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14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN JOSE DIVISION

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

17 FACEBOOK, INC.,
 18 Plaintiff,

19 v.

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

27 Defendant.

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

**DECLARATION OF STEPHEN S.
 SMITH IN SUPPORT OF
 OPPOSITION TO FACEBOOK,
 INC.'S MOTION FOR EXPEDITED
 DISCOVERY**

[Memorandum of Points and Authorities,
 and (Proposed) Order concurrently filed]

Complaint Filed: July 18, 2008

DECLARATION OF STEPHEN S. SMITH

I, Stephen S. Smith declare:

1. I am an attorney at law duly licensed to practice in the State of California, and am a partner at Greenberg Glusker Fields Claman & Machtinger LLP, counsel of record for defendants Verlagsgruppe Georg von Holtzbrinck GmbH (“VGH”), Holtzbrinck Networks GmbH (“Networks”), Holtzbrinck Ventures (“Ventures”) and studiVZ, Ltd. (“studiVZ”) (collectively “Defendants”) in this action. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto under oath.

2. In the motion for expedited personal jurisdiction discovery (the “Motion”) filed by plaintiff Facebook, Inc. (“Facebook”) and in the accompanying Declaration of Julio Avalos in support of the Motion, Facebook argues that Defendants have sought to “delay unnecessarily” the “progress of this case.” (Opp. at 4:1-3). In making this argument, Facebook misstates and/or mischaracterizes the facts, as follows:

a. Facebook’s July 9, 2008 demand letter, referenced in Mr. Avalos’ declaration at paragraph 2, demanded a response “within 7 days” of the date of the letter.

b. On July 15, 2008, I was retained by studiVZ for the sole purpose of responding to the July 9, 2008 letter. I was not retained by VGH, Networks or Ventures at that time. Although the July 9, 2008 letter had been sent to VGH, Networks and Ventures, it complained of alleged acts and omissions of studiVZ only.

1 c. Contrary to Mr. Avalos' statement in his declaration at
2 paragraph 3 that I did not respond to the July 9, 2008 letter until the deadline in that
3 letter had "lapsed," in fact, I telephoned I. Neel Chatterjee, counsel for Facebook
4 who had drafted the July 9, 2008 letter, on July 16, 2008, which was still "within"
5 the seven days he had demanded. I telephoned Mr. Chatterjee and left him a
6 voicemail message stating that I had been retained by studiVZ and asked him for
7 10-14 days of additional time to respond to the letter. I also told Mr. Chatterjee that
8 I would like him to call me back because I had some questions that I wished to
9 discuss.

10
11 d. In its opposition, Facebook claims that "Facebook granted [my]
12 request, but there were no discussions." (Opp. at 4:8). That is false. On July 16,
13 2008, at 2:04 p.m., Mr. Chatterjee emailed me to say that he would give me only 7
14 days (not the 10-14 I had requested) and would return my call to discuss the claims
15 *only if* I first execute an onerous "standstill" agreement, which among other things
16 would have required studiVZ to agree to exclusive jurisdiction in the United States
17 District Court, Northern District of California. True and correct copies of Mr.
18 Chatterjee's July 16, 2008 e-mail and the attached "standstill" agreement are
19 attached hereto as "Exhibit A."

20
21 e. Facebook further claims that I "misrepresented" that I needed
22 additional time until July 18, 2008 to respond to the proposal regarding the standstill
23 agreement. This again is false. As noted above, I received Mr. Chatterjee's July 16,
24 2008 email at 2:04 p.m. Pacific Time. That was already late at night in Germany.
25 My client, therefore, did not even see the proposed standstill until July 17, 2008, and
26 I had no opportunity to discuss it with studiVZ until that time.

1 f. At 8:39 a.m. on July 17, 2008, Mr. Chatterjee was already
2 demanding a response to his proposed standstill agreement. Less than one hour
3 later, at 9:38 a.m. that same morning, July 17, 2008, I responded by telling him that
4 I had forwarded the email to my client and that I hoped to have a response the next
5 day, July 18, 2008. The next day, I did in fact respond to the proposed standstill
6 agreement by rejecting it in a letter to Mr. Chatterjee, a true and correct copy of
7 which is attached hereto as “Exhibit B.”
8

