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16 UNITED STATES DISTRICT COURT  
 17 NORTHERN DISTRICT OF CALIFORNIA  
 18 SAN JOSE DIVISION

19 FACEBOOK, INC.,

20 Plaintiff,

21 v.

22 STUDIVZ LTD., VERLAGSGRUPPE  
 23 GEORG VON HOLTZBRINCK GmbH,  
 24 HOLTZBRINCK NETWORKS GmbH,  
 25 HOLTZBRINCK VENTURES GmbH, and  
 26 DOES 1-25,

27 Defendants.

Case No. 5:08-CV-03468 JF  
 Assigned To: Hon. Jeremy Fogel

**REPLY IN SUPPORT OF MOTION TO  
 DISMISS FOR LACK OF PERSONAL  
 JURISDICTION AND FORUM NON  
 CONVENIENS ON BEHALF OF  
 HOLTZBRINCK NETWORKS GmbH AND  
 HOLTZBRINCK VENTURES GmbH**

[StudiVZ Ltd.'s Reply Brief; Supplemental  
 Declarations of Stephen S. Smith, William M.  
 Walker and Martin Weber (and Exhibits Thereto)  
 Filed Concurrently]

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 Place: Courtroom 3

Complaint Filed: July 18, 2008

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1 **I. INTRODUCTION**

2 **A. Personal Jurisdiction**

3 Facebook filed one opposition to the separate motions to dismiss of StudiVZ, Ltd.  
4 (“StudiVZ”) and Holtzbrinck Networks GmbH and Holtzbrinck Ventures GmbH (collectively the  
5 “Holtzbrinck defendants”). The vast majority of that opposition refers only to StudiVZ.  
6 Concerning the Holtzbrinck defendants, Facebook does not contest any of the facts set forth in  
7 their motion to dismiss. Facebook does not argue that the Holtzbrinck defendants are subject to  
8 general or specific jurisdiction or that they are alter egos or agents of StudiVZ.

9 Instead, Facebook argues that the Holtzbrinck defendants are subject to jurisdiction  
10 because StudiVZ “continued” and “expanded” its allegedly wrongful conduct after becoming a  
11 subsidiary of the Holtzbrinck defendants. (Opp. at 4:9-22 and 15:2-4). Facebook presents no  
12 evidence that the Holtzbrinck defendants authorized or directed StudiVZ to engage in such  
13 conduct, and the undisputed evidence is directly contrary. (Weber Decl., ¶ 10; Brehm Decl., ¶19).  
14 Facebook cites no law to support its argument. The cases Facebook does cite -- *Licciardello v.*  
15 *Lovelady*, 544 F.3d 1280 (11th Cir. 2008) and *Panavision v. Toeppen*, 141 F.3d 1316 (9th Cir.  
16 1998) -- do not involve parent company defendants being sued for their subsidiary’s alleged  
17 conduct. They involve individual defendants being sued for their own conduct. Moreover,  
18 Facebook’s newly invented legal theory would reverse well-established personal jurisdiction law  
19 holding that a parent company may not be subjected to personal jurisdiction for its subsidiary’s  
20 acts unless it is proven that they are alter egos or agents of each other, which Facebook does not  
21 even try to prove. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122,  
22 1134 (9th Cir. 2003). There is simply no basis to assert jurisdiction over these defendants.

23 Further, even if the Holtzbrinck defendants were otherwise subject to jurisdiction, the  
24 exercise of jurisdiction would also be unreasonable. The factors courts consider to determine  
25 reasonableness weigh overwhelmingly against jurisdiction.

26 Accordingly, the Holtzbrinck defendants’ motion to dismiss should be granted.  
27  
28

1           **B.     Forum Non Conveniens**

2           The Holtzbrinck defendants should also be dismissed for the independent reason of *forum*  
3 *non conveniens*. Facebook’s argument to the contrary is meritless and is proven so by an  
4 omission that is striking given its direct relevance to the issue.

5           Facebook ignores entirely the fact that it filed an 82-page complaint in Cologne, Germany,  
6 which alleges the same factual allegations and seeks the same relief as in this case and which is  
7 scheduled to commence trial on April 28, 2009. The Magistrate Court has already noted that the  
8 issues raised in the German litigation are “substantially similar (if not identical) to those raised  
9 here.” (Docket No. 68 at 4:27-28).

10          Facebook omits any reference to this fact because it proves that Facebook’s position is  
11 meritless. First, it proves false Facebook’s claim that Germany is not a valid alternative forum.  
12 Second, it diminishes the weight that would otherwise be given to Facebook’s choice of forum  
13 here. Third, it contradicts Facebook’s argument that there is a mandatory forum selection clause  
14 applicable to this case.<sup>1</sup> Fourth, it shows that the private and public interest factors weigh heavily  
15 in favor of Germany as the more appropriate forum.

