

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

11 Attorneys for Defendants  
 12 Holtzbrinck Networks GmbH and  
 13 Holtzbrinck Ventures GmbH

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

17 FACEBOOK, INC.,  
 18 Plaintiff,  
 19 v.  
 20 STUDIVZ LTD., HOLTZBRINCK  
 21 NETWORKS GmbH,  
 22 HOLTZBRINCK VENTURES  
 23 GmbH, and DOES 1-25,  
 24 Defendants.

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

**HOLTZBRINCK NETWORKS' AND  
 HOLTZBRINCK VENTURES'  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN OPPOSITION  
 TO FACEBOOK, INC.'S MOTION  
 TO COMPEL**

Date: March 3, 2009  
 Time: 10:00 a.m.  
 Place: Courtroom 2, 5th Floor  
 Hon. Howard R. Lloyd

[Declarations of Stephen S. Smith and  
 William M. Walker (and exhibits thereto)  
 concurrently filed]

Complaint Filed: July 18, 2008

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

TABLE OF CONTENTS

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	Page
I. INTRODUCTION.....	1
II. BACKGROUND.....	1
A. The Holtzbrinck Defendants Filed a Motion to Dismiss and Facebook Agreed to a Hearing Date of February 13, 2009 .....	1
B. The Parties Reached Complete Agreement on the Discovery Propounded on the Holtzbrinck Defendants.....	2
C. Facebook Was Given the Opportunity to Depose the Single Holtzbrinck Witness It Asked to Depose .....	2
D. The Parties’ Discussions About Continuing the Hearing Date for the Motions to Dismiss .....	3
E. Facebook Sought to Continue the Hearing on the Motions. ....	4
F. The Court Denied Facebook’s Request to File a Supplemental Opposition Brief Regarding the Holtzbrinck Defendants.....	5
III. ARGUMENT .....	5
A. This Motion is Moot with Respect to the Holtzbrinck Defendants .....	5
B. There Is No Dispute That The Parties Came to Complete Agreement as to the Holtzbrinck Defendants and That Facebook Did Not Meet and Confer Prior to Moving to Compel.....	6
IV. CONCLUSION .....	9

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**Page**

**CASES**

Brooke Credit Corp. v. Lobell Ins. Servs., L.L.C.,  
2007 U.S. Dist. LEXIS 84814 (D. Kan. Nov. 15, 2007) ..... 6

**COURT RULES**

FRCP 37(a)(2)(B) ..... 7  
N.D. Cal. L.R. 37-1(a) ..... 7

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2  
3 I. **INTRODUCTION**

4 Holtzbrinck Networks, GmbH (“Networks”) and Holtzbrinck Ventures,  
5 GmbH (“Ventures”) (collectively the “Holtzbrinck Defendants”) submit this  
6 separate opposition to Facebook’s motion to compel. In this opposition, the  
7 Holtzbrinck Defendants raise arguments that apply only to them. In an effort to save  
8 the Court’s time, the Holtzbrinck Defendants do not repeat herein the arguments that  
9 are contained in StudiVZ’s separate opposition, but instead join in that opposition  
10 where the arguments as to all defendants overlap. As to the Holtzbrinck Defendants,  
11 Facebook’s motion should be denied for these independent reasons:

12 First, the District Court Order dated January 27, 2009 renders moot  
13 Facebook’s motion to compel as to the Holtzbrinck Defendants.

14 Second, Facebook may not move to compel against the Holtzbrinck  
15 Defendants because Facebook withdrew its requests for production of documents  
16 served on the Holtzbrinck Defendants and because the parties reached complete  
17 agreement on the interrogatories, which agreement was set forth in supplemental  
18 interrogatory responses served on December 24, 2008. Facebook has never claimed  
19 to the contrary and never met and conferred before filing the motion to compel.

20 For these reasons, (and for the reasons set forth in the StudiVZ opposition), the  
21 motion to compel should be denied.

22  
23 II. **BACKGROUND**

24 A. **The Holtzbrinck Defendants Filed a Motion to Dismiss and**  
25 **Facebook Agreed to a Hearing Date of February 13, 2009.**

26 On October 22, 2008, defendants filed two motions to dismiss: one by the  
27 Holtzbrinck Defendants, and one by StudiVZ Ltd. (Docket Nos. 41, 42). Both  
28 motions were based on lack of personal jurisdiction and *forum non conveniens*. The

1 hearing on the motions was initially scheduled for February 13, 2009. Defendants  
2 scheduled that date in consultation with Facebook so that Facebook could take  
3 discovery relating to personal jurisdiction. (Smith Decl., ¶ 16).

4 B. **The Parties Reached Complete Agreement on the Discovery**  
5 **Propounded on the Holtzbrinck Defendants.**

6 Facebook served the Holtzbrinck Defendants written discovery requests on  
7 October 14, 2008. The Holtzbrinck Defendants timely responded on November 17,  
8 2008. (Smith Decl., ¶ 23).

