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 9

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

GREENBERG GLUSKER FIELDS CLAMAN
 & MACHTINGER LLP
 1900 Avenue of the Stars, 21st Floor
 Los Angeles, California 90067-4590

14 FACEBOOK, INC.,
 15 Plaintiff,

16 v.

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

Case No. 5:08-CV-03468 JF

Assigned To: Hon. Jeremy Fogel

**DEFENDANTS' OPPOSITION TO
 FACEBOOK, INC.'S MOTION TO
 STRIKE DECLARATION OF
 STEPHEN S. SMITH**

Date: March 24, 2009
 Time: 10:00 a.m.
 Dept./Place: Courtroom 2, 5th Floor
 Hon. Howard R. Lloyd

Complaint Filed: July 18, 2008

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. INTRODUCTION**

4 Facebook’s motion to strike the Declaration of Stephen S. Smith filed in
5 support of Defendants’ oppositions to Facebook’s motion to compel and for
6 sanctions (the “Declaration”) is just another attempt to distract the court from the
7 lack of merit of those motions. Unable to rebut the facts in the Declaration,
8 Facebook instead takes issue with simple organizational devices used to improve
9 clarity and readability. However, the fact that Mr. Smith’s account of the events
10 and conversations described in the Declaration does not comport with Facebook’s
11 own version of events does not transform the Declaration into mere argument.

12
13 The relevant facts are as set forth in the Declaration, and, as shown in
14 defendants’ oppositions to those motions, those facts show that Facebook’s motions
15 to compel and for sanctions should be denied. Facebook’s meritless motion to strike
16 is yet another desperate attempt at diversion, and should accordingly be denied.

17
18 **II. STATEMENT OF FACTS**

19 Stephen Smith is lead counsel for Defendants StudiVZ, Ltd., Holtzbrinck
20 Ventures GmbH and Holtzbrinck Networks GmbH (“Defendants”). On February
21 10, 2009, Mr. Smith filed one combined declaration in support of both Defendants’
22 Opposition to Facebook’s Motion to Compel Further Personal Jurisdiction
23 Discovery and Defendants’ Opposition to Facebook’s Motion for Sanctions.

24
25 As stated in the Declaration itself, Mr. Smith’s Declaration addressed
26 incorrect assertions in Facebook’s motions and declarations. Mr. Smith’s account
27 of his interactions with Facebook’s various counsel incorporated organizational
28 topic headings and bold, italics, and underlined typeface.

1 **III. ARGUMENT**

2 Northern District of California Local Rule 7-2(b) provides that a declaration
3 “may contain only facts” and “must avoid conclusions and argument,” and that a
4 “declaration not in compliance with this rule may be stricken in whole or in part.”
5 N.D. Cal. Civ. L.R. 7-2(b). In an obvious effort to keep defendants’ side of the
6 story out of the record, Facebook moves to strike the entire Declaration.

7
8 In fact, no portion of the Declaration should be stricken. Mr. Smith’s
9 Declaration is, throughout, simply a statement of facts that in many places conflicts
10 with the factual account proffered by Facebook. Within Facebook’s motions to
11 compel and for sanctions, including the attached affidavits from Facebook’s
12 counsel, Facebook made numerous factual assertions and characterizations of
13 interactions between the parties’ counsel, and of certain statements made by Mr.
14 Smith in the course of those interactions. Those assertions and characterizations
15 did not accurately represent what had actually transpired or been said, and so Mr.
16 Smith submitted his Declaration to set the record straight and, to be helpful, to
17 provide the factual contexts in which the interactions between counsel concerning
18 discovery occurred.

