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

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

17 FACEBOOK, INC.,

18 Plaintiff,

19 v.

20 STUDIVZ LTD.,
 21 VERLAGSGRUPPE GEORG VON
 22 HOLTZBRINCK GmbH,
 23 HOLTZBRINCK NETWORKS
 24 GmbH, HOLTZBRINCK
 25 VENTURES GmbH, and DOES 1-
 26 25,

27 Defendant.

Case No. 5:08-CV-03468 JF
 Assigned To: Hon. Jeremy Fogel

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN OPPOSITION
 TO FACEBOOK, INC.'S MOTION
 TO CHANGE TIME UNDER CIVIL
 L.R. 6-3**

[Declarations of Stephen S. Smith and
 William M. Walker (and exhibits thereto)
 concurrently filed]

Complaint Filed: July 18, 2008

1 **I. THERE IS NO EMERGENCY.**

2 **A. Facebook Established the Timeline that It Now Complains About.**

3 Facebook, Inc. (“Facebook”) requested that defendants¹ (all of whom are
4 located in Germany) waive service of process within 60 days in exchange for
5 defendants having 90 days to respond to the Complaint (the “Waiver”). (Smith Decl.,
6 ¶¶ 3-4; Exs. A-B). 90 days is also the response period required by FRCP 4(d)(3).

7 Facebook now complains that defendants complied with Facebook’s request
8 and accuses defendants of engaging in “stall tactics.” To the contrary, defendants are
9 proceeding in accordance with the schedule specifically set forth in the Waiver that
10 Facebook prepared and requested that defendants sign. Facebook’s odd complaint of
11 “malicious compliance” simply makes no sense.

12 **B. Facebook’s Own Delays Belie Its Emergency Request.**

13 Facebook filed this lawsuit two months ago. (Smith Decl., ¶ 2). A week later,
14 Facebook sent defendants the Waiver requesting a response within 60 days. (Smith
15 Decl., ¶ 3; Ex. B). Facebook completely fails to explain the sudden emergency for an
16 order shortening time, and Facebook’s own multi-month delay since it filed this
17 lawsuit belies its assertion that “[e]ach passing day” harms Facebook. (Mot. at 3:8).

18 Also, Facebook’s founder and CEO, Mark Zuckerberg, gave an interview two
19 years ago in which he refused to call studiVZ Ltd.’s website a “copycat” of Facebook’s
20 website, and stated, “I think that they’re different designs and slightly different
21 products.” <http://en.sevenload.com/videos/9cMXu4Y-zuck> (Smith Decl., ¶ 13) (CD
22 available upon request). In addition to undermining Facebook’s entire lawsuit, this
23 admission from two years ago demonstrates that there is absolutely no urgency here.

24 On June 8, 2006 (over two years ago), Facebook’s lawyers sent studiVZ Ltd. a
25 cease and desist letter and asked studiVZ Ltd. to stipulate to an injunction in Germany.
26 studiVZ Ltd. refused, and Facebook never filed a lawsuit or sought an injunction.

27 ¹ Facebook’s use of “studiVZ” to collectively refer to all 4 defendants (Mot. at 1:6) is
28 confusing since of the 4 defendants, only studiVZ Ltd. is named “studiVZ” (the other 3 defendants
have completely different names), and studiVZ Ltd. alone operates the studiVZ websites.

1 (Walker Decl., ¶ 3; Ex. H). This further demonstrates that there is no urgency here.

2 If Facebook were really being harmed by “each passing day,” why did it wait at
3 least 771 days to file this lawsuit and 53 days after filing suit to bring a motion for
4 expedited discovery? Facebook’s own delay demonstrates that both its request to have
5 its motion heard on shortened time and its request for expedited discovery are
6 disingenuous. As discussed below, Facebook’s true motivation is to seek an advantage
7 in this litigation by obtaining early, wide-ranging discovery on a number of topics.

