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8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN JOSE DIVISION

12 FACEBOOK, INC.,
 13 Plaintiff,

14 v.

15 STUDIVZ LTD., VERLAGSGRUPPE
 16 GEORG VON HOLTZBRINCK GmbH,
 HOLTZBRINCK NETWORKS GmbH,
 17 HOLTZBRINCK VENTURES GmbH, and
 DOES 1-25,
 18 Defendants.

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

STUDIVZ'S OPPOSITION TO
FACEBOOK INC.'S MOTION TO
ENLARGE TIME

Complaint Filed: July 18, 2008

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1 **I. INTRODUCTION**

2 Defendant StudiVZ Ltd. (“StudiVZ”) opposes Facebook’s latest motion to enlarge time. There
3 is no good cause for any further continuance, and Facebook is the sole cause of the circumstance it
4 cites as the main basis for its motion.

5 There have already been five dates for the hearing of the motions to dismiss: February 13,
6 April 10, April 17, May 1 and July 10, 2009. The date has been moved four times already – from
7 February 13 to July 10, 2009, a period of five months. Facebook now seeks a fifth continuance to a
8 sixth date. The date Facebook seeks is totally indefinite and would be more than a year after this case
9 was filed and more than nine months after the motions to dismiss were filed.

10 Facebook admits that it stipulated to “take discovery and resolve discovery disputes” related to
11 the motions to dismiss within the original briefing and hearing schedule agreed to in October 2008.
12 The discovery that forms the basis for Facebook’s current motion to enlarge time was *not* propounded
13 in that time period. It therefore violates Facebook’s own stipulation.

14 This Court moved the original hearing date *only* because of the already-pending dispute over
15 discovery that “[Facebook] claimed Defendants were withholding improperly,” i.e., the discovery that
16 had been served as of the time Facebook made its request. (Dkt. 138 at 2:3-7; Dkt 55 at 2:25-3:2). It
17 *never* told the Court that it intended to serve new discovery after the Court moved the hearing date.
18 Prior to now, Facebook had only told the Court about the dispute over the October 2008 discovery,
19 even when the Court *twice* asked Facebook about the state of discovery at the May 1, 2009 hearing.

20 In short, the discovery that forms the basis for Facebook’s current motion is untimely in the
21 extreme. It was not served during the period to which Facebook stipulated. Facebook never asked the
22 Court to relieve it from that stipulation. Facebook never told the Court about this discovery at all, until
23 now. And Facebook intentionally waited to serve the discovery and then to move to compel for
24 months and months after the motions to dismiss were already pending. Enough is enough.

25 **II. FACEBOOK STIPULATED TO TAKE ALL DISCOVERY AND RESOLVE ANY**
26 **DISPUTES RELATED THERETO BY JANUARY 16, 2009.**

27 On October 22, 2008, the Holtzbrinck Defendants and StudiVZ (collectively “Defendants”)
28 filed their motions to dismiss (the “Motions to Dismiss”). (Dkt. 41, 42). Pursuant to local rules,

1 Defendants consulted with Facebook about the hearing date for the Motions to Dismiss. Facebook
 2 admits that the parties agreed to a four-month hearing and briefing schedule for the express purpose of
 3 allowing Facebook adequate time “to take discovery and resolve discovery disputes” so that Facebook
 4 could use any discovery it received during that four-month window when opposing the Motions to
 5 Dismiss. (Dkt. 77 at 2:25-3:5). The agreed hearing date was February 13, 2009. (Dkts. 41, 42).

6 **III. FACEBOOK HAD ADEQUATE TIME TO TAKE DISCOVERY.**

7 Facebook initially asked for jurisdictional discovery in August 2008. (Dkt. 12, ¶ 15). On
 8 September 9, 2008, Facebook filed a motion for expedited jurisdictional discovery, which it then
 9 withdrew after the Court denied its request to shorten time (Dkts. 11, 20, 36).

10 On October 14, 2008, Facebook served its first round of discovery requests on Defendants – 78
 11 pages worth, including 90 requests for production of documents, 69 interrogatories, and 4 deposition
 12 notices (including three Rule 30(b)(6) depositions that covered 54 topics). Defendants timely
 13 responded to the discovery on November 17, 2008. The parties then met and conferred.

