

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

API TECHNOLOGIES, LLC,

Plaintiff

vs.

NO. 2:09-cv-147

- (1) FACEBOOK, INC.;
(2) AMAZON.COM, INC.;
(3) AMAZON WEB SERVICES LLC;
(4) AOL LLC;
(5) MAPQUEST, INC.;
(6) BEBO, INC.;
(7) TRUVEO, INC.;
(8) BEST BUY CO., INC.;
(9) CBS CORPORATION;
(10) CBS INTERACTIVE MEDIA INC.;
(11) CNET INVESTMENTS, INC.;
(12) LAST.FM LIMITED;
(13) THE DUN & BRADSTREET CORPORATION;
(14) HOOVER'S, INC.;
(15) GOOGLE INC.;
(16) ANDROID, INC.;
(17) THOMSON REUTERS CORPORATION;
(18) THOMSON REUTERS U.S. INC.;
(19) THOMSON REUTERS U.S.A. INC.;
(20) REUTERS AMERICA, LLC; and
YAHOO! INC.

Defendants.

STIPULATED PROTECTIVE ORDER

To expedite the flow of discovery materials, to facilitate the prompt resolution of disputes over confidentiality of discovery materials, to adequately protect information the parties are entitled to keep confidential, to ensure that only materials the parties are entitled to keep confidential are subject to such treatment, and to ensure that the parties are permitted reasonably

necessary uses of such materials in preparation for and in the conduct of trial, pursuant to Fed. R. Civ. P. 26(c), it is hereby ORDERED THAT:

**I. INFORMATION SUBJECT TO THIS ORDER**

Discovery materials produced in this case may be labeled as one of four categories: CONFIDENTIAL, CONFIDENTIAL OUTSIDE COUNSEL ONLY, RESTRICTED CONFIDENTIAL - SOURCE CODE, and RESTRICTED CONFIDENTIAL - SECURITY CRITICAL SOURCE CODE, as set forth in Items A-C below. All of the identified categories of information shall be identified collectively in this Order by the title "Protected Information."

**A. Information Designated as Confidential Information**

1. For purposes of this Order, "CONFIDENTIAL INFORMATION" shall mean all information or material produced for or disclosed to a receiving party that a producing party, including any party to this action and any non-party producing information or material voluntarily or pursuant to a subpoena or a court order, considers to constitute confidential technical, sales, marketing, financial, or other commercially sensitive information, whether embodied in physical objects, documents, or the factual knowledge of persons, and which has been so designated by the producing party. Any CONFIDENTIAL INFORMATION obtained by any party from any person pursuant to discovery in this litigation may be used only for purposes of this litigation.

2. Any document or tangible thing containing or including any CONFIDENTIAL INFORMATION may be designated as such by the producing party by marking it "CONFIDENTIAL" prior to or at the time copies are furnished to the receiving party.

3. All CONFIDENTIAL INFORMATION not reduced to documentary, tangible or physical form or which cannot be conveniently designated as set forth in paragraph 2,

shall be designated by the producing party by informing the receiving party of the designation in writing.

4. Any documents (including physical objects) made available for inspection by counsel for the receiving party prior to producing copies of selected items shall initially be considered, as a whole, to constitute CONFIDENTIAL INFORMATION (unless otherwise designated at the time of inspection) and shall be subject to this Order. Thereafter, the producing party shall have a reasonable time to review and designate the appropriate documents as CONFIDENTIAL INFORMATION (or otherwise as appropriate) prior to furnishing copies to the receiving party.

5. The following information is not CONFIDENTIAL INFORMATION:

a. Published advertising materials;

b. Any information that is or, after its disclosure to a receiving party, becomes part of the public domain as a result of publication not involving a violation of this Order;

c. Any information that the receiving party can show was already publicly known prior to the disclosure;

d. Any information that the receiving party can show by written records was received by it from a source who obtained the information lawfully and under no obligation of confidentiality to the producing party.

6. Documents designated CONFIDENTIAL and information contained therein shall be available only to:

a. Outside litigation counsel of record and supporting personnel employed in the law firm(s) of outside litigation counsel of record, such as attorneys, paralegals, legal translators, legal secretaries, legal clerks and shorthand reporters;

b. Technical advisers and their necessary support personnel, subject to the provisions of paragraphs III(A)-III(F) herein, and who have signed the form attached hereto as Attachment A; the term “technical adviser” shall mean independent outside expert witnesses or consultants with whom counsel may deem it necessary to consult and whom complies with paragraph 15;

c. Up to two in-house counsel with responsibility for managing this litigation and one officer level employee of a party who either has responsibility for making decisions dealing directly with the litigation in this action or who is assisting outside counsel in preparation for proceedings in this action, except that defendants' in-house counsel and employees under this paragraph shall not have access to any co-defendants' CONFIDENTIAL INFORMATION;

d. The Court, its personnel and stenographic reporters (under seal or with other suitable precautions determined by the Court); and

e. Independent legal translators retained to translate in connection with this action; independent stenographic reporters and videographers retained to record and transcribe testimony in connection with this action; graphics, translation, or design services retained by counsel for purposes of preparing demonstrative or other exhibits for deposition, trial, or other court proceedings in the actions; non-technical jury or trial consulting services not including mock jurors.