9 g. Given that I initially responded to the July 9 letter within the
10 seven days demanded (albeit to ask for a 10-14 day extension so that I could
11 investigate Facebook’s claims), that I then responded to Mr. Chatterjee’s demand
12 for an onerous standstill agreement within 48 hours of that demand being made, I
13 do not think I can be accused of any kind of egregious delay. Facebook has not
14 submitted any evidence stating that it was truly prepared to file suit on July 16,
15 2008, which was the deadline set forth in its July 9, 2008 letter. But, even
16 assuming it was, then the total delay I supposedly caused by asking for time to
17 review the standstill agreement was at *most only two days*.
18

19 3. Facebook also agrees that Defendants have engaged in “gamesmanship”
20 by insisting on the right to respond to the complaint on October 22, 2008. This is
21 also false.
22

23 a. Facebook filed this action on July 18, 2008. Although Facebook
24 is correct that it asked me to accept service of the complaint on behalf of the
25 Defendants on July 18, 2008 at 4:52 p.m., Facebook fails to note is that I did *not*
26 represent three of the four Defendants and had been retained only by studiVZ and
27 only for the purpose of responding to the July 9, 2008 letter. I had not been
28 retained to defend the lawsuit and, indeed, did not know that three additional

1 Defendants were even potentially going to be parties to any lawsuit. Therefore, at
2 4:54 p.m. on July 18, 2008, *within 2 minutes of being asked*, I truthfully answered
3 that I was not authorized to accept service. There was no “gamesmanship” on my
4 part. It was 1:52 a.m. in Germany at the time of Mr. Chatterjee’s request, and the
5 Defendants in Germany were not even aware that they had been sued. I would have
6 committed a horrendous breach of ethics if I had just assumed that I was authorized
7 to accept service on behalf of all of the Defendants.

8
9 b. On July 24, 2008, Mr. Chatterjee sent a letter to Dr. Anka Reich,
10 the Senior Vice President of VGH, in Stuttgart, Germany. Mr. Chatterjee enclosed
11 a Notice of Lawsuit and Request to Waive Service of a Summons (the “Waiver”)
12 Mr. Chatterjee asked Dr. Reich to sign the Waiver “within 60 days,” which is the
13 time specified in FRCP Rule 4(d)(1)(F), although he added that he desired to have
14 Defendants sign the Waiver sooner than 60 days after it was sent.

15
16 c. As required by the Federal Rules of Civil Procedure, Rule
17 4(d)(3), the Waiver provided the Defendants 90 days to respond to Facebook’s
18 Complaint in exchange for them agreeing to waive service. A true and correct copy
19 of Mr. Chatterjee’s July 24, 2008 letter to Dr. Reich and the Waiver are attached
20 hereto as “Exhibit C.”

21
22 d. I was retained to represent Defendants in this action on August
23 25, 2008. That same day, which was 28 days before the deadline in Mr.
24 Chatterjee’s July 24, 2008 letter and the deadline under Federal Rule of Civil
25 Procedure 4(d)(1)(F), I signed the Waiver on behalf of all Defendants *just as Mr.*
26 *Chatterjee had requested*. I then wrote a letter to Mr. Chatterjee enclosing the
27 Waiver. A true and correct copy of my August 25, 2008 letter and the Waiver that I
28 signed are attached as “Exhibit D.”

1 e. Facebook’s characterization of Defendants decision to sign the
2 Waiver as “gamesmanship” is disingenuous. Defendants did *exactly* what
3 Facebook’s counsel asked them to do, and they did it much *earlier* than requested.
4

5 4. On August 27, 2008, I received a letter from Warrington S. Parker III,
6 another Orrick attorney, a true and correct copy of which is attached hereto as
7 “Exhibit E.” In Mr. Parker’s letter, he noted that Orrick had filed the Waiver with
8 the Court and mentioned that he wished to discuss a plan relating to discovery
9 regarding personal jurisdiction.
10

11 5. On August 28, 2008, I attempted to telephone Mr. Parker to discuss his
12 August 27, 2008 letter. However, he was not there. I then tried Mr. Chatterjee. He
13 was also not there. I was then transferred to Mr. Avalos, who was there. During
14 my telephone call with Mr. Avalos, we discussed Mr. Parker’s suggestion of a
15 discovery plan related to personal jurisdiction. I said that I was representing four
16 different entities and that I was in the process of analyzing how each entity would
17 respond to Facebook’s Complaint. I specifically told Mr. Avalos that, with respect
18 to at least one of the defendants (VGH), I thought Facebook would not need any
19 discovery related to personal jurisdiction and would not even request such
20 discovery because the lack of personal jurisdiction over that defendant was so clear
21 and uncontestable. I said that I predicted that Facebook would decide voluntarily to
22 dismiss that defendant. With respect to the other defendants, I said that, while it
23 was likely that they would also move to dismiss for lack of personal jurisdiction, it
24 made more sense to wait to see (a) what motions were in fact filed, (b) which
25 defendant(s) filed any such motion, and (c) the basis for any such motions, before
26 addressing the necessity, or appropriate scope, of any expedited discovery as to
27 personal jurisdiction. Mr. Avalos said that my suggestion made sense, but that he
28

