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 9

10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN JOSE DIVISION

14 FACEBOOK, INC.,
 15 Plaintiff,

16 v.

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

Case No. 5:08-CV-03468 JF

Assigned To: Hon. Jeremy Fogel

**NOTICE OF MOTION AND MOTION
 OF DEFENDANTS FOR PROTECTIVE
 ORDER QUASHING FACEBOOK'S
 SUBPOENAS SERVED ON THIRD
 PARTIES**

[(Proposed) Order and Declaration of
 Stephen S. Smith Filed Concurrently]

Date: June 23, 2009
 Time: 10:00 a.m.
 Dept./Place: Courtroom 2, 5th Floor
 Hon. Howard R. Lloyd

Complaint Filed: July 18, 2008

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

1 TO PLAINTIFF FACEBOOK, INC. AND ITS ATTORNEYS OF RECORD:

2
3 PLEASE TAKE NOTICE that on June 23, 2009 at 10:00 a.m. or as soon
4 thereafter as counsel may be heard in Courtroom 2 of the above entitled Court,
5 located at 280 S. First Street, San Jose CA 95113, defendants StudiVZ Ltd.,
6 Holtzbrinck Networks GmbH, and Holtzbrinck Ventures GmbH (“Defendants”)
7 will move this Court for a protective order quashing Plaintiff Facebook, Inc.’s
8 (“Facebook”) subpoenas dated on or after May 8, 2009 and addressed to
9 Spreadshirt, Inc., Intetics Co., Gordon Brebner, Phil James-Roxby, Taylor Mingos,
10 Xilinx, Inc., Tobias Walter, and Shoeboxed.com (the “Subpoenas”).

11
12 This Motion is made pursuant to Federal Rule of Civil Procedure 26(c)(1) on
13 the grounds that a protective order is necessary to protect Defendants, and the third
14 parties subject to the Subpoenas, from annoyance, oppression, and undue burden and
15 expense because (1) the Subpoenas contravene orders by the Court in this case; (2) the
16 Subpoenas demand materials and depositions far beyond anything reasonably related
17 to the limited jurisdiction and forum issues currently under consideration by the Court;
18 and (3) the Subpoenas seek trade secret and other confidential information that is not
19 appropriate to disclose at this stage of the case.

20
21 This Motion is based upon this Notice, the attached Memorandum of Points
22 and Authorities, the concurrently filed Declaration of Stephen S. Smith; and all
23 records and pleadings on file in this matter and as may be presented at or before the
24 hearing on this motion. Pursuant to Federal Rule of Civil Procedure 26(c)(1),
25 defendants in good faith conferred with Facebook’s counsel in an effort to resolve this
26 dispute without court action, but to no avail.

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DATED: May 19, 2009

GREENBERG GLUSKER FIELDS
CLAMAN & MACHTINGER LLP

By: /s Stephen S. Smith
STEPHEN S. SMITH
Attorneys for Defendants studiVZ Ltd.,
Holtzbrinck Networks GmbH, and
Holtzbrinck Ventures GmbH

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. INTRODUCTION.**

4
5 Holtzbrinck Networks GmbH, Holtzbrinck Ventures GmbH and StudiVZ
6 Ltd. (“Defendants”) move for a protective order quashing ten third party subpoenas
7 dated May 8, 2009 and addressed by plaintiff Facebook, Inc. (“Facebook”) to
8 Spreadshirt, Inc., Intetics Co., Gordon Brebner, Phil James-Roxby, Taylor Mingos,
9 Xilinx, Inc., Tobias Walter, and Shoeboxed.com (the “Subpoenas”). (Declaration
10 of Stephen S. Smith [“Smith Decl.”], Ex. A).