16          Finally, it also proves that Facebook is forum shopping. In Cologne, Facebook does not  
17 sue the Holtzbrinck defendants. It sues only StudiVZ. If Facebook had any evidence to support  
18 its claims against the Holtzbrinck defendants in this case, then it would have also sued them in the  
19 Cologne case. The fact that it did not strongly implies that Facebook is using this action for an  
20 improper purpose, such as to force a sale of StudiVZ to Facebook, which Facebook has sought at  
21 least three times since late 2006. This is likely why Facebook also originally sued Verlagsgruppe  
22 Georg von Holtzbrinck (“VGH”), only to dismiss VGH for lack of personal jurisdiction six  
23 months ago – after VGH brought a motion to dismiss.

24          If there has ever been a case where a local plaintiff’s lawsuit should be dismissed for  
25 *forum non conveniens*, this is that case. The Court should grant the Holtzbrinck defendants’  
26 motion to dismiss for this independent reason.

27 \_\_\_\_\_  
28 <sup>1</sup> Not to mention that Facebook presents no evidence that the Holtzbrinck defendants ever saw, let alone  
agreed to, Facebook’s Terms of Use.

1 **II. ARGUMENT**

2 **A. The Holtzbrinck Defendants Are Not Subject To Jurisdiction in California.**

3 Facebook does not contest any of the facts in the Holtzbrinck defendants’ motion, and  
4 does not argue that there is general or specific jurisdiction. Facebook does not argue that  
5 StudiVZ is the alter ego or agent of either Holtzbrinck defendant.

6 Facebook makes only two arguments about the Holtzbrinck defendants: (1) that the  
7 Holtzbrinck defendants are subject to personal jurisdiction because StudiVZ continued and  
8 expanded its allegedly wrongful conduct after it became a subsidiary of the Holtzbrinck  
9 defendants (Opp. at 4:9-22 and 15:2-4); and (2) that exercising jurisdiction over the Holtzbrinck  
10 defendants is reasonable. (Opp. at 15:14-18:1). Neither argument has merit.

11 **1. Being a “Knowing” Parent of an Allegedly Wrongdoing Subsidiary**  
12 **Does Not Confer Jurisdiction.**

13 Facebook argues that the Holtzbrinck defendants are liable as owners of StudiVZ because  
14 they “continued and expanded StudiVZ’s ongoing infringement with knowledge thereof and with  
15 knowledge that doing so would harm Facebook in California.” The “knowledge” is based on  
16 Facebook’s June 8, 2006 and January 3, 2007 demand letters to StudiVZ. The “continued and  
17 expanded StudiVZ’s ongoing infringement” is based on “information and belief” that the  
18 Holtzbrinck defendants “either explicitly or implicitly authorized” StudiVZ to engage in such  
19 conduct. (Opp. at 4:9-22 and 15:2-4; Avalos Decl., ¶¶ 9-12).

20 Yet, Facebook cites nothing showing the Holtzbrinck defendants authorized or directed  
21 StudiVZ’s alleged conduct, nor does Facebook dispute Martin Weber’s declaration, which states:  
22 “While Networks and Ventures monitor StudiVZ’s financial performance (as they would any  
23 investment), they do not exercise any type of day-to-day control over StudiVZ – either  
24 operational control or control over strategic decisions.” (Weber Decl., ¶ 10; Brehm Decl., ¶ 19).

25 Facebook’s conclusion that “knowledge” of a subsidiary’s tortious conduct confers  
26 jurisdiction has no legal support. *See e.g. Heritage Copy Products, Inc. v. Savin Corp.*,  
27 661 F.Supp. 463, 472 (M.D. Pa. 1987) (“Heritage . . . cites no cases supporting the proposition  
28 that a parent’s knowledge of a subsidiary’s tort subjects the parent to jurisdiction in the forum

1 where the subsidiary is subject to jurisdiction.”)<sup>2</sup> Indeed, such a rule would eviscerate the  
2 limited liability law that is a hallmark of separate corporate existence. As explained in the motion  
3 (and not disputed by Facebook), the rule is that personal jurisdiction over the subsidiary does not  
4 confer jurisdiction over the parent. (Mot. at 6:18-9:18 and citations therein). The only exceptions  
5 are “alter ego” and “agency.” (Mot. at 6:6-11 and citations therein). Facebook does not dispute  
6 this law and does not argue alter ego or agency.