14 Defendants agreed to produce, and then did produce, almost all of what Facebook
 15 demanded (either as originally requested or as modified during meet and confer), including all
 16 discovery that relates to the traditional indicia of personal jurisdiction, i.e., contacts with the forum state.
 17 Facebook served 30 document demands and 23 interrogatories. StudiVZ answered 22 of the
 18 document demands (73%) and 18 of the interrogatories (78%) to Facebook’s satisfaction. (Dkt.
 19 No. 94 at 5:5-11; Dkt. No. 91). The Holtzbrinck Defendants answered everything to Facebook’s
 20 satisfaction. (Dkt. No. 95 at 2:4-21; Dkt. No. 97 at ¶¶ 27-28; Dkt. No. 92). By December 16,
 21 2008, all issues with respect to the Holtzbrinck defendants and the large majority of issues with
 22 respect to StudiVZ were resolved. Facebook represented to the Court: “We have largely been
 23 able to work out every issue, and there remain, I believe, Your Honor, very few issues that would
 24 come back before this court” (Exhibit A to Avalos Decl. at pp. 5-6 of 28 [Reporter’s
 25 Transcript at 4:23-5:4]) (Docket No. 78-2).

26 Facebook simply withdrew its Rule 30(b)(6) deposition notices. (Dkt. 97 at ¶ 31).

27 Facebook then noticed the depositions of the two individuals who signed declarations in
 28 support of Defendants’ Motions to Dismiss. Defendants made those witnesses available for deposition

1 in Germany on January 12 and 13, 2009, and Facebook noticed them for those dates. But Facebook
2 then cancelled those depositions after defense counsel had already flown to Germany. (Dkts. 83-84).

3 **IV. THE MOTIONS WERE CONTINUED DUE TO THE *THEN-PENDING***
4 **DISCOVERY DISPUTES.**

5 On January 23, 2009, Facebook filed its first motion to continue the hearing of the Motions to
6 Dismiss. (Dkt. 77 at 1:25-2:3; Dkt. 77-2). Although Facebook asked for the hearing date and briefing
7 schedule to be changed, it *never* asked to be relieved of its earlier stipulation to “take” the discovery it
8 believed it needed to oppose the Motions to Dismiss by January 16, 2009, the date its opposition was
9 originally due. Facebook did *not* claim it needed *new* discovery from Defendants or third parties. The
10 entire focus was on the *then-existing disputes* related to discovery Facebook had theretofore sought to
11 take. (Dkt. 77 at 1:4, 1:8-9, 1:24-25, 2:22-23, 4:9-10; *id.* at 4:16-19 – asking for a continuance “to allow
12 the parties to resolve their jurisdictional discovery disputes.”).

13 Indeed, there could not have been any other “discovery disputes” because Facebook had not
14 served any other discovery. As the Court noted in its March 30 and May 4, 2009 Orders describing
15 Facebook’s first motion to continue, Facebook argued that it needed more time to obtain discovery that
16 Defendants allegedly “*were withholding.*” (Dkt. 138 at 2:3-7; Dkt. 155 at 2:25-3:2) (emphasis added).
17 Defendants could not have been withholding something they had not yet been asked to produce.

18 On January 28, 2009, the Court issued its Order. The Court found that Facebook “failed to
19 demonstrate any reason to continue the February 13, 2009 hearing as to either defendant with respect
20 to *forum non conveniens*, or as to Holzbrinck with respect to personal jurisdiction.” (Dkt. 92 at 2:15-
21 17). The Court granted Facebook’s request to file a supplemental brief only as to personal jurisdiction
22 over StudiVZ “in light of any newly discovered material,” but did not grant Facebook’s request to file a
23 supplemental opposition as to any other issue or as to the Holtzbrinck Defendants. (*Id.* at 2:15-22). The
24 Court continued the hearing as to both Motions to Dismiss and all issues because of “judicial
25 economy” and because it was “unlikely to prejudice any party.” (*Id.* at 2:18-20).¹

26
27 ¹ In fact, the Court never said that Facebook had actually made any showing that it was entitled to a continuance of
28 StudiVZ’s motion to dismiss, even as to personal jurisdiction. Rather, the Court merely noted that StudiVZ had not
opposed that portion of Facebook’s request. (Dkt. 92 at 2:3-4). Had Facebook ever said that it planned to serve new
discovery, StudiVZ would have vigorously opposed Facebook’s request in its entirety.

