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

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15 FACEBOOK, INC.,

16 Plaintiff,

17 v.

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

22 Defendants.

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

**STUDIVZ'S MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 OPPOSITION TO FACEBOOK,  
 INC.'S SECOND MOTION TO  
 COMPEL**

Date: June 19, 2009  
 Time: 2:00 p.m.  
 Place: Courtroom 2, 5th Floor  
 Hon. Howard R. Lloyd

[Declaration of Stephen S. Smith (and exhibits thereto) concurrently filed]

Complaint Filed: July 18, 2008

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1 **I. INTRODUCTION**

2 Defendant StudiVZ, Ltd. (“StudiVZ”) opposes Plaintiff Facebook, Inc.’s  
3 (“Facebook”) latest motion to compel.

4 Facebook’s second motion to compel StudiVZ to answer 33 new requests for  
5 production of documents and 22 new requests for admissions raises the following  
6 issue -- when a motion to dismiss is pending, is there *any* limit to (a) the time  
7 within which to propound discovery, or (b) the scope of such discovery? StudiVZ  
8 believes that there are and that Facebook’s motion should be denied because it  
9 violates both such limits.

10 **Time:** Facebook’s motion violates its own stipulation to take discovery  
11 about personal jurisdiction within a particular schedule. Facebook fully admits that  
12 “[i]n order to allow time to take discovery and resolve discovery disputes,  
13 Facebook and Defendants negotiated a stipulation regarding the scheduling of  
14 Defendants’ motions to dismiss and the filing of Facebook’s opposition thereto.”  
15 (Dkt. No. 77 at 2:26-3:5). Facebook did not serve the second set of discovery that  
16 is the subject of the instant motion to compel until February 2, 2009, far outside of  
17 the stipulated schedule.

18 Facebook never asked the Court to relieve it from its stipulation to “take  
19 discovery” within the stipulated time period, and the Court never issued any order  
20 relieving Facebook from its stipulation in that regard. When it filed its first motion  
21 to enlarge time, Facebook referred only to the discovery disputes related to the  
22 already-existing discovery, which had been served on October 14, 2008. It did not  
23 make any mention of the need or desire to serve new discovery requests. And the  
24 Court did not move the date in order to allow Facebook to do so. The Court moved  
25 the hearing only so that Facebook could have the disputes concerning the original  
26 set of discovery heard (which StudiVZ did not even oppose).

27 Facebook propounded the new discovery two days later. Defendants  
28 responded on March 4, 2009, objecting that the discovery was untimely.

1 Facebook then filed a second motion to enlarge time but, again, made no  
2 mention of the second set of discovery. Its request was based solely on the  
3 “discovery dispute *currently pending* before the Magistrate Judge Lloyd.” (Dkt.  
4 No. 122-2 at 1:6-8 (emphasis added); *see also* Dkt No. 122 at 2:19-21).

5 At the hearing of the motion to dismiss on May 1, 2009, the Court twice  
6 asked Facebook about the state of discovery and how much time Facebook needed  
7 to have personal jurisdiction “teed up” and “ready to be heard.” (Dkt. No. 157 at  
8 11:14-17, 12:11-12). Facebook replied by referencing only the first motion to  
9 compel. It again made no mention of the second set of discovery.

10 Then, after the May 4, 2009 Order lifting the stay, Facebook waited another  
11 22 days to file its motion to compel and, as a result, has separately asked the  
12 presiding Court for another continuance of the motion to dismiss hearing -- to a  
13 sixth date. (Dkt. No. 170).

14 Facebook fully admits that it intentionally delayed filing its second motion to  
15 compel “until the first dispute was settled.” (Mot., Dkt No. 163, at 2:11). But it  
16 always intended to file both. The vast majority of the second set of discovery does  
17 not overlap with the first. So if Facebook wanted it, it had to file the second motion  
18 to compel no matter what the ruling on the first.

19 In sum, Facebook did not propound this discovery within the time period to  
20 which it stipulated. It did not ask for or obtain the Court’s relief from that  
21 stipulation. It then delayed filing the motion. Thus, the discovery and the motion  
22 are both untimely, and for this reason alone the motion should be denied.

23 **Scope:** The motion should also be denied because the discovery is not limited  
24 in scope to any material disputed issue related to personal jurisdiction. Facebook  
25 served 55 new requests on StudiVZ and 14 new requests on the Holtzbrinck  
26 Defendants. That discovery literally seeks, “ALL DOCUMENTS in possession,  
27 custody or control of STUDIVZ that RELATE in ANY way to the subject matter of  
28 this lawsuit.” (Dkt. No. 164-3 at 30:20-22, Request No. 50). Yet, Facebook has the

1 gall to describe this discovery as “*Limited*” to personal jurisdiction. (Mot., Dkt. No.  
2 163, at 1:6-13). Simply put, Defendants should not be subject to such obviously  
3 unlimited discovery while the motions to dismiss are undecided, *especially* given that  
4 the presiding Court has stated that it is already “inclined to dismiss” this action on  
5 *forum non conveniens* grounds. (Dkt. No. 155 at 3:12-14).

6 Even as to the minority of the requests that arguably relate to jurisdiction, the  
7 discovery is irrelevant and Facebook has not established a *prima facie* case for it.