7 The Holtzbrinck defendants’ mere status as a combined parent company who were aware  
8 of a claim asserted against StudiVZ by Facebook does not make them subject to personal  
9 jurisdiction in the United States.<sup>3</sup>

10 **2. The Exercise of Jurisdiction Would Be Unreasonable.**

11 Facebook miscomprehends the “reasonableness” requirement for jurisdiction. Facebook  
12 argues that the requirement is “but one factor a court should consider and is not determinative by  
13 itself.” (Opp. at 15:15-18). That is wrong. Reasonableness is a required element of personal  
14 jurisdiction. *Schwarzeneggerv. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). To  
15 exercise jurisdiction, the Court must first find that it is reasonable to do so. The seven  
16 reasonableness factors show that exercising jurisdiction over the Holtzbrinck defendants would be  
17 unreasonable. *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993).

18 (i) **Purposeful Availment:** Facebook claims that “Defendants” intentionally  
19 trespassed Facebook’s servers, stole its property and have over 11,000 users in California. Yet,  
20 there is no allegation or evidence that the Holtzbrinck defendants did anything or have any  
21 “users.” The evidence is undisputed to the contrary. (Weber Decl., ¶ 10; Brehm Decl., ¶ 19).

22  
23 <sup>2</sup> And the “knowledge” evidence here is particularly flimsy. Facebook does not even show that the Holtzbrinck  
24 defendants ever saw the demand letters that supposedly conferred this “knowledge.” The letters were addressed to  
25 StudiVZ, not to Holtzbrinck. Facebook omits from the record, even though it asked for and obtained these documents in  
26 discovery, the Stock Purchase Agreement by which the Holtzbrinck defendants became owners of StudiVZ, which  
references the June 8, 2006 letter, but which also contains a warranty and representation from the sellers of StudiVZ that  
the claims in that letter were resolved. That representation was corroborated by an opinion letter from StudiVZ’s  
independent outside counsel. (March 25, 2009 Supplemental Declaration of Martin Weber, ¶¶ 3-4; Exs. L-M; March  
27, 2009 Supplemental Declaration of William M. Walker [“Supp. Walker Decl.”], ¶ 8; Ex. J).

27 <sup>3</sup> The two cases Facebook cites have nothing to do with Facebook’s argument. (Opp. at 15:6-13, citing  
28 *Licciardello v. Lovelady*, 544 F.3d 1280 (11th Cir. 2008) and *Panavision International, L.P. v. Toepfen*, 141 F.3d  
1316 (9th Cir. 1998)). Neither case discusses a parent’s liability for the acts of its subsidiary. The defendants were  
individuals. Jurisdiction was being asserted over them based solely on their own individual acts.

1                   (ii) **Burden on Defendant:** Facebook claims there is no burden because the  
2 Holtzbrinck defendants are “part of one of the largest and wealthiest media conglomerates in the  
3 world, Verlagsgruppe Georg Von Holtzbrinck” (“VGH”). (Opp. at 16:11-12). Although VGH  
4 may be one of the largest and wealthiest companies in the world, that fact is irrelevant since VGH  
5 is not a defendant in this case. The Holtzbrinck defendants are two separate and different  
6 companies that are far less wealthy and profitable than Facebook.<sup>4</sup> Besides, even if “the burdens  
7 [were] equal, the second factor tips in favor of [the moving party] because the law of personal  
8 jurisdiction is asymmetrical and is primarily concerned with the defendant's burden.” *Terracom*  
9 *v. Valley Nat'l Bank*, 49 F.3d 555, 561 (9th Cir. 1995).<sup>5</sup> Here, the burden on the Holtzbrinck  
10 defendants is considerable given (1) they have no offices, personnel or other ties to this forum,  
11 (2) the lawsuit concerns whether German-based websites, trafficked almost entirely by consumers  
12 in Europe, violate Facebook’s rights, (3) the vast majority of the evidence is in Germany and is  
13 written in German, and (4) most of the witnesses are German citizens residing in Germany who  
14 speak German as their primary language.

15                   (iii) **Conflict with Sovereignty:** Facebook entirely fails to distinguish *Core-Vent*  
16 with respect to this factor. As *Core-Vent* held, the conflict is created as a result of the fact that the  
17 Holtzbrinck defendants are foreign nationals with no U.S. based relationships. 11 F.3d at 1489  
18 (“Litigation against an alien defendant creates a higher jurisdictional barrier than litigation against a  
19 citizen from a sister state because important sovereignty concerns exist.”). Facebook does not even  
20 attempt to dispute that fact, but instead argues that it is “outweighed by the reason” that  
21 “Defendants trespassed to California property and committed willful intellectual property theft on  
22 a massive unabashed scale.” (Opp. at 17:1-5). But *Core-Vent* does not allow such weighing (at  
23 least as to this factor) and, as noted above, there is no evidence supporting Facebook’s claim.

