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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  
 20 NETWORKS GmbH, HOLTZBRINCK  
 VENTURES GmbH, and DOES 1-25,

21 Defendant.

Case No. 5:08-cv-03468 JF

**NOTICE OF MOTION AND MOTION  
 FOR SANCTIONS AGAINST  
 STUDIVZ LTD., HOLTZBRINCK  
 VENTURES GMBH AND  
 HOLTZBRINCK NETWORKS  
 GMBH PURSUANT TO CIVIL L.R. 7-  
 1 AND 37-2**

Date: March 3, 2009  
 Time: 10:00 a.m.  
 Room: Courtroom 2, 5th Floor

Judge: Honorable Magistrate Judge  
 Howard R. Lloyd, for  
 Discovery Purposes

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**NOTICE OF MOTION**

**TO DEFENDANTS STUDIVZ LTD., HOLTZBRINCK NETWORKS GMBH AND  
HOLTZBRINCK VENTURES GMBH**

PLEASE TAKE NOTICE that on March 3, 2009 at 10:00 a.m. or as soon thereafter as it may be heard, in Courtroom 2 of this Court, before the Honorable Howard R. Lloyd, Plaintiff Facebook, Inc., pursuant to N.D. Cal. Civil Local Rule 7-8, will and hereby does move for an order for sanctions against Defendants StudiVZ Ltd., Holtzbrinck Ventures GmbH and Holtzbrinck Networks GmbH. This motion is based on the accompanying Memorandum, the Declaration of Julio C. Avalos, and all pleadings and papers which are of record and are on file in this case.

Facebook requests that the Court sanction Defendants for legal fees incurred as a result of Defendants' bad faith tactics resulting in various unnecessary discovery conferences and the filing of Facebook's Motion to Compel Defendants' discovery responses. Facebook also requests that the Court issue a sanction inferring that all of Defendants' improperly withheld discovery would be favorable to Facebook.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Facebook, Inc. requests sanctions for certain actions taken by Defendants and their  
4 counsel. Facebook understands that requests for sanctions are not something sought in the  
5 general course of litigation and should not be taken lightly. However, the matters set forth in this  
6 memorandum demonstrate highly questionable and unprofessional activity that does not occur in  
7 typical litigation. From the outset, Defendants’ strategy of unnecessarily stalling and delaying  
8 this litigation has been clear. Defendants’ bad faith conduct has cost Facebook thousands of  
9 dollars in unnecessary legal fees incurred as it was strung along in a series of fruitless meet and  
10 confers during which Defendants’ counsel made no effort to negotiate in good faith and which  
11 required the drafting of a motion to compel Defendants to comply with their discovery  
12 obligations.

13 The central dispute between the parties continues to be the scope of personal jurisdiction  
14 discovery. As explicitly admitted by Defendants’ counsel during one of a half dozen meet and  
15 confers, Defendants’ goal is to be dismissed from this litigation without producing any  
16 meaningful discovery. As a means to achieve this end, Defendants first raised a number of  
17 untenable and legally unsupported objections to Facebook’s discovery requests, typically offering  
18 nothing but boilerplate objections and repeating the mantra that Facebook’s requests were not  
19 relevant to personal jurisdiction. But, Defendants’ counsel refused to identify which requests he  
20 felt did not relate to personal jurisdiction or his grounds for this objection.

21 Rather than negotiating in good faith, Defendants opted instead to file a premature Motion  
22 for Protective Order, effectively delaying any discovery for at least another month. But,  
23 Defendants’ motion was incomprehensibly vague, both in its argumentation and the scope of  
24 requested relief and they ultimately withdrew the motion. During the hearing on their ill-  
25 conceived motion, Defendants conceded that Facebook is entitled to discovery in which personal  
26 jurisdiction is “intertwined” with the merits. Yet, Defendants have refused to respond to any such  
27 discovery, requiring Facebook to file the current motion.

28 It has since become clear that Defendants withdrew their motion for protective order

1 simply as a ruse by which to keep the issue of the proper scope of personal jurisdiction discovery  
2 unadjudicated for as long as possible. Immediately following the December 16 hearing,  
3 Defendants returned to their old objections, even continuing to object to discovery requests on the  
4 grounds that such information would be used in the German action pending between the parties,  
5 an objection explicitly denied by the Court's Order of December 17, 2008.

6 Defendants have produced virtually no discovery relevant to Facebook's jurisdictional  
7 arguments, choosing instead to string Facebook along in a series of fruitless meet and confers.  
8 Defendants admit they are withholding responsive discovery, itself an improper, sanctionable  
9 offense. As a result of Defendants' bad faith tactics, Facebook has been forced to file a  
10 concurrent Motion to Compel in order to resolve disputes that were properly before this Court  
11 nearly six weeks ago.