11
12 Defendants’ October 22, 2008 motions to dismiss for lack of personal
13 jurisdiction and for *forum non conveniens* remain pending before Judge Fogel. As
14 described further below, Judge Fogel has reviewed substantial evidence and
15 briefing on those motions, heard substantial oral argument on the *forum non*
16 *conveniens* portion of those motions, and stated that he is inclined to grant
17 Defendants’ motions to dismiss on *forum non conveniens* grounds. Nonetheless,
18 Judge Fogel deferred ruling on Defendants’ motions to dismiss until July 10, 2009
19 so that he can more thoroughly consider the issue relating to personal jurisdiction
20 over StudiVZ, too. Accordingly, he lifted a March 30, 2009 stay order as to pre-
21 existing personal jurisdiction discovery disputes between StudiVZ and Facebook
22 that were pending before this Court as of March 30, 2009.

23
24 As shown below, the Subpoenas grossly exceed the discovery contemplated
25 by the Court. Nowhere do the Court’s orders permit the kind of unduly
26 burdensome, expensive and oppressive discovery sought by the Subpoenas. Under
27 relevant Court orders, the Subpoenas are grossly overbroad, unduly burdensome
28 and oppressive, and demonstrate yet again Facebook’s complete unwillingness to

1 tailor any of its discovery requests to the limited personal jurisdiction issues in
2 dispute at this stage of the case.

3
4 As such, the Subpoenas are improper and Defendants respectfully request
5 that they be quashed.

6
7 **II. THE COURT'S ORDERS LIMIT THE PERMISSIBLE DISCOVERY**
8 **TO PERSONAL JURISDICTION DISCOVERY PREVIOUSLY**
9 **SERVED BY FACEBOOK ON STUDIVZ.**

10
11 **A. Defendants Move to Dismiss the Complaint Based on Lack of**
12 **Personal Jurisdiction and *Forum Non Conveniens*, and Respond to**
13 **Facebook's Discovery.**

14
15 Defendants filed motions to dismiss for lack of personal jurisdiction and for
16 *forum non conveniens* on October 22, 2008. (Docket Nos. 41, 42). The motions were
17 set for hearing on February 13, 2009 -- a date selected in consultation with Facebook
18 to allow Facebook time to take discovery concerning personal jurisdiction and forum.
19 Facebook served document requests and interrogatories on Defendants on October 14,
20 2008.¹ Defendants produced documents responsive to the vast majority of
21 Facebook's document demands, and answered the vast majority of Facebook's
22 interrogatories. The depositions of Defendants' two declarants were set for January
23 12 and 13, 2009 at the Frankfurt offices of Facebook's counsel. (Docket Nos. 83-85).

24
25 However, Facebook cancelled those depositions after Defendants' counsel
26 had already flown to Germany to defend them. (Docket Nos. 83-85). That

27
28 ¹ Facebook could have issued the Subpoenas at any time during the four months between October 22, 2008 and February 13, 2009. It is quite telling that Facebook did not propound the Subpoenas until seven months after Defendants' filed their motions to dismiss and three months after the original February 13, 2009 hearing date.

1 thirteenth hour cancellation is the subject of a pending motion by Defendants for
2 the reimbursement of the fees and costs incurred by Defendants as a result of that
3 cancellation. (Docket Nos. 83-85).

4
5 **B. The Court’s January 28, 2009 Order Limited the Scope of**
6 **Discovery to That Related to Facebook’s Outstanding Discovery**
7 **Requests to StudiVZ Concerning Personal Jurisdiction.**

8
9 On January 23, 2009, Facebook moved the Court for an order continuing the
10 hearing date on the motions to dismiss, claiming that alleged misconduct by
11 Defendants had hampered its discovery efforts. (Docket No. 77). Facebook stated
12 several times that the basis for its motion was the need to resolve disputes
13 concerning Facebook’s then-pending discovery requests, as to which Facebook said
14 it “soon will be filing a motion to compel the needed discovery” on January 27,
15 2009 with a March 3, 2009 hearing date. (Docket No. 77 at 1:4, 1:8-9, 2:22-23,
16 4:9-10). StudiVZ acknowledged a good faith dispute with respect to certain limited
17 discovery issues arising from Facebook’s pending discovery requests and
18 pertaining solely to personal jurisdiction over StudiVZ only, but all of the
19 Defendants opposed a continuance of the hearing on any of the other grounds of
20 Defendants’ motions. (Docket Nos. 80-82; Docket No. 92 -- Order Granting in Part
21 Motion to Enlarge Time at 2:3-7) (“January 28, 2009 Order”).