**B. Information Designated Confidential Outside Counsel Only**

1. The CONFIDENTIAL OUTSIDE COUNSEL ONLY designation is reserved for CONFIDENTIAL INFORMATION that constitutes proprietary marketing, financial, sales, web traffic, research and development, or technical data/information or commercially sensitive competitive information, including, without limitation, CONFIDENTIAL INFORMATION obtained from a nonparty pursuant to a current Nondisclosure Agreement ("NDA"), CONFIDENTIAL INFORMATION relating to future products not yet commercially released, strategic plans, and settlement agreements or settlement communications, the disclosure of which is likely to cause harm to the competitive position of the producing party. Documents marked CONFIDENTIAL OUTSIDE ATTORNEYS' EYES ONLY shall be treated as if designated CONFIDENTIAL OUTSIDE COUNSEL ONLY. In determining whether information should be designated as CONFIDENTIAL OUTSIDE COUNSEL ONLY, each party agrees to use such designation only in good faith.

2. Documents designated CONFIDENTIAL OUTSIDE COUNSEL ONLY and information contained therein shall be available only to United States Citizens or Permanent Residents in the following categories:

a. Outside litigation counsel of record as of the date of this Protective Order and supporting personnel employed in the law firm(s) of outside litigation counsel of record, such as attorneys, paralegals, legal translators, legal secretaries, legal clerks and shorthand reporters. The parties reserve the right to object to additional counsel that appear on behalf of a party. To the extent that a party raises an objection to an additional counsel, such counsel may be prohibited from accessing CONFIDENTIAL OUTSIDE COUNSEL ONLY documents for a period no longer than five (5) business days and the parties agree to negotiate his or her access to CONFIDENTIAL OUTSIDE COUNSEL ONLY documents in good faith. If

the objecting party files a motion for protective order, after a good faith meet and confer, the ban on the access to CONFIDENTIAL OUTSIDE COUNSEL ONLY documents shall extend until the motion is decided. The motion shall be briefed on an expedited basis where responsive briefs are due five (5) business days after the moving brief is filed;

b. Technical advisers and their necessary support personnel, subject to the provisions of paragraphs III(A)-III(F) herein, and who have signed the form attached hereto as Attachment A;

c. The Court, its personnel and stenographic reporters (under seal or with other suitable precautions determined by the Court); and

d. Independent legal translators retained to translate in connection with this action; independent stenographic reporters and videographers retained to record and transcribe testimony in connection with this action; graphics, translation, or design services retained by counsel for purposes of preparing demonstrative or other exhibits for deposition, trial, or other court proceedings in the actions; non-technical jury or trial consulting services not including mock jurors.

**C. Information Designated Restricted Confidential - Source Code or Restricted Confidential – Security Critical Source Code**

1. Native source code shall be produced in native format as it is organized and kept in the ordinary course of business. Native source code may either be produced for inspection or produced on an external media to the receiving party.

a. If native source code is produced for inspection, the following provisions apply:

(1) Unless the Producing Party designates source code as “RESTRICTED CONFIDENTIAL – SECURITY CRITICAL SOURCE CODE” according to

the provisions in part C(1)(a)(5) below, all source code produced shall be deemed "RESTRICTED CONFIDENTIAL—SOURCE CODE."

(2) Any source code that is produced shall be made available for inspection in electronic format at the producing party's option, at (1) the San Francisco or Menlo Park area offices of the producing party's primary outside counsel of record in this action; (2) a single, third-party site located within the San Francisco or Menlo Park area; or (3) a location mutually agreed upon by the receiving and producing parties. Any location under (1), (2) or (3) above shall be in the continental United States. Said source code shall be made available during regular business hours (8:00 a.m. to 6:00 p.m. local time) on three business days notice. Access will also be provided on Saturdays and Sundays, so long as actual notice is provided to the producing party by not later than 9:00 a.m. local time on the Friday before the weekend for which access is requested. Access from 6:00 p.m. through 10:00 p.m. local time on weekdays shall be provided so long as actual notice of such need is provided to the producing party by not later than 4:00 p.m. local time on the preceding day. The requesting party shall make its best efforts to restrict its access to normal business hours, and the producing party may seek court relief if the requesting party is unreasonably utilizing after-hours and weekend access. Two "stand-alone" computers shall be provided at each of the secure offices containing the source code. Subject to the other provisions of this Protective Order, the requesting party may bring with it to the secure offices a cell phone and laptop computer, and the secure offices will be outfitted with either wired or wireless Internet access. Beginning one week prior to the beginning of trial and continuing through the end of trial, access to said source code shall be provided within twenty miles of the trial location. Prior to trial, the parties agree to negotiate in good faith the manner and logistics of said source code access. For purposes of this Order, the

term "Inspection Session" shall mean any reasonably contiguous series of days in which the Receiving Party is conducting an inspection of the source code.