12 Facebook seeks sanctions against Defendants for the cost incurred in participating in  
13 discovery conferences in which Defendants refused to behave in good faith and for the costs  
14 incurred in filing the Motion to Compel Discovery Responses. Further, as Defendants are  
15 admittedly withholding material, unprivileged discovery without reason and in direct  
16 contravention to their discovery obligations, Facebook requests that the Court enter an adverse  
17 inference regarding the contents of that discovery. Finally, as a result of Defendants' consistent  
18 discovery abuses and bad faith negotiation tactics, Facebook requests that the Court assign a  
19 Special Master to be present at all future discovery events with the cost to be borne by  
20 Defendants.

## 21 **II. STATEMENT OF FACTS**

### 22 **A. Nature of the Case**

23 Facebook is suing defendants StudiVZ Ltd., Holtzbrinck Ventures GmbH and Holtzbrinck  
24 Networks GmbH (herein collectively referred to as the "StudiVZ Defendants") for trademark  
25 infringement, violation of California Penal Code 502(c), violation of the Computer Fraud and  
26 Abuse Act, breach of contract and breach of the covenant of good faith and fair dealing.

27 Facebook's causes of action arise out of StudiVZ's willful accessing of Facebook's website and  
28 servers, its theft of Facebook's intellectual property, including trade dress and possibly source

1 code, and the subsequent use of that intellectual property in the design, creation and development  
2 of a number of knockoff websites run by StudiVZ.

3 **B. Defendants Forestall The Obligatory Rule 26(f) Conference, Agreeing To It**  
4 **Only After Facebook Files (And Then Agrees to Withdraw) A Motion for**  
5 **Discovery**

6 On July 18, 2008, Defendants' lead counsel, Stephen S. Smith, sent a letter to Facebook  
7 stating that if Facebook sued Defendants in California federal court, Defendants would move to  
8 dismiss for, among other reasons, lack of personal jurisdiction and *forum non conveniens*. See  
9 Declaration of Julio C. Avalos In Support of Facebook's Motion for Sanctions ("Avalos Decl.")  
10 at ¶ 2. On August 28, 2008, Mr. Smith confirmed that Defendants would move to dismiss for  
11 lack of personal jurisdiction. *Id.* ¶ 3. Defendants initially refused to hold the obligatory Rule  
12 26(f) conference. *Id.* ¶ 3. Facebook was thus forced to file a Motion for Expedited Personal  
13 Jurisdiction Discovery. *Id.* ¶ 4. Defendants then agreed to hold the conference in return for the  
14 withdrawal of the motion and the voluntary dismissal without prejudice of defendant  
15 Verlagsgruppe Georg von Holtzbrinck. *Id.*

16 The Rule 26(f) conference was held on October 9, 2008, officially opening the discovery  
17 period. *Id.* ¶ 5. On October 13, 2008, in response to an October 9 letter memorializing the Rule  
18 26(f) conference, Mr. Smith wrote a letter stating that Facebook's list of discovery topics  
19 "includes issues that have nothing to do with personal jurisdiction" and that it was Defendants'  
20 position that "discovery into the merits of the case should be stayed pending the resolution of any  
21 motions to dismiss for lack of personal jurisdiction and/or *forum non conveniens*." *Id.* ¶ 6.

22 On October 14, 2008, Facebook propounded its First Set of Discovery Requests Relating  
23 to Personal Jurisdiction. *Id.* ¶ 7. On October 27, Facebook attempted to meet and confer with  
24 Defendants regarding the outstanding discovery. *Id.* ¶ 8. Mr. Smith repeated his objection that  
25 the requests touched on issues that had nothing to do with personal jurisdiction but refused to  
26 identify which requests or portions thereof that he found objectionable. *Id.* Four days later, on  
27 October 31, 2008, Defendants filed a Motion for Protective Order seeking to stay merits-based  
28 discovery and to prevent discovery produced in this matter from being used in any other litigation  
between the parties. *Id.* ¶ 9.

1 On November 17, 2008, Defendants responded to Facebook’s First Set of Discovery  
2 Requests with uniform, blanket objections. *Id.* ¶ 10. With respect to some of the discovery  
3 requests, Defendants stated that they would agree to respond following the resolution of the  
4 pending Motion for Protective Order. *Id.* ¶ 10. In an attempt to resolve the discovery disputes,  
5 Facebook once again requested a meet and confer with Defendants.

