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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

**FACEBOOK'S REPLY IN SUPPORT
 OF ITS MOTION TO COMPEL
 PERSONAL JURISDICTION
 DISCOVERY**

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. INTRODUCTION**

2 Defendants have previously agreed that Facebook is entitled to personal jurisdiction
3 discovery, including personal jurisdiction discovery that is also intertwined with the merits of the
4 case. Defendants expressly conceded the issue in front of this Court during the December 16,
5 2008 hearing on Defendants premature Motion for Protective Order. True to their ways,
6 however, Defendants now attempt to backtrack on that clear and unequivocal statement. Indeed,
7 in their opposition brief Defendants now seemingly argue that Facebook should not get the
8 requested discovery either because Facebook has not established a *prima facie* showing of
9 personal jurisdiction or because of their newly-raised theories regarding German privacy laws.
10 Defendants are wrong on all accounts, both factually and legally. Defendants’ opposition is
11 merely more of the same: obfuscation and delay. Enough is enough. Facebook has met and
12 conferred in good faith and has narrowed discovery requests to relate to the personal jurisdiction
13 issues raised by Defendants’ motions. Defendants should now be compelled to fully and
14 adequately respond to the discovery requests at issue and immediately provide 30(b)(6) witnesses
15 who will testify completely as to the personal jurisdiction issues – including those that touch upon
16 the merits of this case.

17 **II. ARGUMENT**

18 **A. Defendants Are Improperly Attempting To Litigate The Issue Of Whether**
19 **Facebook Is Entitled To Personal Jurisdiction Discovery.**

20 On December 16, 2008, Defendants stood before this Court and conceded that Facebook
21 is entitled to personal jurisdiction discovery. Even more, Defendants stated that Facebook is
22 entitled to discovery in which the merits of the case are intertwined with the personal jurisdiction
23 aspects. Specifically, the Court began the hearing on Defendants’ Motion for Protective Order by
24 asking Defendants if they had a “problem” with personal jurisdiction discovery that also touched
25 on merits discovery. Defendants clearly and unequivocally agreed that Facebook was entitled to
26 such discovery and that their motion, which was premature and ultimately withdrawn, was only
27 targeted at purely merits-based discovery.

28 THE COURT: As I understand it, the defendants agree that if, in the
course of investigating personal jurisdiction, that discovery would

1 also go to the merits, that that wouldn't be a problem.

2 Mr. SMITH: That's correct, Your Honor.

3 THE COURT: Okay. So, your objection is to discovery which is
4 solely, you say, directed at merits at this time?

5 MR. SMITH: That's correct, Your Honor.

6 THE COURT: And that would apply to the depositions, too. In
7 other words, you're not opposed to a deposition - - and I know there
8 were several sought - - that are on personal jurisdiction issues, at
9 this time?

10 MR. SMITH: That's correct, Your Honor, two of them are
11 currently scheduled to occur in January.

12 See Docket No. 90-15, p. 2-3. Unfortunately, as set forth in Facebook's moving papers, after
13 making such statements in open court, and indicating that they would fulfill their discovery
14 obligations, Defendants made an immediate about-face. Within a few days of the hearing,
15 Defendants produced only a handful of documents, none of which relate to the Defendants'
16 design and development of Defendants' infringing websites or Defendants' accessing of
17 Facebook's website and intellectual property. As Facebook has repeatedly explained to
18 Defendants, such issues relate directly to personal jurisdiction under the *Calder* effects test – even
19 though they also may touch upon the merits of Facebook's claims. During the meet and confer
20 process, however, Defendants have seemingly forgotten their statements to the Court that they
21 “had no problem” with producing such discovery. Rather, they have obstinately refused to
22 provide any such “intertwined” discovery.