(3) All source code will be made available by the producing party to the receiving party's outside counsel and/or experts in a private room on a secured computer without Internet access or network access to other computers, as necessary and appropriate to prevent and protect against any unauthorized copying, transmission, removal or other transfer of any source code outside or away from the computer on which the source code is provided for inspection (the "Source Code Computer"). The producing party shall be obligated to install such tools or programs necessary to review and search the code produced on the platform produced. The receiving party's outside counsel and/or experts may request that other commercially available licensed software tools for viewing and searching source code be installed on the secured computer. The receiving party must provide the producing party with the installers/executables for such software tool(s) at least two days in advance of the inspection.

The receiving party's outside counsel and/or expert shall be entitled to take notes relating to the source code but may not copy substantial portions of the source code into the notes. For purposes of this provision, fifteen or more lines of code is "substantial." No copies of all or any portion of the source code may leave the room in which the source code is inspected except as otherwise provided herein. Further, no other written or electronic record of the source code is permitted except as otherwise provided herein.

(4) The producing party shall make available a laser printer with commercially reasonable printing speeds for on-site printing during inspection of the code. The receiving party may print portions of the source code only when reasonably necessary to facilitate the receiving party's preparation of the case, including but not limited to when



reasonably necessary to prepare any filing with the Court or to serve any pleadings or other papers on any other party; to prepare internal attorney work product materials; or to prepare other necessary case materials such as testifying expert reports, consulting expert written analyses, and related drafts and correspondences. Upon printing any such portions of source code, the printed pages shall be collected by the producing party. The producing party shall Bates number, copy, and label "RESTRICTED CONFIDENTIAL - SOURCE CODE" any pages printed by the receiving party. The producing party may object to the production of the source code for good cause within three (3) business days. Following the producing party's objection, the parties will meet and confer on the issue. If the issue is not resolved, the producing party shall file a motion for a protective order within five (5) business days of the meet and confer. In the absence of any objection, the Producing Party shall provide one copy set of such pages to the receiving party within three (3) business days and shall retain one copy set. The printed pages shall constitute part of the source code produced by the producing party in this action.

(5) Google and Yahoo have asserted that certain source code raises more serious concerns than the usual security concerns associated with source code. Therefore, the parties agree that certain limited portions of source code for Google's OpenID, AuthSub, ClientLogin, and OAuth products and Yahoo's OAuth and BBAuth products may, if produced, be designated "RESTRICTED CONFIDENTIAL – SECURITY CRITICAL SOURCE CODE." The parties further agree that this provision is not an admission of, or evidence that, source code for the above referenced products is relevant or discoverable. If it is determined that source code from other products qualifies for this designation, the parties shall meet and confer to discuss the producing party's request. Printouts of source code designated "RESTRICTED CONFIDENTIAL – SECURITY CRITICAL SOURCE CODE" shall be produced as described

above in Paragraph 1(C)(a)(4). After production of the source code printouts, however, the parties shall engage in a good faith meet and confer within a reasonable time based on the circumstances (*e.g.*, 3 business days) to discuss the appropriate additional security protections required for this source code during pre-trial activities, including determining whether the parties can stipulate to the relevant functionality of the source code and whether any of the provisions of Paragraph 1(C)(a) need to be modified. If the parties agree to modify provisions of this Paragraph 1(C)(a), the parties shall file a stipulation with the Court indicating the agreed changes. If the parties are unable to agree on proper procedures for this source code, the producing party shall file a motion for protective order with the Court within five (5) business days after the meet and confer concludes. No electronic or paper copies of this source code may be made until the parties agree on appropriate procedures to protect such source code, or until the Court resolves any motion for a protective order regarding those procedures. The parties shall meet and confer to discuss security concerns related to the use of the source code at trial at an appropriate time prior to trial but no less than 60 days before the final pretrial conference. The parties agree that this provision is meant to apply only to small portions of the source code likely to be produced in this case and will be used only when absolutely necessary. The parties further agree that source code designated “RESTRICTED CONFIDENTIAL – SECURITY CRITICAL SOURCE CODE” may be used to help prove the receiving party's case and the producing party may not demand security procedures that unnecessarily hinder or otherwise prevent the receiving party's ability to use the source code in pleadings, expert reports, at trial, etc, when necessary.

(6) A list of names of persons who will view the source code will be provided to the producing party in conjunction with any written (including email) notice requesting inspection. The producing party shall be entitled to have a person observe all

entrances and exits from the source code viewing room. Except for observing entrances and exits from the source code viewing room, the Producing Party shall not otherwise videotape or monitor review of source code by the Receiving Party.