22
23 In response, the Court issued its January 28, 2009 Order, ruling that:

24
25 “[a] review of the record and the parties’ papers reveals that Facebook has
26 failed to demonstrate any reason to continue the February 13, 2009 hearing
27 as to either defendant with respect to *forum non conveniens*, or as to
28 Holtzbrinck with respect to personal jurisdiction. Nonetheless, because

1 considerations of judicial economy weigh in favor of hearing all of the
2 motions concurrently, and because a brief continuance is unlikely to
3 prejudice any party, the Court will grant Facebook’s motion for a
4 continuance. Facebook will be permitted to file a supplemental opposition
5 with respect to whether this Court has personal jurisdiction over StudiVZ in
6 light of any newly discovered material.”

7 (January 28, 2009 Order at 2:15-22) (Docket No. 92). The new hearing date was
8 April 10, 2009 at 9 a.m. (Docket No. 92 at 2:23).

9
10 **C. The Court’s March 30, 2009 Order Stays Even That Limited**
11 **Discovery Pending the Court’s Hearing of the Defendants’**
12 **Motions to Dismiss for *Forum Non Conveniens*.**

13
14 On January 28, 2009, Facebook moved to compel additional document
15 production and interrogatory responses on four categories of information, and
16 Defendants opposed Facebook’s motion. (Docket Nos. 91, 94-95). On March 20,
17 2009, while this Court was considering that motion, Facebook moved Judge Fogel
18 for an additional extension of the hearing date on Defendants’ motions to dismiss,
19 and Defendants moved to keep the hearing date as to everything except the personal
20 jurisdiction portion of StudiVZ’s motion. (Docket Nos. 122, 123; *see also* 119, 120
21 and 124). Once again, Facebook’s motion was based on Facebook’s alleged need
22 for “relief from the current schedule pending a resolution of the outstanding
23 discovery disputes” in the form of an order from Magistrate Judge Lloyd on
24 Facebook’s pending motion to compel because “since January 28 Defendants have
25 refused to produce any discovery” (cleverly ignoring Defendants’ previous
26 productions and the fact that, as discussed, Defendants made their declarants
27 available for deposition at the Frankfurt, Germany offices of Facebook’s counsel on
28 January 9 and 10, 2009). (Docket No. 122 at 1:7-8, 5:14, 5:18-19).

1 On March 30, 2009, Judge Fogel ruled on those administrative scheduling
2 motions. He initially noted that “[b]y a previous administrative motion, Facebook
3 requested a continuance of the hearing on Defendants’ motions on the ground that it
4 required additional discovery that it claimed Defendants were withholding
5 improperly. The Court denied Facebook’s request except with respect to the issue
6 of personal jurisdiction over defendant StudiVZ.” (Docket No. 138 -- Order re
7 Motions for Administrative Relief at 2:3-7) (“March 30, 2009 Order”).

8
9 The Court then ruled that it was “convinced that the course most likely to
10 serve the interests of judicial economy and fairness to the parties is to stay all
11 proceedings related to personal jurisdiction and to hear Defendants’ motions to
12 dismiss on the grounds of *forum non conveniens*.” (Docket No. 138 at 2:20-23). In
13 doing so, the Court noted that “Defendants have shown that discovery related to
14 personal jurisdiction has grown complicated and burdensome,” (Docket No. 138 at
15 3:3-4), and that “Facebook has failed to explain why any category of outstanding
16 discovery would alter the relevant [*forum non conveniens*] analysis.” (Docket No.
17 138 at 3:5-6). The Court ultimately set the hearing on the motions to dismiss for
18 May 1, 2009. (Docket No. 154).