6 **C. Defendants Use Meet and Confer Process As a Bad Faith Means To Stall**  
7 **Discovery**

8 On November 26, 2008, the parties conducted the first substantive meet and confer with  
9 respect to Facebook’s discovery requests. *Id.* ¶ 11. The central dispute between the parties  
10 centered around the proper scope of personal jurisdiction discovery. Defendants continued to  
11 object that Facebook’s requests went beyond the bounds of jurisdictional issues and touched on  
12 the merits of this case. Specifically, Defendants’ counsel objected that Facebook’s discovery  
13 requests dealing with the “access” of Facebook by StudiVZ and the subsequent “development” of  
14 the StudiVZ websites did not go to the jurisdictional issues of this case. *Id.* However, Mr. Smith  
15 stated that StudiVZ might stipulate to the fact that it had indeed accessed Facebook and “done  
16 what Facebook claims they did.” *Id.* ¶ 11. Mr. Smith stated that he doubted that this behavior  
17 was actionable, and that the parties would have to fight on this latter point. *Id.* Counsel for  
18 Facebook stated that even were StudiVZ to stipulate to accessing and copying Facebook  
19 intellectual property, Facebook would still be entitled to discovery within Mr. Smith’s possession.  
20 Mr. Smith stated that he would have to “think about it.” *Id.*

21 Mr. Smith made clear that he was in possession of evidence that would establish that  
22 StudiVZ employees had accessed Facebook in the course and conduct of their employment. *Id.* ¶  
23 11. He confirmed this point at a later meet and confer. *Id.* ¶ 12. Mr. Smith went back and forth  
24 between stating, on the one hand, that Defendants would produce these documents and, on the  
25 other, stating that these documents would only be produced if Facebook agreed to waive any  
26 future right to compel the production of more discovery. *Id.* Facebook refused to waive this right  
27 and reminded Mr. Smith that he had an obligation to produce discovery relevant to personal  
28 jurisdiction. *Id.* Mr. Smith stated that Facebook would receive at least some discovery relating to

1 StudiVZ's accessing of Facebook. *Id.* Based on this representation, Facebook felt that progress  
2 had been made towards resolving the outstanding discovery disputes.

3 On December 16, 2008, a hearing was held before this Court on Defendants' Motion for  
4 Protective Order. At the hearing, Mr. Smith began by stating that he thought that Facebook had  
5 misunderstood Defendants' Motion. *Id.* ¶ 13. He also stated that he agreed that Facebook was  
6 entitled to jurisdictional discovery that also touched on the merits of the case. *Id.* In light of the  
7 confusion over Defendants' motion, this Court then asked Mr. Smith whether he wished to  
8 withdraw his request for a stay of discovery. *Id.* Mr. Smith stated that he did. *Id.* Counsel for  
9 Facebook agreed that based on these representations and those made by Defendants' counsel at  
10 previous meet and confers, it appeared that the parties had resolved nearly all of the outstanding  
11 discovery disputes. With the understanding that Facebook and Defendants now agreed that  
12 Facebook was entitled to discovery that touched on the merits of the case if that discovery also  
13 informed Defendants' jurisdictional arguments, the Court accepted Mr. Smith's withdrawal of the  
14 motion. *Id.* See December 17, 2008 Order of Magistrate Judge Lloyd (Dkt. # 68).

15 The next day, on December 18, 2008, Defendants produced a first round of documents.  
16 Avalos Decl. ¶ 15. Defendants did not produce any emails, letters, or communications of any  
17 kind. Nor did the production contain any documents relating to StudiVZ's accessing of Facebook  
18 or the development and creation of StudiVZ. *Id.* Facebook accordingly called for another meet  
19 and confer which took place on December 23, 2008. *Id.* ¶ 16. Mr. Smith was unable to join the  
20 conference and Defendants were represented by Mr. Smith's partner, William Walker. *Id.* Mr.  
21 Walker appeared to be only generally aware of Defendants' positions on various outstanding  
22 discovery issues, but refused to take an affirmative position on them. *Id.* Mr. Walker stated that  
23 he would attempt to contact Mr. Smith regarding the outstanding discovery, and that a follow-up  
24 meet and confer should be scheduled for the following week. *Id.* Acting in good faith, Facebook  
25 agreed to postpone any motion to compel for another week. *Id.*

26 On December 24, 2008, Defendants served Supplemental Interrogatory Responses. The  
27 first General Objection in these responses stated that Defendants objected to Facebook's  
28 discovery requests on the grounds that discovery obtained through those requests would be used

