

1 I. NEEL CHATTERJEE (State Bar No. 173985)
 nchatterjee@orrick.com
 2 JULIO C. AVALOS (STATE BAR NO. 255350)
 javalos@orrick.com
 3 ORRICK, HERRINGTON & SUTCLIFFE LLP
 1000 Marsh Road
 4 Menlo Park, CA 94025
 Telephone: 650-614-7400
 5 Facsimile: 650-614-7401

6 THOMAS J. GRAY (STATE BAR NO. 191411)
 tgray@orrick.com
 7 ORRICK, HERRINGTON & SUTCLIFFE LLP
 4 Park Plaza
 8 Suite 1600
 Irvine, CA 92614-2558
 9 Telephone: +1-949-567-6700
 Facsimile: 949-567 6710

10 Attorneys for Plaintiff
 11 FACEBOOK, INC.

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN JOSE DIVISION

16 FACEBOOK, INC.,
 17 Plaintiff,
 18 v.
 19 STUDIVZ LTD., HOLTZBRINCK
 NETWORKS GmbH, HOLTZBRINCK
 20 VENTURES GmbH AND DOES 1-25,
 21 Defendants.

Case No. 5:08-cv-03468 JF

**DECLARATION OF JULIO C.
 AVALOS IN SUPPORT OF
 FACEBOOK'S OPPOSITION TO
 DEFENDANTS' MOTION FOR
 SANCTIONS**

Date: March 3, 2009
 Time: 10:00 a.m.
 Room: Courtroom 2, 5th Floor
 Judge: Honorable Magistrate Judge
 Howard R. Lloyd,
 for Discovery Purposes

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1 I, Julio C. Avalos, declare as follows:

2 1. I am an attorney with the law firm of Orrick, Herrington & Sutcliffe LLP, counsel
3 for Plaintiff Facebook, Inc. I make this Declaration in support of Facebook's Motion in
4 Opposition to Defendants' Motion for Sanctions. I am an active member in good standing of the
5 California State Bar. Except as set forth herein, I have personal knowledge of the facts stated
6 herein and if called as a witness, could and would competently testify thereto.

7 2. On July 18, 2008, Facebook brought the instant suit against StudiVZ Ltd.,
8 Holtzbrinck Ventures GmbH and Holtzbrinck Networks GmbH for trade dress infringement,
9 violation of the Computer Fraud and Abuse Act, violation of California Penal Code section
10 502(c), breach of contract and breach of the covenant of good faith and fair dealing. Facebook's
11 claims are based on Facebook's allegations that Defendant StudiVZ Ltd. ("StudiVZ") illegally
12 accessed Facebook's California-based servers and website in order to steal valuable intellectual
13 property contained thereon. Facebook further alleges that StudiVZ used Facebook's intellectual
14 property in the development of a number of knockoff websites, beginning with the website
15 located at www.studivz.net.

16 3. On October 31, 2008, Defendants filed a Motion for Protective Order seeking to
17 stay "all discovery that does not relate to disputed material issues raised in Defendants' pending
18 motions to dismiss" and to prevent discovery produced in this matter from being used in any
19 other litigation between the parties.

20 4. On November 26, 2008, parties' counsel conducted the first substantive meet and
21 confer with respect to Facebook's discovery requests. The meet and confer lasted nearly two
22 hours and the parties went through each discovery request individually. Facebook was
23 represented by Annette Hurst and myself. Stephen S. Smith represented the Defendants. With
24 respect to discovery requests aimed at evidence relating to StudiVZ's accessing and copying of
25 the Facebook website, Mr. Smith stated that he was considering stipulating to the fact that
26 StudiVZ had intentionally accessed the Facebook website and "done what you claim they did."
27 He stated that he would agree to produce the names, Facebook user accounts and other
28 information related to StudiVZ's accessing of Facebook. Specifically, Mr. Smith stated, that he

1 was “willing to give accounts used in the scope of StudiVZ, not all employees who have a
2 Facebook account.”