8 First, after having propounded requests related to StudiVZ’s general  
9 jurisdiction contacts with “California” in October 2008, Facebook now seeks the  
10 same categories of discovery, but with respect to general jurisdiction “contacts”  
11 with the “United States.” But Facebook’s “Jurisdiction” allegations in both its  
12 original complaint and amended complaint refer to Defendants’ alleged contacts  
13 with “California.” (Dkt. No. 1 at 3:3-25; Dkt. No. 140 at 3:2-26). Moreover,  
14 Facebook did not argue in its opposition to the motions to dismiss that Defendants  
15 were subject to general jurisdiction at all – based on contacts with California or the  
16 United States. (Dkt. No. 76). This is simply another, long “after-the-fact,” entirely  
17 speculative fishing expedition. Facebook should not be permitted to pursue  
18 discovery into “nationwide contacts” jurisdiction, when it had never before even  
19 argued for jurisdiction on this basis.<sup>1</sup>

20 Second, Facebook continues its improper attempt to seek discovery under the  
21 “effects test” of *Calder v. Jones*. The effects test has three elements, all of which  
22 must exist to establish jurisdiction. The third element -- brunt of the harm  
23 occurring in the jurisdiction -- does not exist in this case. Facebook has previously  
24 admitted that StudiVZ’s alleged conduct caused Facebook to be harmed “in the  
25 European Market.” (Dkt. No. 1, ¶ 41; Dkt. No. 140, ¶ 60). The Court has already

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<sup>1</sup> So-called “nationwide contacts” can be used as a method to establish jurisdiction under FRCP 4(k)(2). *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006); *Holland America Line Inc. v. Wartsila North America, Inc.*, 485 F.3d 450, 461 (9th Cir. 2007). Facebook only first alleged anything related to Defendants’ possible “systematic and continuous contacts” (i.e., general jurisdiction) with the United States in its amended complaint filed on March 31, 2009, more than five months after the motions to dismiss were filed.

1 found that the “conduct complained of appears to have occurred *principally* in  
2 Germany.” (Dkt. 155 at 4:21) (emphasis added). The Court has noted that the  
3 “*source*” of the alleged infringement is in “Germany.” (Dkt. No. 155 at 5:21-23)  
4 (emphasis added).

5 These two categories of discovery show clearly why Courts employ the  
6 *prima facie* test before allowing jurisdictional discovery. Facebook has not made,  
7 and cannot make, a *prima facie* case of general jurisdiction or that the brunt of the  
8 harm has occurred in the forum. Accordingly, Facebook should not be permitted to  
9 invoke either argument now as a basis to engage in far-reaching discovery.

10 The presiding Court has already noted that “Defendants have shown that  
11 discovery related to personal jurisdiction has grown complicated and burdensome”  
12 and that the “efficiency considerations raised by Defendants are legitimate.” (Dkt.  
13 No. 138:3-4; Dkt No. 155 at 7:21-22). That was before Facebook filed this motion  
14 to compel. Since then, this Court has noted that the issues presented by the pending  
15 discovery motions are numerous and complex. (Dkt. No. 169 at 2:9).

16 This dispute, which has been ongoing since September 2008, requires the  
17 Court to draw a line between two competing policy concerns -- the right of a  
18 plaintiff to oppose *fairly* a motion to dismiss versus the right of a defendant, who  
19 argues it should never have been sued in that action, to be free of the burden and  
20 expense associated with litigating that action. StudiVZ submits that the line to be  
21 drawn is now clear. Facebook made a deal as to timing and should be held to that  
22 deal. And, given Facebook’s complete inability to establish a *prima facie* case for  
23 the discovery it seeks, and given the expense and burden that has already been  
24 found to exist, the Court should decide that no further discovery is allowed.

## 25 **II. FACTS**

### 26 **A. The First Set of Discovery**

27 On October 14, 2008, before the motions to dismiss were filed, Facebook  
28 served written discovery that it claimed was related to personal jurisdiction. The

1 parties then met and conferred for the purpose of setting a mutually agreeable  
2 hearing date and briefing schedule for the motions to dismiss. Facebook admits  
3 that the parties stipulated to take discovery related to the motions to dismiss by  
4 January 16, 2009. In its first Motion to Enlarge Time, Facebook wrote as follows:

5 ***“In order to allow time to take discovery and resolve discovery***

6 ***disputes***, Facebook and Defendants negotiated a stipulation regarding  
7 the scheduling of Defendants’ motions to dismiss and the filing of  
8 Facebook’s opposition thereto. The Court entered the Proposed  
9 Stipulated Scheduling Order on November 4, 2008, which provides  
10 that Facebook’s deadline was to be January 16, 2009 to file and serve  
11 its opposition to Defendants’ motions to dismiss. *Id.*; *see* Docket No.  
12 54. Defendants were given two weeks from that date to file their  
13 Reply papers. *Id.* The hearing on Defendants’ motions to dismiss was  
14 set for February 13, 2009. *Id.*”

15 (Dkt. No. 77 at 2:26-3:5) (emphasis added); *see also* Dkt. Nos. 41, 42, 48 and 54).

16 StudiVZ timely responded to the discovery on November 17, 2008. Facebook  
17 believed the responses were inadequate. The parties met and conferred and resolved  
18 the large majority of the disputes. Facebook served 30 document demands and 23  
19 interrogatories. StudiVZ answered 22 of the document demands (73%) and 18 of the  
20 interrogatories (78%) to Facebook’s satisfaction. By December 16, 2008, all issues  
21 with respect to the Holtzbrinck defendants and the large majority of issues with  
22 respect to StudiVZ were resolved. As Facebook represented to the Court:

23 “We have largely been able to work out every issue, and there remain,  
24 I believe, Your Honor, very few issues that would come back before  
25 this court . . . .”

