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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  
 COMPEL STUDIVZ LTD.,  
 HOLTZBRINCK VENTURES GMBH  
 AND HOLTZBRINCK NETWORKS  
 GMBH TO FULLY RESPOND TO  
 INTERROGATORIES AND TO  
 PRODUCE DOCUMENTS AND  
 THINGS 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

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 Compel  
4 StudiVZ Ltd., Holtzbrinck Ventures GmbH and Holtzbrinck Networks GmbH to Permit  
5 Inspection of Documents and Things Pursuant to Civil L.R. 7-1 and 37-2. I am an active member  
6 in good standing of the California State Bar. Except as set forth herein, I have personal  
7 knowledge of the facts stated herein and if called as a witness, could and would competently  
8 testify thereto.

9 2. The Facebook website and service was launched in February 2004 by Mark  
10 Zuckerberg while Mr. Zuckerberg was a student at Harvard University. Upon information and  
11 belief based on online sources, Facebook's growth in 2004 and subsequent years was  
12 unprecedented. ([http://www.insidefacebook.com/2008/08/19/mapping-facebooks-growth-over-](http://www.insidefacebook.com/2008/08/19/mapping-facebooks-growth-over-time/)  
13 [time/](http://www.insidefacebook.com/2008/08/19/mapping-facebooks-growth-over-time/)). Upon information and belief, by December 2004, Facebook had reached nearly 1 million  
14 active users. (<http://www.facebook.com/press/info.php?timeline>)

15 3. Upon information and belief, in June 2004, Facebook relocated to Palo Alto,  
16 California. (<http://www.facebook.com/press/info.php?timeline>)

17 4. Upon information and belief based on an article from Fortune magazine date  
18 November 28, 2005 and located online at  
19 [http://money.cnn.com/magazines/fortune/fortune\\_archive/2005/11/28/8361945/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2005/11/28/8361945/index.htm), by the  
20 summer of 2005, Facebook had more than six million users. Currently, Facebook has over 150  
21 million users.

22 5. Attached hereto as **Exhibit 1** is a true and correct copy of the International Herald  
23 Tribune Article, "Facebook and StudiVZ battle over Germany," dated August 7, 2008. The  
24 article is available at <http://www.iht.com/articles/2008/08/07/technology/social.php>. The article  
25 describes Mr. Bemann as a "computer programmer" who "helped to design Internet routing  
26 equipment in Colorado and California."

27 6. Attached hereto as **Exhibit 2** is a true and correct copy of a screenshot of the  
28 webpage located at <http://www.fccm.org/FCCM04.php>. The webpage is an itinerary for a

1 technology conference held from April 20, 2004 through April 23, 2004 in Napa Valley,  
2 California. Mr. Bemann is listed as one of the speakers.

3 7. Attached hereto as **Exhibit 3** is a true and correct copy of the publicly-available  
4 Facebook profile page for Dennis Bemann found at  
5 <http://www.facebook.com/home.php#/s.php?init=q&q=dennis%20bemann&ref=ts&sid=71ea4b>  
6 [ac9600b57fec1a2e9c5943c834](http://www.facebook.com/home.php#/s.php?init=q&q=dennis%20bemann&ref=ts&sid=71ea4bac9600b57fec1a2e9c5943c834).

7 8. Attached hereto as **Exhibit 4** is a true and correct copy of the webpage located at  
8 [http://www.techcrunch.com/2008/11/11/nimbuzz-strikes-deal-with-studiVZ-germanys-largest-](http://www.techcrunch.com/2008/11/11/nimbuzz-strikes-deal-with-studiVZ-germanys-largest-social-network/)  
9 [social-network/](http://www.techcrunch.com/2008/11/11/nimbuzz-strikes-deal-with-studiVZ-germanys-largest-social-network/) The article, dated November 11, 2008 discusses, among other things, the  
10 implementation of a new chat feature on the StudiVZ websites. The article also includes a  
11 screenshot of the StudiVZ chat feature at work.

12 9. On July 18, 2008, Facebook brought the instant suit against StudiVZ Ltd.,  
13 Holtzbrinck Ventures GmbH and Holtzbrinck Networks GmbH for trade dress infringement,  
14 violation of the Computer Fraud and Abuse Act, violation of California Penal Code section  
15 502(c), breach of contract and breach of the covenant of good faith and fair dealing. Facebook  
16 notified Defendants' local counsel via email that the lawsuit had been filed. Defendants' counsel  
17 responded by advising Facebook that StudiVZ had earlier in the day filed its own action for  
18 declaratory judgment in German civil court.

