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 9

10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN JOSE DIVISION

GREENBERG GLUSKER FIELDS CLAMAN
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 1900 Avenue of the Stars, 21st Floor
 Los Angeles, California 900674590

14 FACEBOOK, INC.,

15 Plaintiff,

16 v.

17 STUDIVZ LTD., HOLTZBRINCK
 NETWORKS GmbH,
 18 HOLTZBRINCK VENTURES
 GmbH, and DOES 1-25,

19 Defendants.

Case No. 5:08-CV-03468 JF

Assigned To: Hon. Jeremy Fogel

**REPLY MEMORANDUM OF POINTS
 AND AUTHORITIES IN SUPPORT OF
 MOTION FOR SANCTIONS DUE TO
 FACEBOOK'S CANCELLATION OF
 DEPOSITIONS**

[Supplemental Declaration of Stephen S.
 Smith (with exhibits) concurrently filed]

Date: March 3, 2009
 Time: 10:00 a.m.
 Dept./Place: Courtroom 2, 5th Floor
 Hon. Howard R. Lloyd

Complaint Filed: July 18, 2008

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1 **I. INTRODUCTION**

2 Facebook fails to demonstrate any justification for cancelling the depositions
3 after Mr. Smith had flown to Germany. All of the facts are admitted by Facebook
4 or are in writing. They establish the following:

- 5 1. Facebook knew Mr. Smith was flying “Wednesday evening.”
- 6 2. Facebook did not threaten to cancel the depositions until after it knew
7 Mr. Smith was in Germany.
- 8 3. The reason Facebook cancelled related to only one of the deponents.
- 9 4. Just before Facebook cancelled, Mr. Smith said that he would allow
10 “any and all questions that are reasonably related to jurisdiction and/or
11 venue” and would “take an expansive view” of what that meant.
- 12 5. Facebook cancelled anyway, ignoring (a) this Court’s Standing Order;
13 (b) Civil L.R. 37-1(b); (c) the fact that parties never agree in advance
14 of a deposition about every question to be asked; and (d) Mr. Smith’s
15 statement that he would “take an expansive view” and allow “any and
16 all questions that are reasonably related to jurisdiction and/or venue.”

17 Moreover, a close reading of Facebook’s own papers shows that the reason
18 Facebook cited for cancelling did not exist. Mr. Smith did not renege on any
19 agreement because there never was any agreement.

20 Accordingly, defendants request that their motion be granted so that they can
21 recoup the attorneys’ fees and costs they incurred in connection with flying their
22 counsel to Germany for depositions that Facebook wrongfully cancelled after their
23 counsel had already made the trip.

24
25 **II. FACEBOOK WAS *NOT* JUSTIFIED IN CANCELLING.**

26 First, Facebook knew about Mr. Smith’s travel plans. On January 5, 2009,
27 Mr. Smith informed Thomas Gray and Julio Avalos that “I am leaving for Germany
28 on Wednesday Evening.” (Ex. C) (Docket No. 84-4). Neither Mr. Gray nor Mr.

1 Avalos denies receiving or reading that email. Facebook ignores this email in its
2 opposition.¹

3 Second, Facebook admits it “did not ‘threaten’ to cancel the depositions”
4 before Mr. Smith flew to Germany. (Opp. at 7:14). Facebook claims that it
5 “clearly indicated that the scope of the depositions was a critical issue and that if
6 the parties could not resolve the issue it did not make sense to fly to Germany to
7 conduct the depositions.” But Facebook cites *nothing* in support of this claim.
8 (Opp. at 7:14-16). Messrs. Gray and Avalos do not support this claim in their
9 declarations. Facebook provides no written communications to support this claim.
10 It is nothing more than revisionist history.

11 Third, Facebook fails to explain why it waited *five hours* on the evening that
12 Mr. Smith was leaving to finally threaten to cancel. At 4:44 p.m. on January 7,
13 2009, Mr. Smith wrote that “there is no agreement on questions related to access.”
14 Mr. Smith sent his email to Messrs. Gray and Avalos. Neither responded until 9:33
15 p.m., far into the evening. (Ex. D) (Docket No. 84-5). They had to know it was
16 very *unlikely* that Mr. Smith would see the 9:33 p.m. email before he left. They do
17 not explain why they waited so long to tell Mr. Smith that they intended to cancel.