26 (Exhibit A to Avalos Decl. at pp. 5-6 of 28 [Reporter’s Transcript at 4:23-5:4])

27 (Docket No. 78-2).

28

1           **B. The Deposition of Michael Brehm**

2           Facebook also asked to depose Michael Brehm, the declarant in support of  
3           StudiVZ's motions to dismiss. The parties agreed that Mr. Brehm's deposition  
4           would take place in Germany at the offices of Facebook's counsel on January 12,  
5           2009. Facebook noticed the deposition for that date. On January 8, 2009, Facebook  
6           canceled the deposition. (Smith Decl. in Support of Defendants' Motion for  
7           Sanctions, Dkt. No. 84, ¶¶ 2-20; Dkt. No. 84-2).

8           **C. Facebook's First Motion to Continue**

9           On January 23, 2009, Facebook filed its first motion to continue the hearing  
10          of the motions to dismiss. (Dkt. No. 77). Facebook did not argue that it needed to  
11          take any new discovery. The entire focus was the *then-existing* dispute related to  
12          discovery that Facebook had theretofore sought. (Dkt. No. 77 at 1:4, 1:8-9, 1:24-  
13          25; 2:22-23, 4:9-10, 4:18-19).

14          StudiVZ opposed Facebook's motion only in part. StudiVZ agreed to having  
15          the hearing moved as to personal jurisdiction only because the *then-existing*  
16          discovery dispute was a good faith dispute. (Dkt. No. 81 at 1:7-8, 2:7-4:25). But,  
17          because that dispute did not relate to *forum non conveniens*, it opposed moving that  
18          portion of the motions to dismiss. (*Id.* at 1-11 and 4:6-25).

19          On January 28, 2009, the Court issued its Order.

20          “A review of the record and the parties' papers reveals that Facebook  
21          has failed to demonstrate any reason to continue the February 13, 2009  
22          hearing as to either defendant with respect to *forum non conveniens*, or  
23          as to Holtzbrinck with respect to personal jurisdiction.”

24          (Order, Dkt. No. 92, at 2:15-17). The Court ruled that Facebook would be  
25          “permitted to file a supplemental opposition with respect to whether this Court has  
26          personal jurisdiction over StudiVZ in light of any newly discovered material.” (*Id.*  
27          at 2:20-22). The Court moved the hearing date of the motions to dismiss to April  
28          10, 2009 for reasons of “judicial economy” and “because a brief continuance is

1 unlikely to prejudice any party.” (*Id.* at 2:18-19).<sup>2</sup>

2 **D. The Second Set of Discovery Requests**

3 Two days later, on Friday, January 30, 2009, Facebook propounded and sent  
4 out for service its second set of discovery, which was then served on Defendants on  
5 Monday, February 2, 2009.<sup>3</sup> Facebook served StudiVZ with 33 new requests for  
6 production of documents and 22 new requests for admissions. These requests fall  
7 into three main categories: (1) requests that have nothing to do with jurisdiction, but  
8 which relate solely to new issues about the merits or nothing at all; (2) requests that  
9 are more narrowly-drafted versions of prior requests related to the “access” issue;  
10 and (3) requests that relate to StudiVZ’s contacts with the United States, as opposed  
11 to the prior requests which asked about StudiVZ’s contacts with California.<sup>4</sup> On  
12 March 4, 2009, StudiVZ responded to these requests. It objected and did not  
13 answer the requests or produce the documents. (Dkt. No. 164-1).

14 **E. Facebook’s Second Motion to Continue**

15 On March 20, 2009, Facebook filed its second motion to continue the hearing  
16 of the motions to dismiss. Facebook did not reference the second set of discovery.  
17 It did not argue it needed more time in order to move to compel further responses to  
18 the second set of discovery. (Dkt. No. 122). Facebook argued that “in light of the  
19 *pending* threshold discovery issue, Facebook respectfully requests that the Court  
20 hold in abeyance or take off calendar Defendants’ Motions to Dismiss currently  
21 scheduled for April 10, 2009.” (Dkt. No. 122 at 2:19-21) (emphasis added). In its  
22 proposed order, Facebook proposed that the motion to dismiss be taken off calendar  
23 “until such time as the underlying discovery dispute *currently pending* before  
24 Magistrate Judge Lloyd is resolved.” (Dkt. No. 122-2 at 1:6-8) (emphasis added).

25  
26 <sup>2</sup> The Court did *not* actually find that Facebook had made any showing that it was entitled to a continuance of the StudiVZ motion to dismiss, even as to personal jurisdiction. Rather, the Court simply noted that StudiVZ had not opposed that part of Facebook’s motion.

27 <sup>3</sup> The discovery requests, which Facebook did not attach to its motion papers, are dated Friday January 30, 2009. But they were not actually served on Defendants until Monday, February 2, 2009. (Smith Decl., ¶ 2; Ex. A).

28 <sup>4</sup> The specific requests are discussed in more detail in the argument section below to avoid repetition.

1 On March 30, 2009, the Court stayed the personal jurisdiction portion of the  
2 case in order to hear the *forum non conveniens* portion of the motions to dismiss  
3 first. The Court found that “Defendants have shown that discovery related to  
4 personal jurisdiction has grown complicated and burdensome.” (Dkt. No. 138 at  
5 3:3-4). The Court continued the hearing to April 17, 2009. (*Id.* at 3:28). The  
6 parties then moved the hearing date to May 1, 2009 via stipulation requested by  
7 Facebook due its counsel’s vacations. (Dkt. No. 144).