19
20 **D. The Court’s May 4, 2009 Order Defers Ruling on the Motions to**
21 **Dismiss Until July 10, 2009 and Only Lifts the Stay of Personal**
22 **Jurisdiction Discovery Over StudiVZ.**

23
24 On May 1, 2009, Judge Fogel heard oral arguments on the Defendants’ motions
25 to dismiss for *forum non conveniens*. (Docket No. 157). On May 4, 2009, he issued an
26 Order Deferring Ruling on Motions to Dismiss. (“May 4, 2009 Order”) (Docket No.
27 155). In the May 4, 2009 Order, Judge Fogel referenced his January 28, 2009 and
28 March 30, 2009 Orders on the subject of personal jurisdiction discovery, stating that:

1 “[s]ince the filing of Defendants’ motions to dismiss, multiple discovery disputes
2 have impeded the resolution of the jurisdictional issues. In an earlier
3 administrative motion, Facebook requested a continuance of the hearing on
4 Defendants’ motions, claiming that it required additional discovery that
5 Defendants improperly were withholding. The Court denied Facebook’s request
6 except with respect to the issue of personal jurisdiction over StudiVZ.”
7 (Docket No. 155 at 2:24-3:2).

8
9 The Court then undertook a lengthy analysis of the *forum non conveniens*
10 portions of the motions to dismiss, finding that “the Court is inclined to dismiss the
11 instant action on the ground that Germany is the more appropriate forum.” (Docket
12 No. 155 at 3:12-14). Ultimately, “[n]otwithstanding the apparent strength of
13 Defendants’ arguments with respect to *forum non conveniens*,” (Docket No. 155 at
14 7:20-21), the Court decided to consider the personal jurisdiction portions of the
15 motions on July 10, 2009 and so to “defer consideration of Defendants’ motions to
16 dismiss on the ground of *forum non conveniens*” until the same date. (Docket No.
17 155 at 8:4-5). The Court then lifted its previous stay of personal jurisdiction discovery.
18 (Docket No. 155 at 8:5-6).

19
20 ***Nowhere*** do any of the Court’s orders contemplate any ***new*** discovery demands,
21 let alone the grossly overbroad document and deposition Subpoenas directed at third
22 parties. When viewed in the context from which they arose, Judge Fogel’s orders
23 provide one last, short continuance of the hearing date in order to allow the parties to
24 wrap up their ***previously existing***, previously stayed disputes as to the issues raised in
25 Facebook’s motion to compel, and to then file one last brief each before the July 10,
26 2009 hearing. The only discovery that Facebook ever served in the four months
27 between the filing of the motions and the original hearing date was its original, first set
28 of written discovery requests that were the subject of Facebook’s motion to compel. It

1 was *that* discovery that was the subject of (a) Facebook’s January 23rd request to
2 continue to hearing date on the motions to dismiss, (b) the District Court’s January 28th
3 order continuing the hearing of the motions to dismiss, (c) Facebook’s March 20th
4 second request for a continuance of the hearing, (d) the District Court’s March 30th
5 order staying discovery to consider independently the *forum non conveniens* argument,
6 and (e) the District Court’s May 4th order lifting the stay. Nowhere do Facebook’s
7 requests or the District Court’s orders open the door to any new discovery, let alone the
8 Subpoenas, which as discussed below, further show Facebook’s complete
9 unwillingness to focus on the limited personal jurisdiction issues that are currently
10 under consideration by the Court. Accordingly, they should be quashed.

11
12 **III. THE SUBPOENAS ARE GROSSLY OVERBROAD, UNDULY**
13 **BURDENSOME AND OPPRESSIVE ON THEIR FACES.**

14
15 Even if it were appropriate for Facebook to engage in new, additional
16 discovery (which it is not), Facebook’s recent Subpoenas are extremely overbroad,
17 burdensome, harassing, merits-based, and not appropriate in the context of motions
18 to dismiss for lack of personal jurisdiction and *forum non conveniens*.

