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12 | FACEBOOK, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FACEBOOK, INC.,

Plaintiff,

V.

20 STUDIVZ LTD., VERLAGSGRUPPE
21 GEORG VON HOLTZBRINCK GmBH,
22 HOTLZBRINCK NETWORKS GmBH,
HOLTZBRINCK VENTURES GmBH, and
DOES 1-25

Defendant

Case No. 5:08-cv-03468 JF

**FACEBOOK'S NOTICE OF MOTION
AND MOTION FOR EXPEDITED
DISCOVERY RE: PERSONAL
JURISDICTION**

Date: October 14, 2008

Date: October 1
Time: 10:00 A.M.

Time: 10:00 A.M.
Room: Courtroom 2, 5th Floor

Room: Courtroom 2, 5th Floor

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

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 14, 2008 at 10:00 A.M. or soon thereafter as counsel may be heard by Magistrate Judge Howard R. Lloyd of the above entitled Court, located at 280 South First Street, San Jose, California, Plaintiff Facebook, Inc. will and hereby does move this Court to authorize expedited discovery relating to the claim of Defendants StudiVZ Ltd., Verlagsgruppe George von Holtzbrinck GmbH, Holtzbrinck Networks GmbH and Holtzbrinck Ventures GmbH that this Court does not have personal jurisdiction over them. Alternatively, Facebook requests that the Court require plaintiff to file its motion to dismiss by September 20, 2008.

Facebook's request is based upon this Motion, the accompanying Memorandum and Points and Authorities in Support of Motion for Discovery Re: Personal Jurisdiction, the accompanying Declaration of Julio C. Avalos, the related, separately filed Motion To Shorten Time, all the pleadings in the case, and such other arguments and evidence as may properly come before the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a scheduling motion seeking and accelerating discovery related to a jurisdictional challenge. Before and after Facebook filed the complaint, Defendants (herein collectively referred to as “StudiVZ” or “Defendants”) have repeatedly notified Facebook of their intent to file a motion dismiss for lack of personal jurisdiction. Facebook seeks discovery relating to that challenge. Facebook requests that this Court authorize expedited jurisdictional discovery as soon as possible or, alternatively, set September 20, 2008 as the deadline to file a motion to dismiss related to jurisdiction.¹

¹ Discovery requested from Defendants includes interrogatories, requests for documents, and Rule 30(b)(6) deposition notices, all narrowly tailored to the issue of personal jurisdiction. *See Declaration of Julio Avalos In Support Of Facebook's Motion For Expedited Personal Jurisdiction Discovery ("Avalos Decl.") Exhibit A.*

1 Defendants do not dispute the propriety of discovery related to jurisdiction. The
2 dispute is about the timing of the discovery. Defendants wish to wait at least another month prior
3 to filing a motion that they have threatened to bring since July, effectively pushing out any
4 resolution of the personal jurisdiction issue until early next year. Given that all parties are
5 sophisticated and know what is at issue, and the increasing harm caused to Facebook by
6 StudiVZ's intellectual property theft, Facebook wishes to avoid further delay when it is both
7 unnecessary and when Defendants cannot identify any prejudice by allowing discovery.²

8 Delay is a concern because Defendants have been, and are, unnecessarily delaying
9 this case. At the same time, they have available to them and are using—both to maintain and
10 expand their base of operations—Facebook's intellectual property.

11 To forestall the filing of the complaint, Defendants asked for additional time to
12 speak with Facebook about its cease and desist letter. Facebook gave the additional time, but
13 there were no conversations with or any contact from Defendants. Instead, they prepared a
14 lawsuit in Germany. After Facebook filed its complaint, Defendants refused to accept service,
15 requiring Facebook to engage in the lengthy process of serving by use of Hague Convention
16 procedures. When service was imminent under the Hague Convention procedures, Defendants
17 then waived service. This extended, according to Defendants, their response period from 20 to 90
18 days. They now claim that they do not need to respond to the complaint or agree to discovery
19 until October 22, 2008. Facebook thus respectfully asks this Court to grant it expedited personal
20 jurisdiction discovery that, but for Defendants' gamesmanship, Facebook would have obtained
21 weeks ago.

