

1 STEPHEN S. SMITH (SBN 166539)
 2 SSmith@GreenbergGlusker.com
 3 WILLIAM M. WALKER (SBN 145559)
 4 WWalker@GreenbergGlusker.com
 5 AARON J. MOSS (SBN 190625)
 6 AMoss@GreenbergGlusker.com
 7 GREENBERG GLUSKER FIELDS
 8 CLAMAN & MACHTINGER LLP
 9 1900 Avenue of the Stars, 21st Floor
 10 Los Angeles, California 90067-4590
 11 Telephone: 310.553.3610
 12 Fax: 310.553.0687

13 Attorneys for Defendants studiVZ Ltd.,
 14 Holtzbrinck Networks GmbH, and
 15 Holtzbrinck Ventures GmbH

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

19 FACEBOOK, INC.,
 20 Plaintiff,

21 v.

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

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

**DECLARATION OF STEPHEN S.
 SMITH IN SUPPORT OF
 DEFENDANTS' OPPOSITIONS TO
 MOTION TO ENLARGE TIME;
 EXHIBITS A-J**

[Opposition of the Holtzbrinck
 Defendants and Partial Opposition of
 StudiVZ filed Concurrently]

Complaint Filed: July 18, 2008

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

1 November 26, 2008. I participated on that call on behalf of Defendants. After
2 some back and forth, Facebook’s counsel, Annette Hurst, and I came to an
3 agreement concerning how the Holtzbrinck defendants would supplement their
4 responses. The Holtzbrinck defendants served their supplemental responses on
5 December 24, 2008. Since that time, Facebook’s counsel has raised no complaint
6 about the Holtzbrinck defendants’ responses to Facebook’s interrogatories. True
7 and correct copies of the Holtzbrinck defendants’ supplemental interrogatory
8 responses are attached hereto as Exhibit “A.”
9

10 5. During that same November 26, 2008 telephone call, Ms. Hurst also
11 agreed to withdraw (without prejudice) Facebook’s document demands served on
12 the Holtzbrinck defendants -- the words she used were “put a pin in it” -- if the
13 Holtzbrinck defendants agreed to produce the following two categories of
14 documents: (a) any portions of the agreement by which they purchased StudiVZ,
15 and any due diligence documents associated with that acquisition, that made any
16 explicit or implicit mention of Facebook, and (b) any StudiVZ board meeting
17 minutes that contain any implicit or explicit reference to Facebook. I, on behalf of
18 the Holtzbrinck defendants, said that I would recommend to my clients that they
19 produce those two categories of documents. I drafted a letter memorializing this
20 agreement and sent it to Ms. Hurst on December 4, 2008. A true and correct copy
21 of that letter is attached hereto as Exhibit “B.” That letter states that, at that time, I
22 was still waiting for confirmation from the client as to category (b). However, I
23 subsequently learned that there were no documents in category (b), so it became
24 moot. The Holtzbrinck defendants have since produced the category (a)
25 documents, and I have informed Facebook’s counsel that there are no documents in
26 category (b). Since this agreement was reached on November 26, 2008, Facebook
27 has never raised any complaint about the Holtzbrinck defendants’ document
28 production.

1 6. Ms. Hurst and I also agreed to resolve many of the document demands
2 and interrogatories served on StudiVZ. Those agreements are reflected in
3 StudiVZ’s supplemental interrogatory responses, which were served on December
4 24, 2008, and in StudiVZ’s supplemental document responses, which were served
5 on January 9, 2009. True and correct copies of those supplemental responses are
6 attached hereto as Exhibits “C” and “D,” respectively. Because of these numerous
7 agreements, Ms. Hurst and I represented truthfully to the Court at the hearing on
8 December 16, 2008 that we had “largely” been able to work out “every issue” and
9 that “very few” issues remained. (*See* Exhibit A to Avalos Decl., pages 5-13 of 28
10 [Reporter’s Transcript at pages 4-12]).

11
12 7. Since then, Facebook has continued meeting and conferring about only
13 a small number of interrogatories and document demands served on StudiVZ. The
14 last letter received from counsel for Facebook about the remaining written discovery
15 issues was dated January 9, 2009 and referred to only StudiVZ Interrogatory Nos. 10
16 and 14-16 and StudiVZ Document Demand Nos. 14, 16, 23, 25, 27-30. A true and
17 correct copy of that letter and my January 14, 2009 response thereto are attached as
18 Exhibits “E” and “F,” respectively. The main area of dispute involves the issue of
19 whether these particular discovery requests relate to personal jurisdiction and, more
20 specifically the “effects” test of Calder v. Jones, or whether, as StudiVZ contends
21 they relate solely to the merits of the case. I have been meeting and conferring with
22 Facebook’s counsel about this issue since mid-October 2008.

