever information the Expert believes can be disclosed without violating any confidentiality agreements.

4. The Producing Party shall have the right to object in writing to the proposed access prior to the expiration of the five (5) day waiting period. In the event of such an objection, no access will be given until the objection is resolved by negotiation or by Court Order. In the event the matter is put before the Court by the Receiving Party, the Producing Party shall have the burden of justifying the objection.

#### **G. ACCESS TO AND USE OF PROTECTED INFORMATION**

1. Unless otherwise permitted by written consent of the Producing Party or an order of the Court, Protected Information shall be used by the Receiving Party only for the conduct of this litigation, and not for any other litigation or business purpose. The Receiving Party shall diligently maintain the confidentiality of the Protected Information in accordance with its designation unless and until it becomes publicly available without violation of this Order, pursuant to Section B(3) above.

2. Protected Information must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this order.

3. Except as required by the Federal Rules in connection with service of a pleading or paper in this case, Plaintiff shall not disclose Protected Information of one Defendant to any other Defendant. To the extent the Federal Rules would require service of a pleading or paper in this case containing one Defendant's Protected Information on another Defendant, Plaintiff shall serve that pleading or paper only on the Defendant whose Protected Information is included in that document at the time of service. That Defendant must then redact any information to which it believes another Defendant should not have access and serve the redacted document on the other Defendant within three (3) business days of receipt.

4. Protected Information may be used at a deposition only to the extent that the witness and his or her counsel would otherwise be entitled to receive the Protected Information, and any person not entitled to such receipt shall be excluded from the deposition.

5. All transcripts, documents, things, or pleadings containing Protected Information shall be filed under seal in a manner prescribed by the Court for such filings.

**I. PROSECUTION BAR**

Documents that have been designated with the source-code designation pursuant to paragraph D of this Protective order shall be treated as CONFIDENTIAL – OUTSIDE COUNSEL ONLY – SUBJECT TO PROSECUTION BAR in accordance with this section. In addition, the Producing Party may designate highly confidential technical documents otherwise subject to designation under Section B(2) above as CONFIDENTIAL – OUTSIDE COUNSEL ONLY – SUBJECT TO PROSECUTION BAR.

For the period ending two years after the final resolution by non-appealable judgment or complete settlement of all claims against that Producing Party in the action, no natural person who receives the Protected Information of any Producing Party that is designated

CONFIDENTIAL – OUTSIDE COUNSEL ONLY – SUBJECT TO PROSECUTION BAR may participate directly or indirectly (e.g., by consulting or advising those directly involved) in the prosecution of any patent application claiming priority to or otherwise related to the patents asserted in this action, or any other patents or patent applications that relate to the subject matter of the patents-in-suit or the subject matter of the information designated under this paragraph before any foreign or domestic agency responsible for the issuance of patents, including the United States Patent and Trademark Office. For purposes of this paragraph, “prosecution” includes directly or indirectly drafting, amending, advising, or otherwise affecting the scope of patent claims. Prosecution includes, for example, original prosecution, reissue, and reexamination and other post grant proceedings.

Nothing in this provision shall preclude counsel of record for a party challenging a patent before a domestic or foreign agency from participating in any way in a reexamination, post-grant review, inter partes review, or other post grant proceeding.

This bar shall not preclude the communication to counsel in a proceeding in any patent office of (a) non-confidential prior art to be provided to the PTO; (b) non-confidential court filings or orders; and (c) non-confidential objective factual information about this Civil Action.

#### **J. PRIVILEGE LOGS**

The following documents need not be listed on a privilege log, and failure to do so shall not constitute a waiver of any privilege or immunity: Privileged or work product documents created after the commencement of this Action.

**K. INADVERTENT DISCLOSURE OR PRODUCTION  
OF PRIVILEGED OR PROTECTED INFORMATION**

1. The inadvertent disclosure of information subject to any privilege or immunity that would justify withholding the information shall not constitute a waiver of the privilege or immunity if the Producing Party notifies the Receiving Party promptly upon becoming aware of the inadvertent disclosure.

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

3. When a Producing Party gives notice to Receiving Parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B).

**L. A NON-PARTY'S PROTECTED INFORMATION  
SOUGHT TO BE PRODUCED IN THIS LITIGATION**

1. Nothing in these provisions should be construed as prohibiting a non-party from seeking additional protections.

2. In the event that a party is required, by a valid discovery request, to produce a non-party's confidential information in its possession, and the party is subject to an agreement with the non-party not to produce the non-party's confidential information, then the party shall:

- a. promptly notify in writing the Requesting Party and the non-party that some or all of the information requested is subject to a confidentiality agreement with a non-party;
- b. promptly provide the non-party with a copy of the Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific description of the information requested; and
- c. make the information requested available for inspection by the non-party.