18 Fourth, the reason Facebook gave for cancelling did not relate to Mr. Weber.
19 Although Facebook claims it was “justified in believing that Mr. Weber’s deposition
20 would be as much a waste of time as Mr. Brehm’s” (Opp. at 15:16-18), this claim is
21 contradicted by Facebook’s own admissions. Mr. Avalos notes that the parties had
22 no disagreement about Mr. Weber’s deposition. (Avalos Decl., ¶ 13). *Before*
23 cancelling, Mr. Gray wrote: “As to Weber, you seemed comfortable with all
24 questions related to access (presumably bc he doesn’t know anything about what
25 StudiVZ did).” *Before* Facebook cancelled, Mr. Smith responded by confirming
26 that “[n]one of this discussion has anything to do with Martin Weber.” (Ex. D)

27
28 ¹ Mr. Gray claims he did not know Mr. Smith “had flown” to Germany until Mr. Smith
was in Germany. (Gray Decl., ¶ 5). But he never denies seeing Mr. Smith’s January 5 email.

1 (Docket No. 84-5).² Only then did Facebook cancel.

2 Fifth, Facebook’s argument that it was justified in cancelling Mr. Weber’s
3 deposition because the parties had generally been “unable to agree on the scope of
4 personal jurisdiction discovery” (Opp. at 15:8-18) is also false. It is undisputed that
5 there had never been an agreement on the scope of personal jurisdiction discovery.
6 Facebook admits that Mr. Smith said, on January 6, 2009, that the parties had
7 reached an “impasse” and “Facebook should move to compel.” (Avalos Decl., ¶ 15).
8 Facebook noticed Mr. Weber’s deposition after that conversation. (Exs. A-C)
9 (Docket Nos. 84-2, 84-3, 84-4).

10 Sixth, Facebook ignores the communication Mr. Smith sent just before
11 Facebook cancelled. Mr. Smith agreed to allow questions about “any and all issues
12 that are reasonably related to jurisdiction and/or venue.” Mr. Smith wrote that he
13 would take an “expansive view” of what that meant. Mr. Smith agreed to allow
14 questions that “go somewhat beyond” personal jurisdiction and venue. He said he
15 would object only if Facebook approached an area that related “solely” to the merits.
16 He offered to “do my best to work with you so that you get what you need for
17 jurisdiction and venue without the deposition turning into a free for all about the case
18 as a whole.” Facebook cancelled in its very next email. (Ex. D) (Docket No. 84-5).

19 Seventh, Facebook ignored Civil L.R. 37-1 and this Court’s “Standing Order
20 Re: Initial Case Management.” Local Rule 37-1 provides that, if the parties have a
21 discovery dispute that they are unable to resolve, and if there is the opportunity to
22 save expense or time, then counsel may contact the assigned District Judge or
23 Magistrate Judge to ask if he is available to address the issue. Paragraph 9 of the
24 Court’s Standing Order provides as follows: “Finally, in emergencies during
25 discovery events (such as depositions), any party may contact the Court to ask if the
26

27 ² Facebook criticizes defendants for submitting copies of counsel’s communications,
28 relying on Paragraph 9 of this Court’s Standing Order, which discourages the practice. While
defendants prefer not to attach such communications, they have no real choice as those writings
prove that Facebook misrepresents the record and are the best record of what occurred.

1 Judge is available to address the problem pursuant to Civil L.R. 37-1(b).”

2 Facebook received Mr. Smith’s email mid day on Thursday, in plenty of time to
3 avail itself of this Rule and Order. But Facebook waited until 10:56 p.m. PST to
4 cancel. (Ex. D) (Docket No. 84-5).

5 Finally, Mr. Smith never reneged on any agreement because there never was
6 any agreement. Facebook admits that the discussion about the documents (no
7 agreement) and interrogatories (no agreement) bracketed the discussion about Mr.
8 Brehm’s deposition. (Opp. at 8:25-28). So, Facebook must argue that Mr. Smith
9 agreed on the issue as to the deposition just after having disagreed on the exact
10 same issue as to the documents and just before disagreeing on the exact same issue
11 as to the interrogatories.

