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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 AND DOES 1-25,
 21 Defendants.

Case No. 5:08-cv-03468 JF

**DECLARATION OF JULIO C.
 AVALOS IN SUPPORT OF
 FACEBOOK'S MOTION TO
 ENLARGE TIME PURSUANT TO
 L.R. 6-3**

Room: Courtroom 3, 5th Floor
 Judge: Honorable Jeremy Fogel

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1 I, Julio C. Avalos, declare as follows:

2 1. I am an attorney with the law firm of Orrick, Herrington & Sutcliffe LLP, counsel
3 for Plaintiff Facebook, Inc. I make this Declaration in support of Facebook's Motion to Enlarge
4 Time Pursuant to Civil L.R. 6-3. I am an active member in good standing of the California State
5 Bar. Except as set forth herein, I have personal knowledge of the facts stated herein and if called
6 as a witness, could and would competently testify thereto.

7 2. On August 28, 2008, I had a telephonic conversation with Defendants' counsel,
8 Stephen Smith. Mr. Smith confirmed that Defendants would challenge this Court's personal
9 jurisdiction over Defendants. On September 2, 2008, I, along with my colleague Neel Chatterjee,
10 again spoke to Mr. Smith and he again confirmed that Defendants would move to dismiss for lack
11 of personal jurisdiction.

12 3. On October 9, 2008, the parties held the obligatory Rule 26(f) conference via
13 telephone. At the conference, Mr. Smith represented that Defendants agreed that Facebook was
14 entitled to some discovery on the issue of personal jurisdiction. However, he stated that
15 Defendants would not respond to any discovery requests that they felt reflected on the merits of
16 this case.

17 4. On October 13, 2008, in response to an October 9 letter from my colleague
18 Tina Naicker, Mr. Smith wrote that Facebook's list of discovery topics "includes issues that have
19 nothing to do with personal jurisdiction" and that it was Defendants' position that "discovery into
20 the merits of the case should be stayed pending the resolution of any motions to dismiss for lack
21 of personal jurisdiction and/or *forum non conveniens*."

22 5. On October 14, 2008, Facebook propounded its First Set of Discovery Requests.

23 6. On October 22, 2008, Defendant StudiVZ and the Holtzbrinck Defendants filed
24 separate motions to dismiss for lack of personal jurisdiction and *forum non conveniens*. In order
25 to allow time to take personal jurisdiction discovery and resolve discovery disputes, Facebook
26 and Defendants negotiated a proposed stipulation regarding the scheduling of Defendants'
27 motions to dismiss and the filing of Facebook's opposition thereto. The parties agreed to the
28 proposed stipulation on October 23, 2008 and filed it on October 28. The Court entered the

1 Proposed Scheduling Order on November 4, 2008. The Scheduling Order provided that
2 Facebook “has up to and including Friday, January 16, 2009” to file and serve its oppositions to
3 Defendants’ motions to dismiss for lack of personal jurisdiction. Defendants were given two
4 weeks from that date to file their reply papers. The hearing on Defendants’ motions to dismiss
5 was set for February 13, 2009.

6 7. On October 27, 2008, counsel for the parties attempted to have a meet and confer
7 to discuss outstanding discovery issues. With respect to the outstanding discovery requests,
8 Mr. Smith refused to identify any specific discovery requests to which his clients objected as
9 going to the merits of the case. Mr. Smith simply stated that his clients would not produce any
10 discovery not related to personal jurisdiction. He refused to identify which discovery requests he
11 felt were not related to personal jurisdiction. Mr. Smith confirmed to my colleague Warrington S.
12 Parker that there were areas of discovery to which Defendants did not object, but refused to
13 identify them.

14 8. On October 31, 2008, Defendants filed a Motion for Protective Order seeking to
15 stay merits-based discovery and to prevent discovery produced in this matter from being used in
16 any other litigation between the parties.

17 9. On November 17, 2008, while the Motion for Protective Order was still pending,
18 Defendants responded to Facebook’s First Set of Discovery Requests with uniform, blanket
19 objections. With respect to some of the discovery requests, Defendants stated that they would
20 agree to respond following resolution of the pending Motion for Protective Order.