8 **F. The Hearing of the Motions to Dismiss**

9 At the May 1, 2009 hearing of the motions to dismiss, the Court raised with  
10 Facebook the subject of the outstanding discovery. The Court noted that “you’re in  
11 the midst of objections and motions and so forth.” The Court asked Facebook two  
12 separate times how much time it needed to get the personal jurisdiction portion of  
13 the motions “teed up” and “ready to be heard.” (Dkt. Nos. 157/168-1 at 11:14-17,  
14 12:11-12). Facebook responded, “I think we are beyond that . . .” -- i.e., beyond  
15 being in the “midst of objections and motions and so forth.” Facebook referenced  
16 only the already-existing dispute pending in front of the Magistrate Court. (*Id.* at  
17 11:16-13:2). It said that jurisdiction could be ready to be heard “relatively quick if  
18 Defendants comply with the discovery issues.” (*Id.* at 13:1-2). Facebook again  
19 made no mention of the second set of discovery and did not say that it needed such  
20 discovery in order to oppose the motions to dismiss.

21 On May 4, 2009, the Court issued an Order stating it was “inclined to dismiss”  
22 the action on *forum non conveniens* grounds, but deferred the final decision until the  
23 personal jurisdiction issues could be “fairly presented.” The Court noted that the  
24 “efficiency concerns raised by Defendants are legitimate,” but then added that “it is  
25 possible . . . that the personal jurisdiction inquiry meaningfully will inform the  
26 Court’s ultimate decision with respect to *forum non conveniens*.” (Dkt. No. 155 at  
27 7:21-8:1). The Court set a new hearing date for July 10, 2009 and lifted the stay. The  
28 Court allowed Facebook to file another supplemental brief on or before June 26, 2009.

1           **G.    Facebook Files Its Second Motion to Compel**

2           Facebook waited another 22 days, until May 26, 2009, to move to compel.  
3 (Dkt. No. 163). By that time, the motion could not be heard on normal notice  
4 before Facebook's supplemental opposition would be due. Facebook moved to  
5 shorten time, which the Court granted in part. (Dkt. No. 165).

6           **H.    Facebook Files Its Third Motion to Continue**

7           On June 3, 2009, Facebook filed another motion to enlarge time, asking the  
8 Court to move the motion to dismiss hearing to a *sixth* date. (Dkt. No. 170).

9           **III.   ARGUMENT**

10          **A.    Facebook Was Not Permitted to Serve New Discovery.**

11          Facebook was not permitted to use the extra time created by the continuance  
12 of the motion to dismiss to propound new discovery.

13          Facebook stipulated to "take discovery" related to the motions to dismiss on  
14 a particular schedule. (Dkt. No. 77 at 2:26-3:5). It never requested that Defendants  
15 modify or amend that part of the stipulation, either in connection with the meet and  
16 confer concerning Facebook's motions to enlarge time or otherwise. Facebook did  
17 not make such a request to the Court in its January 23, 2008 motion to enlarge time  
18 or in its March 20, 2009 motion to enlarge time. It did not mention any need to take  
19 new discovery. Facebook simply stated that it wished to obtain further responses to  
20 the discovery it had already served. (Dkt. No. 77 at 1:4, 1:8-9, 1:24-25; 2:22-23,  
21 4:9-10, 4:18-19; Dkt. No. 122 at 2:19-21; Dkt No. 122-2 at 1:6-8).

22          It is clear that the Court understood Facebook to be asking for more time  
23 solely to have the discovery dispute concerning the first set of discovery heard. In its  
24 March 30, 2009 Order, the Court described its January 28, 2009 Order as follows:  
25 "By a previous administrative motion, Facebook requested a continuance of the  
26 hearing on Defendants' motions on the ground that it required additional discovery  
27 that it claimed Defendants *were* withholding improperly." (Dkt. No. 138 at 2:3-7)  
28 (emphasis added). In its May 4, 2009 Order, the Court again described its January

1 28, 2009 Order as follows: “In an earlier administrative motion, Facebook requested  
2 a continuance of the hearing on Defendants’ motions, claiming that it required  
3 additional discovery that Defendants improperly *were* withholding.” (Dkt. No. 155  
4 at 2:25-3:2). By definition, the only discovery that Defendants “were withholding”  
5 as of January 23, 2009 was discovery that had been served as of that date.<sup>5</sup>

6 In none of its prior Orders has the Court ever relieved Facebook of its prior  
7 stipulation. It never gave Facebook permission to serve new discovery (and would  
8 not have even known to consider the issue since Facebook never raised it).

9 Local Rule 6-3, upon which Facebook based both of its prior motions to enlarge  
10 time, requires the moving party to state the bases for its motion “with particularity.”  
11 Given that the only reason ever stated was the need to resolve the pending dispute  
12 about the already-existing discovery, Facebook should be held to that basis.

13 Facebook was clearly lying in wait. Its second set of discovery was dated  
14 January 30, 2009, only two days after the Court granted the motion to continue the  
15 hearing date. That discovery contained 69 new requests, in six different documents  
16 served on three parties. It is not believable that Facebook only first considered  
17 serving this new discovery on January 29 or January 30, 2009. It was already  
18 drafted and ready to serve.

19 In sum, the second set of discovery violates the stipulation of the parties. It  
20 was not a basis for Facebook’s request to continue the hearing date. It was not a  
21 basis for the Court’s Order continuing the hearing date. It was gamesmanship, pure  
22 and simple, designed to increase the time, burden and costs on Defendants and this  
23 Court. For this reason alone, the motion should be denied.