3. If the non-party fails to object or seek a protective order from this court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the non-party's confidential information responsive to the discovery request. If the non-party timely seeks a protective order, the Producing Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the non-party before a determination by the Court.

#### **M. MISCELLANEOUS**

1. **Export Control**: Disclosure of Protected Information shall be subject to all applicable laws and regulations relating to the export of technical data contained in such Protected Information, including the release of such technical data to foreign persons or nationals in the United States or elsewhere. No Protected Information may leave the territorial boundaries of the United States of America. Without limitation, this prohibition extends to Protected Information (including copies) in physical and electronic form. The viewing of Protected Information through electronic means outside the territorial limits of the United States of America is similarly prohibited. The restrictions contained within this paragraph may be amended through the express written consent of the producing Party to the extent that such

agreed to procedures conform with applicable export control laws and regulations. Nothing in this paragraph is intended to remove any obligation that may otherwise exist to produce documents currently located in a foreign country.

2. Filing Protected Information. Without written permission from the Producing Party or a court order secured after appropriate notice to all interested persons, a party may not file in the public record in this action any Protected Information, but rather must seek to file under seal any Protected Information in compliance with Local Civil Rule 5.

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

#### **N. MODIFICATION**

1. Any party may apply to the Court for modification of this Order.
2. Any Producing Party may, without application to the Court, waive in writing, in whole or in part, the protection provided by this Order to its Protected Information.

#### **O. POST-LITIGATION PROVISIONS**

1. The provisions of this Order shall remain in place after the termination of this litigation, and this Court will retain jurisdiction for enforcement of the Order and the resolution of any dispute relating thereto.
2. Within 90 days after the final resolution of this litigation by settlement or a judgment not subject to appeal, each Receiving Party shall return, or destroy and certify destruction to the Producing Party, all documents and things received from the Producing Party containing

Protected Information or Protected Information. Notwithstanding the above, nothing in this order shall require the destruction of copies of court filings and orders, correspondence, or attorney work product, including e-mails. Furthermore, to the extent containing Protected Information, a Receiving Party may retain one archival copy subject to the provisions of this order of trial, discovery and hearing transcripts and exhibits, written discovery responses and exhibits, expert reports, and any contentions relating to infringement or invalidity. Nothing in this order shall require a Receiving Party to return or destroy information that is stored in a backup or disaster recovery system that is not intended for day-to-day access by users.

**P. RESPONSE TO COURT ORDER TO PRODUCE**

If a court or other governmental body subpoenas or otherwise orders a Receiving Party to produce documents or things embodying Protected Information, the Receiving Party shall immediately give notice in writing to the Producing Party or Parties. The Receiving Party shall promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this Protective Order. Such notification shall include a copy of this Protective Order. If no application to prevent compliance with the order is made to this Court within 10 business days of the notice, the Receiving Party may thereafter comply with the order. If application is made to this Court within 10 business days, the Receiving Party shall await resolution of the matter by this Court.

SIGNED AND ENTERED this 2<sup>nd</sup> day of April, 2013.

UNITED STATES ~~DISTRICT~~ JUDGE

*Magistrate*  
**/s/Thomas Rawles Jones, Jr.**

THOMAS RAWLES JONES, JR.  
U.S. MAGISTRATE JUDGE  
EASTERN DISTRICT OF VIRGINIA



**EXHIBIT A**

**Agreement to be bound by Protective Order**

I hereby acknowledge that I may receive Protected Information pursuant to my work in connection with Civil Action No. 1:13-CV-158(TSE/TRJ) titled *Rembrandt Social Media, LP v. Facebook, Inc. et al.*, pending in the United States District Court for Eastern District of Virginia (the "Litigation"). I acknowledge receipt of a copy of the Agreed Protective Order in the Litigation, and certify that I have read it and agree to comply with it. I agree to subject myself to the jurisdiction of the United States District Court for Eastern District of Virginia for the purpose of any proceedings relating to the Agreed Protective Order, and that I may be subject to sanctions imposed by the Court, including an order of contempt, if I fail to comply with the Agreed Protective Order.

Name (printed): \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_