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

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

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

**DEFENDANTS' OPPOSITION TO  
 FACEBOOK, INC.'S MOTION FOR  
 SANCTIONS**

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)  
 filed concurrently]

Complaint Filed: July 18, 2008

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2  
3 **I. INTRODUCTION**

4 Facebook’s motion for sanctions is preposterous and totally without merit.  
5 Facebook filed the motion as a defensive maneuver after defendants told Facebook  
6 that they would move for sanctions based on Facebook’s sudden and unjustified  
7 cancellation of two depositions in Germany after defense counsel had traveled to  
8 Germany to defend them. Facebook seeks to create a morass of unsupported  
9 counter-accusations in the hope that the Court will throw its hands up in the air and  
10 just deny both motions.

11 In fact, defendants have done *nothing* wrong, have acted entirely in good  
12 faith and have bent over backwards to move this case along in a practical and  
13 efficient manner. For example:

- 14 • Defendants did not delay responding to the complaint, but rather  
15 executed *Facebook’s* Waiver of Service Under FRCP 4 *before* the time Facebook  
16 requested and then filed their responsive pleadings within the time set forth therein.
- 17 • Defendants did not delay the Rule 26(f) conference. They never  
18 refused to hold it, and the conference was indeed held 22 days before the Court-  
19 ordered deadline, *before* defendants had even responded to the complaint.
- 20 • Defendants proactively set the hearing of their motions to dismiss on  
21 the date Facebook requested, in order to provide Facebook with nearly four months  
22 to take discovery into personal jurisdiction.
- 23 • Defendants explained in writing, *before* their discovery responses were  
24 even due, the problems that existed in the discovery and suggested that Facebook  
25 correct those problems then. Defendants did not simply wait until their formal  
26 responses were due (which they were entitled to do). By way of an obvious  
27 example, defendants informed Facebook that it had defined “YOU” improperly to  
28 refer to the defendant Verlasgruppe Georg von Holtzbrinck (“VGH”), which had

1 already been dismissed, and suggested that Facebook fix that (and other) mistakes  
2 and re-serve its discovery. Facebook expressly refused to do so.

3 • Defendants formally responded to Facebook’s discovery on the  
4 original due date and did not ask for any extensions of time.

5 • Within days of serving those responses, defendants engaged in detailed  
6 oral and written meet and confer sessions with Facebook’s counsel. Within 18 days  
7 of service of the original responses, the parties by Facebook’s own admission had  
8 “largely been able to work out every issue,” and only a “very few” issues remained.

9 • Defendants agreed to produce for deposition the declarants in support  
10 of defendants’ motions to dismiss voluntarily on dates prior to the dates Facebook  
11 requested so that Facebook could incorporate that testimony into its opposition to  
12 the motions to dismiss (after Facebook suggested dates falling after that deadline).

13 • Defendants had their counsel fly to Germany to prepare the witnesses  
14 for and defend those depositions, only to have Facebook suddenly and unjustifiably  
15 cancel them even though Facebook knew of defense counsel’s travel plans in  
16 advance and that defense counsel was already in fact in Germany.

17 • After all of that, defendants still agreed to Facebook’s request to  
18 continue the hearing of the personal jurisdiction portion of StudiVZ’s motion to  
19 dismiss so that Facebook could have its motion to compel heard before the motion  
20 to dismiss was decided by the District Court. Defendants did oppose any  
21 continuance of the Holtzbrinck defendants motion to dismiss and opposed the  
22 continuance of the *forum non conveniens* portion of the StudiVZ motion to dismiss.  
23 But, the District Court agreed 100% with defendants’ argument on both issues,  
24 ruling on January 28, 2009 that “Facebook has failed to demonstrate any reason to  
25 continue the February 13, 2009 hearing as to either defendant with respect to *forum*  
26 *non conveniens*, or as to Holtzbrinck with respect to personal jurisdiction.”

27 The existing disagreement between the parties is limited to less than 10% of  
28 the written discovery Facebook served. That dispute has nothing to do with two of

1 the three defendants, and as to the third it is limited to a distinct minority of the  
2 discovery served. Sanctions against defendants are absolutely unwarranted.

3 The story of Facebook's conduct is completely different. After expressly  
4 asking defendants to sign the Waiver of Service, Facebook tried to force defendants  
5 to respond weeks early. Facebook then filed ill-conceived motions for expedited  
6 discovery and to shorten time as to hundreds of interrogatories and document  
7 demands relating almost entirely to the merits. Facebook withdrew the motion only  
8 after this Court denied the order shortening time, and after defendants had been  
9 forced to file their oppositions, on the eve of its hearing. Facebook sued defendant  
10 VGH without any basis for doing so and only dismissed it after forcing VGH to  
11 move to dismiss. After the parties resolved all discovery issues with respect to the  
12 remaining two Holtzbrinck defendants, Facebook reneged and now seeks to compel  
13 further responses from them, even though the District Court has already ruled that  
14 Facebook may not file a supplemental opposition as to those defendants' motion to  
15 dismiss. Worst of all, Facebook continues to litigate this case in the United States,  
16 when it has affirmatively filed, and is pursuing, the exact same lawsuit in Germany.

