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 11 FACEBOOK, INC.

12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN JOSE DIVISION

15  
 16 FACEBOOK, INC.,

17 Plaintiff,

18 v.

19 STUDIVZ LTD., HOLTZBRINCK  
 20 NETWORKS GmbH, HOLTZBRINCK  
 VENTURES GmbH, and DOES 1-25,

21 Defendant.  
 22

Case No. 5:08-cv-03468 JF

**FACEBOOK INC.'S OPPOSITION  
 TO DEFENDANTS' MOTION FOR  
 ADMINISTRATIVE RELIEF**

Judge: Honorable Jeremy Fogel

Complaint Filed: July 18, 2008

1 **I. INTRODUCTION**

2 Defendants’ motion for “administrative relief” is both procedurally and substantively  
3 flawed. Defendants admit that this latest request for a bifurcation and stay of the personal  
4 jurisdiction portion of their motions to dismiss “is similar to one it made in January” that the  
5 Court denied. Defendants now ask the Court to reconsider that denial. But instead of seeking  
6 leave to file a motion for reconsideration as required by the local rules, Defendants improperly  
7 filed their request as an “administrative” matter under L. R. 7-11. Defendants have prejudiced  
8 Facebook, which now must oppose this request on shortened time and in only five pages.

9 Regardless, Defendants fail to raise any new material facts or changes of law that would  
10 merit reconsideration. Defendants argue that a deepened discovery dispute permits  
11 reconsideration. But the dispute remains the same and continues only because Defendants have  
12 refused to comply with their discovery obligations. By this logic, all parties in Defendants’ shoes  
13 could get an order reconsidered simply by digging their heels, refusing to follow the federal rules  
14 and ignoring orders from the Court. This cannot be the law.

15 At heart, Defendants’ request, similar to their previous request for bifurcation,  
16 misrepresents this case’s record and the law of *forum non conveniens*. Defendants rely heavily on  
17 *Sinochem*. But, *Sinochem* is readily distinguishable. This is not a “text-book” case where *forum*  
18 *non conveniens* should inevitably be granted. Here, Facebook, a California resident, suffered  
19 injury here, and filed a suit in its home venue, alleging uniquely United States and California  
20 claims. Additionally, unlike *Sinochem*, Facebook’s pending discovery will inform the Court’s  
21 venue as well as personal jurisdiction analysis. Efficiency dictates that both issues be heard  
22 together and that the Court deny Defendants’ request.

23 **II. ARGUMENT**

24 **A. Defendants’ Motion Is Procedurally Improper As It Seeks Reconsideration**  
25 **Of A Prior Order And Asks For Relief That Is Not Administrative.**

26 A motion for administrative relief may be brought solely “with respect to miscellaneous  
27 administrative matters, not otherwise governed by a federal statute, Federal or local rule or  
28 standing order of the assigned judge.” N.D. Cal. Civ. L.R. 7-11. Examples include “motions to

1 exceed otherwise applicable page limitations or motions to file documents under seal.” *Id.*  
2 Defendants request that the Court bifurcate the personal jurisdiction issues raised in their motions  
3 to dismiss from the *forum non conveniens* issues and stay the personal jurisdiction portion of  
4 StudiVZ’s Motion to Dismiss and the related discovery. Def. Mot. at 2:7-12. These requests  
5 cannot reasonably be considered minor administrative matters contemplated by L.R. 7-11. *See*  
6 *Dister v. Apple-Bay E., Inc.*, 2007 U.S. Dist. LEXIS 86839, at \*8-\*10, (N.D. Cal. Nov. 15, 2007)  
7 (holding that L.R. 7-11 was “an improper vehicle to bring a motion to stay”); *see also Advanced*  
8 *Internet Techs., Inc. v. Google Inc.*, 2006 U.S. Dist. LEXIS 20117, \*3-\*4, (N.D. Cal. Apr. 5,  
9 2006) (a request for a stay is not properly brought as a motion for administrative relief).

10 Moreover, Defendants’ request constitutes a motion for reconsideration. Defendants  
11 themselves “recognize[] that this request is similar to one it made in January in connection with  
12 Facebook’s Motion to Enlarge Time.” Def. Mot. at 1:5-6. This attempt to shoehorn a motion for  
13 reconsideration into a motion for administrative relief is improper. *See Spieler v. Mt. Diablo*  
14 *Unified School District*, 2007 U.S. Dist. LEXIS 47534, \*8-\*9, (N.D. Cal. Jun. 20, 2007)  
15 (“motions seeking amendment or clarification” should be brought pursuant to Rule 7-9, not Rule  
16 7-11). Thus, the Court should deny Defendants’ motion as procedurally flawed.