9 Facebook initially believed the responses were inadequate. The parties then  
10 met and conferred, culminating on November 26, 2008 with a resolution of the  
11 discovery disputes related to the Holtzbrinck Defendants. The Holtzbrinck  
12 Defendants agreed to supplement their interrogatory responses, which they did on  
13 December 24, 2008. They also agreed to produce (a) any portions of the agreement  
14 by which they purchased StudiVZ, and any due diligence documents associated with  
15 that acquisition, that made any explicit or implicit mention of Facebook, and (b) any  
16 StudiVZ board meeting minutes that contain any implicit or explicit reference to  
17 Facebook. In return, Facebook withdrew its document requests. (Smith Decl., ¶ 28).

18 Prior to filing its motion to compel, Facebook never claimed that the  
19 supplemental interrogatory responses or document production were inadequate or  
20 incomplete. Facebook never even threatened to move to compel with respect to the  
21 Holtzbrinck Defendants.<sup>1</sup> (Smith Decl., ¶¶ 27-28).

22 C. **Facebook Was Given the Opportunity to Depose the Single**  
23 **Holtzbrinck Witness It Asked to Depose.**

24 The only Holtzbrinck witness Facebook ever asked to depose was Martin  
25 Weber, the managing director of the Holtzbrinck Defendants and the declarant in  
26

27 <sup>1</sup> As stated by Facebook’s counsel on the record on December 16, 2008: “We have  
28 largely been able to work out every issue. . . .” (Exhibit A to Avalos Decl. at Page 5 of 28  
[Reporter’s Transcript at 4:23-24]) (Docket No. 78-2) (emphasis added). The “very few issues”  
that remained unresolved related to StudiVZ, not the Holtzbrinck defendants.

1 support of the Holtzbrinck Defendants’ motions to dismiss. The parties agreed that  
2 Mr. Weber’s deposition would take place in Frankfurt, Germany on January 13,  
3 2009, and Facebook noticed the deposition accordingly. (Smith Decl., ¶ 31; Docket  
4 No. 84-2).

5 Then, at 10:57 p.m. PST on Thursday, January 8, 2009 (8:57 a.m. on Friday,  
6 January 9, 2009 in Germany), Facebook canceled the deposition. The reason given  
7 for cancelling Mr. Weber’s deposition had nothing to do with Mr. Weber or the  
8 Holtzbrinck Defendants. Rather, it related to a single topic that was relevant only to  
9 StudiVZ and StudiVZ’s witness, Michael Brehm, whose deposition was scheduled  
10 for January 12, 2009. Prior to defense counsel flying to Germany, Facebook had  
11 never indicated that it would cancel the deposition of either witness if disagreement  
12 over this single topic was not resolved in advance. (Smith Decl. in Support of  
13 Defendants’ Motion for Sanctions, ¶¶ 7-20) (Docket No. 84).

14 D. **The Parties’ Discussions About Continuing the Hearing Date for**  
15 **the Motions to Dismiss.**

16 As noted above, the written discovery issues with respect to the Holtzbrinck  
17 Defendants were resolved well before the January 16, 2009 due date for Facebook’s  
18 opposition to the Motion to Dismiss. However, because Mr. Weber’s deposition  
19 was not scheduled to commence until January 13, 2009, Facebook asked for more  
20 time to incorporate into its opposition to the Holtzbrinck Motion to Dismiss what it  
21 learned at Mr. Weber’s deposition. Defense counsel was agreeable to moving the  
22 hearing date of that motion for two or three weeks for that purpose. Facebook’s  
23 cancellation of the deposition obviated the whole reason for the request. (Smith  
24 Decl. in Opposition to Motion to Enlarge Time, ¶¶ 17, 19) (Docket No. 82).

25 Nonetheless, even after canceling Mr. Weber’s deposition, Facebook wanted  
26 more time to oppose the Holtzbrinck Motion to Dismiss. Facebook did not claim  
27 that it needed more time because there was a discovery dispute with respect to the  
28 Holtzbrinck Defendants. Rather, it wanted the additional time only because it had

1 not yet prepared its opposition brief. (Facebook’s Motion to Enlarge Time at 1:23-  
2 24) (Docket No. 77).