19 10. Facebook had sent its first cease and desist letter to StudiVZ on June 8, 2006.  
20 Attached hereto as **Exhibit 5** is a true and correct copy of that letter.

21 11. Facebook had sent its second cease and desist letter to StudiVZ on January 3,  
22 2007. Attached hereto as **Exhibit 6** is a true and correct copy of that letter.

23 12. Facebook had sent its third cease and desist letter to StudiVZ on July 9, 2008.  
24 Attached hereto as **Exhibit 7** is a true and correct copy of that letter.

25 13. Attached hereto as **Exhibit 8** is a true and correct copy of screenshots depicting an  
26 exemplar Facebook profile page and an exemplar StudiVZ profile page.

27 14. On August 28, 2008, I had a telephonic conversation with Defendants' counsel,  
28 Stephen Smith. Mr. Smith confirmed that Defendants would challenge this Court's personal

1 jurisdiction over StudiVZ. On September 2, 2008, I, along with Neel Chatterjee, again spoke to  
2 Mr. Smith and he again confirmed that Defendants would move to dismiss for lack of personal  
3 jurisdiction.

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

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

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

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

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

26 20. On November 17, 2008, while the Motion for Protective Order was still pending,  
27 Defendants responded to Facebook's First Set of Discovery Requests with uniform, blanket  
28 objections. With respect to some of the discovery requests, Defendants stated that they would

1 agree to respond following resolution of the pending Motion for Protective Order.

2 21. On November 26, 2008, parties' counsel conducted the first substantive meet and  
3 confer with respect to Facebook's discovery requests. The meet and confer lasted nearly two  
4 hours and the parties went through the discovery requests one-by-one. With respect to discovery  
5 requests aimed at evidence relating to StudiVZ's accessing and copying of the Facebook website,  
6 Mr. Smith stated that he was considering stipulating to the fact that StudiVZ had intentionally  
7 accessed the Facebook website and "done what you claim they did." He stated that he would  
8 agree to produce the names, Facebook user accounts and other information related to StudiVZ's  
9 accessing of Facebook. Specifically, Mr. Smith stated, that he was "willing to give accounts used  
10 in the scope of StudiVZ, not all employees who have a Facebook account."

11 22. During the conference, issues arose over several specific discovery requests. With  
12 respect to Facebook Interrogatory No. 10, Mr. Smith stated, that he was "willing to compromise."  
13 I'm willing to say that they did access Facebook within the course and scope of their employment  
14 and identify why."

15 23. Regarding Facebook Interrogatory No. 15, Mr. Smith first objected that it  
16 effectively covered every single StudiVZ employee. This, Mr. Smith said, "I don't intend to give  
17 you." Ms. Hurst requested that at the very least, StudiVZ first provide Facebook with an  
18 organizational chart so that the parties could better negotiate discovery limitations and possible  
19 depositions. Mr. Smith stated, "I will try to do that. I've gotten push back [from the client]."  
20 Ms. Hurst said, "We'll move to compel on this," and Mr. Smith responded, "I told you I'll push at  
21 the client." Defendants did ultimately produce an organizational chart, but the chart does not  
22 state which employees were responsible for the initial creation, development and implementation  
23 of the StudiVZ websites.

24 24. Regarding Facebook Request for Production No. 14, Ms. Hurst stated that the  
25 discovery sought related to the jurisdictional basis for Facebook's Computer Fraud and Abuse  
26 Act claim, its California Penal Code 502(c) claim and other jurisdictional factors. Mr. Smith  
27 stated, "My major problem is that I think this is where you cross from jurisdiction into merits. I  
28 think given the causes of action you've plead, you're entitled to know whether there are contacts

1 with California related to the claims that you have plead.” Ms. Hurst stated that there was no way  
2 to sort out the merits from the jurisdictional issues. Mr. Smith then said, “I think it’s going to be  
3 undisputed that those people that had user accounts and used them in connection with their  
4 employment did at least what you claim they did. We’ll have a huge fight as to whether that  
5 violates the anti-hacking statute. It’s going to be undisputed that there were some users who  
6 accessed Facebook.” Ms. Hurst then said, “Just because you’re willing to stipulate to it, doesn’t  
7 mean that I don’t want to conduct jurisdiction discovery on it. I can’t examine witnesses without  
8 documents.” Mr. Smith said, “Let me think about it.” Regarding RFP 16, Mr. Smith stated, “16  
9 is just horribly broad.” Ms. Hurst said, “I agree with you. Let me think about it.”