24 \_\_\_\_\_  
25 <sup>4</sup> Facebook sued VGH in this case only to dismiss it in the face of a motion to dismiss for lack of personal  
26 jurisdiction. (Docket Nos. 15 and 27). In support of that motion, VGH submitted evidence, which Facebook never  
disputed, showing that VGH has no ownership interest in StudiVZ (Docket No. 16, ¶ 8), which necessarily also  
means that it has no ownership interest in the Holtzbrinck defendants.

27 <sup>5</sup> Facebook claims the law is primarily concerned with the defendant’s burden only when the defendant is  
28 smaller than the plaintiff. (Opp. at 16:4-10). Facebook is wrong. The Ninth Circuit has unambiguously held that  
when the burdens are “equal” this factor “tips in favor of” the defendant because the law is “primarily concerned with  
the defendant’s burden.” *Terracom*, 49 F.3d at 561. *Accord Core-Vent*, 11 F.3d at 1489.

1                   **(iv) Forum State’s Interests:** Facebook argues that this forum has an interest in  
2 exercising jurisdiction because Facebook is a California citizen that was harmed in California.  
3 (Opp. at 17:6-15). While Facebook is presumably a California citizen, this factor is entitled to  
4 less weight for two reasons.<sup>6</sup> First, concerning the Holtzbrinck defendants, Facebook presents no  
5 evidence (or even allegation) that Facebook was harmed by anything they did. Second, even as to  
6 StudiVZ, Facebook ignores the fact that the brunt of any alleged harm necessarily occurred  
7 outside this forum. It is without dispute that 99.9% of StudiVZ users are outside of California.  
8 (Brehm Decl., ¶ 17). Finally, Facebook’s argument is also severely diminished by the fact that  
9 Facebook itself has sued StudiVZ in Germany. (Docket No. 69).

10                   **(v) Efficient Resolution of the Controversy:** For this factor, the court will look  
11 “primarily at where the witnesses and the evidence are likely to be located.” *Core-Vent*, 11 F.3d  
12 at 1489. Facebook argues that some witnesses and documents are in California. However, it is  
13 indisputable that the vast majority of witnesses and documents are in Germany and are written in  
14 (or speak) German.

15                   **(vi) Plaintiff’s Interest in Effective Relief:** Facebook does not address this  
16 factor. It simply groups it with the “existence of alternative forum” factor and then cites to its  
17 discussion on *forum non conveniens*. (Opp. at 17:28-18:1). But, then, in the *forum* section,  
18 Facebook does not address this factor (at least not explicitly). In any event, if there were any  
19 doubt about Facebook being able to obtain “effective relief” in Germany, Facebook’s Cologne  
20 lawsuit removes such doubt. As explained in Section B.1 below, Facebook seeks the same relief  
21 as here, and more, in its Cologne, Germany action.

22                   **(vii) Existence of Alternative Forum:** Facebook also does not address this factor  
23 in its argument about the reasonableness of jurisdiction, but instead incorporates its argument about  
24 *forum non conveniens*. (Opp. at 17:27-18:1). As a result, Facebook misstates the burden. In the  
25 jurisdiction context, Facebook has the burden to prove that no alternative forum exists. *Core-Vent*, 11  
26 F.3d at 1490. Facebook does not meet that burden. Facebook’s own actions prove that an alternative

27 \_\_\_\_\_  
28 <sup>6</sup> This is only “presumably” true, because Facebook has presented no competent evidence that it is, in fact, a California citizen. The only “evidence” on this is from Facebook’s counsel, Julio Avalos, who lacks personal knowledge to attest to the truth or falsity of that fact.

1 forum exists, as Facebook filed the same lawsuit in Cologne, Germany. While Facebook’s decision  
2 not to sue the Holtzbrinck defendants in Cologne says something about its confidence in its claims  
3 against those defendants, it does not change the fact that an alternative forum exists.

4 In sum, the *Core-Vent* factors show that the exercise of jurisdiction would be unreasonable.

5 **B. The Case Should Be Dismissed For *Forum Non Conveniens*.**

6 **1. Facebook’s Cologne, Germany Lawsuit Proves that Germany is an**  
7 **Adequate Alternative Forum.**

8 Facebook argues that defendants have not proven that an adequate alternative forum  
9 exists. (Opp. 18:12-19:4). This is false, and Facebook knows it.

10 On November 19, 2008, Facebook filed an 82-page complaint against StudiVZ in  
11 Cologne, Germany based on the same conduct alleged in the instant case (the “German  
12 Complaint”). (Docket Nos. 69, 70 and 70-2). As stated by Magistrate Judge Lloyd, “[t]here is no  
13 apparent dispute that the issues in the German Action are substantially similar (if not identical) to  
14 those raised here.” (Order, Docket No. 68 at 4:27-28).