23 Worse yet, in their opposition papers Defendants now backtrack even further and claim
24 that Facebook is not entitled to any discovery. See StudiVZ's Opposition Brief, pp. 6-8.
25 Defendants for the first time now argue that Facebook should be denied discovery altogether
26 because it has purportedly not established a “*prima facie*” showing that jurisdiction exists and that
27 Facebook should be denied. *Id.* But Defendants have already conceded that Facebook is entitled
28 to personal jurisdiction discovery – even personal jurisdiction discovery that also goes to the
merits of the case. Moreover, they specifically stated in their reply brief for the ill-conceived
Motion For Protective Order, that “Defendants do not seek to bar Facebook from taking discovery

1 that relates to disputed issues raised by the Motions to Dismiss even if such discovery may also
2 touch on the merits.” Defendants’ Reply In Support of their Motion for Protective Order (Docket
3 No. 63), p. 7: 6-8. In that brief, Defendants claimed that they were “being accommodating” by
4 allowing Facebook such personal jurisdiction discovery without first requiring Facebook to
5 establish “that it is entitled to such discovery.” *Id.*, p. 7:8-p.8:15. Consistent with their
6 unprofessional tactics and gamesmanship, Defendants have changed their position - again. The
7 problem is, they never raised the issue during the December and January meet and confer
8 sessions. Rather, they continued to pay lip service to their previous concessions that they would
9 permit discovery that went to both personal jurisdiction and the merits of the case.¹ Of course,
10 they have refused to provide any such discovery.

11 Defendants’ arguments related to a “*prima facie*” or colorable showing are both legally
12 and factually wrong. As Facebook stated in its opening papers, in the Ninth Circuit, Facebook is
13 not required to make a *prima facie* showing of jurisdiction in order to get discovery to establish
14 jurisdiction. Indeed, in the Ninth Circuit, it is an abuse of discretion to refuse discovery regarding
15 personal jurisdiction where jurisdiction has been the subject of an initial challenge by way of
16 motion to dismiss. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122,
17 1135 (9th Cir. 2003). Defendants have even conceded that there exists contrary California
18 authority for the arguments they make. *See* Opposition (Docket No. 94), p.7, note 5. Regardless,
19 even if the standards suggested by Defendants are used, Facebook has made a *prima facie* or
20 colorable showing that this Court has jurisdiction over the Defendants.

21 Facebook provides much more than mere speculation regarding Defendants’ activities that
22 support personal jurisdiction. Importantly, Defendants do not dispute that their websites are
23 virtual clones of Facebook’s widely popular site. Nor could they. As set forth in detail in
24 Facebook’s Complaint, many users of both Facebook and Defendants’ sites have commented that

25 ¹ Incredibly, Defendants even seem to be changing their position that Facebook is entitled to
26 personal jurisdiction discovery that is intertwined with the merits of the case. Specifically, in
27 footnote 5 on page 7 of their opposition brief (Docket No. 94), they claim that “Facebook’s
28 remaining discovery requests are improper. . . the requests are overwhelmingly *not* limited to
personal jurisdiction.” But they have already conceded to the Court and Facebook that the
requests do not need to be “limited to personal jurisdiction.” Rather, they can go to the merits
also.

1 Defendants' sites are "clones" of Facebook and that with the exception of the colors and the
2 languages, the sites are virtually identical. Complaint (Docket No. 1), ¶¶ 27-39. Others have
3 commented that there are numerous indications that the code for Defendants' sites is based on
4 Facebook's code and the exact names of Facebook's files (written in English) are also seen in
5 Defendants' code for their German language sites. *Id.*, ¶ 35, Exs. 12 and 16.

