# **EXHIBIT** A

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#### 12/16/2008

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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION

FACEBOOK, INC.,

CASE NO. 5:08-CV-03468 JF

Plaintiff,

v.

STUDIVZ LTD., HOLTZBRINK NETWORKS GMBH, HOLTZBRINK VENTURES GMBH and DOES 1-25,

Defendants.

The above-styled cause came on for hearing on December 16, 2008 at 10:31 a.m. before The Honorable Howard R. Lloyd, United States Magistrate Judge, Courtroom 2, Fifth Floor.

APPEARANCES:

ON BEHALF OF PLAINTIFF:

ORRICK, HERRINGTON & SUTCLIFFE, LLP By Annette L. Hurst 1000 Marsh Road Menlo Park, CA 94043

ON BEHALF OF DEFENDANTS:

GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER, LLP By Stephen S. Smith 1900 Avenue of the Stars Suite 2100 Los Angeles, CA 90067

1	THE CLERK: Let's see, Facebook and StudiVZ.
2	I probably didn't pronounce that right. Facebook
3	against a bunch of German entities.
4	MS. HURST: Good morning, Your Honor, Annette
5	Hurst from Orrick for plaintiff Facebook.
6	MR. SMITH: Good morning, Your Honor, Stephen
7	Smith, Greenberg Glusker on behalf of StudiVZ,
8	Holtzbrinck Ventures and Holtzbrinck Networks.
9	THE COURT: Hello, counsel. The defendants
10	move for a protective order. They want to stay
11	discovery that's unrelated to personal jurisdiction
12	issues raised in their motions to dismiss until those
13	motions are resolved, and they want to preclude
14	Facebook from using in the German action any discovery
15	obtained in the instant lawsuit. And we'll talk about
16	the first one first.
17	As I understand it, the defendants agree that
18	if, in the course of investigating personal
19	jurisdiction, that discovery would also go to the
20	merits, that that wouldn't be a problem.
21	MR. SMITH: That's correct, Your Honor.
22	THE COURT: Okay. So, your objection is to
23	discovery which is solely, you say, directed at merits
24	at this time?
25	MR. SMITH: That's correct, Your Honor.

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THE COURT: And that would apply to the depositions, too. In other words, you're not opposed to a deposition -- and I know there were several sought -- that are on personal jurisdiction issues, at this time?

MR. SMITH: That's correct, Your Honor, two of them are currently scheduled to occur in January.

THE COURT: And do you think that -- let me ask it this way: Do you agree that you should be limited to discovery which deals with personal jurisdiction, even if it happens to also overlap into merits? Or do you say "I should be able to do anything I want, within reason?"

MS. HURST: Your Honor, we certainly disagree that there must be some prima facie standard met on personal jurisdiction in order to conduct discovery. That collapses the merit standard for evaluating a personal jurisdiction motion with the current inquiry, and that is improper.

That said, as a practical matter, we have not conducted discovery that is solely related to the merits. For example, no damages discovery has been propounded, Your Honor, and so we have taken a practical approach, but there is a significant difference between the parties in terms of framing the

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issues for personal jurisdiction. And we don't want to get dragged into some quagmire where we contend it's related to personal jurisdiction and they don't simply because it's not covered by one of the declarations that they filed in support of their motion.

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THE COURT: Am I being dragged into the quagmire now, being asked to rule on your discovery requests and to parse those out which deal with personal jurisdiction and those which deal only with merits?

MS. HURST: Your Honor, in fact, the motion has not presented that issue to the court properly. The proposed order asks simply for a blanket scope that, unless it's a dispute of material issue raised in their motion to dismiss, we can't take discovery on it.

THE COURT: Oh, I'm not going to sign that.

17 MS. HURST: So the proper procedure -- Your 18 Honor, no protective order is necessary here. Quite 19 frankly, we haven't conducted any discovery that is solely related to the merits, such as damages 20 discovery. We have engaged in further meet and confer 21 2.2 about specific discovery requests for several weeks 23 since the time this motion has been filed. We have 24 largely been able to work out every issue, and there remain, I believe, Your Honor, very few issues that 25