15 This lawsuit was not a response to the negative declaratory relief action that StudiVZ filed  
16 in Stuttgart, Germany on July 18, 2008; Facebook filed no counter-claim in the Stuttgart case.  
17 Rather, Facebook went to a separate jurisdiction in Germany to file a new, affirmative claim as a  
18 plaintiff. (Docket Nos. 69, 70, 70-2 and 130, ¶ 5).

19 Per German practice, Facebook had to present its entire case in its German Complaint.  
20 Thus, the complaint contains its legal claims, requests relief greater than that demanded in its U.S.  
21 lawsuit, lists its evidence and its witnesses, contains lengthy written and graphic analysis in the  
22 form of two written expert opinions (49 and 41 pages including exhibits, respectively), attaches  
23 dozens of exhibits, and contains a legal brief citing the law under which Facebook seeks relief.

24 Facebook’s Cologne, Germany lawsuit asserts even broader claims and seeks even broader  
25 relief than that sought in this case.

26 • Facebook’s German Complaint makes claims both under Germany’s Unfair  
27 Competition Act and Germany’s Trademark Act for alleged misuse of the “look and feel” of  
28 Facebook’s website, and for false designation of origin. (*Cf.* German Complaint at pp.66-69 to

1 Facebook’s U.S. Complaint, Docket No. 1 at pp.14:6-23).

2 • Facebook’s German Complaint alleges exploitation of, and harm to, Facebook’s  
3 “good reputation.” (*Cf.* German Complaint at p.70 to U.S. Complaint, Docket No. 1 at 1:13-17,  
4 4:23-24, 7:10-12).

5 • Facebook’s German Complaint alleges StudiVZ “unfairly gained access to the  
6 information and documents required to produce the imitation. Clearly [StudiVZ] obtained the  
7 source code of [Facebook] which forms the basis of the website of [Facebook]. How [StudiVZ]  
8 obtained the source code is irrelevant.” (*Cf.* German Complaint at p.70 to U.S. Complaint,  
9 Docket No. 1 at 12:10-24; 13:9-20).

10 • Facebook’s German Lawsuit alleges that StudiVZ without permission, and in  
11 violation of Facebook’s terms of use, accessed and “spied on” Facebook’s website, and “copied,  
12 downloaded and published” aspects of Facebook’s website. (*Cf.* German Complaint at pp.80-81  
13 to U.S. Complaint, Docket No. 1 at 12:10-19, 13:9-20, 14:28-15:13).

14 • Facebook’s German Lawsuit also alleges that Facebook was damaged because  
15 StudiVZ was “the first social network on the market” in Germany, as does its U.S. lawsuit, and  
16 seeks so-called “pioneer protection” under German law based on that. (*Cf.* German Complaint at  
17 71:137 to U.S. Complaint, Docket No. 1 at 11:21-23).

18 • Indeed, Facebook makes claims in Germany that it does not make here, including  
19 copyright infringement claims and much more extensive trademark infringement claims than the  
20 trade dress claim it asserts here. (*See* German Complaint at pp.72-82).

21 • Just as it does in this U.S. case, Facebook demands an injunction against  
22 “[c]opying and/or providing access to the ‘Look and Feel’ and the screen as set out in Exhibits A1  
23 to A4 or processed versions thereof,” the use of “the pictorial mark of [Facebook]” and source  
24 code, and seven other things including double bar designs, color schemes, a three column  
25 structure, fonts and typography, style sheets, StudiVZ’s “gruscheln” function, and various  
26 buttons, function fields and place fields. (*Cf.* German Complaint at p.2 to U.S. Complaint,  
27 Docket No. 1 at 16:3-14).

28 • Just as it does in this U.S. case, Facebook asks for damages, specifically “that

1 Defendant is obligated to compensate [Facebook] for all loss suffered and still to be suffered.”  
2 (Cf. German Complaint at p.2 to U.S. Complaint, Docket No. 1 at 16:4).

3 • Facebook even seeks an accounting of both financial and non-financial  
4 information, and all of StudiVZ’s overhead costs, which is more than what it seeks here. (Cf.  
5 German Complaint at p.2 to U.S. Complaint, Docket No. 1 at 16:19-23).

6 On February 24, 2009, StudiVZ filed an 81-page response to Facebook’s German  
7 Complaint. That response contained StudiVZ’s evidence and briefing in opposition to  
8 Facebook’s case, including documents, witness lists, and a written expert report that refutes all of  
9 Facebook’s claims. (Docket Nos. 120-2 and 120-3).

10 On March 13, 2009, Facebook filed yet another, extensive amendment to its German  
11 Complaint in Cologne, Germany. That amendment asks for even more forms of relief and  
12 attaches a third written expert report in support of its claims. (March 27, 2009 Supplemental  
13 Declaration of William M. Walker [“Supp. Walker Decl.”], ¶¶ 4, 5, 7; Exs. G, I).