21 10. Since November, the parties have engaged in five meet and confers.

22 11. The first substantive meet and confer with respect to Facebook’s discovery
23 requests took place on November 26, 2008. I, along with my colleague Annette Hurst, met and
24 conferred with Defendants’ counsel, Mr. Smith and his partner William Walker. The parties spent
25 approximately one and a half hours discussing Facebook’s discovery request-by-request. With
26 respect to Facebook’s Request For Production No. 14, which requests “ALL DOCUMENTS
27 RELATED TO instances when YOU accessed [the] FACEBOOK website, www.facebook.com
28 OR www.thefacebook.com,” Mr. Smith stated, “My major problem is that I think this is where

1 you cross from jurisdiction into merits. I think given the causes of action, you're entitled to know
2 whether there are contacts with California related to the claims you have pled." Ms. Hurst then
3 said, "There's no way to sort out the merits from the jurisdiction." Mr. Smith responded, "I think
4 it's going to be undisputed that those people that had user accounts and used them in connection
5 with their employment did at least what you claim they did. Now, we'll have a huge fight as to
6 whether that violates the anti-hacking statute, but it's going to be undisputed that there were some
7 users who accessed Facebook." Mr. Smith agreed to produce the names of the StudiVZ
8 employees to which he was referring and their Facebook user accounts. He then stated that he
9 would not produce them unless Facebook first agreed that it would limit its discovery requests
10 and that it would not seek further discovery in the future.

11 12. On December 2, 2008, the parties engaged in a follow-up meet and confer.

12 13. On December 16, 2008, Magistrate Judge Lloyd held a hearing on Defendants'
13 Motion for Protective Order. I attended the hearing along with my colleague Annette Hurst. At
14 the hearing, Mr. Smith represented that he felt that Facebook had misunderstood the nature of
15 Defendants' motion. Mr. Smith stated that Defendants did not disagree that Facebook was
16 entitled to discovery that involved intertwined issues of personal jurisdiction and the merits of
17 this case. When this Court asked Mr. Smith whether he wished to withdraw his request to stay
18 discovery, Mr. Smith answered in the affirmative. Attached as **Exhibit A** is a true and correct
19 copy of the transcript of the December 16, 2008 hearing before Judge Lloyd at which Defendants
20 withdrew their motion for a protective order to prevent discovery.

21 14. On December 18, 2008, Defendants produced a first round of documents but did
22 not serve supplemental responses to Facebook's interrogatories. Defendant StudiVZ Ltd.
23 produced 198 pages consisting mostly of one contract. Defendant Holtzbrinck Networks
24 produced a total of nine heavily-redacted pages. The production contained no emails, letters, or
25 communications of any kind. The production also contained no programming or source code.
26 Despite Mr. Smith's November 26 representations regarding forthcoming evidence of StudiVZ's
27 access to and copying of Facebook's intellectual property, no such discovery was produced.

28 15. Following this production, the parties again met and conferred on December 23,

1 2008. Mr. Smith was unable to attend the conference and Defendants were represented by his
2 colleague, Mr. Walker. Mr. Walker was only generally aware of the Defendants' positions on
3 various outstanding discovery issues and stated that he would try to contact Mr. Smith (who was
4 out on vacation) prior to a follow-up meet and confer scheduled for December 30, 2008.

5 16. On December 24, 2008, Defendants served Supplemental Interrogatory Responses.
6 The first General Objection in these Supplemental Interrogatory Responses stated that Defendants
7 objected to Facebook's discovery requests on the grounds that discovery obtained through those
8 requests would be used in the pending German action between the parties.

9 17. On December 30, 2008, the parties once again met and conferred. Defendants
10 were once again represented by Mr. Walker, who represented that in the time since the last meet
11 and confer he had not been able to speak to Mr. Smith or Defendants and that he had no
12 additional information with respect to various outstanding discovery disputes.