3 5. Regarding Facebook Request for Production No. 14, Mr. Smith said, “I think it’s
4 going to be undisputed that those people that had user accounts and used them in connection with
5 their employment did at least what you claim they did. We’ll have a huge fight as to whether that
6 violates the anti-hacking statute. It’s going to be undisputed that there were some users who
7 accessed Facebook.” Ms. Hurst then said, “Just because you’re willing to stipulate to it, doesn’t
8 mean that I don’t want to conduct jurisdiction discovery on it. I can’t examine witnesses without
9 documents.” Mr. Smith said, “Let me think about it.”

10 6. On December 2, 2008, the parties engaged in a follow-up meet and confer.

11 7. Around this time, the parties began negotiating a pair of “personal jurisdiction”
12 depositions. Defendants agreed to produce two witnesses relating to personal jurisdiction,
13 Michael Brehm representing StudiVZ and Martin Weber on behalf of the Holtzbrinck
14 Defendants. These witnesses had previously filed declarations in support of Defendants’
15 respective motions to dismiss for lack of personal jurisdiction and *forum non conveniens*.
16 Defendants advised Facebook that Mr. Brehm would be traveling around the world for three
17 months beginning approximately on or about January 14, 2009. Accordingly the parties agreed to
18 schedule the depositions to take place before Mr. Brehm left. On December 8, 2008, counsel for
19 Facebook confirmed Defendants’ offer to hold the depositions on the week of January 12, 2009 in
20 Frankfurt, Germany. At this time, Facebook continued to believe the representations made by
21 Mr. Smith at the November 26, 2008 meet and confer that Defendants would be producing
22 discovery relevant to StudiVZ’s accessing of the Facebook website and Facebook’s intellectual
23 property.

24 8. On December 16, 2008, this Court held a hearing on Defendants’ Motion for
25 Protective Order. I attended the hearing along with my colleague Annette Hurst. At the hearing,
26 Mr. Smith represented that he felt that Facebook had misunderstood the nature of StudiVZ’s
27 motion. Mr. Smith stated that Defendants did not disagree that Facebook was entitled to
28 discovery that involved intertwined issues of personal jurisdiction and the merits of this case.

1 When this Court asked Mr. Smith whether he wished to withdraw his request to stay discovery,
2 Mr. Smith answered in the affirmative. Ms. Hurst represented to the Court that the parties had
3 made progress in recent weeks and that she felt confident that the parties would be able to resolve
4 their discovery disputes amicably.

5 9. On December 18, 2008, Defendants produced a set of documents but did not serve
6 supplemental responses to Facebook's interrogatories. Defendant StudiVZ Ltd. produced 198
7 pages consisting mostly of one contract. Defendant Holtzbrinck Networks produced a total of 9,
8 heavily-redacted pages. The production contained no emails, letters, or communications of any
9 kind. The production also contained no programming or source code. Despite Mr. Smith's
10 November 26 representations regarding forthcoming evidence of StudiVZ's accessing and
11 copying of Facebook's intellectual property, no such discovery was produced. Around this time,
12 it became clear to me that explicit confirmation would be needed regarding the proper scope of
13 testimony for Defendants' two "personal jurisdiction" witnesses.

14 10. Following this production, the parties again met and conferred on December 23,
15 2008. Mr. Smith was unable to attend the conference and Defendants were represented by Mr.
16 Smith's colleague, Bill Walker. Mr. Walker admitted to having an imperfect knowledge of
17 certain details of the case and stated that he would try to contact Mr. Smith (who was out on
18 holiday vacation) prior to a follow-up meet and confer scheduled for December 30, 2008.