14 The trial in Facebook’s Cologne, Germany case will commence on April 28, 2009.  
15 (Walker Decl., ¶6; Ex. H). At this point, Facebook’s U.S. case is a side-show of the larger, and  
16 further advanced German litigation.

17 Incredibly, although this was the entire subject of defendants’ supplemental December 18,  
18 2008 supplemental brief (Docket No. 69) and is directly relevant to the *forum non conveniens*  
19 analysis, Facebook’s opposition nowhere mentions its German Complaint. That is telling.

20 It is also telling that Facebook chose not to sue the Holtzbrinck defendants in Cologne. It  
21 sued only StudiVZ. If Facebook had any evidence of wrongdoing by the Holtzbrinck defendants,  
22 then one would expect Facebook to have sued them, too. The fact that Facebook did not do so  
23 strongly suggests that it has no such evidence – just as it has failed to present any such evidence  
24 in support of its opposition to this motion. That Facebook nonetheless sued the Holtzbrinck  
25 defendants here, in California, suggests that Facebook is forum shopping to apply improper  
26 pressure on the Holtzbrinck defendants that is totally unrelated to the merits of Facebook’s  
27 claims, which seek to force a sale of StudiVZ to Facebook, which Facebook has tried to do at  
28 least three times since late 2006 and always in connection with a threat to sue.

1 Beginning with Facebook's June 8, 2006 and January 3, 2007 German demand letters,  
2 Facebook repeatedly identified Germany as the proper forum and StudiVZ as the only proper  
3 defendant. Facebook is vigorously pursuing its German case and has a trial scheduled to commence  
4 on April 28, 2009. (Supp. Walker Decl., ¶ 6). Germany is clearly the more appropriate forum.

5 **2. Any Differences Between German and U.S. Law are Irrelevant.**

6 Facebook claims that Germany is not an appropriate forum because it alleges violations of  
7 U.S. and California statutes and because German courts allegedly do not apply foreign substantive  
8 laws. (Opp. at 18:19-25). Neither argument has any merit.

9 Any difference between Germany and California concerning the legal basis for relief, or  
10 the relief itself, is legally irrelevant unless the available remedy is "so clearly inadequate or  
11 unsatisfactory that it is no remedy at all." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981);  
12 *Lockman Foundation v. Evangelical Alliance Mission*, 930 F.2d 764, 768, 769 (9th Cir. 1991).  
13 "[I]t is only in 'rare circumstances' . . . where the remedy provided by the alternative forum . . . is  
14 so clearly inadequate or unsatisfactory, that it is no remedy at all,' [and] that this requirement is  
15 not met." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001), *citing Lockman*, 930  
16 F.2d at 768 (*quoting Piper*, 454 U.S. at 254), *Ceramic Corp. v. Inka Maritime Corp.*, 1 F.3d 947,  
17 949 (9th Cir. 1993).

18 *Piper*, *Lockman* and *Lueck* are dispositive. *Piper* held that Scotland's lack of strict  
19 liability did not make it an inadequate forum. 454 U.S. at 255. *Lockman* held that the  
20 unavailability of RICO and Lanham Act claims did not make Japan an inadequate forum because  
21 the plaintiff could make other claims, and also held that less favorable discovery laws and the  
22 lack of jury trials does not make a forum inadequate. 930 F.2d at 768-69. *Lueck* upheld a *forum*  
23 *non conveniens* dismissal of a plane crash case in favor of New Zealand as a forum, even though  
24 New Zealand barred civil actions for such cases in favor of drastically limited, administrative  
25 relief. 236 F.3d at 1140-1142. And many cases find "Germany to be [an] adequate [forum]  
26 despite its differences in civil procedure." *Flex-N-Gate Corp. v. Wegen*, 2008 U.S. Dist. LEXIS  
27 105781 at \*5 (S.D.N.Y. Dec. 29, 2008).

28 The unavailability of punitive damages also does not make an alternative forum inappropriate.

1 *Kearney v. Litton Precision Gear*, 1988 WL 236112 at \*1 (C.D.Cal. 1988); *Nolan v. Boeing Co.*,  
2 762 F.Supp. 680, 681-82 (E.D.La. 1989). Even severely restricted damages in the alternative forum  
3 do not matter. *Lueck*, 236 F.3d at 1143, 1144; *Gonzalez v. Chrysler Corp.*, 301 F.2d 377, 381, 383  
4 (5th Cir. 2002) (affirming dismissal of case based on *forum non conveniens* in favor of Mexico  
5 even though Mexico did not provide strict tort liability and capped damages at \$2,500).