19
20 Facebook’s scorched earth policy with respect to third party discovery is yet
21 another desperate attempt by Facebook to try to find *some* issue, no matter how
22 small, that *may* possibly convince the Court to allow Facebook to continue
23 prosecuting this action in the United States while Facebook simultaneously
24 prosecutes its separate action in Germany.

25
26 Facebook has served ten subpoenas, seeking the production of 94 categories
27 of documents and two depositions (both outside California). One requested
28 deponent is a former intern at StudiVZ. Another requested deponent is a former

1 intern and employee of only seven months at StudiVZ who worked in StudiVZ's
2 marketing department.

3
4 The document requests went out to such irrelevant sources as (a) a t-shirt
5 company at which former StudiVZ executive Ehssan Dariani is alleged to have
6 been an intern many years ago, and (b) a computer hardware company at which
7 former StudiVZ executive Dennis Bemmann is alleged to have been an intern and
8 employee many years ago.

9
10 Facebook's requests for production include such wildly over-broad requests
11 as "[a]ll documents relating to StudiVZ or the StudiVZ websites" and "[a]ll
12 documents relating to Facebook or the Facebook websites." To make matters
13 worse, there is no limit as to timeframe.

14
15 Is a t-shirt company now supposed to locate and produce every instance of its
16 employees accessing Facebook's website for their personal use? Does it really
17 make sense for that t-shirt company to now produce "[a]ll documents relating to the
18 internship and/or employ of Ehssan Dariani at Spreadshirt" and "[a]ll documents
19 and/or communications between you and Ehssan Dariani"?

20
21 Intetics Co., another company to which Facebook has now propounded
22 overly broad and harassing discovery, is an Illinois outsourcing company which has
23 worked with StudiVZ. Is Intetics now supposed to reveal to Facebook (StudiVZ's
24 competitor in the German market) trade secret and other confidential information
25 that would fall under the ridiculously overbroad requested categories of "[a]ll
26 documents relating to StudiVZ or the StudiVZ websites," "[a]ll communications
27 between [Intetics] and StudiVZ" and "[a]ll documents and/or communications
28 between [Intetics] and any person or persons employed by, representing, or

1 otherwise associated with StudiVZ, whether currently or previously so employed”?

2
3 These requests have nothing to do with jurisdiction and are an obvious
4 “fishing expedition” on the merits. “Instead of using rod and reel, or even a
5 reasonably sized net, [Facebook] would drain the pond and collect the fish from the
6 bottom,” and would do so “without even knowing whether there were any fish in
7 the pond.” Amcast Indus. Corp. v. Detrex Corp., 138 F.R.D. 115, 121 (N.D. Ind.
8 1991) (quoting In re IBM Peripheral EDP Devices Antitrust Litig., 77 F.R.D. 39,
9 41-42 (N.D. Cal. 1977)); Claude P. Bamberger Int’l v. Rohm & Haas Co., 1998
10 U.S. Dist. LEXIS 11141 at *4-*6 (D. N.J. Mar. 31, 1998).

11
12 Facebook’s ridiculously overbroad discovery requests are yet another
13 example of Facebook’s complete unwillingness to attempt to tailor discovery
14 requests to anything related to limited personal jurisdiction² and *forum non*
15 *conveniens*.

16
17 Facebook seeks to have these third parties “search every file that exists.”
18 Coleman v. American Red Cross (6th Cir. 1994) 23 F.3d 1091, 1098. Since the
19 burden and/or expense associated with the discovery outweighs its likely benefit,
20 the discovery should be denied. F.R.C.P. 26(b)(2)(C). The law is especially
21 protective of third parties from whom discovery is sought. *See, e.g. Dart Indus.*
22 *Co., Inc. v. Westwood Chem. Co., Inc.* (9th Cir. 1980) 649 F.2d 646, 649 (holding
23 that protective orders are more easily obtained when discovery is sought from third
24 parties).

25
26
27
28 ² Facebook *does not contend* that defendants are subject to general personal jurisdiction. Accordingly, the universe of potentially relevant discovery is very limited.