12 That defies common sense. Facebook admits that Mr. Smith said he would
13 not produce “any discovery” related to the issue of access unless Facebook agreed
14 to his proposed limitation because he did not want Facebook to file a motion to
15 compel in the future seeking more than what had been offered. Facebook refused.
16 The parties were at an impasse. Mr. Smith said that Facebook would need to move
17 to compel. (Avalos Decl., ¶ 15). How is the explicit refusal to produce “any”
18 discovery an agreement?³

19 But if there were any doubt that Facebook is wrong, one need only read
20 Facebook’s own words:

21 “Mr. Smith seemingly relented a bit and stated that he might try to
22 limit any testimony regarding the accessing of Facebook to that which
23 also had the additional predicate act such as copying. . . . Mr. Smith
24 then stated that it didn’t necessarily have to be ‘copying’ but that
25 testimony relating to access of Facebook or the development of the

26 ³ One need only read Facebook’s motion to compel to see that no agreement had been
27 reached. Facebook seeks an order compelling more than what Mr. Smith offered, not just as to
28 the document demands and not just as to the interrogatories, but also as to the depositions. (Mot.
to Compel at 25:1-12) (Docket No. 91). Facebook does not claim in that motion to have agreed to
Mr. Smith’s proposed limitation.

1 StudiVZ website would have to ‘link’ in some way with causes of
2 action plead in Facebook’s complaint. Therefore, it appeared to
3 Facebook’s counsel that some relevant testimony would be gained
4 regarding the *Calder* effects test issues and the depositions could go
5 forward.”

6 (Opp. at 8:17-19) (emphasis added). That is not an agreement. (Facebook itself
7 calls it only an “apparent” or “seeming” agreement) (Opp. at 8:25; 9:7-9).

8 Mr. Smith’s statement was an offer. And nowhere in the declarations of
9 Messrs. Gray and Avalos do they ever state that they agreed to Mr. Smith’s proposal.
10 In their opposition brief, Facebook claims that it “agreed” to Mr. Smith’s limitation.
11 (Opp. at 9:28, fn. 2). But Facebook provides no evidence to support that claim, and
12 Messrs. Gray and Avalos do not say that anywhere in their declarations.⁴

13 Facebook wanted what Mr. Smith offered, but only if it did not have to agree
14 in return to Mr. Smith’s limitation, which is exactly the point that Mr. Smith made
15 in his January 7, 2009 email:

16 “ Second, you are again mischaracterizing what I offered to do as an
17 ‘agreement.’ I do not know how many more times I could have
18 possibly repeated the point -- I was willing to agree to a limitation on
19 scope along the lines of what you describe below if and only if you
20 also agreed. I am not and have never been willing to agree, only to
21 have you not agree and move to compel anyway. I have said that to
22 you (and to Warrington and Annette before you) more times than I can

23 ⁴ A close reading of the declarations of Messrs. Avalos and Gray proves the point. They
24 both say that they “believed” there was an agreement. (Avalos Decl., ¶ 16 at 7:7-8; Gray Decl.,
25 ¶ 2 at 2:15-16). But neither one of them says that they ever actually expressed any agreement to
26 Mr. Smith’s proposed limitation. In fact, as Mr. Avalos’ own declaration states, Facebook’s
27 counsel expressed disagreement with Mr. Smith proposed limitation. (Avalos Decl., ¶ 15; see
28 also Supplemental Declaration of Stephen Smith, ¶ 12(f)-(g)).

Messrs. Avalos and Gray do not even agree on what Mr. Smith proposed. Mr. Avalos
claims that Mr. Smith agreed to allow questioning about access tied to “copying.” (Avalos Decl.,
¶ 16 at 7:5-7). Mr. Gray claims that Mr. Smith agreed to allow questioning about access for the
much broader “commercial purposes.” (Gray Decl., ¶ 2 at 2:15). So they supposedly “believed”
in different agreements.

1 count. What I said was that I would not agree to discovery (i.e.,
2 documents, facts or deposition testimony) as to ‘access’ generally
3 which, among other things, is grossly overbroad. Then we discussed
4 narrowing that issue further. You wanted access related to ‘design,
5 development and creation.’ That was as far as you were willing to
6 ‘narrow’ it. I offered a further narrowing to access that led to copying.
7 You refused to agree to that. I then invited you to come back with
8 something that was between your offer and my offer for me to
9 consider. You have not done that. So at the moment, there is no
10 agreement on questions related to access.”

