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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, DENNIS BEMMANN,
 MICHAEL BREHM, AND DOES 1-25,
 21 Defendants.
 22

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

**DECLARATION OF DR. SIEGFRIED
 H. ELSING IN SUPPORT OF
 FACEBOOK'S OPPOSITION TO
 DEFENDANTS' MOTION FOR
 STATUS CONFERENCE AND STAY
 OF PROCEEDINGS**

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1 I, Dr. Siegfried H. Elsing, declare as follows:

2 1. I am an attorney and partner with the law firm of Orrick Hölters & Elsing,
3 Immermannstraße 40, Düsseldorf 40210, Germany. Orrick Hölters & Elsing is the German
4 operation of Orrick, Herrington & Sutcliffe LLP. I make this declaration in support of Facebook's
5 Opposition to Defendant's Administrative Motion Requesting a Stay of Proceedings and a Status
6 Conference. I am fully licensed to practice law in Germany and New York and am in good
7 standing with my local bars. I earned my juris doctorate (Dr. jur.) from the University of Münster,
8 Faculty of Law in 1976. In addition to my private practice, I am an honorary professor at
9 Heinrich-Heine University, Faculty of Law, Düsseldorf, where I teach arbitration and
10 international civil procedure. Except as set forth herein, I have personal knowledge of the facts
11 stated herein and if called as a witness, could and would competently testify thereto.

12 2. I have reviewed the June 16, 2009 Judgment issued by the Cologne State Court in
13 the matter of Facebook, Inc. v. StudiVZ Ltd., 33 O 374/08 (the "Cologne Judgment"). Attached
14 as **Exhibit A**, is a true and correct copy of an English translation of the Cologne Judgment.

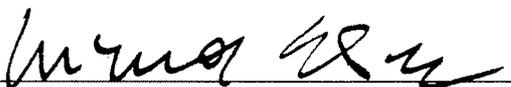
15 3. Under German Civil Procedural Code Sections 322, 325, 511, 517 and 705, the
16 Judgment does not have res judicata effect under German law and is not final. Under these Code
17 Sections, the Cologne Judgment could only be considered res judicata when there are no legal
18 remedies remaining and the judgment cannot be appealed any more (*See BGH, Judgment of May*
19 *12, 1992, VI ZR 118/91, NJW 1992, 2296; Adolf Baumbach/Wolfgang Lauterbach/Jan*
20 *Albers/Peter Hartmann, Zivilprozessordnung, 66th edition, 2008, Section 705, para. 3). Under*
21 *Section 511 Para. 2 No. 1 of the German Civil Procedural Code, an appeal is generally admissible*
22 *when the amount in controversy exceeds a minimum sum of € 600. The time for appeal, given in*
23 *Section 517 of the German Civil Procedural Code, is one month, running from the day of service*
24 *of the judgment to the appealing party. Further, under German law, res judicata applies only to*
25 *the actual claims litigated, the so-called "dispositive" part of the judgment ("Urteilsformel" or*
26 *"Tenor"). The relevant German Civil Procedural Code Sections 322, 325 and 705 do not*
27 *recognize "issue preclusion" (collateral estoppel) with respect to the factual determinations on*
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1 which the judgment is based (*See BGH, Judgement of July 14, 1995, V ZR 171/94, NJW 1995,*
 2 *2993; BGH, Judgment of January 30, 1985, IVb ZR 67/83, NJW 1985, 1340; RG, Judgement of*
 3 *March 19, 1928, VI 266/27, RGZ 120, 317; Dr. Hans-Joachim Musielak, Der rechtskräftig*
 4 *entschiedende Lebenssachverhalt, NJW 2000, 3593). Parties can, and frequently do, re-litigate*
 5 *factual issues that relate to subsequently litigated claims.*

6 4. Attached as **Exhibit B** is a true and correct copy of the Notice of Appeal of the
 7 Cologne Judgment, dated June 18, 2009, filed by Facebook on June 19, 2009. The Notice of
 8 Appeal has been filed within only three days after pronouncement of the Cologne Judgment and
 9 therefore within the time for appeal, provided by Section 517 of the Civil German Procedural
 10 Code. With an amount in controversy of € 1,000,000 as stated in the Cologne Judgment, the
 11 minimum sum of € 600, required by Section 511 Para. 2 No. 1 of the German Civil Procedural
 12 Code, is also exceeded. Hence, the appellate court has no discretion to decline to take this
 13 admissible appeal. Therefore, in my opinion and depending on the work load of the court, it likely
 14 will take one year or more before the appellate court issues a decision.

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 17 I declare under the penalty of perjury that the foregoing is true and correct to the best of
 18 my knowledge.

19 Executed this 22 day of June 2009, at Misselroy.

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 Dr. Siegfried H. Elsing

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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 June 22, 2009.

Dated: June 22, 2009.

Respectfully submitted,

/s/ Thomas J. Gray
Thomas J. Gray