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1	would come back before this court in the context of	
2	further dispute about a burden versus relevance	
3	analysis, whether it be for personal jurisdiction or	
4	merits purposes.	
5	Respectfully, Your Honor, this motion is	
6	unnecessary, but it's also misguided in terms of its	
7	substantive standards.	
8	MR. SMITH: Can I respond to that?	
9	THE COURT: Well, yeah, but just a minute.	
10	Now, you're not telling me you've worked this out and	
11	the time that I've spent on this is wasted, are you?	
12	MS. HURST: Your Honor, it was our view as	
13	set forth in the opposition that this motion was	
14	premature and unnecessary.	
15	THE COURT: No, I'm talking about you said in	
16	the weeks since it was briefed and filed and briefed	
17	that you've continued to talk, and there was some	
18	allusion there to where "we've got it mostly worked	
19	out."	
20	MS. HURST: Well certainly, Your Honor, we	
21	continue to meet and confer regarding the specific	
22	discovery that was served in the context of the	
23	responses that were received from the defendants,	
24	whether they were sufficient or not, what documents	
25	would be produced, what interrogatories would be	

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answered, and what witnesses would be produced for 1 deposition, which is part of the reason why, Your Honor, in our opposition we took the view there had been inadequate meet and confer with respect to this motion and that it should be denied on that ground, as well.

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THE COURT: Well, there's like 30 requests for document production. And I understood that I and my staff was going to go through these and decide whether they were exclusively merits-based discovery or whether they had a tinge of personal jurisdiction. Shouldn't they have done that?

MR. SMITH: I think we're in agreement with that, Your Honor, that's not what the motion for protective order is directed at. I would disagree with two other things Ms. Hurst said, with all due respect. One, there has been a tremendous amount of meet and confer about this. We've been meeting and conferring about it for months.

20 The responses to this discovery were not even due until after the motion for protective order was 21 2.2 filed, and that goes to the other thing I'd like to 23 say. I asked counsel for Facebook, Ms. Hurst's 24 colleague, Warrington Parker, repeatedly prior to filing the motion, "are you saying that you're going to 25

insist on the right to take merits-based discovery now,
and if so, I'm going to have to file a motion for
protective order. If you would just agree not to do
that, I won't have to file a motion for protective
order." He refused to agree to that, that's the only
reason the motion for protective order was filed.
THE COURT: So, what are you looking for?
Now I'm really confused.
MR. SMITH: We're just looking for an order
that they not be entitled to engage in merits-based
solely merits-based discovery.
THE COURT: But you two won't agree on what
that means.
MR. SMITH: Well, Your Honor, after they
filed their opposition, I called Ms. Hurst and said "is
it even necessary to have a fight about this anymore?"
I said "why don't we just have an agreement," I did use
the word "stipulation," I believe, but "an agreement
that you won't do merits-based discovery solely
merits-based discovery while the motions to dismiss are
pending?" And she said she was afraid that if I got
that kind of stipulation and order, I would "lord it"

calendar.

THE COURT: So, with reference to the

over her heard. So that's why this is still on the

Page 8 document and production requests, and I think there are 1 30 of them, have you responded to them by now? 2 MR. SMITH: Yes, Your Honor. And then 3 4 afterwards, we have had as Ms. Hurst said, some I think productive meet and confer. I don't think that we're 5 in total agreement, but there has been a substantial 6 amount, I think, of progress made. 7 THE COURT: And so the time that we spent 8 looking through them and trying to assess whether it 9 was related to personal jurisdiction or simply based on 10 merit, is time that was not well spent? I'm trying to 11 12 understand. 13 MR. SMITH: Yes, Your Honor, but we didn't 14 ask for that and we have been -- in fact, at the time we filed our motion, there hadn't even been a response 15 yet to that discovery. The motion is not directed to 16 17 that discovery, it's directed towards their insistence, 18 it's not just in the discovery, it's in the Rule 26(f) 19 statement, the case management conference statement. 20 THE COURT: But when you say "it's not directed to that discovery," then what is it directed 21 2.2 to? 23 MR. SMITH: It's directed to having a protective order to prevent certain discovery from 24 occurring. Normally, if you're going to just object to 25

discovery that is propounded, you object and the other side needs to compel. I was seeking a motion for protective order because Mr. Parker would not agree not to serve merits-based discovery while the motions to dismiss were pending.

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THE COURT: Okay, well, that's interesting. Ms. Hurst, what do you think I'm being asked to decide?

MS. HURST: Your Honor, respectfully, I always look at the proposed order to really try to ascertain where the rubber meets the road, and I understood the motion to be some kind of a request for a blanket line drawing about what discovery could be conducted and what discovery not.