19 11. On December 30, 2008, the parties once again met and conferred. Defendants
20 were once again represented by Bill Walker, who represented that in the time since the last meet
21 and confer he had not been able to speak to Mr. Smith or Defendants. Facebook was represented
22 by my colleague Tom Gray and me. At the conference, the parties discussed the upcoming
23 personal jurisdiction depositions of StudiVZ witness Michael Brehm and Holtzbrinck
24 Defendants' witness, Martin Weber. The depositions were scheduled to take place on January 12
25 and 13, 2009. Defendants had previously stated that Mr. Brehm would be unavailable for a
26 period of three months beginning on January 14, 2009. Mr. Walker clarified that Messrs. Brehm
27 and Weber were not being offered as Rule 30(b)(6) witnesses, but simply as "personal
28 jurisdiction" witnesses. When Mr. Gray asked what topics these witnesses would be prepared to

1 testify on, Mr. Walker stated that they were knowledgeable of general issues regarding personal
2 jurisdiction. Mr. Walker provided as examples the subjects that Messrs. Brehm and Weber had
3 testified to in their respective Declarations in Support of Defendants Motions to Dismiss For Lack
4 of Personal Jurisdiction and *Forum non conveniens*. Mr. Walker stated that he did not know for
5 sure, but doubted that Defendants' witnesses would testify about Defendants' access of the
6 Facebook website, Facebook's source code or any other Facebook intellectual property.

7 12. During this meet and confer, my colleague Tom Gray also asked Mr. Walker
8 whether it was Defendants' position that Facebook was not entitled to any discovery that touched
9 simultaneously on jurisdictional and merits-related issues. Mr. Walker stated that this was not
10 Defendants' position, but that neither he nor Defendants was persuaded that discovery relating to
11 the development and implementation of the StudiVZ website was relevant to personal jurisdiction
12 analysis. When Mr. Gray stated that central to Facebook's jurisdictional argument was the notion
13 that StudiVZ had reached out to California, submitted to California law, venue and jurisdiction
14 and then stole intellectual property located in the state, Mr. Walker stated that he was still not
15 persuaded and that in any event we should wait to speak to Mr. Smith.

16 13. On January 6, 2008, the parties held a final meet and confer. Mr. Smith was in
17 attendance. The conference first touched on the upcoming depositions of the two "personal
18 jurisdiction" witnesses that StudiVZ and the Holtzbrinck defendants had agreed to produce.
19 Given the disagreement as to the scope of what "personal jurisdiction" discovery meant, Mr. Gray
20 sought to clarify the topics that these witnesses would be prepared to testify to. Mr. Smith
21 indicated that the Holtzbrinck witness, Martin Weber, would be able to testify to his knowledge
22 of StudiVZ's accessing of Facebook, which Mr. Smith stated he probably knew nothing about.
23 Mr. Gray stated, "I don't want to fly to Germany and find out that I'm not going to get answers.
24 It sounded from my conversations with Bill [Mr. Walker], that these guys were only going to
25 testify about stuff in their declarations [in support of Defendants' Motions to Dismiss for Lack of
26 Personal Jurisdiction. We want to ask him about his knowledge about Bemmann, Dariani, if they
27 had access to Facebook source code to develop the site, etc." Mr. Smith answered, "Well - I'm
28 willing to allow - No, you know what, I'm willing to allow him to testify about that fully.

1 Period. I think I'm willing to allow him to testify about that. I could fight you on this, but I don't
2 have any particular reason to." Mr. Smith stated that he doubted that Mr. Weber knew much
3 about StudiVZ's access of Facebook. The parties then segued into a conversation regarding
4 Facebook's outstanding discovery requests.

5 14. Mr. Smith stated that although he agreed that Facebook was entitled to discovery
6 that touched on both merits-based and jurisdictional issues, he now felt that Facebook was
7 required to show that the personal jurisdiction discovery was somehow "tied" to allegations in
8 Facebook's complaint. In other words, Mr. Smith stated, discovery relating to StudiVZ's
9 accessing of Facebook—even if that access was made within the course and conduct of StudiVZ
10 business—would not be produced unless that discovery also contained evidence of some
11 additional "predicate act" related to Facebook's Complaint. Mr. Smith stated that evidence of
12 "copying" would suffice as a predicate act relating to Facebook's Complaint. Facebook restated
13 its position that any discovery relating to the commercial accessing of Facebook should be
14 produced, regardless of whether the discovery also contained some "smoking gun" regarding
15 copying. Facebook also restated its position that discovery relating to the creation and
16 development of StudiVZ should also be produced, as it might contain evidence of copied
17 Facebook intellectual property that would in turn prove intentional conduct aimed at the state of
18 California. Mr. Smith stated that he disagreed. Mr. Gray argued that access and development
19 documents were relevant to Facebook's *Calder* effects argument. Mr. Smith agreed in principle,
20 but stated that the discovery would be withheld barring an agreement as to future discovery and
21 the understanding that no documents that did not evidence the additional predicate act such as
22 "copying" would be produced.