(7) Unless otherwise agreed in advance by the parties in writing, following each inspection, the receiving party's outside counsel and/or experts shall remove all notes, documents, laptops, and all other materials from the room that may contain work product and/or attorney-client privileged information. The producing party shall not be responsible for any items left in the room following each inspection session.

(8) The receiving party shall maintain and store any paper copies of the source code at the offices of its outside counsel or experts, in a manner that prevents duplication of or unauthorized access to the source code, including, without limitation, storing the source code in a locked room or cabinet at all times when it is not in use.

(9) The receiving party may include excerpts of source code in a pleading, exhibit, expert report, discovery document, deposition transcript, other Court document, or any drafts of these documents ("SOURCE CODE DOCUMENTS"). The receiving party shall only include such excerpts as are reasonably necessary for the purposes for which such part of the source code is used.

(10) To the extent portions of source code are quoted in a SOURCE CODE DOCUMENT, either (1) the entire document will be stamped and treated as RESTRICTED CONFIDENTIAL – SOURCE CODE or (2) those pages containing quoted source code will be separately bound, and stamped and treated as RESTRICTED CONFIDENTIAL – SOURCE CODE.

(11) The receiving party's outside counsel of record may make no more than five (5) additional paper copies of any portions of the printed source code, not including copies attached to court filings. All paper copies shall be securely destroyed if they are no longer in use (e.g. unmarked and/or spare copies at the conclusion of a deposition). Copies of source code that are marked as deposition exhibits shall not be provided to the Court Reporter or attached to deposition transcripts; rather, the deposition record will identify the exhibit by its production numbers.

(12) Except as provided in this Order, the receiving party may not create electronic images, or any other images, of the source code from the paper copy for use on a computer (e.g., may not scan the source code to a PDF, or photograph the code). The receiving party may create an electronic copy or image of selected portions of the source code only when reasonably necessary to accomplish any filing with the Court or to serve any pleadings or other papers on any other party; or to prepare other necessary case materials such as testifying expert reports, consulting expert written analyses, and related drafts and correspondences. Images or copies of source code shall not be included in correspondence between the parties (references to production numbers and source code page and line numbers shall be used instead) and shall be omitted from pleadings and other papers except to the extent permitted herein. To the extent any electronic images of any portion of source code are permitted under this Order, such electronic images must be encrypted using commercially reasonable encryption software including password protection; pleadings, briefs, and other work product containing excerpts of source code need not be encrypted. The communication and/or disclosure of electronic files containing any portion of source code shall at all times be limited to

individuals who are authorized to see source code under the provisions of this Protective Order. All electronic copies must be labeled "RESTRICTED CONFIDENTIAL – SOURCE CODE".

(13) The receiving party shall maintain a log of all printed or electronic copies of the source code that are delivered by the receiving party to any qualified person. The log shall include the names of the recipients of copies and locations where the copies are stored. The log shall be provided by the receiving party to the producing party upon request.

b. Only United States citizens or permanent residents falling within the following categories shall have access to “RESTRICTED CONFIDENTIAL - SOURCE CODE” or RESTRICTED CONFIDENTIAL – SECURITY CRITICAL SOURCE CODE materials, absent the express written consent of the Producing Party or further court order:

(1) Outside litigation counsel of record as of the date of this Protective Order, including any attorneys, paralegals, technology specialists and clerical employees of their respective law firms. The parties reserve the right to object to additional counsel that appear on behalf of a party. To the extent that a party raises an objection to an additional counsel, such counsel may be prohibited from accessing RESTRICTED CONFIDENTIAL – SOURCE CODE and RESTRICTED CONFIDENTIAL – SECURITY CRITICAL SOURCE CODE documents for a period no longer than five (5) business days and the parties agree to negotiate his or her access to “RESTRICTED CONFIDENTIAL – SOURCE CODE” or RESTRICTED CONFIDENTIAL – SECURITY CRITICAL SOURCE CODE materials in good faith. If the objecting party files a motion for protective order, after a good faith meet and confer, the ban on the access to RESTRICTED CONFIDENTIAL – SOURCE CODE and RESTRICTED CONFIDENTIAL – SECURITY CRITICAL SOURCE CODE

documents shall extend until the motion is decided. The motion shall be briefed on an expedited basis where responsive briefs are due five (5) business days after the moving brief is filed.

(2) Up to three (3) outside experts or consultants per party, pre-approved in accordance with Paragraphs III.B. and III.C. and specifically identified as eligible to access Source Code. If the receiving party wishes to have one or more of its experts or consultants view source code designated “RESTRICTED CONFIDENTIAL – SECURITY CRITICAL SOURCE CODE,” those experts must be additionally identified as such. The parties agree to negotiate disclosure of “RESTRICTED CONFIDENTIAL – SOURCE CODE” or “RESTRICTED CONFIDENTIAL – SECURITY CRITICAL SOURCE CODE” materials to additional outside experts in good faith and upon a showing of good cause;

(3) The Court, its technical advisor (if one is appointed), the jury, court personnel, and court reporters or videographers recording testimony or other proceedings in this action;

(4) While testifying at deposition or trial in this action only: (i) any current or former officer, director or employee of the producing party or original source of the information; (ii) any person designated by the producing party to provide testimony pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure; and/or (iii) any person who authored, previously received, or was directly involved in creating, modifying, or editing the source code, as evident from its face or reasonably certain in view of other testimony or evidence. Persons authorized to view Source Code pursuant to this sub-paragraph shall not retain or be given copies of the Source Code except while so testifying.