24 **B. Facebook Waived Its Right to Move to Compel.**

25 Facebook’s motion to compel should also be denied as untimely because  
26 Facebook intentionally delayed filing it and consciously misled the presiding Court  
27 concerning its intent to file it.

28 <sup>5</sup> The Court also noted that a continuance was “unlikely to prejudice any party.” (Dkt. No. 92 at 2:19). Yet, moving the hearing date would have prejudiced StudiVZ if it would have subjected it to new discovery requests.

1 The fact of the delay is undisputed. The responses were served on March 4,  
2 2009. Defendants' position was clearly stated therein.<sup>6</sup> Facebook delayed filing  
3 the motion to compel until May 26, 2009. While there was a stay in effect for 35  
4 days (from March 30 to May 4, 2009), Facebook could have filed the motion  
5 anytime during the 26 days before the stay was entered or anytime in the 22 days  
6 after the stay was lifted.

7 The fact of Facebook's intent is also undisputed. Facebook waited on  
8 purpose for the Court to rule on the first motion to compel. It claims that it always  
9 intended to file the second motion to compel, but only after the Court ruled on the  
10 first. (Dkt. No. 163 at 2:9-11; Dkt No. 165 at 1:4-5, 2:8-12). Facebook has not  
11 claimed that any ruling on the first motion to compel would have avoided the need  
12 for the second motion to compel. It always intended to file both. (*Id.*)

13 Indeed, no ruling on the first motion would have avoided the need (to the  
14 extent Facebook desired to compel further responses to its second set of discovery)  
15 for the second. The vast majority of the requests in the second set of discovery do  
16 not overlap with any of the requests that are the subject of the first motion to compel.  
17 So Facebook admits to deliberately extending the time it claims is needed to obtain  
18 this discovery for no reason other than delay itself.

19 The fact that Facebook consciously misled the Court is also indisputable.  
20 Facebook misled the Court for the first time in its January 23, 2009 motion to  
21 continue. It asked for a continuance only for the purpose of resolving the already-  
22 existing dispute about the already-existing discovery requests. It made no mention  
23 of any need to take new discovery. Two days later, it signed the second set of  
24 discovery. Facebook misled the Court a second time in its March 20, 2009 motion  
25 to continue. It again asked for a continuance only for the purpose of resolving the  
26

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27 <sup>6</sup> Facebook argues in its Motion that it was waiting for Defendants to "voluntarily comply with their discovery  
28 obligations." (Mot. at 2:13-14). Such a statement is not believable. Defendants had stated their position explicitly in  
their responses, which were served on March 4, 2009. (Dkt No. 164-1). In addition, the parties met and conferred  
about it on March 20, 2009, wherein Defendants restated the exact same position. Facebook was not waiting for  
Defendants to voluntarily comply. It was just waiting. (Smith Decl., ¶ 3).

1 discovery dispute that was then “pending” in the Magistrate Court. It made no  
2 mention at all of the second set of discovery (or the Subpoenas). Facebook misled  
3 the Court a third time at the May 1, 2009 hearing. In response to two questions  
4 from the Court about how much time it needed to make the jurisdiction portion of  
5 the motions to dismiss ready to be heard, Facebook mentioned only the motion to  
6 compel that was pending in front of the Magistrate Court. It made no mention of  
7 the second set of discovery (or the Subpoenas).

8 Facebook engaged in a classic bait and switch. At each of these three points in  
9 time, Facebook knew there would be discovery disputes over the second set of  
10 discovery (and the Subpoenas). Defendants had already objected on the ground that *no*  
11 *further discovery was permitted*. Some of the new requests related to the old “access”  
12 issue, which had already generated extensive motion practice. Most of the requests  
13 relate to the merits only, which Defendants have been refusing to produce since  
14 September 2008. The inevitability of the dispute could not have been more obvious.

15 Yet, Facebook waited and waited, made no mention of the oncoming,  
16 inevitable dispute and affirmatively downplayed the extent and complexity of the  
17 problem when directly asked by the Court about it. Under these circumstances, the  
18 Court should find that Facebook has waived its right to move to compel. *See e.g.*  
19 *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999); *In re Sulfuric*  
20 *Acid Antitrust Litigation*, 231 F.R.D. 331 (N.D. Ill. 2005); *West v. Miller*, 2006 U.S.  
21 Dist. LEXIS 56243, \*13-\*17 (N.D. Ill. Aug. 11, 2006); *Purnell v. Arrow Financial*  
22 *Services, L.L.C.*, 2007 U.S. Dist. LEXIS 4588, \*1-\*2 (E.D. Mich. Jan. 23, 2007).

23 **C. Most of the New Discovery is Not Related to Jurisdiction.**

24 Even assuming that Facebook was permitted to serve new discovery, such  
25 discovery must be related to jurisdiction. On January 28, 2009, the Court “denied  
26 Facebook’s request except with respect to the issue of personal jurisdiction over  
27 StudiVZ.” (Dkt. No. 155 at 3:1-2). In its March 30, 2009 Order, the Court noted  
28 that “Defendants have shown that discovery related to personal jurisdiction has

1 grown complicated and burdensome.” (Dkt. No. 138 at 3:3-4). In its May 4, 2009  
2 Order, the Court noted that the “efficiency considerations raised by Defendants [in  
3 connection with the discovery] are legitimate.” (Dkt. No. 155 at 7:21-22). The  
4 Court said that it would defer its ruling only “out of prudence” so that “the issue of  
5 personal jurisdiction can be fairly presented.” (*Id.* at 8:1-2).