22 **II. FACTS**

23 **A. Facebook Has Sued Defendants Because They Improperly Accessed**
24 **Facebook's Website And Copied Facebook's Look And Feel**

25 Facebook, Inc., headquartered in Palo Alto, California, developed and operates the
26 most popular online "social network" on the Internet, www.facebook.com. Facebook's servers
27

28

² As required by L.R. 37-1, counsel conferred for the purpose of attempting to resolve this dispute.

1 are located in Santa Clara, California. Defendant StudiVZ Ltd. is headquartered in Berlin,
2 Germany. The company was founded by Ehassan Dariani and Dennis Bemann. StudiVZ
3 operates a number of social networking websites throughout Europe that, as noted in the
4 complaint, are knock-offs of Facebook, both in terms of look and feel and features offered. These
5 websites include the German-language sites www.studivz.net, www.schuelervz.net and
6 www.meinvz.net, the French-language site www.studiqg.fr, the Italian-language site
7 www.studiln.it, the Spanish-language site www.estudiln.net and the Polish-language site
8 www.studentix.pl. All of these websites were built by accessing the Facebook website and
9 copying its look and feel.

10 Defendant Verlagsgruppe Georg von Holtzbrinck GmbH (“VGH”) now owns
11 StudiVZ. VGH is a major multinational holding corporation that owns publishing and web-based
12 companies around the world. It also publishes the books of well known authors, such as Salman
13 Rushdie and Tom Wolfe. Its total annual sales are reported to exceed \$2.1 billion Euros. It is
14 headquartered in Stuttgart, Germany. VGH purchased StudiVZ Ltd. in January 2007. VGH runs,
15 manages, and directs StudiVZ through a number of subsidiaries, including Defendants
16 Holtzbrinck Networks GmbH (“HNG”), headquartered in Munich, Germany, Macmillan
17 Publishers headquartered in New York, and Holtzbrinck Ventures GmbH (“HVG”), also
18 headquartered in Munich.

19 Facebook has set forth the facts and claims underlying this case in its complaint.
20 In short, the founders of StudiVZ launched the StudiVZ website (and its related websites) by
21 improperly accessing the Facebook website and copying its look and feel without authorization.
22 At least one founder of StudiVZ has openly admitted his actions in this regard. Facebook’s belief
23 is that (1) StudiVZ’s interactive websites, that include California “venues,” (2) Defendants’
24 continued accessing of Facebook’s servers based in California in order to copy information from
25 the Facebook website, (3) Defendants’ employees’ agreement to submit to California through
26 Facebook’s terms of use, and (4) the harm caused to Facebook, a California based company, by
27 Defendants’ actions, all support a finding of jurisdiction. Defendants disagree.

28

1 **B. Defendants Delay Unnecessarily**

2 Defendants have consistently tried to delay the progress of this case, despite being
3 fully aware for months that they would challenge jurisdiction. Facebook initially sent a cease and
4 desist letter to Defendants on July 9, 2008. *See* Avalos Decl., at ¶ 2. The day the deadline in the
5 letter lapsed, Defendants' California-based counsel contacted Facebook and asked for some
6 additional time to respond due to the counsel's new entry into the case. *See* Avalos Decl., at ¶ 3.
7 Defendants also sought to delay the filing of the complaint by requesting additional time for
8 discussion. *Id.* Facebook granted its request, but there were no discussions. *Id.* Instead,
9 StudiVZ used the time to draft and file a German action against Facebook for declaratory relief.
10 The day before the German action was filed, Defendants' California-based counsel had stalled for
11 additional time by misrepresenting that his clients needed more time to decide whether they
12 would enter into a Standstill Agreement with Facebook. *See* Avalos Decl., at ¶¶ 3-5.

13 Contemporaneous with the filing of its declaratory action, StudiVZ sent a letter
14 asserting that this Court did not have personal jurisdiction over it and warning that it would file a
15 motion to dismiss on those and other grounds. *See* Avalos Decl., at ¶ 7.

16 Facebook filed this lawsuit on July 18, 2008, on the same day and at about the
17 same time as StudiVZ's German action. Facebook asked Defendants' California-based counsel to
18 waive service of the complaint. *See* Avalos Decl., at ¶ 6. However, after having allowed their
19 California counsel to negotiate with Facebook , Defendants strategically refused to allow him (or
20 their German counsel) to accept service. *See* Avalos Decl., at ¶ 7. Defendants' German counsel
21 further instructed Facebook not to communicate with their California-based counsel, implying
22 that he no longer represented them. *See* Avalos Decl., at ¶ 8. As a result, Facebook corresponded
23 with Defendants' German counsel over the following weeks and began service under the Hague
24 Convention. *See* Avalos Decl., at ¶¶ 9 - 12. Only when Hague Convention service was
25 imminent—over 30 days after the initial request to waive service—did Defendants agree to waive
26 service, which they did through the same California counsel previously represented to be off the
27 case. *See* Avalos Decl., at ¶ 13.