6 The undisputed evidence of Defendants' copying of Facebook's site, and concomitant
7 trade dress infringement, is enough to establish a colorable claim of personal jurisdiction over
8 Defendants. *See Licciardello v. Lovelady*, 544 F.3d 1280, 1283-84 (11th Cir. 2008) (holding that
9 the out-of-state Defendant's unauthorized use of the plaintiff's trademark and misappropriation of
10 his name and reputation for commercial gain satisfied the *Calder* effects test). The evidence of
11 Defendants' copying also suggests that Defendants created their clone sites by accessing
12 Facebook's site and servers in order to copy every last detail of Facebook's website - right down
13 to the size of the columns and the number of pixels on the screen. Such activities also support
14 personal jurisdiction over Defendants pursuant to *Calder* and its internet-related progeny. *See*
15 Facebook's Motion to Compel (Docket No. 91), pp. 11:10-13:19. Defendants' use of
16 Facebook's source code to create identical, German-language versions of Facebook's site further
17 establishes personal jurisdiction over Defendants. *Id.* Thus, Facebook is entitled to discovery
18 related to Defendants' design and development of their sites, as well as the accessing of
19 Facebook's site, servers and code – regardless of whether such discovery also touches upon the
20 merits of the case.

21 **B. Facebook Has Attempted To Narrow Its Requests To Address The Issues**
22 **Raised By Defendants' Motions To Dismiss.**

23 In their Opposition, Defendants throw around a bunch of numbers and percentages to
24 suggest that they have largely complied with Facebook's discovery requests. Defendants'
25 arguments are misleading and irrelevant. In an effort to narrow the parties' discovery disputes,
26 Facebook selected a handful of interrogatories and document requests that were critical to the
27 issues raised by Defendants' motions to dismiss. The Court should in no way infer that Facebook
28 was completely satisfied with Defendants' other responses, as Defendants suggest. It was not and

1 still is not. Facebook has chosen to pick its battles with Defendants in order to streamline this
2 process and conserve judicial resources as much as possible.

3 In reality, the most important statistic is how Defendants responded to the discovery
4 requests at issue in this motion. For these discovery requests, Defendants have provided no
5 responses or documents. Despite their (repeated) concession that Facebook is entitled to personal
6 jurisdiction discovery that also touches on the merits of the case, Defendants have provided no
7 design and development documents related to how they developed their clone of the Facebook
8 site, they have provided no source code, they have provided no documents related to how and
9 when Defendants' employees accessed Facebook for "commercial purposes." Nor have they
10 provided complete and satisfactory answers to such interrogatories. Rather, Defendants have
11 attempted to hold such discovery hostage by offering to produce "smoking gun" documents –
12 only if Facebook agreed sight unseen to waive its rights to compel additional documents and
13 discovery from Defendants. Facebook is entitled to a broader range of discovery than just the
14 documents that establish on their face Defendants' wrongful conduct. Since Defendants believe
15 they have done nothing wrong through their wholesale copying of the design of Facebook's
16 website, they cannot be entrusted to make the determination as to what narrow subset of
17 documents should be produced. Discovery, even as to personal jurisdiction issues, is broader than
18 that.

19 **1. Defendants Should Be Compelled To Respond Completely To**
20 **Facebook's Discovery Requests Related to Defendants' Accessing of**
21 **the Facebook – Interrogatory 10; Requests For Production 14, 28, 29**

22 **a. Facebook Has Narrowly Tailored the "Access" Discovery**
23 **Requests Through the Meet and Confer Process.**

24 During the meet and confer sessions, Defendants have repeatedly conceded that
25 Defendants' employees have accessed Facebook for "commercial purposes." Indeed, it seems
26 highly unlikely, if not impossible, that Defendants could have created and updated their clone
27 sites without regularly accessing Facebook's site and servers. Facebook has attempted to reduce
28 the burden on Defendants, and avoid the German privacy law issues, by limiting Defendants'
responses and documents to situations where Defendants design and development employees

1 have accessed Facebook for commercial purposes in furtherance of the jobs. Additionally, with
2 respect to the document requests, Facebook has offered to narrow the requests to a core group of
3 employees (whether it be 10, 20 or 30 employees) who necessarily would have access to such
4 documents and information. Defendants have steadfastly refused to produce such highly relevant
5 documents and provide no valid basis for withholding them.