17 **B. Defendants Have Presented No Grounds For Reconsideration.**

18 Even if Defendants had brought a proper motion for reconsideration, no grounds for  
19 reconsideration exist. According to Civil Local Rule 7-9(b), Defendants must demonstrate “the  
20 emergence of new material facts or a change of law occurring after the time of such order.”  
21 Defendants fail to offer a single new material fact or change of law that would have had any  
22 bearing on the Court’s order. Defendants point to the supposedly deepening discovery dispute  
23 between the parties, but whatever deepening has occurred is of their own making. *See* Dkt. No.  
24 122 (providing further detail on the discovery dispute). Indeed, Defendants’ compliance with  
25 Judge Lloyd’s March 3 minute order would almost certainly have put an end to the “enormous”  
26 discovery dispute Defendants bemoan. Def. Mot. at 1:25-26. Defendants again mention the  
27 purportedly exorbitant costs of discovery and the looming specter of German privacy law, but  
28 these arguments, in addition to being red herrings, are hardly new – Defendants have been

1 making them since at least last October. *See, e.g.*, Dkt. No. 42-1 at 22:17-23:3. And as  
2 Defendants observe, they have already been presented to, and likely rejected by, Magistrate Judge  
3 Lloyd (based on his March 3 remarks). *See* Def. Mot. Admin. Rel. at 3:13-15; *see also* Dkt. No.  
4 123, Ex. B. Finally, the new round of discovery did not expand the scope of discovery – it was a  
5 direct response to Defendants’ refusal to comply with discovery and repeated objections to the  
6 previous discovery requests. Facebook still seeks essentially the same categories of discovery.

7 **C. Facebook Is Entitled To Its Pending Discovery, Which Will Inform Both**  
8 **Personal Jurisdiction and Venue-Related Issues**

9 Defendants’ request is premised on a series of factual and legal misrepresentations that  
10 stem back to their original opposition to Facebook’s previous Motion to Enlarge Time. (Dkt.  
11 Nos. 77, 80 and 81). Because Defendants had produced no meaningful discovery prior to the  
12 deadline for Facebook’s opposition to Defendants’ motions to dismiss, Facebook filed its L.R. 6-  
13 3 request that the motions to dismiss be continued and that Facebook be allowed to file a  
14 supplemental opposition. (Dkt. No. 77). Due to the fact that L.R. 6-3 does not allow a Reply nor  
15 a hearing, Defendants took the opportunity to mischaracterize the record and present the Court  
16 with inapposite, distinguishable law. They also improperly requested affirmative relief –  
17 bifurcating the personal jurisdiction and forum issues – without filing their own motion. Under  
18 L.R. 6-3, Facebook could not oppose Defendants request.

19 In their previous opposition and their current motion, Defendants rely heavily on  
20 *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Co. Ltd.*, 549 U.S. 422, 127 S. Ct. 1184, 1188  
21 (2007), which Defendants falsely claim is “in all relevant respects identical” to the current case.  
22 Def. Mot. Admin. Rel. at 2:7-8. But in *Sinochem*, a Malaysian company sued a Chinese importer  
23 in Pennsylvania district court for allegedly false representations made in China and for damages  
24 resulting from an arrest by officials in China. *Sinochem* is “a case . . . involv[ing] a foreign  
25 plaintiff suing a foreign defendant about a single alleged fraud, which [also] took place overseas.”  
26 *Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 455-57 (S.D.N.Y. 2008). In addition, there  
27 was a preexisting Chinese suit. Since no discovery would avoid the District Court’s “inevitable”  
28 dismissal of the case, the Supreme Court held that where “personal jurisdiction is difficult to

1 determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the  
2 court properly takes the less burdensome course.” *Sinochem*, 549 U.S. at 436.