13 18. During this meet and confer, my colleague Tom Gray asked Mr. Walker whether it
14 was Defendants' position that Facebook was not entitled to any discovery that touched
15 simultaneously on jurisdictional and merits-related issues. Mr. Walker stated that this was not
16 Defendants' position, but that neither he nor Defendants was persuaded that discovery relating to
17 the development and implementation of the StudiVZ website was relevant to personal jurisdiction
18 analysis. When Mr. Gray stated that central to Facebook's jurisdictional argument was the notion
19 that StudiVZ had reached out to California, submitted to California law, venue and jurisdiction
20 and then stole intellectual property located in the state, Mr. Walker stated that he was still not
21 persuaded and that in any event we should wait to speak to Mr. Smith. Mr. Walker stated that
22 although he could not speak with absolute certainty regarding many of Defendants' discovery
23 positions, he was fairly certain that Defendants would under no circumstances produce source
24 code.

25 19. On January 6, 2008, the parties held a final meet and confer. Mr. Smith was in
26 attendance. The conference first touched on the upcoming depositions of two "personal
27 jurisdiction" witnesses that StudiVZ and the Holtzbrinck defendants had agreed to produce.
28 Given the disagreement as to the scope of what "personal jurisdiction" discovery meant, Mr. Gray

1 sought to clarify the topics that these witnesses would be prepared to testify to. Mr. Smith
2 indicated that the Holtzbrinck witness, Martin Weber, would be able to testify to his knowledge
3 of StudiVZ's accessing of Facebook, which Mr. Smith stated he probably knew nothing about.
4 Mr. Gray stated, "I don't want to fly to Germany and find out that I'm not going to get answers.
5 It sounded from my conversations with Bill [Mr. Walker], that these guys were only going to
6 testify about stuff in their declarations [in support of Defendants' Motions to Dismiss for Lack of
7 Personal Jurisdiction]. We want to ask him about his knowledge about Bemann, Dariani, if
8 they had access to Facebook source code to develop the site, etc." Mr. Smith answered, "Well –
9 I'm willing to allow – No, you know what, I'm willing to allow him to testify about that fully.
10 Period. I think I'm willing to allow him to testify about that. I could fight you on this, but I don't
11 have any particular reason to." With respect to Mr. Brehm, the StudiVZ "personal jurisdiction"
12 witness, Mr. Smith stated that he might try to limit any testimony regarding the accessing of
13 Facebook to "copying," but that "I'm using a broad definition of copying. I'm not going to slice
14 it that thinly."

15 20. With respect to the outstanding discovery requests, the parties were unable to
16 reach an agreement regarding the proper scope of personal jurisdiction discovery. Mr. Smith
17 stated that most discovery going to access or the development of StudiVZ did not have to do with
18 personal jurisdiction or, the corollary, dealt only with the merits of the case. He stated that he
19 would fight this "all the way to the Supreme Court if I have to." Mr. Smith argued that Facebook
20 was not entitled to any and all discovery that related to StudiVZ's accessing of Facebook in the
21 course and conduct of StudiVZ's business. Mr. Smith stated that no "access" or "development"
22 documents would be produced unless those documents also evidenced some additional predicate
23 act related to Facebook's causes of action, such as "copying." He also stated that no documents
24 would be produced unless Facebook first agreed that it would waive its right to move to compel
25 future production. My colleague Mr. Gray suggested that Defendants produce whatever access
26 and development documents they felt did go to personal jurisdiction and that a resolution could
27 then be more productively made. Mr. Smith refused. Mr. Gray argued that access and
28 development documents were relevant to Facebook's *Calder* effects argument. Mr. Smith agreed

1 in principle, but stated that the discovery would be withheld barring an agreement as to future
2 discovery and the understanding that no documents that did not evidence the additional predicate
3 act such as “copying” would be produced.