6 Further, if Facebook believes that its California and U.S. statutory claims provide the  
7 opportunity for some form of relief that German law does not, there is nothing to prevent  
8 Facebook from seeking to have the Cologne, Germany court consider such claims. *Creative*  
9 *Technology, Ltd. v. Aztech Systems Pte., Ltd.*, 61 F.3d 696, 701 (9th Cir. 1995) (High Court of  
10 Singapore could apply “United States Copyright law to Creative’s counterclaim in the event that  
11 it determines the scope of remedies offered under the Singapore Copyright Act to be  
12 inadequate”); *Contact Lumber Co. v. P.T. Moges Shipping Co., Ltd.*, 918 F.2d 1446, 1450 (9th  
13 Cir. 1990) (Philippine court “could apply U.S. COGSA if the situation so warrants”); *Cheng v.*  
14 *The Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir. 1983) (Taiwan was “competent to decide  
15 questions of American law, if American law should apply to the issues in this litigation.”).

16 **3. Facebook’s Choice of Forum is Not Determinative.**

17 Facebook repeatedly argues that its forum choice is dispositive. (Opp. at 19:5). Facebook  
18 is wrong. Any “deference due to plaintiff[] . . . is far from absolute.” *Lockman*, 930 F.2d at 767;  
19 *Contact Lumber*, 918 F.2d 1449-1450. “A citizen’s forum choice should not be given dispositive  
20 weight . . . [I]f the balance of conveniences suggests that trial in the chosen forum would be  
21 unnecessarily burdensome for the defendant or the court, dismissal is proper.” *Piper Aircraft*, 454  
22 U.S. at 256, n.23. “A plaintiff’s choice of forum is also given reduced emphasis where . . . the  
23 operative facts upon which the litigation is brought bear little material connection to the chosen  
24 forum.” *Flex-N-Gate*, *supra*, 2008 U.S. Dist. LEXIS 105781 at \*3-\*4 (dismissing case filed by  
25 U.S. plaintiff in favor of Germany because the core alleged misconduct occurred in Germany).

26 In addition, Facebook is doing business in Germany. Thus, Facebook “should expect to  
27 litigate claims relating to [its] business ventures in Germany.” *Id.* at \*3-\*4. “[T]he deference due  
28 an American plaintiff is diminished where plaintiff is a corporation doing business abroad and

1 can expect to litigate in foreign courts.” *Id.* at \*4; *Contact Lumber*, 918 F.2d at 1450. As a U.S.  
2 company present and doing business in Germany, Facebook expects to, and does, litigate in  
3 Germany. Facebook’s U.S. complaint shows that this dispute concerns alleged damages to  
4 Facebook’s German and other European operations because of allegedly improper conduct by  
5 Germans in Germany. (Docket No. 1, ¶¶ 1, 3-6, 12, 28, 40-41).

6 Also, Facebook did not choose California as its only forum. It brought the same case in  
7 Germany, too. Thus, Facebook’s choice of California as a forum should be given substantially  
8 less weight. *EFCO Corp. v. Aluma Systems USA, Inc.*, 145 F.Supp.2d 1040, 1046-47 (S.D. Iowa  
9 2000) (U.S. plaintiff’s choice of forum discounted because U.S. plaintiff also sued in Canada).

10 **4. The Private Interest Factors Favor Germany.**

11 **(i) Residence of Parties and Witnesses:** This favors Germany. The  
12 complaint alleges that the conduct occurred in Germany and was committed by German citizens.  
13 (Docket No. 1, ¶¶ 1, 3-6, 12, 28, 40-41). Facebook notes its own witnesses are here, but does not  
14 say who they are or what they add to the case. Without any competent evidence, Facebook  
15 claims that StudiVZ’s German founders spent time in the U.S. long ago and so concludes that the  
16 “initial creation and development of the StudiVZ site . . . appears to have occurred on U.S. soil.”  
17 (Opp. 22:10-14). But that is pure speculation and contradicts Facebook’s own complaint, which  
18 states that StudiVZ was built by German residents from computers in Germany in “October  
19 2005” and launched in Berlin, Germany. (Docket No. 1, ¶28).

20 **(ii) Convenience to Litigants:** This factor favors Germany. Defendants  
21 and Facebook both have a presence in Germany. Facebook does regular, continual business in  
22 Germany. It has pursued its legal claims in Germany for over 2 ½ years, beginning with its June  
23 2006 demand letter and continuing through its pending Cologne, Germany lawsuit. Defendants,  
24 though, have no presence at all in California. The balance of convenience to the litigants tips  
25 heavily in favor of Germany. *Contact Lumber*, 918 F.2d at 1450 (“ In an era of increasing  
26 international commerce, parties who choose to engage in international transactions should know  
27 that when their foreign operations lead to litigation they cannot expect always to bring their  
28 foreign opponents into a United States forum when every reasonable consideration leads to the

1 conclusion that the site of the litigation should be elsewhere.”).