6 Simply put the information requested by Facebook is narrowly tailored to address the
7 personal jurisdiction issues raised by Defendants' motions to dismiss. Accordingly, Facebook
8 requests that the Court compel Defendants to completely and adequately respond to Interrogatory
9 No. 10 and supply the requested documents in response to Document Requests 14, 28 and 29.

10 **b. Defendants' Newly-Raised German Privacy Law Argument Is a**
11 **Red Herring.**

12 Defendants newly-raised arguments related to the German privacy laws and blocking
13 statutes are without merit and yet another improper attempt on the part of Defendants to avoid the
14 discovery they already stated they would supply. First, the cases cited by Defendants generally
15 allow for discovery under these circumstances. *See, e.g., Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D.
16 503 (N.D. Ill. 1984). Second, as set forth above, Facebook seeks only limited information
17 regarding persons who accessed Facebook in furtherance of their jobs for Defendants. Facebook
18 does not seek personal information, such as their home addresses, personal telephone numbers,
19 financial information, or the content of their personal emails. *Cp. Volkswagen, A.G. v. Valdez*,
20 909 S.W. 2d 900 (Tex. 1995). Third, Defendants' arguments fail to establish that the disclosure
21 of such information is strictly prohibited under German blocking statutes. Fourth, Defendants
22 have already provided some of this information in the form of the organizational charts.
23 Defendants fail to show how providing a few more names somehow runs afoul of the German
24 blocking statutes. Fifth, Defendants are in sole possession of this information and Facebook
25 requires the information in order to oppose Defendants' motion to dismiss and litigate the case.
26 The balance of the competing interests weighs in favor of compelling Defendants to respond.
27 Sixth, Defendants have suggested no alternatives that would comply with German law and still
28 allow Facebook to receive the information it needs to litigate the case. Seventh, Defendants have

1 only recently raised these German privacy law issues as a way to block Facebook's discovery.
2 Indeed, Defendants failed to raise this supposedly compelling issue in their previous Motion for
3 Protective Order. Nor did they raise the issue during the meet and confer process, with the
4 exception of a concern over Defendants' employees' private emails, which Facebook does not
5 want. Defendants' belated arguments concerning German privacy laws should not be permitted
6 to defeat Facebook's long outstanding, and narrowly tailored, discovery requests.

7 **c. Facebook is Entitled to Know Which of Defendants' Employees**
8 **Became Facebook Users For Commercial Purposes In**
9 **Furtherance of Their Jobs.**

10 Additionally, despite Defendants' arguments, information concerning which of
11 Defendants' employees became Facebook users for commercial purposes and are subject to
12 Facebook's Terms of Use is highly relevant to the personal jurisdiction issues. First, Facebook
13 cannot possibly access this information (even if it possessed the ability to do so), since
14 Defendants are withholding the names of such persons. Second, if Defendants directed their
15 employees to register as a Facebook user in order to monitor and copy Facebook's design and
16 features, such employees would have enrolled in Facebook, and violating Facebook's Terms of
17 Use, as agents of Defendants. Such information regarding Defendants' intentional actions aimed
18 at Facebook is highly relevant to the personal jurisdiction issues raised by Defendants. Moreover,
19 such activity on the part of Defendants may give rise to a claim for intentional interference with
20 contractual relationship between the Defendants' employees and Facebook - yet another
21 intentional tort that would support personal jurisdiction over Defendants.

22 Finally, Defendants' argument that Facebook has somehow waived its jurisdiction/forum
23 clause is baseless. StudiVZ filed a preemptive declaratory judgment case in Germany the same
24 day Facebook filed the current action. Unfortunately, Facebook was required to respond to
25 StudiVZ's German action, and did just that. Facebook did not chose to litigate any of its claims
26 in Germany, but is now required to do so because of Defendants' forum shopping.
27
28

1 **2. Defendants Should Be Compelled to Respond Completely To**
2 **Facebook’s Discovery Requests Related To The Design And**
3 **Development Of Defendants’ Infringing Websites – Interrogatories**
4 **15, 16; Requests For Production 16, 23, 25**

5 As set forth above and in Facebook’s moving papers, there is no dispute that Defendants’
6 infringing sites are nearly identical to Facebook. Facebook is entitled to Defendants’ design and
7 development documents, which will undoubtedly show that Defendants repeatedly, and
8 improperly, accessed Facebook’s site and servers to steal Facebook’s design and functionality.