4 21. Nearing the end of the January 6 meet and confer, my colleague Mr. Gray raised
5 the issue of Facebook’s upcoming January 16 deadline to oppose Defendants’ motions to dismiss.
6 Mr. Gray stated that it appeared unlikely that Facebook would receive the personal jurisdiction
7 discovery that it sought prior to January 16 and that the parties should agree to take the hearing
8 for Defendants’ motions off calendar. Mr. Smith responded that he agreed to take the hearing off
9 calendar for Defendant StudiVZ, but would prefer not to do so with respect to the Holtzbrinck
10 Defendants. He would agree to a continuance of a few weeks, but would not take the hearing off
11 calendar because, he said, “I’m still hopeful that you guys will agree to voluntarily dismiss them.
12 I’d agree to doing it without prejudice like we did for the other Holtzbrinck defendant. If you
13 guys find out something later on, you’d be free to add them again, but for now my goal is to get
14 them voluntarily dismissed without producing any discovery. I don’t think they should be part of
15 this case.” Mr. Gray responded that he would prefer to take the Holtzbrinck Defendants’ motions
16 to dismiss hearing off calendar as well, but that the parties would talk about it again. The final
17 word on the subject came from Mr. Gray, who sought confirmation that Mr. Smith would agree to
18 take StudiVZ off calendar and grant a few week continuance with respect to the Holtzbrinck
19 Defendants. Mr. Smith stated, “That’s right, but just a few weeks, two or three weeks.”

20 22. In reliance on these representations, Facebook did not move to continue its
21 deadline to oppose Defendants’ motions to dismiss.

22 23. The following day, January 7, 2009, my colleague Mr. Gray sent an email to
23 Mr. Smith regarding the upcoming personal jurisdiction depositions. The email stated, in relevant
24 part, “I might add that I was concerned that we might not go forward with the depositions based
25 on the meet and confer that I had with Bill Walker last week. Based on Bill’s statements, it
26 seemed like you were only going to allow Messrs. Brehm and Weber to testify about the issues
27 raised in their declarations filed in support of the defendants’ motion. It makes sense to go
28 forward with the depositions, however, based on your comments yesterday that you would allow

1 the witnesses to testify about whether StudiVZ's [sic] accessed the Facebook site or IP in order to
2 copy (to be loosely defined) the Facebook site or in furtherance of the other claims alleged by
3 Facebook in the complaint. I appreciate your clarification regarding that issue."

4 24. Mr. Smith then responded, "You are again mischaracterizing what I offered to do
5 as an 'agreement.' I do not know how many more times I could have possibly repeated the point
6 – I was willing to agree to a limitation on scope along the lines of what you describe below if and
7 only if you also agreed. I am not and have never been willing to agree, only to have you not
8 agree and move to compel anyway . . . So at the moment, there is no agreement on questions
9 related to access." Accordingly, as there was no agreement on questions related to access,
10 Mr. Gray cancelled the depositions in Frankfurt, Germany.

11 25. On January 13, 2009, three days before Facebook's deadline to oppose
12 Defendants' motions to dismiss, counsel for the parties had a telephone conversation in which
13 Defendants' counsel stated for the first time that Defendants would agree to a continuance of the
14 hearing on the Holtzbrinck Defendants' motion to dismiss only if Facebook agreed to "bifurcate"
15 Defendants' *forum non conveniens* arguments from Defendants' personal jurisdiction arguments.
16 Mr. Gray stated that he would think over the proposal.

17 26. The following day, two days before Facebook's deadline to oppose Defendants'
18 motions to dismiss, the parties discussed Defendants' counsel "bifurcation" proposal. Mr. Gray
19 advised Mr. Smith that Facebook would not agree to bifurcate the motions by party-defendant.
20 Losing his temper, Defendants' counsel stated that he no longer agreed to continue any of
21 Facebook's oppositions or the February 13 hearing and said that Facebook would have to file its
22 oppositions on the deadline of January 16, 2009.

23 27. Facebook drafted its Opposition to Defendants' Motions to Dismiss without any
24 discovery relating to Facebook's jurisdictional theories.

25 I declare, under penalty of perjury, that the foregoing is true and correct to the best of my
26 knowledge.

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Executed this 23rd day of January, at Paris, France.

/s/ Julio C. Avalos /s/
Julio C. Avalos