8 **C. Facebook has Failed to Meet Its Civil Local Rule 6-3 Obligations.**

9 Northern District Civil Local Rule 6-3 governs motions to shorten time. The
10 Rule sets forth specific requirements for a party to bring such motions, including a
11 declaration that, *inter alia*, sets forth “with particularity” the reasons for the requested
12 shortening of time, and “[i]dentifies the substantial harm or prejudice that would occur
13 if the Court did not change the time.” (emphasis added).

14 Prior to filing this motion, Facebook never explained how it would be
15 prejudiced if the motion were heard a couple of weeks later pursuant to a regular
16 notice. (Smith Decl., ¶ 14). In its moving papers, Facebook makes nebulous claims
17 about being harmed with “[e]ach passing day” because Facebook might seek some
18 type of injunctive relief. (Mot. at 1:26-28, 2:25-26, 3:8). Of course, Facebook fails to
19 provide any details, let alone details “with particularity,” regarding why the requested
20 shortened time is needed or how Facebook would allegedly be harmed or prejudiced
21 by having its motion for expedited discovery heard on October 14, 2008.

22 Moreover, Facebook’s vague references to injunctive relief is a red herring. As
23 discussed above, Facebook knew about studiVZ Ltd.’s website over two years ago,
24 and Facebook never filed suit or sought injunctive relief.

25 **D. Three of the Four Defendants Have Not Even Responded Yet to**
26 **Facebook’s Complaint.**

27 On September 10, 2008, defendant Verlagsgruppe Georg von Holtzbrinck
28 GmbH (“VGH”) responded to Facebook’s Complaint by filing its Motion to Dismiss

1 for Lack of Personal Jurisdiction.² None of the other defendants have responded to
2 Facebook’s Complaint. As discussed above, these defendants have until October 22,
3 2008 to respond to Facebook’s Complaint. (Smith Decl., ¶ 13).

4 Given that (1) there are four defendants, (2) different facts surround each,
5 (3) three are still evaluating (a) how they will respond to Facebook’s Complaint, and
6 (b) whether they will file a motion to dismiss for lack of personal jurisdiction, it simply
7 makes no sense to force them to engage in expedited discovery. The whole purpose of
8 Rule 12 motions to dismiss is to avoid the need for discovery if not necessary. Cf.
9 Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 738 (9th Cir. 1987) (“The
10 purpose of F.R.Civ.P. 12(b)(6) is to enable defendants to challenge the legal sufficiency
11 of complaints without subjecting themselves to discovery.”).

12 Even Facebook’s counsel initially acknowledged that it made sense to discuss
13 expedited discovery, if any, only after a defendant had responded since the response
14 will inform the need and scope of such discovery, if any. (Smith Decl., ¶¶ 6-7).

15 **II. FACEBOOK’S TRUE MOTIVE IS TO TAKE EARLY DISCOVERY ON**
16 **ISSUES THAT GO WELL BEYOND PERSONAL JURISDICTION.**

17 A cursory review of Facebook’s proposed discovery reveals Facebook’s true
18 motivations. Under the false pretense of engaging in “routine,” “tailored” expedited
19 discovery regarding “personal jurisdiction,” Facebook has propounded 92 pages worth
20 of discovery requests, which include 120 requests for production of documents, 92
21 interrogatories, and 6 depositions (including 4 Rule 30(b)(6) depositions that cover a
22 total of 72 topics). (Avalos Declaration in Support of Motion for Expedited Personal
23 Jurisdiction Discovery (hereinafter, “Avalos Decl.”), Ex. A).

24 These are not narrowly-tailored discovery requests relating to personal
25 jurisdiction, either. Facebook’s proposed requests seek everything under the sun from
26 all four defendants, from all of their business records (e.g., meeting minutes, Articles

27 _____
28 ² The fact that VGH filed its motion 42 days before its deadline to respond to the
Complaint flies in the face of Facebook’s claim that the defendants are engaging in stall tactics.

1 of Incorporation, operating agreements, stock agreements, etc.) to every type of
2 financial report imaginable (e.g., profit/loss statements, budgets, accounts receivable,
3 accounts payable, etc.) to all documents relating to services provided to users of
4 studiVZ Ltd.’s seven different websites and how they are provided to “all versions of
5 computer” code relating to those seven different websites. (Avalos Decl., Ex. A, pp.
6 33-36 (Request Nos. 7-8, 16, 23)). In fact, Facebook has even stated that its proposed
7 discovery has been requested not for personal jurisdiction purposes, but to “uncover[]
8 information that would give rise to injunctive remedies.” (Mot. at 2:25-26).