10 25. Regarding RFP 17, Ms. Hurst stated, “I want documents about forming a  
11 company.” Mr. Smith responded, “I think if you limit it to anything related to Facebook, I can  
12 sell that.” Ms. Hurst stated, “I would need to see that.” Mr. Smith stated that there was a  
13 problem regarding the scope of electronic discovery. Ms. Hurst responded that it was just two  
14 people’s documents. Mr. Smith stated that he would consider it. Regarding Request for  
15 Production No. 25, Defendants’ counsel stated that production would be prohibitively expensive.  
16 Facebook stated that it might consider splitting the cost if StudiVZ explained why it was  
17 necessary.

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

19 27. On December 16, 2008, this Court held a hearing on Defendants’ Motion for  
20 Protective Order. I attended the hearing along with my colleague Annette Hurst. At the hearing,  
21 Mr. Smith represented that he felt that Facebook had misunderstood the nature of StudiVZ’s  
22 motion. Mr. Smith stated that Defendants did not disagree that Facebook was entitled to  
23 discovery that involved intertwined issues of personal jurisdiction and the merits of this case.  
24 When this Court asked Mr. Smith whether he wished to withdraw his request to stay discovery,  
25 Mr. Smith answered in the affirmative.

26 28. On December 18, 2008, Defendants produced a first round of documents but did  
27 not serve supplemental responses to Facebook’s interrogatories. Defendant StudiVZ Ltd.  
28 produced 198 pages consisting mostly of one contract. Defendant Holtzbrinck Networks

1 produced a total of 9, heavily-redacted pages. The production contained no emails, letters, or  
2 communications of any kind. The production also contained no programming or source code.  
3 Despite Mr. Smith's November 26 representations regarding forthcoming evidence of StudiVZ's  
4 accessing and copying of Facebook's intellectual property, no such discovery was produced.

5 29. Following this production, the parties again met and conferred on December 23,  
6 2008. Mr. Smith was unable to attend the conference and Defendants were represented by Mr.  
7 Smith's colleague, Bill Walker. Mr. Walker was only generally aware of the Defendants'  
8 positions on various outstanding discovery issues and stated that he would try to contact Mr.  
9 Smith (who was out on holiday vacation) prior to a follow-up meet and confer scheduled for  
10 December 30, 2008.

11 30. On December 24, 2008, Defendants served Supplemental Interrogatory Responses.  
12 The first General Objection in these Supplemental Interrogatory Responses stated that Defendants  
13 objected to Facebook's discovery requests on the grounds that discovery obtained through those  
14 requests would be used in the pending German action between the parties. In response to  
15 Interrogatory No. 5, Defendants admitted that they had 11,013 StudiVZ users in California as of  
16 October 22, 2008, an increase of nearly 1,000 California users in just one week. In the same  
17 Interrogatory response, StudiVZ admitted to having 10,272 California users as of October 14,  
18 2008. In response to Interrogatory No. 12, Defendants admitted that they had knowledge that  
19 Facebook was headquartered in California as early as "2005." Attached hereto as **Exhibit 9** is a  
20 true and correct copy of Defendants' relevant Supplemental Interrogatory Responses.

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

25 32. During this meet and confer, my colleague Tom Gray asked Mr. Walker whether it  
26 was Defendants' position that Facebook was not entitled to any discovery that touched  
27 simultaneously on jurisdictional and merits-related issues. Mr. Walker stated that this was not  
28 Defendants' position, but that neither he nor Defendants was persuaded that discovery relating to

1 the development and implementation of the StudiVZ website was relevant to personal jurisdiction  
2 analysis. When Mr. Gray stated that central to Facebook’s jurisdictional argument was the notion  
3 that StudiVZ had reached out to California, submitted to California law, venue and jurisdiction  
4 and then stole intellectual property located in the state, Mr. Walker stated that he was still not  
5 persuaded and that in any event we should wait to speak to Mr. Smith. Mr. Walker stated that  
6 although he could not speak with absolute certainty regarding many of Defendants’ discovery  
7 positions, he was fairly certain that Defendants would under no circumstances produce source  
8 code. Facebook offered to limit several discovery requests, including Request for Production No.  
9 16, but Mr. Walker stated that the request was “irredeemably broad.”