1 in the pending German action between the parties. *Id.* ¶ 17. The Responses offered no new  
2 evidence as to StudiVZ’s accessing of Facebook or the development of StudiVZ. *Id.*

3 On December 30, 2008, Mr. Smith was once again unavailable. *Id.* ¶ 18. Mr. Walker  
4 stated that he been unable to speak to either Mr. Smith or Defendants regarding the outstanding  
5 discovery. *Id.* He now suggested that another meet and confer be scheduled for the following  
6 week, at which Mr. Smith would most likely be present. *Id.* Facebook, once again acting in good  
7 faith and seeking an amicable resolution of the discovery dispute, agreed. *Id.*

8 The parties were unable to reach an agreement at the January 6, 2009 meet and confer.  
9 Despite his earlier representations to Facebook counsel and this Court, Mr. Smith stated that most  
10 discovery going to access or the development of StudiVZ did not have to do with personal  
11 jurisdiction or, the corollary, dealt only with the merits of the case. *Id.* He stated that he would  
12 fight this “all the way to the Supreme Court if I have to.” *Id.* Mr. Smith argued that Facebook  
13 was not entitled to any and all discovery that related to StudiVZ’s accessing of Facebook in the  
14 course and conduct of StudiVZ’s business. *Id.* Mr. Smith stated that no “access” or  
15 “development” documents would be produced unless those documents also evidenced some  
16 additional predicate act related to Facebook’s causes of action, such as “copying.” *Id.* He also  
17 stated that no documents would be produced unless Facebook first agreed that it would waive its  
18 right to move to compel future production. *Id.* Facebook suggested that Defendants produce  
19 whatever access and development documents they felt did go to personal jurisdiction and that a  
20 resolution could then be more productively made. *Id.* Mr. Smith refused. *Id.* Facebook counsel  
21 argued that access and development documents were relevant to Facebook’s *Calder* effects  
22 argument and that these issues had already been covered in the hearing on Defendants’ Motion  
23 for Protective Order. *Id.* Mr. Smith, although stating that he agreed in principle, continued to  
24 state that discovery would be withheld barring an agreement as to future discovery and the  
25 understanding that no documents that did not evidence the additional predicate act such as  
26 “copying” would be produced.

27 During the January 6, 2009 meet and confer, counsel also discussed the upcoming  
28 depositions of Messrs. Brehm and Weber. Avalos Decl., ¶ 20. Counsel for Facebook thought an

1 agreement had been reached that would allow the witnesses to testify about Defendants'  
2 accessing Facebooks' site, servers and intellectual property. *Id.* The next day, Mr. Smith claimed  
3 no agreement had been reached. *Id.* In light of Defendants' position, Facebook was forced to  
4 cancel the depositions. *Id.* It simply made no sense for Facebook to spend tens of thousands of  
5 dollars and fly half way around the world only to have Mr. Smith object and instruct his witnesses  
6 not to answer such questions.

7 On January 27, 2009, Facebook, having exceeded its meet and confer obligations, filed a  
8 Motion to Compel Full Discovery Responses from Defendants concurrently with this Motion for  
9 Sanctions.

### 10 **III. ANALYSIS**

11 The Court has broad inherent power to police litigants and to manage its docket through,  
12 for example, monetary sanctions, including costs and attorneys' fees. *See, e.g., Chambers v.*  
13 *NASCO, Inc.*, 501 U.S. 32, 43-47 (1991). The Court may also sanction attorneys and parties who  
14 have "multiplie[d] the proceedings in any case unreasonably and vexatiously" under 28 U.S.C. §  
15 1927. *See, e.g., Assoc'd Bus. Tel. Sys. Corp. v. Cohn*, No. C-93-1570-DJJ, 1994 WL 589487 at  
16 \*3-4 (N.D. Cal. Oct. 4 1994) (awarding costs payable by plaintiff). Under the Federal Rules of  
17 Civil Procedure, the Court may award further sanctions to deter abusive conduct in discovery and  
18 motion practice. *See Fed. R. Civ. Pro. 26.* Under Federal Rule of Civil Procedure 37(b), a court  
19 may also order that matters at issue be deemed "established for purposes of the action." *See Fed.*  
20 *R. Civ. P. 37(b)(2)(C).* Finally, it is well-established that when a party withholds relevant  
21 evidence, the appropriate sanction is to "put the demanding party in the position in which it would  
22 have been had that discovery been entirely favorable." *Sauer v. Superior Court*, 195 Cal. App. 3d  
23 213, 228-29 (1987). Financial sanctions are warranted where a party has withheld responsive,  
24 unprivileged discovery. *See Keithley v. Homestore.com, Inc.*, 2009 U.S. Dist. LEXIS 2720, Case  
25 No. C-03-04447 SI (N.D. Cal. January 7, 2009) (awarding monetary sanctions consisting of fees  
26 and costs incurred as a result of party's late production of documents).