9 These overly broad discovery requests (under the guise of personal jurisdiction
10 discovery) demonstrates (1) that Facebook just wants early, broad discovery, and
11 (2) why it makes sense to wait until after a defendant has responded to Facebook’s
12 Complaint before considering any discovery relating to personal jurisdiction.

13 **III. FACEBOOK IS ESTOPPED FROM AVOIDING THE SCHEDULE**
14 **ESTABLISHED BY ITS OWN WAIVER.**

15 It is well-established that when a party receives the benefits of one part of a
16 stipulation with an opposing party, it is estopped from avoiding the accompanying
17 burdens. See, e.g. Hawes v. Clark, 84 Cal. 272, 275 (1890); Escondido Union School
18 Dist. v. Casa Suenos De Oro, Inc., 129 Cal.App.4th 944, 967-69 (2005).

19 Through its obnoxious “rush tactics,” Facebook seeks to reap the benefit of its
20 Waiver (not having to go through the trouble and expense of serving defendants with
21 process in Germany) while avoiding its burdens, and thereby strip defendants of their
22 benefits of having complied with Facebook’s Waiver (90 days to respond -- the time
23 period required by law). FRCP 4(d)(3).

24 Facebook is estopped from having its cake and eating it too. It would be
25 patently unfair to allow Facebook to proceed with expedited discovery on shortened
26 notice when, *but for the Waiver signed by defendants*, Facebook would likely still be
27 attempting to serve defendants with process in Germany pursuant to the Hague
28 Convention. Accordingly, Facebook’s motion to shorten time should be denied.

1 **IV. FACEBOOK FAILED TO MEET AND CONFER.**

2 Civil Local Rule 6-3(a)(4)(i) requires that a party “meet and confer” with an
3 opposing party pursuant to Civil Local Rule 37-1(a) before filing a discovery motion.
4 In turn, Rule 37-1(a) provides that “[t]he Court will not entertain a request or a motion
5 to resolve a disclosure or discovery dispute unless, pursuant to FRCivP 37, counsel
6 have previously conferred for the purpose of attempting to resolve all disputed issues.”
7 (emphasis added).

8 Facebook never met and conferred with defendants with respect to a motion to
9 shorten time. (Smith Decl., ¶ 12). In fact, a careful reading of Facebook’s motion
10 itself shows that Facebook only claims to have met and conferred regarding its motion
11 for expedited personal jurisdiction discovery (and says nothing about having met and
12 conferred regarding a motion to shorten time). (Mot. at 1:5-7).³

13 Since Facebook failed to meet and confer, the motion should be denied.

14
15 **V. CONCLUSION**

16 For each and all of the above reasons, Facebook’s motion should be denied.

17
18 DATED: September 12, 2008

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20
21 By: /s William M. Walker
22 **WILLIAM M. WALKER**
23 Attorneys for Defendant Verlagsgruppe
Georg von Holtzbrinck GmbH

24 ³ Facebook’s claim that defendants have agreed that they will all move to dismiss for lack
25 of personal jurisdiction and that Facebook is entitled to discovery on jurisdiction is false. First,
26 other than VGH (which has filed a motion to dismiss on personal jurisdiction grounds), the other
27 defendants have not yet decided whether they will (or will not) bring such a motion. Smith Decl.,
28 ¶¶ 6-7, 13. Second, Facebook will not be entitled to discovery on jurisdiction if it cannot make
out a *prima facie* case for personal jurisdiction. See, e.g. Protrade Sports, Inc. v. Nexttrade
Holdings, Inc., 2006 U.S. Dist. LEXIS 6631, Case No. C05-04039 MJJ at *9 (N.D. Cal. Feb. 2,
2006) (plaintiff is not entitled to discovery without making a “colorable” showing of personal
jurisdiction).