17 Facebook's requests for monetary and issue sanctions are surreal and absurd.  
18 The only sanctions that should be awarded are the monetary sanctions requested in  
19 defendants' motion regarding Facebook's cancellation of the depositions in Germany.  
20 Facebook's trumped-up motion for sanctions should be denied in its entirety.

## 21 22 **II. BACKGROUND**

### 23 **A. Facebook Has Recognized for Years That Germany is the Proper** 24 **Forum for Any Dispute.**

25 In June 2006 and January 2007, Facebook sent demand letters to StudiVZ in  
26 Germany raising the same factual allegations as are raised in the instant case. The  
27 letters were written in German by Facebook's German counsel. They threatened  
28 litigation under German law. (Smith Decl. in Support of Motion for Protective

1 Order, ¶¶ 22-23; Exs. K-N thereto) (Docket Nos. 64, 64-9, 64-10, 64-11 and 64-12).  
2 On November 19, 2008, long after this case was filed, Facebook filed a massive 82-  
3 page complaint against StudiVZ in Cologne, Germany. (Maurer Decl. in Support of  
4 Motion for Protective Order, ¶ 4(d)) (Docket No. 65). Facebook’s German Action is  
5 based on the identical facts and conduct as this case and seeks affirmative relief  
6 against StudiVZ (including monetary damages, injunctive relief, and an accounting).  
7 (Walker Decl. in Support of Motion to Dismiss, ¶¶ 4-6; Ex. F, pp. 2-3) (Docket No.  
8 70). This Court has already noted (without any disagreement or objection from  
9 Facebook) that the issues in the Cologne lawsuit are “substantially similar (if not  
10 identical) to those raised here.” (Docket No. 68 at 4:27-28).

11 **B. Facebook Made False Claims About Defendants’ Alleged “Delay**  
12 **Tactics” Even Before Defendants Were Ever in the Case.**

13 Facebook has wrongly accused defendants of delay from the outset of the case,  
14 including in motions that were either denied by the Court or were withdrawn by  
15 Facebook before they were heard. Even though none of this alleged pre-discovery  
16 delay concerns the existing discovery dispute, defendants feel compelled to respond  
17 because Facebook purports to include it as a basis for an issues sanction.

18 The initial “delay” in the case was caused by defendants’ *compliance* with  
19 Facebook’s request that defendants waive service of process pursuant to FRCP  
20 4(d)(3). Facebook asked defendants to respond to that request within 60 days or  
21 sooner. Sixty days is also the time for a response under FRCP 4(d)(1)(F).  
22 Defendants responded 28 days *early* by signing the Waiver as Facebook had  
23 requested. (Smith Decl. in Opposition to Motion to Change Time, ¶¶ 3(b)-(d); Exs.  
24 C-D thereto) (Docket Nos. 18, 18-4 and 18-5). As a result, defendants had 90 days to  
25 respond from the date Facebook sent the Waiver. Facebook sent the Waiver on July  
26 24, 2008, which made defendants’ response date October 22, 2008.

27 But then Facebook tried to force defendants to respond earlier than Facebook’s  
28 own Waiver provided. On September 9, 2008 (before any defendants appeared in

1 this action), Facebook filed a motion seeking to have the Court either allow  
2 expedited discovery<sup>1</sup> regarding personal jurisdiction or, alternatively, to “require  
3 plaintiff [sic] to file its motion to dismiss by September 20, 2008.” (Motion for  
4 Expedited Discovery re: Personal Jurisdiction at 1:5-10) (Docket No. 11). Facebook  
5 concurrently filed a Motion to Shorten Time (Docket No. 13), complaining that  
6 defendants would not commit to responding to the Complaint sooner than the  
7 timeframe set forth in both (1) FRCP 4(d)(3), and (2) the waiver of service of process  
8 drafted by Facebook (and signed by defendants).

9 Facebook was complaining that defendants complied with Facebook’s  
10 request and accused defendants of thereby engaging in “stall tactics.” To the  
11 contrary, as shown in the opposition filed by defendant VGH,<sup>2</sup> defendants were  
12 proceeding according to the schedule set forth in the Waiver that Facebook  
13 prepared and requested defendants to sign. Thus, Facebook’s odd complaint of  
14 “malicious compliance” simply made no sense. (Opp. at 1:2-11) (Docket No. 17).

15 The Court denied Facebook’s Request to Shorten Time (Docket No. 20), and  
16 Facebook ultimately withdrew its Motion for Expedited Discovery (Docket No. 36),  
17 instead seeking to have defendants respond to personal jurisdiction discovery upon  
18 regular notice. (Smith Decl., ¶ 15).