6 Yet, *most* of Facebook’s new discovery requests have nothing to do with  
7 personal jurisdiction, as follows:

8 RFP 42 -- All documents related to the conception, design and development  
9 of StudiVZ and its websites

10 RFP 43 -- All documents relating to any communications by StudiVZ  
11 to any media or media outlet regarding StudiVZ, its website or  
12 Facebook.

13 RFP 44 --All documents that relate to StudiVZ’s “business  
14 management information and procedures.”

15 RFP 45 -- All documents reflecting communications between StudiVZ  
16 and any developer of software and computer code used to create, run  
17 or operate StudiVZ’s websites.

18 RFP 46 -- All documents relating to the research and development of  
19 StudiVZ and StudiVZ’s websites.

20 RFPs 47-- All of StudiVZ’s computer systems of any kind.

21 RFPs 50-- All documents that relate in any way to the subject matter of  
22 this lawsuit.

23 RFP 51 -- All documents regarding efforts to locate any StudiVZ  
24 computer that might contain StudiVZ computer code.

25 RFP 52 -- All documents regarding efforts to locate any  
26 communications, documents or code that relate to the subject matter of  
27 the lawsuit.

28 RFP 53 -- All documents relating to every investment in StudiVZ and

- 1 the terms of such investment.
- 2 RFP 57 -- All documents relating to any business plan for StudiVZ.
- 3 RFP 58 -- All documents sufficient to identify any person involved in
- 4 any way in the development of StudiVZ or its websites.
- 5 RFP 59 -- All documents identifying any investors, potential investors,
- 6 loans, gifts, contributions, offers to purchase, or other forms of
- 7 financing contributed to or received by StudiVZ.
- 8 RFP 60 -- All documents relating to the StudiVZ websites being
- 9 modeled after or inspired by the Facebook website.
- 10 RFP 61 -- All documents relating to StudiVZ's website's layout being
- 11 modeled after or inspired by the Facebook website.
- 12 RFP 62 -- All documents relating to StudiVZ's websites functionality
- 13 or features being modeled after or inspired by the Facebook website.
- 14 RFA 4 -- Admit you intentionally designed at least one StudiVZ
- 15 website to look like Facebook's website.
- 16 RFA 16 -- Admit that users of StudiVZ are required to agree to terms
- 17 of use prior to receiving full access to the StudiVZ websites.
- 18 RFA 18 -- Admit that StudiVZ's business, income, revenue or profit
- 19 models rely, at least in part, on income from advertising, including, but
- 20 not limited to, advertisements and advertisement banners placed on the
- 21 StudiVZ websites.
- 22 RFA 19 -- Admit that the number of StudiVZ users is a factor taken
- 23 into account by YOU when negotiating the cost of advertising on at
- 24 least one of the StudiVZ websites.
- 25 RFA 20 -- Admit that StudiVZ's revenue is based, at least in part, on
- 26 the total number of StudiVZ users.
- 27 RFA 21 -- Admit that at least one of the StudiVZ websites was
- 28 modeled after the Facebook website.

1 For Facebook to characterize this discovery as being “limited” and related to  
2 jurisdiction crosses the line from aggressive advocacy to a violation of Rule 11.  
3 There is no conceivable argument that these requests are directed at personal  
4 jurisdiction. Facebook literally seeks all documents about all issues in the case!<sup>7</sup>

5 **D. Facebook Has Failed to Make a Sufficient Showing to Permit Any**  
6 **Additional Discovery Related to Jurisdiction.**

7 The other two categories of discovery requests set forth in the second set of  
8 discovery might, under some circumstances, relate to jurisdiction. But, under the  
9 circumstances presented here, Facebook is not entitled to any further such  
10 discovery because it fails to make out a *prima facie* case that either category relates  
11 to any material disputed issue of personal jurisdiction in this case.

12 Courts do not allow discovery, or strictly limit its scope, unless the plaintiff  
13 first proves a *prima facie* case that personal jurisdiction exists. *Central States,*  
14 *Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230  
15 F.3d 934, 946 (7th Cir. 2000) (“Foreign nationals should not be subjected to  
16 extensive discovery in order to determine whether personal jurisdiction over them  
17 exists.”); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185-86 (2d Cir. 1998) (denying  
18 discovery where the plaintiff “did not establish a prima facie case that the district  
19 court had jurisdiction”); *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs.,*  
20 *Inc.*, 334 F.3d 390, 402-03 (4th Cir. 2003); *Mitan v. Feeney*, 497 F.Supp.2d 1113,  
21 1118 (C.D. Cal. 2007) (“In order to obtain discovery on jurisdictional facts, the  
22 plaintiff must at least make a ‘colorable’ showing that the Court can exercise  
23 personal jurisdiction over the defendant.”); *Protrade Sports, Inc. v. Nextrade*  
24 *Holdings, Inc.*, 2006 U.S. Dist. LEXIS 6631, Case No. C05-04039 MJJ at \*9 (N.D.  
25 Cal. Feb. 2, 2006) (a plaintiff is not entitled to early discovery concerning personal  
26 jurisdiction unless it first makes a “colorable” showing of personal jurisdiction);

27 <sup>7</sup> As early as September 2008, Defendants noted that this was always Facebook’s true intent and is probably the  
28 only reason it sued StudiVZ in the United States to begin with. In their opposition to Facebook’s motion for  
expedited discovery, Defendants wrote: “Facebook’s true motive is to take massive early discovery on issues that go  
well beyond personal jurisdiction.” (Dkt. No. at 11:20-14:4). Can there any longer be any doubt?