(5) The receiving party and its outside counsel may only disclose source code to individuals specified in this Paragraph C(1)(b) (e.g., source code may not be disclosed to in-house counsel).

c. Documents or other things that are designated CONFIDENTIAL INFORMATION and contain or substantively relate to a party's source code may be designated "RESTRICTED CONFIDENTIAL–SOURCE CODE," or "RESTRICTED CONFIDENTIAL–SECURITY CRITICAL SOURCE CODE" and treated as such if they comprise or include confidential, proprietary and/or trade secret source code or technical design documentation.

## **II. PROSECUTION BAR**

A. Any person that reviews or in any way gains knowledge of the contents of any material produced by an opposing party designated Confidential Outside Counsel Only Materials, Restricted Confidential - Source Code, or Restricted Confidential – Security Critical Source Code (all of which shall also be referred to as "Prosecution Bar Materials") shall not, for a period commencing upon the date that person reviews such material or in any way gains knowledge of the contents of such material (whichever is earlier) and ending one year following the conclusion of this case (including any appeals), engage in any Prosecution Activity (as defined below), involving claims on a method, apparatus, or system that is related or similar to any information or subject matter contained in any Prosecution Bar Materials produced by an opposing party. Furthermore, any person that reviews or in any way gains knowledge of the contents of any Prosecution Bar Materials shall not, for a period commencing upon the date that person reviews such material or in any way gains knowledge of the contents of such material (whichever is earlier) and ending one year following the conclusion of this case (including any appeals), engage in any Prosecution Activity involving claims on a method, apparatus, or system

that provides a user interface to select data and generates a license necessary to access the data on behalf of their client.

B. The following documents and materials shall not be eligible for classification as Prosecution Bar Materials: (i) documents and information related only to damages or reasonable royalty rates; (ii) publications, including patents and published patent applications; (iii) materials regarding 3<sup>rd</sup> party systems or products, if those materials are publicly known, on sale, or in public use, unless such materials are designated as Confidential Outside Counsel Only or Restricted Confidential – Source Code by a 3<sup>rd</sup> party; and (iv) information that is publicly available.

C. Prosecution Activity shall mean: (1) prepare any patent application (or portion thereof), whether design or utility, and either in the United States or abroad on behalf of a patentee or assignee of patentee's rights; (2) prepare patent claim(s) on behalf of a patentee or assignee of patentee's rights; (3) directly participate in any reissue or reexamination proceedings on behalf of the patentee or assignee of the patentee's rights, or (4) provide advice, counsel or suggestions regarding, or in any other way influencing, claim scope and/or language, embodiment(s) for claim coverage, claim(s) for prosecution, or products or processes for coverage by claim(s) on behalf of a patentee or assignee of patentee's rights. Prosecution Activity, however, shall not include outside counsel advising prosecution counsel, the patentee, or the assignee in any reexamination proceeding involving a patent-in-suit if the following conditions are met: (1) outside counsel retains reexamination counsel separate from, and unaffiliated with outside counsel in this case, (2) such outside litigation counsel does not directly prosecute the reexamination, in whole or in part, (3) such outside litigation counsel does not reveal Prosecution Bar Material to outside reexamination counsel, and (4) such outside litigation



counsel does not use the opposing side's Prosecution Bar Materials for any purpose other than the preparation for and conduct of the trial in this case, which shall include not using the opposing side's Prosecution Bar Materials or knowledge gained therefrom in connection with advising reexamination counsel, the patentee, or the assignee regarding the amendment, addition, or other modification of the claims or claim scope. For the avoidance of doubt, Prosecution Activity shall also not include participating in a reexamination proceeding regarding a patent-in-suit on behalf of a party other than the patentee or the assignee of the patent. Additionally, nothing in this paragraph shall prevent any attorney from sending Prior Art or other non-confidential litigation material to an attorney involved in patent prosecution for purposes of ensuring that such information is submitted to the U.S. Patent and Trademark Office (or any similar agency of a foreign government) to assist a patent applicant in complying with its duty of candor. Prior Art shall mean (i) publications, including patents and published patent applications; and (ii) materials or information regarding 3<sup>rd</sup> party systems or products that were publicly known, on sale, or in public use before February 2007, unless such materials are designated as Confidential, Confidential Outside Counsel Only or Restricted Confidential – Source Code by a third party.