19 **C. Facebook’s Claims About the Rule 26(f) Conference are False.**

20 **1. *Facebook Did Not File Its Motion for Expedited Discovery***  
21 ***Due to Defendants’ Alleged Refusal to Hold the Conference.***

22 Facebook claims that defendants “initially refused to hold the obligatory Rule  
23 26(f) conference,” and that Facebook was therefore “forced the file a Motion for  
24

25 <sup>1</sup> In its motion, Facebook moved on 92 pages worth of discovery requests, which included  
26 120 requests for production, 92 interrogatories, and 6 deposition notices (including four Rule  
30(b)(6) depositions that covered 72 topics). (Ex. A to Avalos Declaration in Support of Motion  
for Expedited Discovery) (Docket No. 12-2).

27 <sup>2</sup> At that time, VGH was the only defendant who had appeared in the action as VGH filed  
28 a motion to dismiss for lack of personal jurisdiction on September 10, 2008 (Docket No. 15).  
Facebook voluntarily dismissed VGH before VGH’s motion would be heard. (Docket No. 27).

1 Expedited Discovery.” (Mot. at 4:10-12) (Docket No. 86). Facebook’s claim is  
2 demonstrably false. Facebook filed its Motion for Expedited Discovery *before* the  
3 issue of holding a Rule 26(f) conference ever arose. (Smith Decl., ¶ 12; Ex. A).  
4 Thus, Facebook’s motion could not have been caused by defendants’ alleged  
5 refusal to hold a Rule 26(f) conference.<sup>3</sup>

6 **2. Defendants Did Not Place Conditions on the Conference.**

7 Facebook also claims that defendants only “agreed to hold the conference in  
8 return for the withdrawal of the motion [for expedited discovery] and the voluntary  
9 dismissal without prejudice of [VGH].” (Mot. at 4:12-14) (Docket No. 86). Again,  
10 this is false.

11 First, the conference was held on October 9, 2008 (Rule 26(f) Report and  
12 Discovery Plan, ¶ 1) (Docket No. 50) and Facebook did not withdraw its Motion for  
13 Expedited Discovery *until the next day*, October 10, 2008 (Docket No. 36). Thus,  
14 defendants obviously did not refuse to hold the Rule 26(f) conference until the  
15 Motion for Expedited Discovery had been withdrawn when it was not, in fact,  
16 withdrawn until *after* the Rule 26(f) conference had taken place. In fact, Facebook  
17 told defendants *for the first time* that it intended to withdraw its Motion for  
18 Expedited Discovery *during* the Rule 26(f) conference. (Smith Decl., ¶ 14(d)).

19 Second, Facebook did not tell Defendants that it had decided to dismiss VGH  
20 until September 29, 2008, 13 days *after* Defendants had already agreed to conduct  
21 the Rule 26(f) conference irrespective of whether Facebook dismissed VGH or not.  
22 (Smith Decl., ¶¶ 14(a); Ex. E). The only connection between the two events was  
23 that *both* parties agreed that the Rule 26(f) conference should be held only after  
24 Facebook had decided *whether or not* to dismiss VGH, so that defense counsel

25 \_\_\_\_\_  
26 <sup>3</sup> Defendants also did not “refuse” to hold the conference. Rather, on September 15, 2008,  
27 defendants simply expressed their belief that a conference was “premature” for a number of  
28 reasons. (Smith Decl., ¶ 13(b)). However, *the next day* defendants learned of the Court’s Order  
setting the Case Management Conference (which Facebook had not previously served on  
defendants), and defendants withdrew their objection, agreed to hold a Rule 26(f) conference and  
scheduled a mutually agreeable date. (Smith Decl., ¶ 13(c)).

1 could know whether or not VGH needed to participate in that conference. (Smith  
2 Decl., ¶ 13(e)).

3 **D. Facebook Propounded Massively Overbroad Discovery on**  
4 **Defendants.**

5 Knowing it has no basis to sue in the U.S., Facebook has pursued a discovery  
6 plan based not on learning facts related to jurisdiction but on trying to litigate the  
7 merits of its dispute with StudiVZ. Facebook thus seeks to force defendants to  
8 litigate their guilt or innocence during the jurisdictional phase of this case.

9 Pursuant to that plan, on October 14 and 15, 2008, *before* defendants had  
10 even appeared in the case, Facebook propounded a plethora of overbroad, merits-  
11 based document demands, interrogatories and other discovery, seeking literally  
12 every shred of paper and electronic document in the possession of all defendants and  
13 any company or person remotely related to them.

14 **E. Defendants Filed Motions to Dismiss.**

15 On October 22, 2008, the two Holtzbrinck defendants filed one motion to  
16 dismiss and StudiVZ filed a separate motion to dismiss. (Docket Nos. 41, 42). Both  
17 motions were brought on the grounds of lack of personal jurisdiction and *forum non*  
18 *conveniens*. The motion hearings were initially set for February 13, 2009. Defense  
19 counsel scheduled the hearing on the date Facebook's counsel requested so that  
20 Facebook could take discovery relating to personal jurisdiction. (Smith Decl., ¶ 16).