1 *eMag Solutions, LLC v. Toda Kogyo Corp.*, 2006 U.S. Dist. LEXIS 94462, Case No.  
2 C02-1611 PJH at \*10 (N.D. Cal. Dec. 21, 2006) (granting plaintiffs' request for  
3 jurisdictional discovery only because plaintiffs had "provided some evidence" of the  
4 defendant's California contacts).

5 This case and Facebook's discovery requests reveals the need for the *prima*  
6 *facie* rule. Discovery related to personal jurisdiction is supposed to be limited to  
7 some material issue that is in dispute because Courts are rightly hesitant to subject a  
8 defendant who potentially never should have been sued in this jurisdiction to  
9 intrusive and burdensome discovery. The whole point of a motion to dismiss is to be  
10 dismissed from the case *before* having to litigate it extensively. *Cf. Rutman Wine*  
11 *Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("The purpose of  
12 F.R.Civ.P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of  
13 complaints without subjecting themselves to discovery."). Here, however, Facebook  
14 unashamedly seeks to subject StudiVZ to very far ranging discovery about two broad  
15 issues under the guise of "personal jurisdiction," even though it cannot make out a  
16 *prima facie* case that either issue matters.

17 **1. Facebook Does Not Even Argue General Jurisdiction.**

18 Requests for production 31-38 and 40-41 and requests for admissions 6 and  
19 17 relates to StudiVZ's general "contacts" with the "United States." Such requests  
20 would relate to establishing that StudiVZ is subject to general personal jurisdiction  
21 based on nationwide contacts with the United States under FRCP 4(k)(2), rather  
22 than contacts with California specifically. *See, e.g. Consolidated Develop. Corp. v.*  
23 *Sherritt, Inc.*, 216 F.3d 1286, 1292 (11th Cir. 2000).

24 But Facebook did not allege in its original or currently operative complaint  
25 that jurisdiction is based on StudiVZ's nationwide contacts. Rather, it alleges  
26 jurisdiction based on contacts with "California." (Dkt. No. 1 at 3:3-25; Dkt. No.  
27 140 at 3:2-26).<sup>8</sup> And it has not argued for the application of nationwide contacts,  
28

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<sup>8</sup> In its amended complaint, Facebook did add a new factual section about StudiVZ's (*Continued on next page*)  
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1 general jurisdiction in opposition to the motions to dismiss. Indeed, in its  
2 opposition to the motions to dismiss, Facebook did not argue that StudiVZ was  
3 subject to general jurisdiction at all, whether based on California contacts or  
4 nationwide contacts. StudiVZ should not be subject to entirely speculative  
5 discovery about “contacts” when Facebook has no reason to believe, evidence to  
6 show or even allegations that such contacts confer jurisdiction to begin with.

7 **2. The *Calder v. Jones* “Effects Test” Does Not Apply.**

8 Requests for admissions 1-3, 5, 7-15 and 22 and requests for production 39,  
9 48, 49, 54-56 and 63 seek more discovery related to the so-called “access” issue that  
10 was the main subject of Facebook’s first motion to compel. Accordingly, in an effort  
11 to avoid repetition, StudiVZ hereby incorporates by reference the arguments it made  
12 in opposition to the first motion to compel. (Dkt. No. 94).

13 In addition, StudiVZ makes the following argument.

14 Facebook relies on the “effects test” of *Calder v. Jones* as the basis for  
15 seeking this “access” discovery. Facebook describes that test as follows: “The  
16 *Calder* effects test has three elements: the defendant must have (1) committed an  
17 intentional act, (2) expressly aimed at the forum state, (3) causing harm, ***the brunt***  
18 ***of which is suffered*** -- and which the defendants know is likely to be suffered -- ***in***  
19 ***the forum state.***” (Dkt. No. 76 at 6:19-22) (emphasis added). Citing this test,  
20 Facebook claims that it is entitled to take discovery into any issue related to its  
21 allegations of intentional bad acts.

22 But this is exactly why it is a prerequisite to any jurisdiction discovery that a  
23 plaintiff first prove a *prima facie* case of jurisdiction. If a plaintiff could simply  
24 allege a claim, then it could force a defendant who may not be subject to jurisdiction  
25 to submit to discovery about all issues in a case before having the opportunity to have  
26 its motion to dismiss heard, which is exactly what Facebook seeks to do here.

27  
28 (Continued from previous page) supposed contacts with the United States, but it is not part of Facebook’s jurisdiction  
allegations. And, this new section was raised belatedly, on March 31, 2009, more than five months after the motions  
to dismiss were filed, long after the originally-scheduled hearing date.

1 On the other hand, if Facebook is first required (as it should be) to establish a  
 2 *prima facie* case that the effects test even applies, then the discovery would have to  
 3 be denied because Facebook cannot meet (and does not try to meet) that test. Most  
 4 obviously, Facebook cannot establish a *prima facie* case that the brunt of the harm  
 5 was suffered in this jurisdiction.<sup>9</sup> Indeed, Facebook has never made any attempt to  
 6 show that it suffered the brunt of alleged harm in California or the United States  
 7 because it is undisputed that it did not.