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1 After Defendants accepted service of the complaint, they again confirmed—by
2 letters and conversation—that they would be filing a motion to dismiss for lack of personal
3 jurisdiction. *See* Avalos Decl., at ¶ 15. However, despite these representations and the nearly
4 two months that have gone by since they obtained copies of Facebook’s complaint, Defendants
5 now insist that they will not file their motion to dismiss until October 22, 2008, the response date
6 it claims to have obtained by waiving service of process. *See* Avalos Decl., at ¶ 17.

7 **C. The Parties Agree That Discovery Is Necessary; The Dispute Is About Timing**

8 On August 27, Facebook requested confirmation from Defendants’ California-
9 based counsel that StudiVZ still intended to move for lack of personal jurisdiction and, if so,
10 requested to meet and confer on the issue of expedited personal jurisdiction discovery. *See*
11 Avalos Decl., at ¶ 14. On August 28, counsel had a telephone conference during which
12 Defendants’ counsel affirmed that Defendants would seek to dismiss for lack of personal
13 jurisdiction. *See* Avalos Decl., at ¶ 15. Counsel further stated that the Defendants were amenable
14 to expedited personal jurisdiction discovery, but required a meet and confer on the scope and
15 timeline for such discovery. *Id.*

16 During this conversation there was a discussion about the timing of the discovery.
17 Defendants’ counsel asked whether discovery should take place with or without a prior motion
18 filed by StudiVZ. *Id.* Defendants’ counsel was open to either; he thought that both Facebook and
19 his clients would benefit from having a motion stating the possibly distinct posture of at least one
20 named defendant that existed as a mere “shell” holding company. *Id.*

21 On September 2, 2008, Facebook met and conferred with Defendants’ counsel via
22 telephone. *See* Avalos Decl., at ¶ 16. Defendants’ counsel again reiterated his clients’
23 amenability to engaging in expedited personal jurisdiction discovery. *Id.* He again observed that
24 no discovery might be had from the shell company, but stated that discovery from the other
25 defendants was unobjectionable and would be produced. *Id.* Defendants’ counsel stated that
26 waiting until a formal motion to dismiss was filed might help to clarify this issue, but did not
27 insist on this point. *Id.*³

28 ³ Facebook and StudiVZ also conferred on a second issue relating to StudiVZ’s deadline to

1 On September 4, Mr. Smith once again agreed that personal jurisdiction discovery
2 seemed appropriate in this matter, but for the first time sought to delay such discovery until after
3 StudiVZ files its motion to dismiss on or shortly before October 22. *See* Avalos Decl., at ¶ 17.
4 And for the first time, Defendants' counsel claimed that his clients may change their mind and not
5 file a motion to dismiss. *Id.*

6 **III. ARGUMENT**

7 **A. The Discovery Requested Is Routine**

8 The discovery sought is "available in federal court to establish the presence of personal
9 jurisdiction in that court." *Gibson v. Chrysler Corp.*, 261 F.3d 927, 948 (9th Cir. 2001); *see also*
10 *Butcher's Union Local No. 498, United Food & Comm'l Workers v. SDC Investment, Inc.*, 788
11 F.2d 535, 540 (9th Cir. 1986) (same). Although Facebook's complaint makes out a prima facie
12 case of personal jurisdiction, it is not required to rely solely on those pleadings. *See, e.g., Orchid*
13 *Biosciences, Inc. v. St. Louis University*, 198 F.R.D. 670, 673 (S.D. Ca. 2001) (permitting
14 personal jurisdiction discovery and observing that no prima facie case for personal jurisdiction
15 was necessary as "[i]t would . . . be counterintuitive to require a plaintiff, prior to conducting
16 discovery, to meet the same burden that would be required in order to defeat a motion to
17 dismiss."). This is all the more true when Defendants have indicated that they are going to
18 challenge Facebook's allegations, or at least not admit that they are true. "[W]here pertinent facts
19 bearing on the question of jurisdiction are in dispute, discovery should be allowed." *America*
20 *West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989).