21 **F. Defendants Met and Conferred in Good Faith.**

22 **1. *Defendants Have Timely Met and Conferred.***

23 On October 21, 2008 (five business days after Facebook served its discovery  
24 and *before* defendants formally appeared in the case), defendants offered to meet  
25 and confer with Facebook regarding Facebook's discovery requests. (Smith Decl.,  
26 ¶ 17). On October 27, 2008 (a mere 13 days after being served with the discovery  
27 and almost three weeks before their response were due), defendants did meet and  
28 confer with Facebook regarding Facebook's discovery. (Smith Decl., ¶ 20).

1 Facebook had specifically asked to delay this meeting until after defendants  
2 responded to the complaint because Facebook wanted to re-evaluate its discovery  
3 requests, and potentially narrow them, to focus on the issues raised in defendants'  
4 motions to dismiss. October 27, 2008 was chosen as the date because it was four  
5 business days after the deadline for the defendants to respond to the complaint. In  
6 telephone calls before this meeting, counsel for defendants pointed out many of  
7 obvious problems with the discovery. Facebook said it wanted to consider those  
8 points and, perhaps, re-draft the discovery to address them. However, on October  
9 27, 2008, Facebook said that it would not modify or change the requests in any way.  
10 Rather, it insisted that defendants respond to them as drafted. (Smith Decl., ¶ 20).

11 Facebook claims that defendants “refused to identify which requests or  
12 portions thereof that [defendants] found objectionable.” (Mot. at 4:24-25). Again,  
13 that claim is false.

14 On October 28, 2008 (long before defendants’ responses were due),  
15 defendants identified, in writing, numerous problems with the discovery requests.  
16 Defendants did not, however, want to “do Facebook’s work for Facebook” and “re-  
17 draft all of the requests.” It makes no sense for the propounding party to dump 92  
18 pages of grossly overbroad discovery requests and expect the responding party to  
19 do all the work to clean up the mess. After identifying many of the problems,  
20 defendants invited Facebook to withdraw the requests and serve proper requests.  
21 Facebook refused to do so. (Smith Decl., ¶¶ 21-22; Ex. O).

22 The October 28, 2008 letter speaks for itself and will not be repeated here.  
23 But, one specific objection raised in that letter is worth recounting because it  
24 demonstrates the absurd position Facebook was taking. Facebook served the two  
25 Holtzbrinck defendants with interrogatories that defined “YOU” as VGH, rather  
26 than as Holtzbrinck Ventures or Holtzbrinck Networks. As a result, the  
27 interrogatories sought information that the Holtzbrinck defendants, by definition,  
28 would not have in their possession. This specific problem was communicated to

1 Facebook orally and in writing. Facebook later admitted to the obvious mistake but  
2 refused to fix it. (Smith Decl., ¶¶ 21-22; Ex. O).

3 **G. The Parties Resolved Nearly All Discovery Issues Informally.**

4 Defendants timely responded to the discovery requests on November 17,  
5 2008, without asking for any extension. The responses were served by email so that  
6 Facebook’s counsel would have them right away. (Smith Decl., ¶ 23).

7 The parties then engaged in meet and confer, which culminated on November  
8 26 and December 2 and 3, 2008 with a resolution of the discovery disputes related to  
9 the Holtzbrinck defendants. The Holtzbrinck defendants agreed to supplement their  
10 interrogatory responses, which they did on December 24, 2008. They also agreed to  
11 produce (a) any portions of the agreement by which they purchased StudiVZ, and  
12 any due diligence documents associated with that acquisition, that made any explicit  
13 or implicit mention of Facebook, and (b) any StudiVZ board meeting minutes that  
14 contain any implicit or explicit reference to Facebook. In return, Facebook  
15 withdrew its document requests. (Smith Decl., ¶ 28).

16 Prior to moving to compel, Facebook never claimed that the Holtzbrinck  
17 defendants’ supplemental interrogatory responses or document production were  
18 inadequate or incomplete, and never even threatened to move to compel on them.  
19 (Smith Decl., ¶¶ 27-28).

20 In fact, on December 23, 2008, defense counsel expressly sought to re-confirm  
21 with Facebook’s counsel that there were no outstanding discovery issues with respect  
22 to the Holtzbrinck defendants. (Walker Decl., ¶ 4(b)). Facebook’s new lead counsel  
23 stated that he would have to double-check with Facebook’s former lead counsel and  
24 “get back to us.” Facebook never did follow up with defendants on this point and  
25 never raised any objection to the Holtzbrinck defendants’ responses -- until Facebook  
26 filed its Motion to Compel. (Smith Decl., ¶¶ 27-28; Walker Decl., ¶ 4(b)).

27 On December 24, 2008, StudiVZ also served supplemental interrogatory  
28 responses. (Smith Decl., ¶ 29). On January 9, 2009, StudiVZ served supplemental

1 document responses. (Id.). Agreements reached by the parties are reflected in  
2 defense counsel’s letter of December 4, 2008 and reflected in the supplemental  
3 responses themselves. (Id.).

