

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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FACEBOOK, INC., CASE NO. 5:08-CV-03468 JF

Plaintiff,

v.

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

Defendants.

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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.

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

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

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

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

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

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

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

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

16 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  
20 solely related to the merits, such as damages  
21 discovery. We have engaged in further meet and confer  
22 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  
25 remain, I believe, Your Honor, very few issues that

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

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

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

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

20 The responses to this discovery were not even  
21 due until after the motion for protective order was  
22 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  
25 filing the motion, "are you saying that you're going to

1 insist on the right to take merits-based discovery now,  
2 and if so, I'm going to have to file a motion for  
3 protective order. If you would just agree not to do  
4 that, I won't have to file a motion for protective  
5 order." He refused to agree to that, that's the only  
6 reason the motion for protective order was filed.

7 THE COURT: So, what are you looking for?  
8 Now I'm really confused.

9 MR. SMITH: We're just looking for an order  
10 that they not be entitled to engage in merits-based --  
11 solely merits-based discovery.

12 THE COURT: But you two won't agree on what  
13 that means.

14 MR. SMITH: Well, Your Honor, after they  
15 filed their opposition, I called Ms. Hurst and said "is  
16 it even necessary to have a fight about this anymore?"  
17 I said "why don't we just have an agreement," I did use  
18 the word "stipulation," I believe, but "an agreement  
19 that you won't do merits-based discovery -- solely  
20 merits-based discovery while the motions to dismiss are  
21 pending?" And she said she was afraid that if I got  
22 that kind of stipulation and order, I would "lord it"  
23 over her head. So that's why this is still on the  
24 calendar.

25 THE COURT: So, with reference to the



1 document and production requests, and I think there are  
2 30 of them, have you responded to them by now?

3 MR. SMITH: Yes, Your Honor. And then  
4 afterwards, we have had as Ms. Hurst said, some I think  
5 productive meet and confer. I don't think that we're  
6 in total agreement, but there has been a substantial  
7 amount, I think, of progress made.

8 THE COURT: And so the time that we spent  
9 looking through them and trying to assess whether it  
10 was related to personal jurisdiction or simply based on  
11 merit, is time that was not well spent? I'm trying to  
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  
15 we filed our motion, there hadn't even been a response  
16 yet to that discovery. The motion is not directed to  
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  
21 directed to that discovery," then what is it directed  
22 to?

23 MR. SMITH: It's directed to having a  
24 protective order to prevent certain discovery from  
25 occurring. Normally, if you're going to just object to

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

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

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

14 I did not understand it to be requesting the  
15 court to go through on a item-by-item basis, and in  
16 fact, that was one of the reasons that we objected to  
17 the motion, because we thought such a procedure would  
18 be premature in that they had not yet responded and we  
19 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.

1 There is at least one issue that we have identified  
2 that we are unlikely to come to an agreement on that  
3 may come back to the court in the future, but it may be  
4 unnecessary for us to bring it back to the court if,  
5 after the production of documents, the interrogatory  
6 responses, and the depositions we ascertain that we  
7 have a sufficient amount of information to proceed in  
8 opposing the motion.

9 MR. SMITH: And I think Ms. Hurst will agree  
10 with me here that even if we have that disagreement or  
11 others, it's going to be much narrower than the entire  
12 universe of the discovery that was propounded, because  
13 on much of that we have come to an agreement.

14 THE COURT: Well, if I were to sign the  
15 proposed order, which I think you said would preclude  
16 merits-based discovery at this point, --

17 MR. SMITH: Solely merits-based, Judge.

18 THE COURT: -- aren't you two going to  
19 disagree over what merit-based discovery is?

20 MS. HURST: Yes, Your Honor, which is why I  
21 was unwilling to agree to a stipulation on this. But  
22 frankly, Your Honor, the process of give and take  
23 during meet and confer is a much better way to resolve  
24 that dispute than some kind of blanket advance  
25 pronouncement.

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

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

1 otherwise, that is correct.

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

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

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

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

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

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

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

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

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

13 THE COURT: No, I don't think you did either.

14 MR. SMITH: Yeah, but my point is: If it  
15 turns out -- there are motions to dismiss currently  
16 pending. If it turns out that those motions should be  
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  
20 against the defendants, and we have had one defendant  
21 who has been dismissed already, so it's -- and the  
22 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.

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



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

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

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

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

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

1 THE COURT: Okay, what do you have to say,  
2 Ms. Hurst, briefly?

3 MS. HURST: Your Honor, the German court is  
4 the place to determine whether this evidence would be  
5 admissible or not. It is inefficient, and frankly,  
6 unjust. It does not lie in the mouth of the defendants  
7 to assert that there is relevant evidence establishing  
8 their liability that we shouldn't be able to go and use  
9 elsewhere subject to local rules.

10 It's just -- it's an unseemly contention,  
11 Your Honor. And to the extent that they are arguing --

12 THE COURT: Unseemly contention, I like that.  
13 I'll have to remember that.

14 MS. HURST: To the extent that they are  
15 arguing, Your Honor, that because the discovery would  
16 be unavailable in German court, you know, and they're  
17 using this kind of back door approach with the 1782  
18 cases on this, Your Honor, I would like to point out  
19 that that implication has been expressly rejected by  
20 the United States Supreme Court under 1782 in the Intel  
21 v. AMD case, 542 U.S. 241.

22 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  
25 law," and that's the way it should be here, as well,

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

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

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.

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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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

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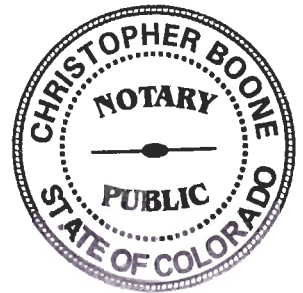
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Christopher Boone,

AAERT Certified Electronic Court Reporter



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