### **III. DISCLOSURE OF TECHNICAL ADVISERS**

A. Information designated by the producing party under any category of Protected Information and such copies of this information as are reasonably necessary for maintaining, defending or evaluating this litigation may be furnished and disclosed to the receiving party's technical advisers and their necessary support personnel.

B. No disclosure of Protected Information to a technical adviser or their necessary support personnel shall occur until that person has signed the form attached hereto as Attachment

A, and a signed copy has been provided to the producing party; and to the extent there has been an objection under paragraph III(C), that objection is resolved as discussed below.

C. A party desiring to disclose Protected Information to a technical adviser shall also give prior written notice by email to the producing party, who shall have five business days after such notice is given to object in writing. The party desiring to disclose Protected Information to a technical adviser must provide the following information for each technical adviser: name, address, curriculum vitae, current employer, employment history for the past five years, a listing of cases in which the witness has testified as an expert at trial or by deposition within the preceding five years, and an identification of the name, application number, and subject matter of any patents or applications for patents in which the technical advisor is identified as an inventor or applicant, which the technical advisor is involved in the prosecution or maintenance thereof, or any patents or patent applications that the technical advisor has any pecuniary interest. No Protected Information shall be disclosed to such expert(s) or consultant(s) until after the expiration of the foregoing notice period.

D. A party objecting to disclosure of Protected Information to a technical adviser shall state with particularity the ground(s) of the objection and the specific categories of documents that are the subject of the objection. The objecting party's consent to the disclosure of Protected Information to a technical adviser shall not be unreasonably withheld, and its objection must be based on that party's good faith belief that disclosure of its Protected Information to the technical adviser will result in specific enumerated business or economic harms to that party.

E. If after consideration of the objection, the party desiring to disclose the Protected Information to a technical adviser refuses to withdraw the technical adviser, that party shall provide notice to the objecting party. Thereafter, the objecting party shall move the Court,

within five business days of receiving such notice, for a ruling on its objection. A failure to file a motion within the five business day period shall operate as an approval of disclosure of the Protected Information to the technical adviser. The parties agree to cooperate in good faith to shorten the time frames set forth in this paragraph if necessary to abide by any discovery or briefing schedules.

F. The objecting party shall have the burden of showing to the Court "good cause" for preventing the disclosure of its Protected Information to the technical adviser. This "good cause" shall include a particularized showing that: (1) the Protected Information is confidential commercial information, (2) disclosure of the Protected Information would result in a clearly defined and serious injury to the objecting party's business, (3) the proposed technical advisor is in a position to allow the Protected Information to be disclosed to the objecting party's competitors, and (4) that the technical advisor's access to Protected Information may create other confidentiality or legal risks in connection with other patent-related activities or interests tied to the technical advisor.

#### **IV. CHALLENGES TO CONFIDENTIALITY DESIGNATIONS**

A. The parties shall use reasonable care when designating documents or information as Protected Information. Nothing in this Order shall prevent a receiving party from contending that any documents or information designated as Protected Information have been improperly designated. A receiving party may at any time request that the producing party cancel or modify the Protected Information designation with respect to any document or information contained therein.

B. A party shall not be obligated to challenge the propriety of a designation of any category of Protected Information at the time of production, and a failure to do so shall not preclude a subsequent challenge thereto. Such a challenge shall be written, shall be served on

counsel for the producing party, and shall particularly identify the documents or information that the receiving party contends should be differently designated. The parties shall use their best efforts to resolve promptly and informally such disputes. If an agreement cannot be reached, the receiving party shall request that the Court cancel or modify a designation. The burden of demonstrating the confidential nature of any information shall at all times be and remain on the designating party.

C. Until a determination by the Court, the information in issue shall be treated as having been properly designated and subject to the terms of this Order.

#### **V. LIMITATIONS ON THE USE OF PROTECTED INFORMATION**

A. All Protected Information shall be held in confidence by each person to whom it is disclosed, shall be used only for purposes of this litigation, shall not be used for any business purpose, and shall not be disclosed to any person who is not entitled to receive such information as herein provided. All produced Protected Information shall be carefully maintained so as to preclude access by persons who are not entitled to receive such information.

B. Except as may be otherwise ordered by the Court, any person may be examined as a witness at depositions and trial and may testify concerning all Protected Information of which such person has prior knowledge. Without in any way limiting the generality of the foregoing:

1. A present director, officer, and/or employee of a producing party may be examined and may testify concerning all Protected Information which has been produced by that party and which the witness has personal knowledge;

2. A former director, officer, agent and/or employee of a producing party may be interviewed, examined and may testify concerning all Protected Information of which he or she has personal knowledge, including any Protected Information that refers to matters of

which the witness has personal knowledge, which has been produced by that party and which pertains to the period or periods of his or her employment; and

3. Non-parties may be examined or testify concerning any document containing Protected Information of a producing party which appears on its face or from other documents or testimony to have been received from or communicated to the non-party as a result of any contact or relationship with the producing party or a representative of the producing party. Any person other than the witness, his or her attorney(s), or any person qualified to receive Protected Information under this Order shall be excluded from the portion of the examination concerning such information, unless the producing party consents to persons other than qualified recipients being present at the examination. If the witness is represented by an attorney who is not qualified under this Order to receive such information, then prior to the examination, the producing party shall request that the attorney provide a signed statement, in the form of Attachment A hereto, that he or she will comply with the terms of this Order and maintain the confidentiality of Protected Information disclosed during the course of the examination. In the event that such attorney declines to sign such a statement prior to the examination, the parties, by their attorneys, shall jointly seek a protective order from the Court prohibiting the attorney from disclosing Protected Information.

