

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: +1-650-614-7400
 5 Facsimile: +1-650-614-7401

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
 20 NETWORKS GmbH, HOLTZBRINCK
 VENTURES GmbH, and DOES 1-25,

21 Defendant.

Case No. 5:08-cv-03468 JF

**FACEBOOK'S MOTION TO STRIKE
 DECLARATION OF STEPHEN S.
 SMITH**

Date: March 24, 2009
 Time: 10:00 a.m.
 Room: Courtroom 2, 5th Floor
 Judge: Honorable Magistrate Judge
 Howard R. Lloyd, for
 Discovery Purposes

1 **NOTICE OF MOTION**

2 **TO DEFENDANTS STUDIVZ LTD., HOLTZBRINCK NETWORKS GMBH AND**
3 **HOLTZBRINCK VENTURES GMBH**

4 PLEASE TAKE NOTICE that on March 24, 2009 at 10:00 a.m. or as soon thereafter as it
5 may be heard, in Courtroom 2 of this Court, before the Honorable Howard R. Lloyd, Plaintiff
6 Facebook, Inc., pursuant to Federal Rule of Civil Procedure 56(e) and N.D. Cal. Civil Local Rule
7 7-5(b), will and hereby does move to strike the Declaration of Stephen S. Smith filed in support
8 of Defendants' Opposition to Facebook's Motions to Compel and For Sanctions. This motion is
9 based on the accompanying Memorandum, the concurrently-filed Declaration of Julio C. Avalos
10 In Support of Facebook's Motion to Strike, and all pleadings and papers which are of record and
11 are on file in this case.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **I. INTRODUCTION**

14 The "declaration" of Stephen S. Smith filed in support of Defendants' Motions in
15 Opposition to Facebook, Inc.'s ("Facebook") Motions to Compel and For Sanctions is a
16 declaration in name only and should be stricken. Northern District of California Civil Local Rule
17 7-5 is clear: "An affidavit or declaration may contain only facts, must conform as much as
18 possible to the requirements of FRCivP 56(e), and must avoid conclusions and argument. . . . An
19 affidavit or declaration not in compliance with this rule may be stricken in whole or in part."

20 The tone of Mr. Smith's declaration would be argumentative even for a substantive
21 motion, with the vast majority of paragraphs peppered with conclusions, over-the-top indignation
22 and of course Mr. Smith's now familiar overuse of the bold, italics and underline functions of his
23 word processing program, which are apparently meant to signal the reader that something
24 important is being said when the words themselves leave doubt. Vast sections of Mr. Smith's
25 diatribe are, in his own words, "totally irrelevant to the current discovery dispute," despite the
26 fact that the declaration has been purportedly filed in support of Defendants' papers regarding
27 that very dispute.

1 A factual affidavit or declaration is neither the place to rail against opposing counsel nor
2 to reiterate one's legal theories or conclusions. Mr. Smith's declaration fails to conform to the
3 Local Rules and should accordingly be stricken from the record.

4 **II. STATEMENT OF FACTS**

5 Stephen S. Smith is lead counsel for Defendants StudiVZ, Ltd., Holtzbrinck Ventures
6 GmbH and Holtzbrinck Networks GmbH ("Defendants"). On February 10, 2009, Mr. Smith filed
7 one declaration purporting to be in support of both Defendants' Opposition to Facebook's Motion
8 to Compel Further Personal Jurisdiction Discovery and Defendants' Opposition to Facebook's
9 Motion for Sanctions. *See* Declaration of Julio C. Avalos In Support of Facebook, Inc.'s Motion
10 to Strike Declaration of Stephen S. Smith ("Avalos Decl.") ¶ 2; **Exhibit A**.

11 Mr. Smith's Declaration begins with a preamble that states that the declaration has been
12 filed to correct "false statements and actions" that Facebook has attributed to Mr. Smith and
13 arguing that "Facebook and its counsel declarants repeatedly exaggerate, mischaracterize and
14 misquote statements." *See* Declaration of Stephen S. Smith In Support of Defendants'
15 Oppositions to Facebook's Motions to Compel and For Sanctions ("Smith Declaration" or simply
16 the "Declaration") (Dkt. #97) ¶ 2.

17 A review of the Smith Declaration reveals that at least 35 of its 56 paragraphs are
18 argumentative and/or contain conclusions. *See* Smith Decl. ¶¶ 2– 9, 11 – 14, 17 – 22, 24, 27 – 28,
19 30, 34 – 37, 46 – 48, 51 – 56. When counting paragraphs containing mere fact but that are
20 nevertheless martialled in support of argumentative headings and sub-headings that act as
21 combative topic sentences, the number of argumentative paragraphs rises near to one hundred
22 percent, with the sole exception being Mr. Smith's initial paragraph declaring his status as a duly
23 licensed attorney.