23
24 8. Facebook propounded only two interrogatories that relate to *forum non*
25 *conveniens* -- Nos. 20 and 22. They were served on all three Defendants, and all
26 three Defendants answered those interrogatories. Facebook has never complained
27 that the answers were inadequate or incomplete in any way. Indeed, there has never
28 been any mention of them by Facebook at all.

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Facebook’s Cancellation of the Depositions

9. Facebook initially served Rule 30(b)(6) deposition notices on each defendant. However, Facebook’s counsel, Annette Hurst later withdrew them. Although she stated at the time that she intended to serve new Rule 30(b)(6) notices, neither she nor anyone else on behalf of Facebook ever did.

10. Facebook’s counsel Annette Hurst asked me to make the two main declarants in support of the two motions to dismiss available for deposition. The first witness was Martin Weber, the managing director of the two Holtzbrinck defendants. The second witness was Michael Brehm, the then-Chief Operating Officer of StudiVZ. I agreed to do so. These two witnesses reside in Germany. Accordingly, Ms. Hurst and I agreed that their depositions would take place at her offices in Frankfurt, Germany on January 12 and 13, 2009. That agreement was memorialized in my December 4, 2008 letter referenced above, Exhibit B, and in an email dated December 8, 2008, a true and correct copy of which is attached hereto as Exhibit “G.” In addition, on January 7, 2009, Facebook formally noticed these two depositions, true and correct copies of which are attached hereto as Exhibit “H.”

11. On January 5, 2009, I sent an email to Facebook’s counsel, Tom Gray. Among other things, that email informed Mr. Gray that I would be leaving for the depositions in Germany on “Wednesday evening,” which was January 7, 2009. A true and correct copy of that email is attached hereto as Exhibit “I.” I did in fact leave on a Lufthansa flight from LAX to Munich, Germany, which departed at 9:00 p.m. on Wednesday, January 7, 2009. That was the latest I could leave in order to arrive in Germany in time to have a meeting with the witnesses (and the Holtzbrinck defendants’ general counsel, Dr. Anka Reich), on the last business day before the depositions were scheduled to commence. Dr. Reich does not reside in

1 Munich. The meeting was in Munich, because that is where Mr. Weber resides. As
2 a result, she also had to fly from her city of residence in Stuttgart, Germany to
3 Munich for that meeting. In addition, the other witness, Michael Brehm, resides in
4 Berlin, Germany. Thus, he also was required to fly to Munich for the meeting.
5

6 12. The meeting with my client and the witnesses was scheduled to start at
7 9:00 a.m. German time on Friday, January 9, 2009. At 7:57 a.m. German time,
8 which was 10:57 p.m. Thursday, January 8, 2009 in California, Tom Gray sent me
9 an email cancelling the depositions. Although Mr. Gray and I had been having a
10 disagreement about the scope of *one particular* topic that Mr. Gray wished to ask
11 Mr. Brehm about, prior to me leaving for Germany Mr. Gray had never threatened
12 to cancel the Mr. Brehm's deposition (let alone Mr. Weber's deposition) if that
13 dispute was not resolved in advance of the depositions. Moreover, this dispute
14 concerned only Michael Brehm and had nothing to do with Martin Weber. I
15 confirmed that point to Mr. Gray twice before he canceled the depositions. Mr.
16 Gray never disputed it. To the contrary, he confirmed *before* cancelling that there
17 was no dispute as to Mr. Weber "presumably bc he doesn't know anything about
18 [the issue of] what StudiVZ did." A true and correct copy of this entire email string
19 is attached hereto as Exhibit "J."
20

21 13. In addition, the single issue about which Mr. Gray and I were
22 disagreeing was only one topic among potentially scores of topics that Mr. Gray
23 could have asked Mr. Brehm about. In my last communication to Mr. Gray before
24 he canceled, which I sent to him at 9:17 p.m. German time on January 8, 2009, I
25 wrote as follows:
26

27 "This is the bottom line. I will be at your office in Frankfurt at 9:30
28 a.m. on Monday morning and again on Tuesday morning with Messrs.

1 Brehm and Weber. They will testify about any and all issues that are
2 reasonably related to jurisdiction and/or venue. I will do everything
3 possible to take an expansive view of those issues within reason,
4 because I believe that it is obvious that there is no personal jurisdiction
5 here and that venue is much better in Germany. If you approach an
6 area that goes into a solely merits based arena, then I will object. And
7 if there is some ambiguity, I will do my best to work with you so that
8 you get what you need for jurisdiction and venue without the
9 deposition turning into a free for all about the case as a whole. But
10 since we do not have any pre-established agreement, and because I
11 have not yet heard the questions and have not seen you lay any
12 foundation yet, I am not going to simply agree to allow you to ask
13 anything you want about the case in advance. I do not think that is
14 even required in a normal case where jurisdiction is not an issue.
15 Indeed, it is a very rare case where counsel have agreed in advance
16 about all proper versus improper deposition topics or questions.”