21 **B. There Is No Reason For Delay And This Court Should Exercise Its Authority**
22 **To Avoid Such Delay**

23 Expediting discovery and advancing the deadline to answer or otherwise plead
24 serves the objectives of the proper administration of justice. A central tenet of the Federal Rules
25 of Civil Procedure is to "secure the just, speedy, and inexpensive determination of every action
26 and proceeding" Fed. R. Civ. Pro. 1. In addition, this Court has the inherent authority to manage

27
28 respond to Facebook's complaint. StudiVZ insisted that it was not required to respond prior to
October 22, 2008 and would not respond prior to that date.

1 its own docket and to adjust deadlines and proceedings in furtherance of that goal. *See Xiong v.*
2 *Fresno County Econ. Opportunities Comm'n*, 36 Fed. Appx. 630, 2002 U.S. App. LEXIS 12087
3 (9th Cir. 2002).

4 Furthermore, Defendants have not claimed that they would be prejudiced by
5 allowing discovery at this stage. Facebook, however, is significantly prejudiced by further
6 delays. Defendants continue to unfairly compete by using Facebook's intellectual property to
7 attract additional users and develop additional websites.

8 Defendants do say that they may not ultimately file a motion a motion to dismiss
9 for lack of personal jurisdiction. However, Defendants have had ample opportunity to make this
10 decision. In fact, they have made the decision. This is confirmed by the number of times that
11 Defendants said that they would be filing such a motion. It is further confirmed by the meet and
12 confer process during which Defendants acknowledged the need for discovery in light of their
13 intent to bring a motion to dismiss for lack of personal jurisdiction.

14 Even were Defendants to be taken at their word, there is no prejudice in requiring
15 Defendants to make this decision sooner than October 22. Defendants have had the complaint for
16 almost two months. Clearly, the issue of personal jurisdiction has been considered during that
17 two month period. Defendants have also had the same counsel for that time period. Those
18 counsel come from reputable law firms located in the U.S. and Germany. Nor are Defendants
19 unsophisticated. Holtzbrinck is a multibillion dollar multinational media and publishing
20 company. StudiVZ is a substantial business, capable of hiring top-tier counsel, with an enormous
21 market presence in Germany covering millions of users. And Defendants are able to draw on in-
22 house counsel from its wholly-owned American subsidiary, the publishing powerhouse
23 Macmillan Publishing Ltd.

24 Finally, the fact that Defendants ultimately waived service of process is not a basis
25 for granting them the delay they seek. The waiver provisions of Federal Rule of Civil Procedure
26 4(d) are meant to minimize the delay and expense in serving process: "An individual, corporation,
27 or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary
28 expenses of serving the summons." Rather than minimizing the delay and expense of service, the

1 Defendants have deliberately increased both. Rule 4(d) was not intended to be used by
2 represented parties with full knowledge of the allegations made against them as a means to hold
3 hostage an entire litigation. To allow what Defendants are asking for undermines, rather than
4 serves the purposes of Rule 1.

5 In short, Federal Rule of Civil Procedure 26(d) permits a party to seek discovery
6 prior to the Rule 26(f) case management conference when it is authorized to do so by court order.
7 Facebook seeks that order. In its Local Rule 6-3 Motion to Shorten Time, filed together with this
8 motion, Facebook also moves to expedite the discovery it seeks.

9 **IV. CONCLUSION**

10 Facebook seeks to take discovery tailored to uncover the facts relevant to whether
11 this Court may properly exercise jurisdiction in this case over the defendants challenging this
12 Court's jurisdiction. *See* Avalos Decl., **Exhibit A** (personal jurisdiction discovery sought by
13 Facebook, including interrogatories, requests for production and Rule 30(b)(6) deposition
14 notices). Such discovery will further the best interests of all parties involved, including the
15 interests and resources of this Court. There is simply no reason to delay.

16

17 Dated: September 9, 2008

ORRICK, HERRINGTON & SUTCLIFFE LLP

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/s/ Julio C. Avalos /s/

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JULIO C. AVALOS
Attorneys for Plaintiff
FACEBOOK, INC.

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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 September 9, 2008.

Dated: September 9, 2008.

Respectfully submitted,

/s/ Julio C. Avalos /s/

Julio C. Avalos