2 **(iii) and (v) Access to Physical Proof and Cost of Bringing Witnesses**  
3 **to Trial:** These favor Germany. The key witnesses and evidence either work at StudiVZ in  
4 Germany or are former StudiVZ employees living in Germany. All speak German and many  
5 have little English proficiency. There is no way to compel any of those witnesses to come to trial  
6 in the United States. The vast bulk of relevant documents are also in German and in Germany.

7 **(iv) Compelling Unwilling Witnesses:** This favors Germany. Facebook  
8 names only two people, Messrs. Dariani and Bemann, as allegedly culpable. (Docket No. 1,  
9 ¶¶ 28, 31, 36, 37). Neither works for StudiVZ now. Both live in Germany and are subject to  
10 German process and jurisdiction. They are not, however, subject to the process of this Court and  
11 cannot be compelled to testify at trial here. Indeed, it will be very difficult to compel them to  
12 testify even at deposition. The Hague Evidence Convention and letters rogatory, as this Court  
13 undoubtedly knows, are slow, cumbersome, and likely to produce nothing as useful as the  
14 testimony that is available from German witnesses in a German court in a German case.

15 **(vi) Judgment Enforceability:** Any judgment – whether German or U.S.  
16 – must be enforced in Germany. That is where all defendants are located. It is easier and cheaper  
17 to enforce a German judgment in Germany than a U.S. judgment, especially where at least one  
18 aspect of a possible U.S. judgment -- punitive damages -- is unenforceable in Germany.  
19 Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, 118 Entscheidungen des  
20 Bundesgerichtshofes in Zivilsachen [BGHZ] 312 (F.R.G.). (copy attached).

21 **(vii) Other Considerations:** Costs and delays associated with the  
22 enormous amount of German translation that will be required are real, significant, and completely  
23 unnecessary in light of Facebook’s German lawsuit. A few witnesses speak respectable English,  
24 but even they will likely need some translation. The rest will require substantial translation.

25 **5. The Public Interest Factors Also Favor Germany.**

26 **(i) Local Interests:** This favors Germany. This case is based on events in  
27 Germany, involving alleged misconduct by Germans in Germany, and purported damage to  
28 Facebook in the German and European markets. (Docket No. 1, ¶¶ 1, 3-6, 12, 28, 40-41).

1 (ii) **Familiarity with Governing Law:** There will be complex disputes  
2 over choice of law because the alleged acts were committed in Germany. And, a German court is  
3 much more able than a U.S. court to analyze German and European markets under applicable law  
4 and to then assess any harm that Facebook allegedly suffered in Germany or Europe. (See  
5 Docket No. 1, ¶ 41).

6 (iii), (iv) and (v) **Burden on Local Court, Court Congestion and Costs**  
7 **Related to Resolving a Dispute that is Unrelated to the Forum:** All of these factors favor  
8 Germany. This Court and the jury would be unduly burdened because the witnesses are Germans  
9 located in Germany who speak German, the documents are in Germany and in German, and  
10 StudiVZ’s allegedly offending computers are in Germany and the documentation they contain is in  
11 German. Interpreting the testimony of every key witness and translating every document from  
12 German into English will greatly prolong the trial and increase expense for everyone, including this  
13 Court. This is especially problematic because the federal court system is congested. “Administrative  
14 difficulties follow for courts when litigation is piled up in congested centers . . . .” *Gulf Oil Corp. v.*  
15 *Gilbert*, 330 U.S. 501, 508 (1947). This is unnecessary and wasteful given Facebook’s pursuit of its  
16 nearly identical German lawsuit that is set to begin trial on April 28.

17 (vi) **Pending Litigation in Alternate Forum:** This factor obviously  
18 favors Germany. Facebook has initiated the same action as a plaintiff in Germany. It is also  
19 defending against the negative declaratory relief action that StudiVZ initiated in Stuttgart,  
20 Germany on the same day that this lawsuit was filed. While Facebook can argue that it was  
21 forced to litigate in the negative declaratory relief action, it consciously chose to initiate the  
22 affirmative claim in Cologne, Germany in November 2008.

23 **6. Facebook’s German Lawsuit Moots Its Terms of Use Argument.**

24 Facebook also claims that, under its terms of use, *forum non conveniens* cannot be  
25 asserted. (Opp. at 25:9-12). Facebook is wrong.

26 First, there is no evidence or even allegation that the Holtzbrinck defendants have ever  
27 seen, let alone agreed to be bound by, Facebook’s terms of use.

28 Second, Facebook may not argue that defendants are subject to a mandatory forum