27 It is clear that Defendants have executed a strategy meant only to increase Facebook's  
28 litigation costs, to "multiply the proceedings" in an unreasonable and vexatious manner, and to

1 withhold relevant discovery so as to prevent Facebook from adequately responding to  
2 Defendants' jurisdictional challenges. Defendants' counsel has repeatedly made clear that he is  
3 in possession of evidence that would establish that StudiVZ accessed Facebook in the regular  
4 course and conduct of its business. Despite the unquestioned relevance and materiality of this  
5 evidence, Defendants have refused to produce it, vacillating between objecting that these  
6 documents somehow do not go to personal jurisdiction or, in the alternate, requiring of Facebook  
7 some kind of "pay to play," stating that the documents will not be produced unless Facebook  
8 agrees, sight unseen, that it will waive any future right to seek additional discovery. This scheme  
9 has no place in American jurisprudence. Defendants have discovery obligations under the  
10 Federal Rules of Civil Procedure that do not allow for bad faith *quid pro quo*. Defendants are  
11 obligated to produce relevant, unprivileged discovery irrespective of whether they can get  
12 something of value in return. Despite the fact that the parties disagree as to the proper scope of  
13 personal jurisdiction discovery, it is clear that Defendants' possess, at the very least, some central  
14 subset of documents that even he agrees go to personal jurisdiction. These documents include, by  
15 Defendants' counsel own admission, discovery related to StudiVZ's accessing of Facebook's  
16 servers, the use of Facebook intellectual property by StudiVZ in the development,  
17 implementation, and continued maintenance of the StudiVZ websites, as well as documents  
18 relating to the thousands of commercial contracts into which StudiVZ has admittedly entered into  
19 with California residents.

20 Defendants have improperly withheld documents, and have improperly refused to allow  
21 their witnesses to testify about accessing Facebook's sites and intellectual property. Accordingly,  
22 Defendants should be required to pay monetary sanctions for the time Facebook has unnecessarily  
23 spent in fruitless meet and confer session and filing this motion.

24 This case is similar to *Sauer v. Superior Court*, 195 Cal. App. 3d 213, 228-29 (1987). In  
25 *Sauer*, a party violated a court order requiring the production of financial records essential to the  
26 plaintiff's claim. Noting that the withheld evidence "could very reasonably have [had] a material  
27 bearing on issues" essential to the determination of the case, *id.* at 222-23, the court imposed  
28 upon the withholding party an issue sanction that "put the demanding party in the position in

1 which it would have been had that discovery been entirely favorable, i.e., the documents would  
2 have shown Sauer suffered no economic loss.” *Id.* at 228-29. Here, as in *Sauer*, Defendants are  
3 explicitly withholding documents relevant to Facebook’s jurisdictional arguments. As in *Sauer*,  
4 the documents being withheld by Defendants are highly material to Facebook’s jurisdictional  
5 arguments. Accordingly, Facebook should be placed in the position in which it would have been  
6 had this discovery been entirely favorable, i.e., the documents show that StudiVZ accessed  
7 Facebook in violation of Facebook’s Terms of Use and that the Facebook servers were accessed  
8 for the purpose of stealing Facebook’s intellectual property contained thereon.

9 **IV. CONCLUSION**

10 Accordingly, Facebook asks the Court to enter an issue sanction requiring that a negative  
11 inference be drawn from Defendants’ withheld discovery. The inference shall place Facebook in  
12 the position it would have been in had the withheld discovery been entirely favorable to  
13 Facebook. Facebook further requests that the Court sanction Defendants for discovery abuses  
14 and that they accordingly be required to pay the costs and attorneys’ fees incurred in the fruitless  
15 meet and confers of December 23, 2008, December 30, 2008 and January 6, 2009 as well as the  
16 costs incurred in bringing the concurrently-filed Motion to Compel. Facebook also requests that a  
17 Special Master be assigned to be present at all future discovery events, including meet and confer  
18 session, and any depositions of Defendants’ witnesses, costs for same to be borne by Defendants.

19 Dated: January 27, 2009

ORRICK, HERRINGTON & SUTCLIFFE LLP

21 \_\_\_\_\_  
22 /s/ Thomas J. Gray  
23 THOMAS J. GRAY  
24 Attorneys for Plaintiff  
25 FACEBOOK, INC.  
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