24 **III. ANALYSIS**

25 Northern District of California Local Rule 7-2(b) provides that a declaration "may contain
26 only facts" and "must avoid conclusions and argument." A "declaration not in compliance with
27 this rule may be stricken in whole or in part." N.D. Cal. Civ. L.R. 7-2(b). Further, this Court has
28 held that a declaration may be stricken in whole or in part when it contains "unnecessary and

1 duplicative” information. *See Page v. Children’s Council*, 2006 U.S. Dist. LEXIS 68269, *14 -
2 *15, Case No. C 06-3268 SBA (N.D. Cal. Sept. 11, 2006) (striking paragraphs from counsel’s
3 declaration that “simply repeat[] portions of the Plaintiff’s memo,” did “not contain the sorts of
4 facts that are appropriate in a declaration,” contained “argument” or were simply “unnecessary
5 and duplicative.”).

6 At least 35 of the 56 paragraphs in Mr. Smith’s declaration are clearly argumentative. The
7 tone is set, for instance, in the declaration’s first substantive paragraph, which is less a statement
8 of facts than a quarrelsome preamble:

9 “In Facebook’s two motions and in the declarations filed in support thereof, Facebook and
10 its counsel declarants repeatedly exaggerate, mischaracterize and misquote statements and
11 actions that they attribute to me. This declaration corrects those false statements and fills
12 in the gaps in the factual record. Sections A-B are totally irrelevant to the current
13 discovery dispute that is the subject of Facebook’s motion to compel, but are included
14 only because Facebook has seen fit to dredge up long-past event [sic] in the case in
15 connection with its motion for sanctions. Because Facebook has raised the issue,
16 defendants feel compelled to respond.”

17 Smith Decl. ¶ 2. This paragraph is purely argumentative and should be stricken, as is the case for
18 most of Mr. Smith’s Declaration. A review of the headings in Mr. Smith’s declaration is
19 sufficient and instructive (as is the fact that his declaration contains headings at all):

- 20 - **“Defendants Have Not Been Engaged In a “Strategy of Stalling and Delaying the
21 Litigation” Since the “Outset of the Case”** (Smith Decl. 1:23 – 24) (emphasis in
22 original)
- 23 - **Facebook’s Statements About the Rule 26(f) Conference Are Totally False.** (*Id.* 3:19-
24 20)
- 25 - **Defendants Did Meet and Confer With Facebook Before Its Responses to the
26 Discovery Were Due and Agreed to Set the Hearing Date of the Motions to Dismiss
27 Four Months After They Were Filed to Allow Facebook Time to Complete That
28 Discovery** (*Id.* 8:21-24) (emphasis in original)
- **The Parties Were “Largely Able to Work Out Every Issue” Related to Facebook’s
Discovery Requests** (*Id.* 11:22-23)

- 1 - **Mr. Avalos Has Misrepresented the Content of My Statements Made During the**
2 **November 26, 2008 Meet and Confer** (*Id.* 15:17-23)
3 - **Ms. Hurst Left the Case and Was Replaced by To Gray [sic] Who Participated in**
4 **Meet and Confers Without My Participation on December 23 and 30.** (*Id.* 21:9-11)
5 (emphasis in original)
6 - **The January 6, 2009 Meet and Confer** (*Id.* 22:14)

7 These headings have their place in a brief, not a factual declaration. Indeed, other than its use of
8 the first-person, Mr. Smith’s declaration more resembles a Memorandum of Points and
9 Authorities than a statement of facts.

10 Defendants cannot maintain that a “declaratory” paragraph that states, for instance, “That
11 was a blatant falsehood. It was untrue under the FRCP. It was inconsistent with the Wavier that
12 *he had drafted* and it was inconsistent with the letter *he had drafted* that accompanied the
13 Waiver,” is not argumentative or conclusory. (*Id.* ¶ 7) (emphasis in original). Again, this is true
14 for paragraphs 2– 9, 11 – 14, 17 – 22, 24, 27 – 28, 30, 34 – 37, 46 – 48, 51 – 56.

15 In short, the vast majority of Mr. Smith’s declaration and the entirety of its spirit run afoul
16 of L.R. 7-5(b) as well as this Court’s recent precedent. Accordingly Mr. Smith’s declaration
17 should be stricken in full from the record.

18 **IV. CONCLUSION**

19 Facebook respectfully requests that the Court enter the accompanying proposed order
20 striking Mr. Smith’s Declaration from the record.

21 Dated: February 17, 2009

ORRICK, HERRINGTON & SUTCLIFFE LLP

22
23 /s/ Julio C. Avalos /s/
24 JULIO C. AVALOS
25 Attorneys for Plaintiff
26 FACEBOOK, INC.
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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on February 17, 2009.

Dated: February 17, 2009

Respectfully submitted,

/s/ Julio C. Avalos /s/
JULIO C. AVALOS