11 (Ex. D) (Docket No. 84-5). This email expressed accurately what counsel had said
12 on the subject during the conversation on January 6, 2009. (Supplemental
13 Declaration of Stephen S. Smith [“Supp. Smith Decl.”], ¶ 12(f)-(g)).

14 The falsity of Facebook’s unsupported claim is demonstrated by the parties
15 January 7-8, 2009 communications. If Facebook had truly agreed to Mr. Smith’s
16 proposed limitation, then the deposition never would have been cancelled! Mr.
17 Gray would have written back to Mr. Smith to clarify that Facebook was, in fact,
18 agreeable to Mr. Smith’s proposed limitation. Had he done that, there would have
19 been no issue. But he did not do that, and he never claims that he did.

20 There was never any agreement, and Facebook knows it. There was an offer,
21 which Facebook rejected. Facebook initially wanted to go forward anyway and
22 noticed the depositions. It changed its mind and cancelled only after it knew that
23 Mr. Smith was already in Germany.

24
25 **III. FACEBOOK REPEATEDLY MAKES DEMONSTRABLY FALSE**
26 **STATEMENTS ABOUT THE PARTIES’ MEET AND CONFER.**

27 Facebook devotes much of its opposition to a discussion of the parties’ meet
28 and confer communications from November 26, 2008 through January 5, 2009, just

1 before the events that are the direct subject of the motion for sanctions. Facebook
2 feels the need, as it should, to explain to the Court why it waited until the day
3 before Mr. Smith left for Germany to try resolve this “central” issue. (Opp. at 3:7;
4 14:22-15:3).

5 So Facebook claims that it believed the issue had been resolved on November
6 26, 2008, only to discover on December 17, 2008 that Mr. Smith “renege.” (Opp.
7 at 3:14; 4:17-18; 5:13-18:). Facebook claims that only then did it become “clear to
8 Facebook’s counsel that confirmation was needed regarding the scope of testimony
9 of Messrs. Brehm and Weber would be permitted to offer at their respective
10 depositions.” (Opp. at 5:16-18). But, then, Mr. Smith went on vacation and was
11 unavailable until January 6, 2009. (Opp. 5:20; 6:27-28). In the interim, Facebook
12 met and conferred with Mr. Smith’s partner, William Walker. But he had only “an
13 imperfect understanding of the status of the case and the outstanding disputes.”
14 (Opp. at 5:21-22). So nothing could be resolved prior to January 6, 2009, giving
15 “the parties a very small window of opportunity to resolve their differences as to
16 the scope of the deposition testimony.” (Opp. at 7:2-3). That is Facebook’s story.
17 All of it is false.

18 First, defendants did not agree or represent on November 26, 2008 that they
19 would produce access-related discovery, and Facebook was not surprised on
20 December 17, 2008 that no such discovery was produced. Mr. Smith did not
21 renege on any agreement because (again) there was no agreement.

22 The proof is in Facebook’s own papers. Just before making the false claim
23 that Mr. Smith “agreed” and “represented” that this discovery would be
24 “forthcoming,” Facebook writes as follows: “Mr. Smith stated that he [sic] ‘think
25 about’ whether he would agree to produce discovery evidence related to his
26 representations [about access.]” (Opp. at 4:5-6) (emphasis added). Similarly, Mr.
27 Avalos declares that Mr. Smith ended the November 26, 2008 meet and confer by
28 saying only “Let me think about it.” (Avalos Decl., ¶ 5).

1 In addition, Mr. Smith sent a letter to Facebook’s counsel, Annette Hurst, on
2 December 4, 2008 confirming what defendants had agreed to produce during the
3 meet and confers of November 26 and December 2 and 3, 2008. Access-related
4 documents or interrogatory responses were not listed among the items defendants
5 agreed to produce. Mr. Smith wrote: “We are still investigating or considering the
6 other categories you mentioned during the meet and confer.” (Ex. G). No counsel
7 for Facebook ever wrote back to say, “wait you also agreed to produce access
8 documents.” (Supp. Smith Decl., ¶ 6).