4. All transcripts of depositions, exhibits, answers to interrogatories, pleadings, briefs, and other documents submitted to the Court which have been designated as Protected Information, or which contain information so designated, shall be filed under seal in a manner prescribed by the Court for such filings.

5. Outside attorneys of record for the parties are hereby authorized to be the persons who may retrieve confidential exhibits and/or other confidential matters filed with the

Court upon termination of this litigation without further order of this Court, and are the persons to whom such confidential exhibits or other confidential matters may be returned by the Clerk of the Court, if they are not so retrieved. No material or copies thereof so filed shall be released except by order of the Court, to outside counsel of record, or as otherwise provided for hereunder. Notwithstanding the foregoing and with regard to material designated as Restricted Confidential - Source Code, the provisions of Paragraph I(C). are controlling to the extent those provisions differ from this paragraph.

6. Protected Information shall not be copied or otherwise produced by a receiving party, except for transmission to qualified recipients, without the written permission of the producing party, or, in the alternative, by further order of the Court. Nothing herein shall, however, restrict a qualified recipient from making working copies, abstracts, digests and analyses of CONFIDENTIAL and CONFIDENTIAL OUTSIDE COUNSEL ONLY information for use in connection with this litigation and such working copies, abstracts, digests and analyses shall be deemed Protected Information under the terms of this Order. Further, nothing herein shall restrict a qualified recipient from converting or translating CONFIDENTIAL and CONFIDENTIAL OUTSIDE COUNSEL ONLY information into machine readable form for incorporation into a data retrieval system used in connection with this action, provided that access to that Protected Information, in whatever form stored or reproduced, shall be limited to qualified recipients.

7. At the request of any party, the original and all copies of any deposition transcript, in whole or in part, shall be marked "CONFIDENTIAL" by the reporter. This request may be made orally during the deposition or in writing within fifteen (15) days of receipt of the final certified transcript. Deposition transcripts shall be treated as CONFIDENTIAL OUTSIDE

COUNSEL ONLY until the expiration of the time to make a confidentiality designation. Any portions so designated shall thereafter be treated in accordance with the terms of this Order.

#### **VI. NON-PARTY USE OF THIS PROTECTIVE ORDER**

A. A nonparty producing information or material voluntarily or pursuant to a subpoena or a court order may designate such material or information as Protected Information pursuant to the terms of this Protective Order.

B. A nonparty's use of this Protective Order to protect its Protected Information does not entitle that nonparty access to the Protected Information produced by any party in this case.

#### **VII. NO WAIVER OF PRIVILEGE**

Nothing in this Protective Order shall require production of information that a party contends is protected from disclosure by the attorney-client privilege, the work product immunity or other privilege, doctrine, right, or immunity. If information subject to a claim of attorney-client privilege, work product immunity, or other privilege, doctrine, right, or immunity is nevertheless inadvertently or unintentionally produced, such production shall in no way prejudice or otherwise constitute a waiver or estoppel as to any such privilege, doctrine, right or immunity. Any party that inadvertently produces materials protected the attorney-client privilege, work product privilege, or other privilege, doctrine, right, or immunity may obtain the return of those materials by promptly notifying the recipient(s) and providing a privilege log for the inadvertently produced materials. The recipient(s) shall gather and return all copies of the privileged material to the producing party, except for any pages containing privileged markings by the recipient, which pages shall instead be destroyed and certified as such by the recipient to the producing party. Nothing in this provision is meant to foreclose the ability of the receiving party to challenge the claim of privilege with respect to the produced document(s).

Notwithstanding this provision, outside litigation counsel of record are not required to delete

information that may reside on their respective firm's electronic back-up systems that are overwritten in the normal course of business.

### **VIII. MISCELLANEOUS PROVISIONS**

A. Any of the notice requirements herein may be waived, in whole or in part, but only in writing signed by the attorney-in-charge for the party against whom such waiver will be effective.