3 Defendants could have simply said “no,” but did not. They offered to move  
4 the hearing date of the Holtzbrinck Motion to Dismiss if (1) the continuance was  
5 short (i.e., two or three weeks), and (2) Facebook would agree that the *forum non*  
6 *conveniens* portion of the StudiVZ Motion to Dismiss could be heard at the same  
7 time. Defendants were unwilling to delay the Holtzbrinck Motion to Dismiss longer  
8 than two or three weeks because there was no open dispute about the Holtzbrinck  
9 Defendants’ discovery responses. Similarly, defendants were unwilling to move the  
10 *forum non conveniens* portion of the StudiVZ Motion to Dismiss because there has  
11 never been any discovery dispute with respect to *forum non conveniens*. Facebook  
12 rejected that proposal without explanation. (Smith Decl. in Opposition to Motion to  
13 Enlarge Time, ¶¶ 16-21) (Docket No. 82).

14 E. **Facebook Sought to Continue the Hearing on the Motions.**

15 On January 23, 2009, Facebook filed with the District Court a motion to  
16 continue for 90 days *both* Motions to Dismiss. (Docket No. 77). Facebook also  
17 asked the District Court to allow Facebook to file supplemental opposition papers  
18 with respect to *both* Motions to Dismiss. (Docket No. 77 at 1:25-2:3; Docket No. 77-  
19 2) Even though it sought to continue both Motions to Dismiss, Facebook made no  
20 argument as to why the Holtzbrinck Motion to Dismiss, specifically, should be  
21 continued (nor did it make any argument as to why the *forum non conveniens* portion  
22 of either Motion to Dismiss should be continued).

23 The Holtzbrinck Defendants opposed Facebook’s motion. They expressly  
24 argued that there was no need for a continuance because it was undisputed that there  
25 were no outstanding discovery issues with respect to the Holtzbrinck Defendants  
26 regarding either personal jurisdiction or *forum non conveniens*. (Docket No. 80 at  
27 1:6-10). StudiVZ opposed Facebook’s motion only in part, agreeing that there were  
28 still pending, unresolved issues regarding personal jurisdiction discovery over

1 StudiVZ but noting that there were no outstanding discovery issues at all relating to  
2 *forum non conveniens*. (Docket No. 81).

3 F. **The Court Denied Facebook’s Request to File a Supplemental**  
4 **Opposition Brief Regarding the Holtzbrinck Defendants.**

5 On January 28, 2009, the District Court issued its Order on Facebook’s Motion  
6 to Enlarge Time. The Court granted Facebook’s motion only in part and denied  
7 Facebook most of the relief it requested. First, the Court found:

8 “A review of the record and the parties’ papers reveals  
9 that Facebook has failed to demonstrate any reason to  
10 continue the February 13, 2009 hearing as to either  
11 defendant with respect to *forum non conveniens*, or as to  
12 Holzbrinck with respect to personal jurisdiction.”

13 (Order at 2:15-17) (Docket No. 92). Second, the Court ruled that Facebook would  
14 only be “permitted to file a supplemental opposition with respect to whether this  
15 Court has personal jurisdiction over StudiVZ in light of any newly discovered  
16 material.” (Order at 2:20-22) (Docket No. 92) (emphasis added). The District Court  
17 did not grant Facebook’s request to file a supplemental opposition to the Holtzbrinck  
18 Defendants’ motion to dismiss. (Id.).

19  
20 III. **ARGUMENT**

21 A. **This Motion is Moot with Respect to the Holtzbrinck Defendants.**

22 Facebook argues that it needs the requested discovery “in order to oppose  
23 Defendants’ Motions to Dismiss.” (Mot. at 11:2-3) (Docket No. 91). However, as  
24 discussed above, (1) Facebook has already filed its opposition to the Holtzbrinck  
25 Defendants’ Motion to Dismiss, and (2) the Court denied Facebook’s request to file  
26 a supplemental brief. Thus, Facebook’s Motion to Compel the Holtzbrinck  
27 Defendants to provide further responses to personal jurisdiction and *forum non*  
28 *conveniens* discovery is moot.

1 The District Court ruled that Facebook had “failed to demonstrate any  
2 reason” to continue the hearing of the Holtzbrink Defendants’ Motion to Dismiss.  
3 The only reason that the Court nonetheless continued the hearing was for “judicial  
4 economy” so that both motions would be heard at the same time.

5 The Order moots Facebook’s Motion to Compel in two respects. First, by  
6 denying Facebook’s request for leave to file a supplemental brief with respect to the  
7 Holtzbrinck Motion to Dismiss, the Court mooted any need for Facebook to obtain  
8 additional discovery from those defendants. Second, the Order demonstrates that the  
9 District Court necessarily found (just as the Holtzbrinck Defendants argued and as  
10 Facebook did not dispute) that all discovery issues between Facebook and the  
11 Holtzbrinck Defendants had, in fact, been resolved. In both respects, the District  
12 Court Order renders Facebook’s current Motion to Compel as to the Holtzbrinck  
13 Defendants a waste of judicial resources and time. Cf. Brooke Credit Corp. v. Lobell  
14 Ins. Servs., L.L.C., 2007 U.S. Dist. LEXIS 84814 at \*15-\*16 (D. Kan. Nov. 15,  
15 2007) (plaintiff’s motion to compel related to personal jurisdiction denied because  
16 the issue became moot).