1 **V. FACEBOOK HID ITS INTENT FROM DEFENDANTS AND THE COURT.**

2 Two days after the Court issued its January 28, 2009 Order, Facebook served Defendants
3 with a second round of discovery requests. On March 4, 2009, Defendants objected. (*See, e.g.*
4 Dkt. 164-2 at 5:25-6:16) (pp. 6-7 of 56). Facebook knew then that it was Defendants' position
5 that no further discovery was allowed.

6 On March 20, 2009, Facebook filed its second motion to continue the hearing of the
7 Motions to Dismiss. Facebook did not reference its second round of discovery. It did not argue it
8 needed more time to move to compel further responses. (Dkt. 122). It did not mention its intent
9 to serve 10 third party subpoenas. Rather, Facebook argued that "in light of the *pending*
10 threshold discovery issue, Facebook respectfully requests that the Court hold in abeyance or take
11 off calendar Defendants' Motions to Dismiss currently scheduled for April 10, 2009." (*Id.* at
12 2:19-21) (emphasis added). Facebook proposed that the Motions to Dismiss be postponed "until
13 such time as the underlying discovery dispute *currently pending* before Magistrate Judge Lloyd is
14 resolved." (Dkt. 122-2 at 1:6-8) (emphasis added). The only thing then pending was the motion
15 to compel further responses to the first set of discovery.

16 At the May 1, 2009 hearing of the Motions to Dismiss, the Court asked Facebook two times
17 how much time it needed to get the jurisdiction portion of the motions "teed up" and "ready to be
18 heard." (Dkt. 168-1 at 11:14-17, 12:11-12). The Court noted that "you're in the midst of objections
19 and motions and so forth." Facebook responded by downplaying the extent and complexity of the
20 disputes. First, Facebook said, "I think we are beyond that . . ." (i.e., beyond being in the "midst of
21 objections and motions and so forth"). Second, Facebook mentioned only the *already-existing*
22 dispute pending in front of the Magistrate Court. (*Id.* at 11:16-13:2). Third, Facebook stated that the
23 jurisdiction issue could be ready to be heard "relatively quick if Defendants comply with the
24 discovery issues." (*Id.* at 13:1-2). Facebook did *not* mention the second set of discovery or any third
25 party subpoenas at all.

26 **VI. DEFENDANTS SHOULD NOT BE PREJUDICED BY FACEBOOK'S DELAYS.**

27 Any delay was caused entirely by Facebook. It waited until February 2, 2009 to serve its second
28 round of discovery in direct violation of its own stipulation to "take discovery" during the original

1 briefing schedule. It waited seven months to serve third party subpoenas. It waited again, until May 26,
2 2009, to file its motion to compel.² Facebook has offered no valid reason for any of these delays.³

3 Facebook admits that it delayed in filing the second motion to compel for strategic reasons.
4 (See Dkt. 171 at 1:21-22.) It waited to file its second motion to compel until after a ruling on the first,
5 even though no possible ruling on the first would have avoided the need for the second. (Most of
6 discovery contained in the second set is nothing like the discovery served in the first; if Facebook
7 wanted both, it had to move on both). The only reason for the delay was delay itself.

8 Facebook's delays are inexcusable given that Facebook itself acknowledges that the period from
9 October 22, 2008 to February 13, 2009 (the original hearing date) was established for the express
10 purpose of allowing it to "take discovery and resolve discovery disputes" related to jurisdiction. (Dkt.
11 77 at 2:25-3:5). In sum, Facebook wants this Court to rescue it from the consequences of its own
12 strategic decisions and lack of diligence, all of which violates Facebook's own stipulation. That
13 is not an appropriate basis for a fifth continuance.

14 **VII. CONCLUSION**

15 For the above reasons, StudiVZ respectfully requests that the motion be denied.

16 DATED: June 8, 2009

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18
19 By: /s/ Stephen S. Smith
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26 ² Facebook's latest discovery is grossly over-broad. For example, RFP 50 to StudiVZ seeks "ALL DOCUMENTS
in possession, custody or control of STUDIVZ *that RELATE in ANY way to the subject matter of this lawsuit.*"
(emphasis added). Facebook does not even pretend to seek discovery about jurisdiction. (Dkt. 170 at 5:10-12).

27 ³ Facebook may not blame its delay on the Court's March 30 Order staying discovery because Facebook had 26 days
28 before the stay was instituted (from March 4 to March 30) and 22 days after the stay was lifted (from May 4 to May 26)
to move to compel.