9 Facebook magically transforms the statements “let me think about whether to
10 produce” and “we are still investigating and considering the other categories” into a
11 representation and agreement to produce. The duplicity is manifest. There was no
12 agreement. Facebook was not surprised about what it received on December 17,
13 2008. Mr. Smith communicated clearly and did not renege on anything.⁵

14 Second, Mr. Smith’s vacation did not mean that the parties had only a “very
15 small window of opportunity” to resolve their differences. On December 17, 2008,
16 Annette Hurst was replaced by Mr. Gray. On Friday, December 19, 2008, Mr.
17 Gray asked for a meet and confer for Monday, December 22, 2008. Mr. Smith was
18 to be on vacation, but he agreed to interrupt his vacation on December 22, 2008 to
19 participate in the call. (Supp. Smith Decl., ¶ 9). But on Saturday, December 20,
20 2008, Mr. Gray said he “goofed” and needed to move the meet and confer to
21 December 23, 2008. Mr. Smith could not participate on that date because he had
22 pre-arranged plans with his family. So his partner, William Walker participated in
23 his stead. (Id.) Mr. Walker recalls very well what was said, and has prepared a
24 declaration recounting what said. Among the topics discussed was the Access
25 Issue.⁶ Mr. Walker stated defendants’ position that the access-related requests were

26 ⁵ As is set forth in the Supplemental Declaration of Stephen S. Smith, the claims
27 Facebook makes about what Mr. Smith said during the November 26, 2008 meet and confer
before he said “Let me think about it,” are also false. (Supp. Smith Decl., ¶ 5(a)-(g)).

28 ⁶ The term “Access Issue” is defined in the Motion at 3:20.

1 overbroad and improper. (Walker Decl., ¶ 3(a)-(h)) (Docket No. 98).

2 There was then another meet and confer on December 30, 2008. During this
3 call, the parties continued to disagree about the Access Issue. That discussion
4 related primarily to the written discovery, but the depositions were also discussed.
5 Facebook admits that it understood the parties were “at an impasse” relating to the
6 meaning of “personal jurisdiction discovery” as it concerned these depositions and
7 were in disagreement about the Access Issue specifically. (Opp. at 6:4-13).

8 So, again, there was no ambiguity. Defendants had repeatedly expressed their
9 position, and there was no agreement. The “window” of opportunity to try to
10 resolve this issue had been open from November 26 through December 30, 2008.
11 The issue was not resolved. If Facebook intended to cancel the depositions over
12 this disagreement it was on clear notice to do so. But it did not do so and did not
13 even threaten to do so. Mr. Gray’s December 31, 2008 email expressed a desire to
14 “iron out” what the witnesses would be prepared to testify about. But the Access
15 Issue specifically was not even mentioned. And Mr. Gray did not communicate any
16 intention to cancel the deposition if that issue was not resolved. (Ex. C) (Docket
17 No. 84-4).

18 Finally, Facebook ignores entirely Mr. Smith’s email on January 5, 2009,
19 which was the last communication going into the January 6, 2009 meet and confer.
20 Mr. Smith told Messrs. Gray and Avalos that he was leaving for Germany on
21 Wednesday evening. He expressly noted that the scope of the witnesses’ testimony
22 was not resolved. He noted: “Our position has been pretty clearly explained via the
23 numerous meet and confers regarding the interrogatories and document requests.”
24 (Ex. C) (Docket No. 84-4).

25 In sum, Facebook’s story about what occurred from November 26, 2008
26 through January 5, 2009 is false and incomplete. It was always clear that there was
27 an unresolved dispute between the parties concerning the Access Issue, whether
28 that issue arose in the context of written discovery or the depositions. Defendants

1 never agreed to produce what Facebook has requested. Defendants always took the
2 position that “access” generally was grossly overbroad and needed to be
3 significantly narrowed. That is the exact same position Mr. Smith took on January
4 6, 2009. Facebook refused to narrow the requests as Mr. Smith had proposed, but it
5 expressly stated an intent to go forward with the depositions nonetheless. It knew
6 when Mr. Smith was leaving. It changed its mind and cancelled after Mr. Smith
7 was already there.

8
9 **IV. CONCLUSION**

10 Facebook noticed depositions to take place in Germany, and then wrongfully
11 cancelled after defense counsel had already made the trip. Defendants respectfully
12 request that the Court grant the motion.

13
14 DATED: February 17, 2009

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15
16
17 By: /s/ Stephen S. Smith
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