10 33. On January 6, 2008, the parties held a final meet and confer. Mr. Smith was in  
11 attendance. The conference first touched on the upcoming depositions of two “personal  
12 jurisdiction” witnesses that StudiVZ and the Holtzbrinck defendants had agreed to produce.  
13 Given the disagreement as to the scope of what “personal jurisdiction” discovery meant, Mr. Gray  
14 sought to clarify the topics that these witnesses would be prepared to testify to. Mr. Smith  
15 indicated that the Holtzbrinck witness, Martin Weber, would be able to testify to his knowledge  
16 of StudiVZ’s accessing of Facebook, which Mr. Smith stated he probably knew nothing about.  
17 Mr. Gray stated, “I don’t want to fly to Germany and find out that I’m not going to get answers.  
18 It sounded from my conversations with Bill [Mr. Walker], that these guys were only going to  
19 testify about stuff in their declarations [in support of Defendants’ Motions to Dismiss for Lack of  
20 Personal Jurisdiction. We want to ask him about his knowledge about Bemmann, Dariani, if they  
21 had access to Facebook source code to develop the site, etc.” Mr. Smith answered, “Well – I’m  
22 willing to allow – No, you know what, I’m willing to allow him to testify about that fully.  
23 Period. I think I’m willing to allow him to testify about that. I could fight you on this, but I don’t  
24 have any particular reason to.” With respect to Mr. Brehm, the StudiVZ “personal jurisdiction”  
25 witness, Mr. Smith stated that he might try to limit any testimony regarding the accessing of  
26 Facebook to “copying,” but that “I’m using a broad definition of copying. I’m not going to slice  
27 it that thinly.”

28 34. With respect to the outstanding discovery requests, the parties were unable to

1 reach an agreement regarding the proper scope of personal jurisdiction discovery. Mr. Smith  
2 stated that most discovery going to access or the development of StudiVZ did not have to do with  
3 personal jurisdiction or, the corollary, dealt only with the merits of the case. He stated that he  
4 would fight this “all the way to the Supreme Court if I have to.” Mr. Smith argued that Facebook  
5 was not entitled to any and all discovery that related to StudiVZ’s accessing of Facebook in the  
6 course and conduct of StudiVZ’s business. Mr. Smith stated that no “access” or “development”  
7 documents would be produced unless those documents also evidenced some additional predicate  
8 act related to Facebook’s causes of action, such as “copying.” He also stated that no documents  
9 would be produced unless Facebook first agreed that it would waive its right to move to compel  
10 future production. My colleague Tom Gray suggested that Defendants produce whatever access  
11 and development documents they felt did go to personal jurisdiction and that a resolution could  
12 then be more productively made. Mr. Smith refused. Mr. Gray argued that access and  
13 development documents were relevant to Facebook’s *Calder* effects argument. Mr. Smith agreed  
14 in principle, but stated that the discovery would be withheld barring an agreement as to future  
15 discovery and the understanding that no documents that did not evidence the additional predicate  
16 act such as “copying” would be produced.

17 35. At the end of the meet and confer, the parties discussed continuing the upcoming  
18 hearing on Defendants’ Motions to Dismiss. Mr. Smith stated that he probably had no problem in  
19 taking the hearing off-calendar with respect to StudiVZ, but that he would like simply if  
20 Facebook voluntarily dismissed the Holtzbrinck Defendants instead. Mr. Smith then said,  
21 “Listen, my goal here is to get my client dismissed without having to give up any discovery.”

22 36. The following day, January 7, 2009, my colleague Mr. Gray sent an email to Mr.  
23 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 37. 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, Mr.  
10 Gray cancelled the depositions in Frankfurt, Germany.

11 38. A true and correct copy of Defendants' Responses to Facebook's Request for  
12 Production, which cite in full Facebook's Requests for Production, is attached hereto as **Exhibit**  
13 **10**.

14 39. Attached hereto as **Exhibit 11** is a true and correct copy of a screenshot of the  
15 StudiVZ Registration page.

16 40. Attached hereto as **Exhibit 12** is a true and correct copy of a screenshot of the  
17 Spanish-language StudiVZ Registration page.

18 41. Attached hereto as **Exhibit 13** is a true and correct copy of a screenshot of the  
19 Spanish-language StudiVZ Registration page. The screenshot depicts a help page from the site.  
20 Translated, the site states, "I wanted to register, but my university doesn't appear! Unfortunately  
21 we do not have a complete list of all universities/jobs. But with your help, this will little by little  
22 be a problem of the past. When you register, the best thing to do is for you to select another  
23 university. You will be able to change this later but you will be able to begin now! Send us an  
24 email with the complete name of your university, its acronym, the country, state, city and  
25 webpage."

26 42. Attached hereto as **Exhibit 14** is a true and correct copy of the transcript of the  
27 December 16, 2008 hearing before Magistrate Judge Lloyd.

28 I declare, under penalty of perjury, that the foregoing is true and correct to the best of my

1 knowledge.

2 Executed this 27th day of January, at Menlo Park, California.

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/s/ Julio C. Avalos /s/

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Julio C. Avalos

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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 January 27, 2009.

Dated: January 27, 2009

Respectfully submitted,

\_\_\_\_\_  
/s/ Julio C. Avalos /s/  
Julio C. Avalos

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