1 needed to discuss the matter with Mr. Chatterjee and Mr. Parker and get back to
2 me. Mr. Avalos did not agree to anything, and I did not agree to anything.

3
4 6. On September 2, 2008, Mr. Chatterjee and Mr. Avalos called me back
5 to further discuss the issue. During that telephone conversation, I again stated that I
6 was open to discussing the possibility of discovery relating to personal jurisdiction
7 but that it did not make sense to engage in such a discussion until after my clients
8 had decided how they intended to respond to Facebook's Complaint. I never stated
9 that all of the defendants were in fact going to move to dismiss for lack of personal
10 jurisdiction. I said only that one defendant would definitely make such a motion
11 (although I did not mention the name of the particular defendant during the call, the
12 defendant I was referring to was VGH, which did in fact file a motion to dismiss for
13 lack of personal jurisdiction on September 10, 2008). I also said that I thought
14 Facebook should decide to voluntarily dismiss the Complaint with respect to that
15 defendant since the lack of personal jurisdiction was so clear. I also told Mr.
16 Chatterjee and Mr. Avalos that I had not yet had time to analyze the issue
17 sufficiently with respect to the other defendants to know for sure whether they
18 would file motions to dismiss for lack of personal jurisdiction, but that I believed
19 one, two or all three of them would likely do so. I specifically noted that the facts
20 with respect to each defendant were different and that, therefore, I could not say
21 with certainty whether the other three defendants would also move to dismiss
22 Facebook's Complaint for lack of personal jurisdiction or, if they did, what the
23 factual basis for each would be. Accordingly, I told Mr. Chatterjee and Mr. Avalos
24 that I thought it made the most sense to wait and see whether or not some or all of
25 the other defendants moved to dismiss for lack of personal jurisdiction, and only
26 then discuss the need for, or scope of, discovery relating to personal jurisdiction.
27 Mr. Chatterjee said that made sense.

1 7. Later during our September 2, 2008 telephone conversation, Mr.
2 Chatterjee said that he believed that defendants were required to respond to
3 Facebook’s Complaint within 20 days of August 25, 2008, the date I had signed the
4 Waiver. I said he was wrong and that defendants’ responses were due on or before
5 October 22, 2008, which was 90 days after the date he had sent the Waiver to
6 defendants in Germany. Mr. Chatterjee disagreed and asked me to provide him
7 with “authority” for my position. I said in words or substance, “You have to be
8 kidding. Your own Waiver says that defendants have 90 days from the date you
9 sent the Waiver to my clients to respond to the complaint. That is exactly what
10 Rule 4 requires the Waiver to say. I signed that Waiver just as you asked us to and
11 then you filed it with the Court. So how can you now sit here and take the position
12 that they must respond within 20 days of my signing the Waiver?” Mr. Chatterjee
13 continued to insist, incorrectly, that defendants were required to respond to the
14 Complaint within 20 days of the date I had signed the Waiver, contrary to what he
15 himself had written in the Waiver itself and contrary to Rule 4. Needless to say,
16 there were no agreements reached between me, on the one hand, and Mr. Chatterjee
17 and/or Mr. Avalos, on the other hand, during the September 2, 2008 telephone call.

18
19 8. Later that same day, I sent to Mr. Chatterjee an email confirming the
20 discussion we had on the telephone and reiterating that defendants had until
21 October 22, 2008 to respond to the complaint per the Waiver that Mr. Chatterjee
22 had drafted, sent to defendants and asked defendants to sign, and which defendants
23 had in fact signed long before the deadline contained in the Waiver itself. A true
24 and correct copy of my September 2, 2008 email to Mr. Chatterjee is attached
25 hereto as Exhibit “F.”