4 Given the extensive meet and confer sessions and the agreements reached on  
5 nearly every discovery issue, only a few discovery issues remain and, as set forth in  
6 the defendants’ opposition briefs to Facebook’s Motion to Compel, defendants’  
7 positions are well-founded and made in good faith. Accordingly, when the parties  
8 appeared before the Court on December 16, 2008, counsel for both parties were  
9 able to represent to the Court that they had “largely” been able to work out “every  
10 issue” and that “very few” issues remained. (*See* Ex. 14 to Avalos Declaration in  
11 Support of Motion to Compel, pp. 5-13 of 28 [Reporter’s Transcript, pp. 4-12])  
12 (Docket No. 90-15).

13 **H. All But Four Issues Were Resolved During the Meet and Confer**  
14 **Process.**

15 Although almost every disputed discovery issue was resolved, some of  
16 Facebook’s requests were simply not salvageable because, among other things, of  
17 their great overbreadth, the enormous burden that it would take to respond to them,  
18 and the fact that they seek solely merits-based discovery during the jurisdiction  
19 phase of the case. Out of plaintiff’s original 90 document requests and 69  
20 interrogatories, eight document demands and six interrogatories directed to only one  
21 party remain in dispute. None have anything to do with any of the typical criteria  
22 that courts examine to analyze personal jurisdiction or *forum non conveniens*.

23 The remaining disputes boil down to only four categories; namely, (1) the  
24 design, development and implementation of the StudiVZ websites (Interrogatory 15  
25 and RFP 16), (2) computer code used by StudiVZ to operate its websites (RFP 23),  
26 (3) access by StudiVZ of Facebook’s website (Interrogatory 10 and RFPs 14, 25, 28  
27 and 29), and (4) adhesion contracts to which StudiVZ is a party (Interrogatories 1, 2  
28 and 9 and RFPs 1 and 13). The parties resolved everything else during meet and

1 confer, and all of these disputes were identified by defense counsel at each stage of  
2 the meet and confer process, beginning on November 26, 2008.

3 Defendants' opposition to plaintiff's motion to compel discusses those  
4 categories of disputes and the reasons why plaintiff should not be allowed that  
5 discovery, and so defendants will not repeat those arguments here. Defendants  
6 respectfully submit that their positions are made in good faith and well-taken.

7 **I. None of The Remaining Discovery Disputes Concern the Two**  
8 **Remaining Holtzbrinck Defendants.**

9 Pursuant to Facebook's usual practice, Facebook lumps the two remaining  
10 Holtzbrinck defendants together with StudiVZ to try to hide the fact that the four  
11 unresolved discovery issues have *nothing* to do with the Holtzbrinck defendants.  
12 Indeed, *nowhere* does Facebook's motion explain how the Holtzbrinck defendants'  
13 conduct is allegedly sanctionable. As shown in the documents and interrogatory  
14 responses that they provided to Facebook, the Holtzbrinck defendants are passive  
15 holders of StudiVZ shares. They do not operate any websites, and they owned no  
16 interest in StudiVZ when the allegedly offending acts purportedly took place. The  
17 bottom line is that Facebook has no claim against either of the Holtzbrinck  
18 defendants, and Facebook knows it. Indeed, in its recent, mammoth 82 page  
19 lawsuit in Germany (where there is clearly jurisdiction over the Holtzbrinck  
20 defendants), Facebook does not even bother to sue them, instead asserting claims  
21 only against StudiVZ. Yet Facebook stubbornly insists on trying to sue them here  
22 in *California*, and to delay the date of the hearing on their motions to dismiss for  
23 inexplicable reasons known only to itself.

24 **J. Facebook Cancelled the German Depositions Without Justification**  
25 **After Defense Counsel Was Already in Germany.**

26 Defendants will not repeat here all of the facts and argument set forth in their  
27 Motion for Sanctions. Suffice it to say that Facebook knew defense counsel's  
28 travel plans and noticed the depositions the day before defense counsel left.

1 Facebook did not cancel or even threaten to cancel until defense counsel had  
2 already left. Facebook canceled knowing that defense counsel was in Germany,  
3 and did so over a single topic that related to only one of the two witnesses noticed  
4 for deposition. And in the email sent by defense counsel immediately before  
5 Facebook canceled, defense counsel reassured Facebook that it could ask any and  
6 all questions that related in any way to personal jurisdiction and that, if there was  
7 any dispute, he would take an “expansive” view of what that meant. Facebook’s  
8 cancellation was sudden and unjustified. Facebook’s attempt in this motion to  
9 portray defense counsel as foolish for having gotten on the plane is outrageous.