I did not understand it to be requesting the court to go through on a item-by-item basis, and in fact, that was one of the reasons that we objected to the motion, because we thought such a procedure would be premature in that they had not yet responded and we had not met and conferred about specific requests.

20 THE COURT: Am I going to get a motion now to 21 compel further responses to the RFPs or the 22 interrogatories now that you've gotten responses?

23 MS. HURST: Your Honor, I can't answer that 24 question today because we don't have the supplemental 25 responses and the document production. It is possible.

There is at least one issue that we have identified that we are unlikely to come to an agreement on that may come back to the court in the future, but it may be unnecessary for us to bring it back to the court if, after the production of documents, the interrogatory responses, and the depositions we ascertain that we have a sufficient amount of information to proceed in opposing the motion. MR. SMITH: And I think Ms. Hurst will agree with me here that even if we have that disagreement or others, it's going to be much narrower than the entire universe of the discovery that was propounded, because on much of that we have come to an agreement. THE COURT: Well, if I were to sign the proposed order, which I think you said would preclude merits-based discovery at this point, --MR. SMITH: Solely merits-based, Judge. THE COURT: -- aren't you two going to disagree over what merit-based discovery is? MS. HURST: Yes, Your Honor, which is why I was unwilling to agree to a stipulation on this. But frankly, Your Honor, the process of give and take during meet and confer is a much better way to resolve that dispute than some kind of blanket advance

25 pronouncement.

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1	THE COURT: I'll go for that.	
2	MS. HURST: We can work this out, Your Honor.	
3	MR. SMITH: I don't even have a problem with	
4	that, Your Honor. I only filed the motion for	
5	protective order because I felt like I was forced to. I	
6	was told by Mr. Parker that I was going to be that	
7	they were insisting on the right to conduct, right then	
8	and there, merits-based discovery.	
9	THE COURT: You know, you always have the	
10	right if they submit a discovery request that is	
11	merits-based, to bring a motion to so that you don't	
12	have to respond to it.	
13	MR. SMITH: And in retrospect, that's what I	
14	should have done.	
15	THE COURT: Yeah, because now we're this	
16	is very this is up in the clouds. This is like	
17	asking for an advisory opinion on something which isn't	
18	a real dispute at the moment, apparently.	
19	MR. SMITH: I thought it was a real dispute.	
20	I had three different conversations with Mr. Parker	
21	about this.	
22	THE COURT: Okay.	
23	MR. SMITH: So, I apologize if I brought the	
24	motion prematurely. I expected to be getting it any	
25	moment, merits-based discovery, while the motions to	

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1	dismiss were pending.	
2	THE COURT: And then I'm going to get a	
3	motion.	
4	MR. SMITH: I think it will be a much smaller	
5	one.	
6	THE COURT: Well, that's nice, but we've	
7	already dealt with this big one. Are you withdrawing	
8	this motion?	
9	MR. SMITH: That part of it.	
10	THE COURT: Fine, then the record will	
11	reflect that the defendants have withdrawn the portion	
12	of the motion dealing with what the court interpreted	
13	to be a dispute over merits-based versus personal	
14	jurisdiction discovery.	
15	All right, as to the other part of the motion	
16	which deals with the defendants' assertion that	
17	Facebook should be precluded from using any discovery	
18	it obtains here in the US of A in the German action,	
19	the German action is an action brought by these	
20	defendants in this court against Facebook in Germany,	
21	apparently intending to obtain a judgment in Germany	
22	saying that whatever they did was perfectly okay.	
23	MR. SMITH: Just for the record, Your Honor,	
24	there are now two actions in Germany. Facebook filed a	
25	separate action after this motion was filed. But	

otherwise, that is correct.

THE COURT: Okay. Now, you want me to order Facebook that they cannot use any discovery they obtain in the US of A in Germany?

MR. SMITH: That's correct, Your Honor.

THE COURT: And why would I be doing that? Wouldn't that be the German court's job to determine what discovery it is willing to consider?

MR. SMITH: I think that may be correct if we didn't have the issue of the defendants even being in this case to begin with, Your Honor. It is our position that the case shouldn't have been filed to begin with, which is why the motions to dismiss are currently pending in front of the District Court.

It seems -- maybe I'm missing something, but it seems completely unfair to have had a case that potentially never should have been filed in the first place used to obtain discovery in Germany, especially when all of the information is found in Germany. That information should be discovered for purposes of being used in the German action pursuant to the German procedure for that.