B. Inadvertent or unintentional production of documents or things containing Protected Information which are not designated as one or more of the three categories of Protected Information at the time of production shall not be deemed a waiver in whole or in part of a claim for confidential treatment. With respect to documents, the producing party shall immediately notify the other parties of the error in writing and provide replacement pages bearing the appropriate confidentiality legend. In the event of any unintentional or inadvertent disclosure of Protected Information other than in a manner authorized by this Protective Order, counsel for the party responsible for the disclosure shall immediately notify opposing counsel of all of the pertinent facts, and make every effort to further prevent unauthorized disclosure including, retrieving all copies of the Protected Information from the recipient(s) thereof, and securing the agreement of the recipients not to further disseminate the Protected Information in any form. Compliance with the foregoing shall not prevent the producing party from seeking further relief from the Court.

C. Within sixty days after the entry of a final non-appealable judgment or order, or the complete settlement of all claims asserted against all parties in this action, each party shall, at the option of the producing party, either return or destroy all physical objects and documents which embody Protected Information it has received, and shall destroy in whatever form stored or reproduced, all physical objects and documents, including but not limited to, correspondence,



memoranda, notes and other work product materials, which contain or refer to any category of Protected Information. All Protected Information not embodied in physical objects and documents shall remain subject to this Order. In the event that a party is dismissed before the entry of a final non-appealable judgment or order, this same procedure shall apply to any Protected Information received from or produced to the dismissed party. Notwithstanding this provision, outside litigation counsel of record are not required to delete information that may reside on their respective firm's electronic back-up systems that are over-written in the normal course of business. Notwithstanding the foregoing, outside counsel shall be entitled to maintain copies of all pleadings, motions and trial briefs (including all supporting and opposing papers and exhibits thereto), written discovery requests and responses (and exhibits thereto), deposition transcripts (and exhibits thereto), trial transcripts, and exhibits offered or introduced into evidence at any hearing or trial, and their attorney work product which refers or is related to any CONFIDENTIAL and CONFIDENTIAL OUTSIDE COUNSEL ONLY information for archival purposes only. If a party opts to destroy CONFIDENTIAL or CONFIDENTIAL OUTSIDE COUNSEL ONLY information, the party must provide a Certificate of Destruction to the producing party.

D. If at any time documents containing Protected Information are subpoenaed by any court, arbitral, administrative or legislative body, the person to whom the subpoena or other request is directed shall immediately give written notice thereof to every party who has produced such documents and to its counsel and shall provide each such party with an opportunity to object to the production of such documents. If a producing party does not take steps to prevent disclosure of such documents within ten business days of the date written notice is given, the

party to whom the referenced subpoena is directed may produce such documents in response thereto.

E. Documents produced in this case with a designation of “HIGHLY CONFIDENTIAL” shall be treated as if such documents were designated as CONFIDENTIAL OUTSIDE COUNSEL ONLY under this Protective Order.

F. No party shall be required to identify on their respective privilege log any document or communication dated on or after the filing of the lawsuit, which absent this provision, the party would have been obligated to so identify on said privilege log.

G. This Order is entered without prejudice to the right of any party to apply to the Court at any time for additional protection, or to relax or rescind the restrictions of this Order, when convenience or necessity requires. Furthermore, without application to this Court, any party that is a beneficiary of the protections of this Order may enter a written agreement releasing any other party hereto from one or more requirements of this Order even if the conduct subject to the release would otherwise violate the terms herein.

H. This Court is responsible for the interpretation and enforcement of this Agreed Protective Order. After termination of this litigation, the provisions of this Agreed Protective Order shall continue to be binding except with respect to those documents and information that become a matter of public record. This Court retains and shall have continuing jurisdiction over the parties and recipients of the Protected Information for enforcement of the provision of this Agreed Protective Order following termination of this litigation. All disputes concerning Protected Information produced under the protection of this Agreed Protective Order shall be resolved by this Court.

SIGNED this \_\_\_\_ day of \_\_\_\_\_, 2010.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

**API TECHNOLOGIES, LLC-**

**Plaintiff,**

**vs.**

**FACEBOOK, INC. ET AL,**

**Defendants.**

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**NO. 2:09-cv-00147**

**ACKNOWLEDGEMENT OF PROTECTIVE ORDER**

1. My full name is: \_\_\_\_\_
  2. My address is: \_\_\_\_\_
  3. My present employer is: \_\_\_\_\_
  4. My job description is: \_\_\_\_\_
  5. My prior regular employment or past or present regular employments with any party to the above-referenced action are: \_\_\_\_\_
- \_\_\_\_\_
- \_\_\_\_\_

6. I also serve as an employee, agent, officer or director of the following entities:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

7. I have received a copy of the Protective Order entered in the above-referenced action. I have carefully read and understand the provisions of the Protective Order. I will comply with all of the provisions of the Protective Order.

8. I will not disclose any Confidential Information or Highly Confidential Information to anyone not qualified for access to that information under the Protective Order. I will use any such information only with respect to this action.

9. I will return all Confidential Information or Highly Confidential Information that comes into my possession, and all documents or things which I have prepared relating to such information, to an attorney representing the party that has employed or retained me.

10. I submit to the jurisdiction of this Court for the purpose of enforcement of the Protective Order.

Dated: \_\_\_\_\_, 2010

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