10 **K. Facebook’s Moving Papers Contain Numerous Other False**  
11 **Statements and Mischaracterizations.**

12 Facebook’s moving papers contain numerous other inaccuracies. First,  
13 Facebook claims that defendants’ counsel said that StudiVZ employees did “what  
14 Facebook claims they did.” (Mot. at 5:13-16). That is false. (Smith Decl., ¶ 35).  
15 Second, Facebook claims that defendants’ counsel agreed to produce documents  
16 showing that StudiVZ employees had accessed Facebook in the course of their  
17 employment only to then withhold such documents. (Mot. at 3:8, 5:20-22, 5:27-6:1).  
18 That is false. (Smith Decl., ¶ 35(g)). Third, Facebook claims that defendants’  
19 counsel admitted that he is in possession of documents relating to StudiVZ’s alleged  
20 use of Facebook’s intellectual property in the development, implementation and  
21 maintenance of StudiVZ’s websites. (Mot. at 9:12-19). That is also false. (Id.).<sup>4</sup>

22 \_\_\_\_\_  
23 <sup>4</sup> Facebook seeks to engage in a practice that discourages oral meet and confer. Because it  
24 has no evidence of personal jurisdiction, it attempts to rely on statements falsely attributed to  
25 opposing counsel during meet and confer as party admissions. As the Declaration of Stephen Smith  
26 explains in great detail, counsel discussed numerous examples of potential types of “access” that  
27 might have occurred, presumably did occur and definitely did not occur. The discussion was for the  
28 express purpose of trying to narrow the “access” requests to what Facebook was supposedly  
claiming was wrongful and aimed at or which caused harm in California. Facebook rejected any  
such limitation. And, now, in its two motions, Facebook seeks to prove that StudiVZ engaged in  
some form of illegal access because StudiVZ’s counsel had offered to respond to the requests if they  
were so limited. Facebook omits the obvious point made by defense counsel during meet and that if  
the requests were limited to allegedly wrongful access, he presumed that the answer would be “no  
documents.”

1           **L. The District Court Has Already Rejected Many of Facebook’s**  
2           **Arguments.**

3           On January 16, 2009, Facebook filed its opposition to both of the Motions to  
4 Dismiss. (Docket Nos. 71, 76). On January 23, 2009, Facebook moved to continue  
5 for 90 days both Motions to dismiss, which were scheduled for hearing on February  
6 13, 2009. (Docket No. 77). Facebook also sought leave to file supplemental  
7 opposition papers with respect to both motions on the issues of both personal  
8 jurisdiction and *forum non conveniens*. (Docket Nos. 77-2 and 77 at 1:25-2:3).

9           In support of its motion to continue, Facebook argued it had been wrongfully  
10 deprived of discovery to which it is allegedly entitled, that Facebook had been  
11 seeking discovery “for months,” that defense counsel had allegedly engaged in  
12 “unprofessional and improper tactics,” that defendants filed their Motion for  
13 Protective Order “in an effort to block Facebook’s discovery,” and that defendants  
14 “still refused to produce the needed discovery” and have engaged in  
15 “gamesmanship and improper tactics.” (Docket No. 77 at 1:25, 3:6-10, 4:20-21).

16           The District Court denied Facebook almost all the relief it sought,<sup>5</sup> finding:

17           “Facebook has failed to demonstrate any reason to  
18 continue the February 13, 2009 hearing as to either  
19 defendant with respect to *forum non conveniens*, or as to  
20 Holzbrinck with respect to personal jurisdiction.”

21 (Order at 2:15-17) (Docket No. 92). Accordingly, the Court implicitly rejected all  
22 of Facebook’s arguments that defendants had engaged in “unprofessional” or  
23 “improper” discovery and/or delay “tactics” and “gamesmanship.”

24           <sup>5</sup> The Court granted Facebook’s motion to continue only in part, and denied Facebook  
25 almost all of the relief it sought. The Court continued the hearings for 60 days (not 90 days), only  
26 moved the Holtzbrinck Defendants’ motion and the *forum non conveniens* portion of StudiVZ’s  
27 motion for the sake of judicial economy (so that everything could be heard at once), and denied  
28 Facebook the right to file any further opposition papers with respect to the Holtzbrinck Defendants  
or with respect to the *forum non conveniens* portion of StudiVZ’s motion. (Order at 2:20-22)  
(Docket No. 92) (Facebook only “permitted to file a supplemental opposition with respect to  
whether this Court has personal jurisdiction over StudiVZ in light of any newly discovered  
material.”) (emphasis added).

1 **III. ARGUMENT**

2 **A. Plaintiff is Not Entitled to Monetary Sanctions.**

3 Plaintiff summarily states that 28 U.S.C. Sec. 1927 and Federal Rules of  
4 Civil Procedure 26 and 37 justify extensive monetary sanctions against defendants.  
5 (Mot. at pp.8-10). Not so. The language of the statutes, plus the case law  
6 interpreting them, decisively show that plaintiff is not entitled to any sanctions.

7 As shown above, after the meet and confer process, a good faith dispute  
8 remains about only four of Facebook’s many discovery categories, and the  
9 defendants have shown why Facebook’s motion to compel should be denied. This  
10 is an unremarkable discovery dispute in which the defendants, faced with massively  
11 broad, merits-based discovery at the jurisdiction and forum stages of the case, in  
12 good faith rolled up their sleeves and (1) did their best to answer everything that  
13 legitimately concerned jurisdiction and forum, and (2) made their relevant  
14 witnesses available at plaintiff’s counsel’s offices in Germany before the plaintiff’s  
15 deadline to respond to defendants’ Motions to Dismiss. Defendants never did  
16 anything to create delay, and never sought a single extension of any discovery  
17 deadline. On this record, Facebook is absolutely not entitled to any sanctions.