17
18 (Exhibit J). Despite these assurance, Mr. Gray canceled the depositions.

19
20 **Defendants Believe, But they Are Not Sure, that Facebook Also Wishes to**
21 **Depose Two Other Witnesses Who Facebook Has Previously Said May Have**
22 **Relevant Knowledge as to Personal Jurisdiction Over StudiVZ**
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24 14. In her December 8, 2008 email, Ms. Hurst also wrote that Facebook
25 intended to try to depose Messrs. Essan Dhariani and Dennis Bemann during the
26 week of January 12, 2009. (Exhibit G). On or about December 8, 2008, I told Mr.
27 Hurst that neither of these witnesses were under StudiVZ’s control as they had both
28 stopped working for StudiVZ prior to the filing of this lawsuit. As a result, a few

1 days later Ms. Hurst told me that Facebook would attempt to depose those two
2 witnesses under the Hague Evidence Convention, and would not be able to do so by
3 the week of January 12, 2009.

4
5 15. Then, Ms. Hurst informed me via email on December 17, 2008 that
6 she would no longer be working on the matter and that her colleague, Tom Gray,
7 would be taking over. Since Ms. Hurst announced that she would no longer be
8 working on the matter, I am not aware of any efforts Facebook has made to depose
9 Messrs. Dhariani or Bemann. From December 17, 2008 until January 16, 2009,
10 Facebook did not tell me whether it was attempting to notice these depositions
11 through the Hague (or otherwise). I began to think that Facebook may have
12 decided not to depose these two witnesses. However, upon reading Facebook's
13 opposition to the motions to dismiss, which mentions these witnesses repeatedly, I
14 assume that Facebook still wishes to depose them. I have previously told Ms. Hurst
15 that defendants do not object to Facebook taking these depositions.

16
17 **The Discussions About Enlarging Time**

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19 16. On or about October 20 and 21, 2008, the day or two before
20 defendants filed their motions to dismiss, I discussed with Facebook's counsel,
21 Warrington Parker, the appropriate hearing date for those motions. He asked for
22 the motions to be scheduled for hearing in February 2009 so that Facebook would
23 have time to obtain discovery related thereto. I agreed, and the motions were
24 therefore set for February 13, 2009.

25
26 17. As noted above, the written discovery issues were resolved well before
27 the January 16, 2009 due date of Facebook's opposition. However, because
28 Messrs. Weber's and Brehm's depositions were not scheduled to commence until

1 January 12 and 13, 2009, Facebook asked for more time to incorporate into its
2 opposition to the Holtzbrinck motion to dismiss what it learned at Mr. Weber's
3 deposition and into its opposition to the StudiVZ motion what it learned at Mr.
4 Brehm's deposition. This discussion first occurred with Annette Hurst in or around
5 early December 2008, at or about the time that Ms. Hurst and I agreed to scheduled
6 those depositions for January 12 and 13, 2008. I was agreeable to moving the
7 hearing date of the motions for a short period of time *for that purpose*.

8
9 18. After Mr. Gray took over the case from Ms. Hurst, Mr. Gray then also
10 discussed with me the issue of potentially moving the hearing date of the motions to
11 dismiss. I told him what I had told Ms. Hurst, but also added that I was willing to
12 consider a longer continuance as to StudiVZ's motion *because of the ongoing*
13 *discovery dispute regarding personal jurisdiction as to that defendant*.

14
15 19. When Mr. Gray cancelled the deposition of Mr. Weber (the *sole*
16 Holtzbrinck deponent), the reason for a continuance of the Holtzbrinck motion to
17 dismiss went away. Nonetheless, Mr. Gray continued to ask for more time to
18 oppose the Holtzbrinck motion to dismiss (and the StudiVZ motion to dismiss as
19 well). On January 13, 2009 (my first day back in the office after my trip to
20 Germany), I responded by offering to move the hearing date of the motions on the
21 following terms: (a) the continuance of the Holtzbrinck motion had to be short, I
22 believe I suggested two weeks, (b) the *forum non conveniens* portion of StudiVZ's
23 motion to dismiss would be heard at the same time as the Holtzbrinck motion to
24 dismiss because there was no outstanding issue as to *forum non conveniens*, and
25 (c) the personal jurisdiction portion of the StudiVZ motion could be continued for
26 as long as Facebook reasonably needed to resolve the open personal jurisdiction
27 discovery issues that related to that defendant.