19
20 **A. Mr. Smith’s Use of Boldfacing, Italics, and Organizational**
21 **Headings Improves the Clarity of His Declaration, and Does Not**
22 **Render It Argumentative.**

23 In essence, Facebook’s motion appears to take exception to (1) Mr. Smith’s
24 use of boldfacing, italics, and underlining; and (2) his use of organizational
25 headings, without regard to the actual uses to which these devices were put. See
26 Facebook’s Motion to Strike Declaration of Stephen S. Smith (“Motion to Strike”),
27 at 1:20–24. It simply makes no sense, however, to assume that the use of typeface
28 or headings is inherently argumentative. Rather, Mr. Smith’s use of bold and italics

1 highlighted specific points of factual disagreement and particular instances where
2 Facebook inaccurately described interactions between the parties’ counsel or
3 misquoted Mr. Smith personally. The substance of the interactions of counsel, and
4 the actual language spoken by Mr. Smith during those interactions, were placed
5 squarely in issue by *Facebook’s own motions and declarations*, and so defendants
6 and Mr. Smith had every right to respond. Mr. Smith’s account of those
7 interactions is not argumentative simply because it does not comport with
8 Facebook’s own self-serving accounts.

9
10 In addition, the use of topic headings is simply a convenient way to improve
11 the clarity, organization, and readability of any legal pleading, statement, or
12 declaration, especially a lengthy one that covers many conversations and a lot of
13 correspondence that took place over a period of between two and three months.
14 Contrary to Facebook’s insistence that such headings are intrinsically
15 argumentative, Mr. Smith’s headings simply helped to organize relevant facts and
16 recollections into coherent statements that accurately described the events
17 discussed, and so are entirely proper.

18
19 The list of headings cited by Facebook as “proof” of the allegedly
20 argumentative quality of the Declaration, by itself, shows the lack of merit of
21 Facebook’s motion, because each and every heading is an assertion of fact. See
22 Motion to Strike, at 3:15–4:9. For example, the headings address, among other
23 things, what Defendants’ alleged “strategy” was or was not (in response to
24 Facebook’s false charges of deliberate delay of discovery), whether certain
25 statements made by Facebook or its counsel were factually correct or incorrect, and
26 whether or not Mr. Smith participated in certain meet and confers and what was
27 said during the contacts in which he took part.

1 **B. Mr. Smith’s Assertion of Facts in His Declaration that Contradict**
2 **Facebook’s Assertions Is Properly Factual and Declaratory.**

3 Actually, a significant portion of Facebook’s motion boils down to an
4 argument that wherever the Declaration disagrees with the story told by Facebook’s
5 motions and/or Facebook’s declarants, such disagreement is argumentative and
6 must be stricken from the record. But that is not so; all that means is that Facebook
7 is claiming that there are disputed questions of fact. Mr. Smith’s Declaration
8 simply provides the facts necessary to point out the inaccuracies in Facebook’s
9 motions and declarations. That does not render the Declaration argumentative, and
10 certainly does not justify the extreme relief that Facebook seeks — the striking of
11 the Declaration from the record in this case.

12
13 Facebook goes on to complain of Mr. Smith’s statement regarding
14 Mr. Avalos’ claims: “That was a blatant falsehood. It was untrue under the FRCP.
15 It was inconsistent with the Waiver that *he had drafted* and it was inconsistent with
16 the letter *he had drafted* that accompanied the Waiver.” See Motion to Strike, at
17 4:10–14 (emphasis in original). But each component of this statement is, itself, an
18 assertion of fact: whether or not a claim was true or false, whether or not a claim
19 was accurate by reference to the FRCP, and whether or not a claim was consistent
20 with a given document and who drafted that document. While Mr. Smith’s use of
21 italics or underlining may have emphasized particularly relevant facts, it did not
22 somehow transform the recitation of those facts into argument.

23
24 In short, Facebook’s attempt to characterize any statement of fact made by
25 Mr. Smith with which Facebook disagrees as strikeable argument is unpersuasive,
26 and is really just a sideshow that is meant to distract from the lack of a sound basis
27 for Facebook’s motions to compel and for sanctions. Facebook’s motion to strike
28 Mr. Smith’s Declaration from the record should be denied. See United States v.