18 **1. *Plaintiff is Not Entitled to Monetary Sanctions under 28***  
19 ***U.S.C. Sec. 1927.***

20 Facebook first cites 28 U.S.C. Sec. 1927, which provides that “[a]ny attorney  
21 or other person admitted to conduct cases in any court of the United States ... who  
22 so multiplies the proceedings in any case unreasonably and vexatiously may be  
23 required to satisfy personally the excess costs, expenses, and attorney’s fees  
24 reasonably incurred because of such conduct.”

25 Cases interpreting this section, both from the Ninth and other Circuits,  
26 clearly hold that it must be narrowly interpreted in order to avoid abuse and so as  
27 not to “stifle the enthusiasm or chill the creativity that is the very lifeblood of the  
28 law.” Avent v. Solfaro, 223 F.R.D. 184, 188 (S.D.N.Y. 2004) (quotation marks and

1 citations omitted); see also In re Keegan Management Co. Securities Litigation, 78  
2 F.3d 431, 436 (9th Cir. 1991); U.S. v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983)  
3 (other citations omitted). Thus, a “clear showing of bad faith” is required. Indeed,  
4 the Ninth Circuit requires conduct to be “knowingly or recklessly . . . frivolous,” or  
5 “intended to harass,” before bad faith may be found. Keegan, supra, 78 F.3d at  
6 436;<sup>6</sup> see also Shafii v. British Airways, 83 F.3d 566, 569 (2d Cir. 1996) (sanctions  
7 warranted only if actions are “so completely without merit as to require the  
8 conclusion that they must have been undertaken for some improper purpose”).

9 Defendants’ conduct, described above, comes nowhere close to satisfying  
10 this stringent standard -- again, at this point, all that remains is a routine, good faith  
11 discovery dispute about a small fraction of Facebook’s requests that concern only  
12 four issues. This motion should be denied.

13 **2. Plaintiff is Not Entitled to Monetary Sanctions under Federal**  
14 **Rule of Civil Procedure 26.**

15 Facebook also requests sanctions under Rule 26. (Mot. at 8:18). Presumably  
16 Facebook bases its motion on Rule 26(g)(3), which provides for an appropriate  
17 sanction on the signer of disclosures and discovery requests, responses and  
18 objections in cases of conduct undertaken for an improper purpose, such as to  
19 harass, cause unnecessary delay, or needlessly increase litigation cost and that is  
20 patently unreasonable. F.R.C.P. 26(g)(1)(B)(ii)-(iii). Facebook’s burden is the same  
21 here and, again, as discussed above, Facebook falls woefully short of meeting it.<sup>7</sup>

22 <sup>6</sup> Facebook’s sole case on this issue supports defendants, because it illustrates the type of  
23 clear, and extreme, bad faith that is required before sanctions are appropriate. Associated  
24 Business Telephone System Corp. v. Cohn, 1994 WL 589487 (N.D. Cal. 1994) (plaintiff  
25 “repeatedly ignored the Court’s Orders and filed papers quite late” in plainly meritless RICO case  
26 that “appear[ed] to be an attempt by plaintiff to pin down the assets of the three defendants in an  
associated matter by suing the entire family and entities related to one of those three defendants;”  
plaintiff ultimately “ignored the [court’s] deadline” to file a third amended complaint (and other  
deadlines and orders, too) and failed to respond to defendants’ motion to dismiss and for  
sanctions, which the court granted). Defendants’ conduct here is **nothing remotely** like that.

27 <sup>7</sup> Again, Facebook’s sole authority shows just how unreasonable conduct must be before  
28 sanctions are justified. Keithley v. Homestore.com, Inc., 2009 U.S. Dist. LEXIS 2720 (N.D. Cal.  
2009) (after nearly **5 years** of litigation in patent infringement case filed (*continued on next page*))

1                   3.     *Plaintiff is not Entitled to an Adverse Inference Order Under*  
2                                    *Federal Rule of Civil Procedure 37.*

3             Facebook wrongly claims that it is entitled to an adverse inference order in  
4     the form of issue establishment and/or evidence/issue preclusion.

5             Federal Rule of Civil Procedure 37(b)(2)(A) (i)-(ii), which governs such  
6     sanctions, only permits them if a party “fails to obey an order to provide or permit  
7     discovery.” Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg. Corp., 982  
8     F.2d 363, 368 (9th Cir. 1992) (“Rule 37(b)(2)’s requirement that there be some  
9     form of court order that has been disobeyed has not been read out of existence; Rule  
10    37(b)(2) has never been read to authorize sanctions for more general discovery  
11    abuse.”) (citations omitted).