9 Again, in an effort to narrow the requests, Facebook offered to limit Document Requests
10 16 and 25 to creation, design and development documents from a core group of custodians who
11 would have authored or received the relevant documents. Defendants, however, tried to
12 improperly limit the production of documents to items that on their face would establish
13 Defendants’ wrongdoing. And Defendants would only produce those documents if Facebook
14 agreed to waive its right to compel all other design and development documents. Facebook is
15 entitled to all documents that relate to how Defendants created, designed and developed their
16 infringing, clone websites.

17 Additionally, in light of the fact that Defendants’ websites are virtually identical, and the
18 filenames found in Defendants’ code that indicate that Defendants had access to and copied
19 Facebook’s code, Defendants should be compelled to produce all major versions of their source
20 code pursuant to Document Request No. 23. StudiVZ is less than four years old. The burden to
21 Defendants related to such a production is minimal. Defendants have offered no valid
22 justification for withholding such relevant documents in light of Facebook’s efforts to narrow the
23 discovery requests.

24 With respect to Interrogatories Nos. 15 and 16, contrary to Defendants’ assertions,
25 Facebook never agreed to two partial snapshots of StudiVZ’s organizational charts. During the
26 meet and confer process, Facebook clearly requested additional names. In response to
27 Defendants arguments that many of Defendants’ employees are involved with the “maintenance”
28 of Defendants’ sites, Facebook limited the interrogatories to Defendants’ employees who were
 involved with the creation, design and development of the Defendants’ sites. Defendants’

1 infringing sites were first launched in 2005. StudiVZ is less than four years old. There can be
2 little burden on Defendants to provide the names of all such persons. Defendants' objections and
3 arguments are not well-founded.

4 **3. Facebook Is Entitled To Responses Regarding The "Adhesion**
5 **Contracts."**

6 Without reviewing the discovery responses or documents, Defendants make the
7 unsupported claim that all so-called adhesion contracts only go to general jurisdiction issues.
8 However, without additional information regarding these supposedly numerous contracts,
9 Defendants cannot accurately argue that adhesion contracts do not relate to personal jurisdiction
10 issues in the case. Facebook is not required to rely on Defendants' counsel's pure speculation as
11 the number of such contracts or their relevance as to all Defendants. Defendants should be
12 required to respond to the interrogatories and document requests.

13 Facebook will take Defendants up on their offer to produce the StudiVZ Terms of Use.
14 However, Facebook believes it is entitled to all versions of StudiVZ's Terms of use from 2005 to
15 present. Accordingly, Defendants should be required to produce such items.

16 **C. The Court Should Compel Additional Discovery From The Holtzbrinck**
17 **Defendants.**

18 **1. Defendants Read Too Much Into The Court's January 28, 2009 Order.**

19 Defendants claim that Facebook's motion to compel as to the Holtzbrinck defendants has
20 been mooted by Judge Fogel's recent Order. Based on the limited record before it, and additional
21 misstatements by Defendants, Judge Fogel ordered that Facebook failed to demonstrate a reason
22 to continue the motion to dismiss hearing as to the Holtzbrinck defendants. However, the Court
23 stopped short of denying Facebook the right to conduct discovery as to all Defendants.
24 Therefore, the current motion is far from moot at this time. The Holtzbrinck Defendants are still
25 parties to this case and should be required to fully respond to the outstanding requests.
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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 February 17, 2009.

Dated: February 17, 2009.

Respectfully submitted,

/s/ Thomas J. Gray
THOMAS J. GRAY