1 Lisle, 1992 U.S. Dist. LEXIS 4652, at *13, *13 n.7 (N.D. Cal. Mar. 25, 1992)
2 (noting that plaintiff had attacked the validity of defendant’s evidence on technical
3 grounds without actually supplying any evidence to contradict it, and denying
4 plaintiff’s motion to strike a declaration submitted by defendant that plaintiff
5 claimed was “conclusory and argumentative”).
6

7 **C. Even if Portions of Mr. Smith’s Declaration Were Argumentative,**
8 **Striking the Entire Declaration Is Not an Appropriate Remedy.**

9 Even assuming, purely for the sake of argument, that portions of Mr. Smith’s
10 Declaration were argumentative, Facebook’s proposed remedy, namely striking the
11 entire Declaration, is completely inappropriate. As set forth above, the vast
12 majority (if not all) of the portions of the Declaration challenged by Facebook are
13 simply factual assertions that contradict Facebook’s own account. Under such
14 circumstances, the appropriate remedy where argument and factual declaration may
15 blur is for the Court to preserve the entire declaration, and then simply give less
16 weight to certain portions as the Court deems inappropriate. See Jones v. Barnhart,
17 349 F.3d 1260, 1270 (10th Cir. 2003) (affirming lower court’s refusal to strike
18 entire declaration, even where portions were potentially argumentative, in favor of
19 simply ignoring any portions the court deemed inappropriate); Newman v. GMC,
20 2008 U.S. Dist. LEXIS 105492, at *27–*29 (D.N.J. Dec. 31, 2008) (declining to
21 strike expert’s certification, even where certain portions “contain what may be
22 characterized as ‘argument’”); Toni & Guy (USA) Ltd. v. Nature’s Therapy, Inc.,
23 2006 U.S. Dist. LEXIS 25291, at *10–*11 (S.D.N.Y. May 1, 2006) (denying
24 reciprocal motions to strike and considering each party’s submissions “to the extent
25 that they comply with [federal rules].”)
26

27 Indeed, ironically, applying Facebook’s own reasoning to Facebook’s own
28 declarations would require that *they* be stricken because they contain objectionable

1 argument. See, e.g., Declaration of Thomas J. Gray in Support of Facebook’s
2 Motion to Compel, at 2:18–19 (“With an obvious disagreement as to the issue, I do
3 not understand why Mr. Smith boarded the plane to Germany.”); Declaration of
4 Julio C. Avalos in Support of Facebook’s Motion for Sanctions, at 5:5–6 (“Despite
5 Mr. Smith’s November 26 representations regarding forthcoming evidence of
6 StudiVZ’s accessing and copying of Facebook’s intellectual property, no such
7 discovery was produced.”); Declaration of Julio C. Avalos in Support of
8 Facebook’s Motion to Compel, at 7:14–16 (“In response to Interrogatory No. 5,
9 Defendants admitted that they had 11,013 StudiVZ users in California as of
10 October 22, 2008, an increase of nearly 1,000 California users in just one week.”).
11

12 In fact, Facebook knows that Mr. Smith’s Declaration really is beyond
13 objection. Facebook’s Motion to Strike is thus reduced to making preposterous
14 arguments such as the following: “[w]hen counting paragraphs containing mere
15 fact but that are nevertheless martialled [sic] in support of argumentative headings
16 and sub-headings that act as combative topic sentences, the number of
17 argumentative paragraphs rises near to one hundred percent, with the sole exception
18 being Mr. Smith’s initial paragraph declaring his status as a duly licensed attorney.”
19 See Motion to Strike, at 2:19–23. In other words, Facebook says that if a heading is
20 somehow objectionable (which, as shown above, they are not here), then every
21 paragraph in the Declaration that falls under the heading should be stricken, even if
22 those paragraphs contain “mere fact.”
23

24 That simply makes no sense. There is no authority for granting a motion like
25 that, which takes “boot-strapping” to a breathtaking new level. Facebook’s motion
26 should be denied.¹

27 ¹ Instead of making an ill-founded, sweeping motion to strike every last thing in Facebook’s declarations,
28 Defendants have pursued a more sensible course by correcting Facebook’s inaccurate versions of events, and by
raising specific evidentiary objections where appropriate. Facebook has done neither. (*Continued on next page*)