12            None of the defendants failed to obey any court order. Facebook does not  
13    identify a court order that has been violated, and Facebook provides no applicable  
14    authority for its motion. Facebook’s sole case, from a California appellate court,  
15    involved a parallel California statute permitting issue preclusion “for failure to obey  
16    a discovery order,” and a plaintiff that had refused to provide discovery after being  
17    ordered by the court to do so and after he had “many opportunities to comply with  
18    the court’s discovery order.” Sauer v. Sup. Ct., 195 Cal.App.3d 213, 228, 229  
19    (1987). There is no such order or conduct here.<sup>8</sup> Thus, Facebook’s request for an  
20    adverse inference order should be denied.

21  
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23    

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*(continued from previous page)*

24    in 2003 and ultimately dismissed on motion for summary judgment in 2008, plaintiffs as of  
25    February 28, 2008 had only produced about 2,000 pages of documents and defendants saw  
26    plaintiffs using non-produced, relevant documents during depositions of plaintiffs’ witnesses in  
27    February 2008, necessitating last-minute additional rounds of discovery and re-taking of several  
28    depositions). *Nothing remotely close* to that has happened here, even if one assumed -- purely for  
   the sake of argument -- that defendants in some way did something improper.

27            <sup>8</sup> In Keithley, another one of Facebook’s authorities, the Court denied defendants’ request  
28    for an adverse instruction even though the plaintiffs did not produce their documents until the  
   case had been pending for almost five years. 2009 U.S. Dist. LEXIS 2720 at \*2.

1                   4.     ***Plaintiff is Not Entitled to Sanctions Under the “Inherent***  
2                                   ***Powers of the Court.”***

3                   Lacking statutes and rules that support its motion, Facebook argues that  
4                   inherent powers of the Court support its request for sanctions. Once again, not so.

5                   The standard for imposing any type of sanction under this doctrine is very high  
6                   -- “[b]ecause inherent powers are shielded from direct democratic controls (i.e.  
7                   because they were not passed by the Congress), they must be exercised with restraint  
8                   and discretion.” Zambrano v. Tustin, 885 F.2d 1473, 1478 (9th Cir. 1989) (internal  
9                   quotes omitted); see also Keegan, 78 F.3d at 436-437 (specific finding of bad faith  
10                  required to invoke inherent powers to ensure that necessary restraint is exercised;  
11                  reversed district court’s decision to base sanctions only on party’s recklessness). As  
12                  discussed above, the facts here do not remotely justify sanctions under any standard,  
13                  much less the heightened standard required under the inherent powers doctrine.

14                  Once again, Facebook’s sole authority undermines Facebook’s argument. In  
15                  Chambers v. Nasco, Inc., 501 U.S. 32 (1991), the defendant was guilty, among  
16                  many other things in a two year period, of lying to the court, violating numerous  
17                  court orders including a preliminary injunction, and fabricating fraudulent  
18                  transactions and pursuing meritless administrative proceedings to try to shield  
19                  assets from the court and the court’s orders. Id. at 36-39, 52-53. After taking great  
20                  pains to emphasize the limitations of this doctrine, Chambers found that the court  
21                  could punish the defendant’s “bad faith conduct before the court which involved  
22                  disobedience of the court’s orders and the attempt to defraud the court itself.”  
23                  Nothing remotely like that has happened here. Defendants’ good faith conduct  
24                  stands in stark contrast to the behavior of the sanctioned party in Chambers.

25                   5.     ***Facebook’s Request for a Special Master is Unfounded and***  
26                                   ***Mere Posturing.***

27                  In the last sentence of the “Conclusion” section of its motion, plaintiff  
28                  requests that “a Special Master be assigned to be present at all future discovery

1 events, including meet and confer session (sic), and any depositions of Defendants’  
2 witnesses, costs for same to be borne by Defendants.” (Mot. at 10:16-18).

3 Nowhere, though, does Facebook provide any authority for such a drastic and  
4 sweeping order. Indeed, the applicable authority, Federal Rule of Civil Procedure  
5 53, on its face clearly does not support it here, nor, as described above, does anything  
6 that defendants have done.

7 The appointment of special masters is governed by Federal Rule of Civil  
8 Procedure 53(a), which states that a court may appoint a special master “only” in  
9 very limited circumstances. The first is to “perform duties consented to by the  
10 parties.” F.R.C.P. 53(a)(1)(A). Here, defendants have not, and do not, consent to  
11 the appointment of a special master.

12 The second is to “hold trial proceedings and make or recommend findings of  
13 fact on issues to be decided without a jury if appointment is warranted by: (i) some  
14 exceptional condition; or (ii) the need to perform an accounting or resolve a difficult  
15 computation of damages.” F.R.C.P. 53(a)(1)(B). As shown above, this obviously  
16 does not apply to the pending routine, limited discovery dispute at issue here; there  
17 are clearly no “exceptional conditions” warranting a special master.

18 The third is to “address pretrial and posttrial matters that cannot be  
19 effectively and timely addressed by an available district judge or magistrate judge  
20 of the district.” F.R.C.P. 53(a)(1)(C). This also obviously does not apply.  
21 Facebook has made no showing that the Court cannot effectively and timely  
22 address any issues that have arisen, or that may arise, between the parties.

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