8 Facebook has made repeated admissions in its pleadings that the brunt of  
 9 harm was suffered in Germany and Europe. Facebook alleged in its original and  
 10 amended complaint that it has “been hampered from entering and competing fairly  
 11 in the *European market*.” (Dkt No. 1, ¶ 41; Dkt. No. 140, ¶ 60) (emphasis added).  
 12 Facebook acknowledged in its opposition to the motions to dismiss that StudiVZ  
 13 runs “a German language site that competed directly against Facebook in *German*  
 14 *speaking countries*.” (Docket No. 76 at 1:10-11) (emphasis added). Facebook has  
 15 acknowledged that StudiVZ was developed and launched from Berlin, Germany.  
 16 (Dkt. No. 1, ¶ 28, Dkt. No. 76 at 3:22-25).

17 Moreover, the Court has previously noted in connection with the May 4,  
 18 2009 Order regarding *forum non conveniens* that the “conduct complained of  
 19 appears to have occurred *principally* in Germany” (Dkt. No. 155 at 4:21) (emphasis  
 20 added) and that the “*source*” of the alleged infringement is located in “Germany.”  
 21 (Dkt. No. 155 at 5:21-23) (emphasis added).<sup>10</sup>

22 \_\_\_\_\_  
 23 <sup>9</sup> StudiVZ does not mean to imply by its focus on the “brunt of harm” that Facebook has made out a *prima facie* case  
 24 of the first two elements of the *Calder* effects test either. Indeed, it has not. Facebook has presented bare allegations,  
 25 conjecture, and hearsay that is, at best, unsubstantiated speculation. Facebook’s sole “evidence” is in the form of  
 26 declarations from its lawyers and hearsay exhibits. On this inadmissible record, Facebook wildly speculates that the two  
 German founders of StudiVZ copied Facebook’s website *before* returning to Germany to form StudiVZ. In other  
 words, even assuming something wrongful occurred from within the United States, Facebook admits that they were *not*  
 the acts of StudiVZ, which had not even been formed yet. Such flimsy, unsubstantiated evidence is not a *prima facie* or  
 colorable showing of evidence necessary to establish any right to jurisdictional discovery. See *Carefirst of Maryland*,  
*supra*, 334 F.3d at 402-03 (jurisdictional discovery should be denied when plaintiff “offers only speculation or  
 conclusory allegations”).

27 <sup>10</sup> The Court also made an interesting point related to the location of the harm in its May 4, 2009 Order, albeit in  
 28 connection with the *forum non conveniens* element of “local interest.” It noted that Facebook’s argument about local  
 interest “conflates the local interest served by the assertion of adjudicatory versus legislative or prescriptive jurisdiction.”  
 In its footnote 5, explaining what it meant by this comment, the Court explained that the only “local interest” was merely  
 adjudicatory (i.e., procedural) in the sense that Facebook wanted the case litigated here because (*Continued on next page*)

1 This case is identical in all relevant respects to *Fielding v. Hubert Burda*  
 2 *Media, Inc.*, 2004 WL 532714, Case No. Civ.A.3:03-CV-0872 (N.D. Tex. Feb. 11,  
 3 2004). In that case, a Texas citizen sued defendants (German companies that publish  
 4 German magazines) in Texas over an alleged campaign to impugn plaintiffs’  
 5 reputations. Although the articles were published by the German media, some  
 6 statements set forth therein were published in the U.S. *Id.*, \*1. Defendants moved to  
 7 dismiss for lack of personal jurisdiction. Plaintiff opposed, claiming defendants’  
 8 actions satisfied the “effects” test of *Calder v. Jones*. The court granted the motion  
 9 to dismiss because the “bulk of Plaintiffs’ harm was suffered in Europe, where  
 10 Plaintiff Borer lost his job as Swiss Ambassador to Germany and Plaintiff Fielding  
 11 lost her unborn child.” *Id.*, \*4.

12 The plaintiffs in *Fielding*, like Facebook, also tried to rely on the fact that the  
 13 German magazines had *some* distribution in Texas. However, the court rejected that  
 14 argument, noting that “the articles published by Defendants were published in  
 15 Germany, in the German language” and with less than one tenth of one percent of the  
 16 magazines at issue are distributed to Texas: “In this case, only a fraction of a percent of  
 17 Defendants’ magazines are distributed in Texas each month. This is a far cry from the  
 18 twelve percent figure in *Calder*.” *Id.* at \*5. Likewise, less than 1/10th of one percent of  
 19 StudiVZ’s users are identified with California. (Docket No. 47, ¶ 17). This is simply  
 20 not enough for California to be considered the location of the brunt of the harm.

21 Since Facebook has not established a *prima facie* case of a required element  
 22 of the *Calder v. Jones* effects test, it should not be entitled to rely on that test as a  
 23 basis to justify its merits-based discovery.

24 ///

25 ///

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26 (Continued from previous page) it is located here. The Court “discern[ed] few legitimate interests to be vindicated by the  
 27 assertion of adjudicatory jurisdiction for its own sake.” (Dkt. No. 155 at 6:12-7:27, fn. 5). Analogizing to personal  
 28 jurisdiction, brunt of harm similarly cannot be established solely by the fact that the plaintiff suffered some harm in the  
 jurisdiction in which it is a citizen. *Fielding v. Hubert Burda Media, Inc.*, 2004 WL 532714, Case No. Civ.A.3:03-CV-  
 0872, at \*4 (N.D. Tex. Feb. 11, 2004) (“Although Plaintiffs’ reputations might have been damaged in Texas, the bulk of  
 plaintiffs’ harm has been suffered in Europe . . .”).