17 B. **There Is No Dispute That The Parties Came to Complete**  
18 **Agreement as to the Holtzbrinck Defendants and That Facebook**  
19 **Did Not Meet and Confer Prior to Moving to Compel.**

20 Although the Holtzbrinck Defendants believe that the January 28, 2009 Court  
21 Order clearly reflects that the District Court found that the parties had reached a  
22 resolution with respect to the written discovery served on the Holtzbrinck  
23 Defendants, the District Court did not expressly state that exact point. But if there  
24 were any doubt as to that issue, that doubt is removed by the undisputed evidence.

25 As noted above, counsel for Facebook withdrew the requests for production of  
26 documents that had been served on the Holtzbrinck Defendants in return for their  
27 agreement to produce certain limited categories of documents, which have since been  
28 produced. Facebook also agreed to accept supplemental interrogatory responses

1 from the Holtzbrinck Defendants, which responses were served on December 24,  
2 2008. The existence of this agreement is confirmed by the declaration of Stephen S.  
3 Smith filed with the District Court in connection with the Holtzbrinck Defendants’  
4 opposition to Facebook’s Motion to Enlarge Time. (Docket No. 82, ¶ 5). The  
5 agreement is also confirmed in the declarations of Stephen S. Smith and William  
6 Walker filed now in connection with this opposition.

7 However, if that were not enough, it is also the case that Facebook has never  
8 even argued to the contrary.

9 First, Facebook did not claim that there was any open discovery dispute with  
10 respect to the Holtzbrinck Defendants in its Motion to Enlarge Time. Facebook  
11 knew full well by the time it filed that motion that the Holtzbrinck Defendants had  
12 refused to agree to any continuance of their motion *because* there was no open  
13 discovery dispute with respect to those defendants. Yet, nowhere in the Motion to  
14 Enlarge Time or in the declarations filed in support thereof did Facebook argue that  
15 such a dispute, in fact, existed.

16 Second, Facebook’s counsel has not claimed that there is any open discovery  
17 dispute with respect to the Holtzbrinck Defendants in their declarations in support of  
18 the instant Motion to Compel. Facebook’s motion includes a Certificate Pursuant to  
19 FRCP 37(a)(2)(B) and N.D. Cal. Civ. L.R. 37-1(a). That certificate is supposed to  
20 state that the issues raised in the motion have been the subject of Facebook’s efforts  
21 to meet and confer. Facebook cites as support for that certificate the Declaration of  
22 Julio Avalos, paragraphs 21-35. Yet, those paragraphs do *not* contain any statement  
23 about any discovery dispute with respect to the Holtzbrinck Defendants. It is all  
24 about StudiVZ. Indeed, nowhere in Mr. Avalos’s declaration or Thomas Gray’s  
25 declaration does either Facebook counsel mention any specific complaint  
26 communicated by them or their colleagues to defense counsel about the Holtzbrinck  
27 Defendants’ discovery responses or production of documents after November 26,  
28 2008. Nor do they refer to or reference any written communication from Facebook’s

1 counsel to defense counsel complaining about the Holtzbrinck Defendants’ discovery  
2 responses or production of documents

3 Again, by the time Facebook filed these declarations, it knew full well that the  
4 Holtzbrinck Defendants had represented to the District Court that the parties had  
5 resolved all discovery issues with respect to the Holtzbrinck Defendants. Yet, they  
6 do not dispute or even address that point in the declarations filed in support of the  
7 Motion to Compel.

8 Third, the memorandum of points and authorities in support of the Motion to  
9 Compel focuses entirely on StudiVZ, and not the Holtzbrinck Defendants. Although  
10 Facebook uses the term “defendants,” and even claims that the Holtzbrinck  
11 Defendants are also at issue in footnote 5, whenever any alleged fact is mentioned, it  
12 is always a fact about StudiVZ, not the Holtzbrinck Defendants. (The only  
13 exception is that at page 23, line 28, Facebook quotes from Holtzbrinck Networks’  
14 response to Request No. 13).

15 This lack of dispute is why the District Court found that Facebook had failed  
16 to provide any reason to continue the hearing of the Holtzbrinck Motion to Dismiss.

17 In sum, there is absolutely no basis for Facebook to move to compel anything  
18 from the Holtzbrinck Defendants. There was a complete agreement reached. The  
19 Holtzbrinck Defendants complied with that agreement. Facebook never said a word  
20 to the contrary. It never met and conferred. At the last minute, it simply decided to  
21 drop the Holtzbrinck Defendants into a motion that relates solely to StudiVZ.

22  
23 ///

24  
25 ///

26  
27 ///