26
27 9. The next day, September 3, 2008, I received a letter from Mr. Parker, a
28 true and correct copy of which is attached hereto as “Exhibit G.” In Mr. Parker’s

1 letter, he stated that Facebook wanted to take discovery regarding personal
2 jurisdiction before the defendants had even responded to Facebook’s Complaint.
3 This was the first time that any such request had been made by any of the Orrick
4 lawyers (i.e., Mr. Chatterjee, Mr. Parker and Mr. Avalos -- the “Orrick Lawyers”).
5

6 10. On September 4, 2008, I wrote a letter to Mr. Parker, a true and correct
7 copy of which is attached hereto as “Exhibit H.” In my September 4, 2008 letter, I
8 pointed out that, during my August 28, 2008 and September 2, 2008 conversations
9 with Mr. Chatterjee and Mr. Avalos, they were both in agreement that it made more
10 sense to take any expedited discovery relating to personal jurisdiction only after any
11 motions to dismiss were filed on those grounds because only then could the
12 appropriate parameters of such discovery be defined. I also noted that I did not
13 think it was a coincidence that Facebook was changing its position only after Mr.
14 Chatterjee had been forced to recall and concede (after reading his own Waiver
15 and/or Rule 4) that defendants had until October 22, 2008 to respond to the
16 Complaint. Only after that did Facebook suddenly think that it no longer made
17 sense to wait until any motions to dismiss were filed, which would define the
18 possible scope of any expedited discovery as to personal jurisdiction, if any.
19 Rather, Facebook suddenly wanted to engage in discovery even before any motions
20 were filed.
21

22 11. On September 5, 2008, I received another letter from Mr. Parker, a
23 true and correct copy of which is attached hereto as “Exhibit I.” In Mr. Parker’s
24 letter, he noted that Facebook might file a motion to seek discovery.
25

26 12. On September 10, 2008, VGH responded to Facebook’s Complaint by
27 filing a Motion to Dismiss for Lack of Personal Jurisdiction. No other defendant
28 has yet responded to Facebook’s Complaint, and the response date for each of the

1 other three defendants remains October 22, 2008 pursuant to the Waiver that
2 Facebook’s counsel drafted and asked the defendants to sign.

3
4 13. On September 18, 2008, I wrote another letter to Mr. Parker, making
5 an offer to resolve the issues raised in the Motion. I proposed that (1) the Motion
6 be taken off calendar without prejudice; (2) within 5 days of each Defendant’s
7 response to the complaint, counsel meet and confer regarding the appropriate scope
8 of personal jurisdiction discovery to be taken, if any, and commence such discovery
9 immediately thereafter; (3) if there remained issues we could not agree on, those
10 issues would be submitted to the Magistrate Judge to be heard on a reasonable
11 shortened notice; (4) Defendants would set (or continue) the hearing dates on any
12 motions to dismiss for lack of personal jurisdiction far enough out to allow the
13 discovery to be completed and included in Facebook’s opposition to the motion(s);
14 and (5) in the interim the remainder of the case, including other discovery, would
15 be stayed. A true and correct copy of my September 18, 2008 letter to Mr. Parker is
16 attached hereto as “Exhibit J.”

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18 14. On September 19, 2008, Mr. Parker wrote back rejecting my offer. A
19 true and correct copy of that letter is attached hereto as “Exhibit K.”

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21 15. Attached hereto as “Exhibit L” is, on information and belief, a true and
22 correct copy of a June 8, 2006 demand letter from Lovells (a large U.K.-based law
23 firm with offices in Germany) representing Facebook, Inc. to studiVZ Ltd. in
24 Berlin. We have had obtained a certified translation of that letter, a true and correct
25 copy of which is attached, along with the certification, as “Exhibit M.”

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27 16. On information and belief, on November 16, 2006 (nearly two years ago),
28 Mark Zuckerberg, Facebook’s founder and CEO, gave a video interview, a true and

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correct copy of which can be found at <http://en.sevenload.com/videos/9cMXu4Y-zuck> and can be made available on CD upon request. At approximately two minutes and forty seconds (2:40) into the interview, the interviewer asked Mr. Zuckerberg about other social networking websites, including specifically defendant “studiVZ,” that some have called “copycats” of Facebook’s website. In response, Mr. Zuckerberg does not use or adopt the word “copycat” but instead says, “I think that they’re different designs and slightly different products.”

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct, and that this declaration was executed in Los Angeles, California on September 23, 2008.

/s Stephen S. Smith

Stephen S. Smith