THE COURT: Well, there's two possibilities.
One is, it just happens to be a US action and there is
a German action, and I don't know of any rule that

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would say that the US court should tell the litigant it cannot use any discovery it acquired in the US of A in Germany. That's up to the German court.

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The other possibility, and there is a case or two cited about that, is if the lawsuit is brought in the US of A solely for the purpose of getting discovery which they otherwise couldn't get in Germany. But I don't know that I have any evidence of that.

MR. SMITH: No, and I think in all fairness, I would concede I don't think Facebook brought the case solely to get discovery in America for use in Germany, and I don't think we argued that.

13 THE COURT: No, I don't think you did either. MR. SMITH: Yeah, but my point is: 14 If it turns out -- there are motions to dismiss currently 15 pending. If it turns out that those motions should be 16 17 granted, and I know we're not here to argue that today, 18 but if it turns out that those motions should be 19 granted and the case never should have been filed against the defendants, and we have had one defendant 20 who has been dismissed already, so it's -- and the 21 2.2 motions are well founded. I don't think anyone is 23 arguing they are intolerable motions. Then the process 24 in the United States shouldn't have happened at all. 25

And the rules in Germany are quite different.

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1	You can get discovery, but it's much more limited. It	
2	usually has to take place in front of the court at the	
3	time it is being offered or obtained, and it just	
4	doesn't seem right, and I think the 1782 cases that we	
5	cited indicate that discovery in that context is not	
6	appropriate to be used in a foreign action.	
7	Now, I do recognize, and we make this point	
8	in our papers, that this is not directly on a 1782	
9	situation.	
10	THE COURT: I don't think 1782 has anything	
11	to do with this situation.	
12	MR. SMITH: I think it's analogous, but I	
13	don't think it's directly on point because in 1782 you	
14	don't have a separate already pending civil action in	
15	the United States. You actually go to the United	
16	States for discovery.	
17	THE COURT: So you want me to order that if	
18	the motions to dismiss get granted and the case is	
19	dismissed, then they can't use the discovery in Germany	
20	or they can't try to; but if it doesn't get dismissed,	
21	then they can try to?	
22	MR. SMITH: That's not how we phrased it, but	
23	I would be okay with that because that's my concern	
24	about it is I agree with you, we shouldn't be going	
25	down this road to begin with if we shouldn't have been	

in the case to begin with. That's the argument. If, after we are not dismissed, if we are not dismissed, they want to argue to the German court, we should be allowed to use this, then I don't feel like I need an order from Your Honor that I go to Germany and say "no, Germany, you can't consider that because it has already been decided in the United States." That's not what the purpose of this motion is for.

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THE COURT: I guess I'm not entirely clear on why, if the case is dismissed, and that would somehow invalidate discovery that has been obtained or immunize it from potential use in Germany.

MR. SMITH: Well, what it means is the defendant shouldn't have been sued here and so no discovery should take place.

THE COURT: But so what, the discovery was obtained and while there was, at that point, a viable action.

MR. SMITH: I guess the issue I'm having, Your Honor, is the word "viable action." If defendants shouldn't have been sued or continuing to be sued prior to their motion to dismiss being heard, is this viable, then yes. But if you have a valid motion to dismiss for lack of personal jurisdiction, I wouldn't call that action viable.

THE COURT: Okay, what do you have to say, 1 2 Ms. Hurst, briefly? 3 MS. HURST: Your Honor, the German court is the place to determine whether this evidence would be 4 5 admissible or not. It is inefficient, and frankly, unjust. It does not lie in the mouth of the defendants 6 to assert that there is relevant evidence establishing 7 8 their liability that we shouldn't be able to go and use elsewhere subject to local rules. 9 It's just -- it's an unseemly contention, 10 Your Honor. And to the extent that they are arguing --11 12 THE COURT: Unseemly contention, I like that. 13 I'll have to remember that. 14 MS. HURST: To the extent that they are arguing, Your Honor, that because the discovery would 15 be unavailable in German court, you know, and they're 16 using this kind of back door approach with the 1782 17 18 cases on this, Your Honor, I would like to point out 19 that that implication has been expressly rejected by the United States Supreme Court under 1782 in the Intel 20 v. AMD case, 542 U.S. 241. 21 2.2 In that case, the court said "we're not going 23 to import a categorical foreign discovery rule into 24 1782." And so, again, saying "it's a matter of local law," and that's the way it should be here, as well, 25