3 Far from being “in all relevant respects identical,” the present case is easily  
4 distinguishable from *Sinochem*. Facebook, a domestic company headquartered and operating in  
5 the Northern District of California brought suit here. It alleged that the Defendants had  
6 unlawfully accessed Facebook’s servers located in the forum and stole Facebook’s valuable  
7 intellectual property in violation of, among other things, the Lanham Act, The Computer Fraud  
8 and Abuse Act and Cal. Penal Code 502(c). Dkt. No. 1 ¶¶ 45-75. Thus, unlike *Sinochem*,  
9 Facebook is entitled to a strong presumption in favor of its choice of forum, made even stronger  
10 by its presence in that forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981); *Amini*  
11 *Innovation Corp. v. JS Imps., Inc.*, 497 F. Supp. 2d 1093, 1110 (C.D. Cal. 2007). And  
12 Facebook’s witnesses and evidence are here in California. Moreover, this Court has a significant  
13 interest in adjudicating these United States and California claims brought by a California resident  
14 regarding harm suffered here in California.

15 In addition, Defendants’ activities directly relate to the forum, resulting in the likelihood  
16 that discovery and witnesses reside in California and the United States. Facebook has alleged that  
17 Defendants’ activities breached a contract between Facebook and Defendants (and/or their  
18 agents) that contained a forum selection clause listing the Northern District of California as the  
19 proper venue. Dkt. No. 1 ¶¶ 21-26; 68-75. Defendant StudiVZ has admitted that its knockoff  
20 websites have over 11,000 users in California alone. Dkt. 72, Ex. 2. Some of these California  
21 Facebook and StudiVZ users may be needed to determine likelihood of confusion. Also, it  
22 appears that Defendant StudiVZ’s founders began their intellectual property theft while in the  
23 United States. Dkt. 76 at 2:3-4:6. Third-party witnesses and evidence likely exist both in this  
24 forum and other states, such as Colorado and Pennsylvania. *Id.* Since January 28, Facebook has  
25 learned that StudiVZ previously entered into a contract with a San Jose-based corporation named  
26 Panther Express, and that now all of StudiVZ’s infringing web content is being routed through  
27 Panther Express and its servers. Declaration of Julio Avalos In Support of Opposition (“Avalos  
28 Decl.”) Ex. A. In addition, Defendants have recently released their infringing product on Apple’s

1 iPhone and through Apple’s Cupertino.-based iTunes program. *Id.* ¶ 3; Ex. B. In addition to  
2 discussions between the two companies, Defendants very likely entered into a development  
3 agreement with Apple that likely has California as a choice of law. *Id.* ¶ 4; Ex. C. Facebook is  
4 entitled to test the declarations submitted by Defendants and to pursue these discovery leads prior  
5 to a hearing on *forum non conveniens*. See *Alfadda v. Fenn*, 1994 WL 714254, at 1 (S.D.N.Y.  
6 1994) (the trial court should permit forum discovery if it “may be useful in resolving issues of  
7 fact presented by the motion, particularly since the necessity of resolving such issues is created by  
8 the movant himself and the relevant evidence is properly within the movant’s possession”); see  
9 also *Hayashi v. Red Wing*, 396 F.2d 13, 14 (9th Cir. 1968) (same).

10 Defendants frequently reference the German action pending between the parties, but this  
11 second front is a creature of their own making, not Facebook’s. Had StudiVZ not filed its  
12 preemptive declaratory judgment action in Germany, there would be only one case – here in  
13 California. Facebook simply did not independently file an affirmative case in Germany. See  
14 Declaration of Katharina Scheja (“Scheja Decl.”) ¶¶ 3-5. Rather, Facebook’s claims in Germany  
15 were a direct response to StudiVZ’s filing of a declaratory judgment case.<sup>1</sup> *Id.* In short, this case  
16 is easily distinguishable from *Sinochem* and bifurcation should be denied. See *Maersk*, 554 F.  
17 Supp. at 455-57 (distinguishing *Sinochem* on similar grounds).

18 Dated: March 24, 2009

ORRICK, HERRINGTON & SUTCLIFFE LLP

21 /s/ Julio C. Avalos /s/  
22 JULIO C. AVALOS  
23 Attorneys for Plaintiff  
24 FACEBOOK, INC.

26 \_\_\_\_\_  
27 <sup>1</sup> Under German law, and unlike U.S. law, Facebook was required to litigate the case of the forum  
28 chosen by StudiVZ with its declaratory relief case. Rather, Facebook was permitted to and did  
respond by filings it writ in a court located in Cologne, which Facebook believes has more  
experience with the types of claims at issue in the case.

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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 March 24, 2009.

Dated: March 24, 2009.

Respectfully submitted,

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