23 15. Mr. Smith also stated that he would withhold any discovery unless the parties
24 could come to some agreement regarding future discovery. Specifically, Mr. Smith stated that he
25 did not wish to produce responsive documents just to have Facebook turn around and compel
26 additional discovery. Mr. Gray stated that Facebook was not obligated to waive its right to
27 compel in order to receive discovery to which it was entitled. Mr. Smith said that the parties were
28 at an impasse and that Facebook should move to compel.

1 16. The parties then turned back to the topic of the upcoming depositions in Germany,
2 specifically that of StudiVZ witness, Michael Brehm, a “co-founder” of StudiVZ. The parties
3 discussed the scope of Mr. Brehm’s testimony. Again, Mr. Smith refused to allow Mr. Brehm to
4 generally testify as to his knowledge of StudiVZ’s access of Facebook’s site and intellectual
5 property during the design and development of the StudiVZ sites. Mr. Smith stated that he might
6 try to limit any testimony regarding the accessing of Facebook to “copying,” but that “I’m using a
7 broad definition of copying. I’m not going to slice it that thinly.” I believed that the parties
8 reached an agreement as to the scope of Mr. Brehm’s testimony.

9 17. The following day, January 7, 2009, my colleague Mr. Gray sent an email to Mr.
10 Smith regarding the upcoming personal jurisdiction depositions.¹ The email stated, in relevant
11 part, “I might add that I was concerned that we might not go forward with the depositions based
12 on the meet and confer that I had with Bill Walker last week. Based on Bill’s statements, it
13 seemed like you were only going to allow Messrs. Brehm and Weber to testify about the issues
14 raised in their declarations filed in support of the defendants’ motion. It makes sense to go
15 forward with the depositions, however, based on your comments yesterday that you would allow
16 the witnesses to testify about whether StudiVZ’s [sic] accessed the Facebook site or IP in order to
17 copy (to be loosely defined) the Facebook site or in furtherance of the other claims alleged by
18 Facebook in the complaint. I appreciate your clarification regarding that issue.”

19 18. Mr. Smith then responded, “You are again mischaracterizing what I offered to do
20 as an ‘agreement.’ I do not know how many more times I could have possibly repeated the point
21 – I was willing to agree to a limitation on scope along the lines of what you describe below if and
22 only if you also agreed. I am not and have never been willing to agree, only to have you not
23 agree and move to compel anyway . . . So at the moment, there is no agreement on questions
24 related to access.” I was surprised by Mr. Smith’s email and position.

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26 _____
27 ¹ Facebook has refrained from attaching inter-attorney communications as evidentiary exhibits
28 pursuant to the Court’s Standing Order discouraging the practice. Defendants have consistently
ignored the Standing Order. Facebook will produce genuine copies of these communications
should the Court request them.

1 19. Because we believed that the parties reached an agreement as to the scope of the
2 deposition testimony of Messrs. Brehm and Weber, Mr. Gray and I started to prepare to take the
3 depositions. I spent approximately 3.75 hours on January 6 and 7, 2009, doing so which resulted
4 in approximately \$1,400 in fees being billed to Facebook.

5 I declare, under penalty of perjury, that the foregoing is true and correct to the best of my
6 knowledge.

7 Executed this 10th day of February, at Menlo Park, California.

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/s/ Julio C. Avalos /s/

Julio C. Avalos