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1	Your Honor.	
2	THE COURT: Okay, the matter is submitted.	
3	MS. HURST: Yes, thank you.	
4	MR. SMITH: Can I briefly respond to the	
5	unseemliness just because I felt like that wasn't fair?	
6	There are rules in the United States about privilege,	
7	for example.	
8	THE COURT: There was a bit of hyperbole	
9	there.	
10	MR. SMITH: This isn't we're not trying to	
11	do anything unseemly. If the United States has a rule,	
12	for example, about attorney-client privilege, that	
13	sometimes will cover relevant information. I don't	
14	know what Germany's rule about attorney-client	
15	privilege is, I'm just saying that the German rule	
16	ought to apply to the stuff that's going to be used	
17	there.	
18	Otherwise, submit Your Honor.	
19	THE COURT: All right, thank you, counsel.	
20	MS. HURST: Your Honor, I have a proposed	
21	form of protective order that allows the use in all	
22	pending proceedings between the parties. It has been	
23	shared with Mr. Smith in advance of the hearing. It is	
24	the same as the stipulated form of order that we	
25	previously submitted to the court, with the exception	

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1	of resolving this issue in the plaintiff's favor. I	
2	could hand it up or submit it electronically to the	
3	court after the hearing.	
4	THE COURT: Is it a stipulated order?	
5	MS. HURST: There was a stipulated form of	
6	order that we filed to have in place pending resolution	
7	of this dispute.	
8	THE COURT: Right, I remember that, and we	
9	were thinking "well, if we issued an order today, then	
10	we wouldn't need that one." But you've withdrawn that	
11	part of it.	
12	MR. SMITH: No, it's the German issue.	
13	THE COURT: The German issue.	
14	MS. HURST: On the German issue.	
15	MR. SMITH: I agree with Ms. Hurst here. She	
16	did give me the language yesterday. Let me see if I	
17	can state it, the District Court's form order, which is	
18	basically what we've used so far.	
19	THE COURT: Right.	
20	MR. SMITH: Says you can only use	
21	confidential information in this action. If I	
22	basically lose the second half of my motion for	
23	protective order,	
24	THE COURT: Yeah.	
25	MR. SMITH: they want to say "expand it so	

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1	it can be used in this action or other litigation	
2	pending between the parties."	
3	THE COURT: Suppose it's silent on it. See,	
4	I'm inclined, on the second part of your motion, I'm	
5	inclined to simply say that I'm not precluding the	
6	plaintiff from using it. That's all.	
7	MR. SMITH: Right, I think that there is a	
8	distinction there, Your Honor, because you don't want	
9	to necessarily have an order giving them the right to	
10	use it and then you're going to deny my request	
11	prohibiting it.	
12	THE COURT: Not precluding it.	
13	MS. HURST: I think that is what our proposed	
14	form of order accomplishes, Your Honor.	
15	THE COURT: Good. Well, it doesn't sound	
16	like you two have quite worked that out, so I don't	
17	want to see it right now.	
18	MR. SMITH: I do respectfully disagree with	
19	that. I think it makes it sound like in the way, and	
20	I'll go back and look at it, but it sounds to me like	
21	it says gives explicit permission for them to use	
22	it.	
23	MS. HURST: Well, in accordance with local	
24	law, sure, certainly.	
25	MR. SMITH: I would rather it be silent.	

		Page 21
1	THE COURT: Go work that out, please.	
2	MS. HURST: Thank you, Your Honor.	
3	MR. SMITH: Thank you, Your Honor.	
4	(Hearing adjourned 10:52 a.m.)	
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Pag 22

	Page 22
1	STATE OF COLORADO )
2	) ss. CERTIFICATE
3	COUNTY OF DENVER )
4	
5	I, Christopher Boone, Certified Electronic
6	Court Reporter and Notary Public within and for the
7	State of Colorado, certify that the foregoing is a
8	correct transcription from the digital recording of
9	the proceedings in the above-entitled matter.
10	
11	I further certify that I am neither counsel
12	for, related to, nor employed by any of the parties
13	to the action in which this hearing was taken, and
14	further that I am not financially or otherwise
15	interested in the outcome of the action.
16	
17	In witness whereof, I have affixed my
18	signature and seal this 11th day of January, 2009.
19	
20	
	My commission expires August 16, 2010.
21	S NOTARY S
22	M W PUBLIC /8
23	hustoph Dome
24	Christopher Boone,
25	AAERT Certified Electronic Court Reporter

12/16/2008

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