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

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 Los Angeles, California 90067-4590

17 FACEBOOK, INC.,
 18 Plaintiff,
 19 v.
 20 STUDIVZ LTD., HOLTZBRINCK
 21 NETWORKS GmbH,
 22 HOLTZBRINCK VENTURES
 23 GmbH, and DOES 1-25,
 24 Defendants.

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

**HOLTZBRINCK NETWORKS' AND
 HOLTZBRINCK VENTURES'
 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 Defendants Holtzbrinck Networks, GmbH (“Networks”) and Holtzbrinck
3 Ventures, GmbH (“Ventures”) (collectively the “Holtzbrinck Defendants”) oppose
4 Facebook’s latest motion to compel further responses to requests for admissions on
5 the following grounds:

6 First, Facebook admits that it stipulated to take all discovery and resolve any
7 disputes related thereto by January 16, 2009. (Dkt. No. 77 at 2:26-3:5). The second
8 set of discovery violates that stipulation. Facebook never asked Defendants to
9 amend that stipulation.

10 Second, the Court’s January 28, 2009 Order was clear. Although it relieved
11 Facebook from that portion of its stipulation requiring the resolution of discovery
12 disputes by January 16, 2009, it did *not* relieve Facebook of the stipulation to “take”
13 discovery by January 16, 2009.

14 Third, the Court’s January 28, 2009 Order states that Facebook “failed to
15 demonstrate any reason” to move the hearing as to the Holtzbrinck Defendants. The
16 hearing was moved for reasons of judicial economy and because the Court
17 determined that no prejudice would result. It was not moved to permit Facebook to
18 serve new discovery on the Holtzbrinck Defendants. (Dkt. No. 92 at 2:15-20).

19 Fourth, Facebook had asked for permission to file supplemental opposition
20 papers to “Defendants’ motions.” (Dkt. No. 77 at 2:3) (emphasis added). Yet, the
21 Court’s January 28, 2009 Order gave Facebook only the right to file a supplemental
22 opposition with respect to StudiVZ. (Dkt. No. 92 at 2:20-21).

23 Fifth, the requests for admissions served on the Holtzbrinck Defendants seek
24 information that Facebook already has or information that is totally irrelevant to any
25 issue of personal jurisdiction.

26 Sixth, each of the three subjects raised in the requests for admissions could have
27 been addressed in the deposition of Martin Weber, which was noticed for January 13,
28 2009, but which Facebook canceled without justification. (Dkt. Nos. 83-84).

1 Seventh, Facebook's motion is untimely. Facebook intentionally delayed
 2 filing the motion until May 26, 2009, thereby causing the condition that Facebook
 3 now argues makes it necessary to move the motion to dismiss hearing date yet again.

4 In sum, the discovery is not permitted, needed or relevant. Facebook could
 5 have obtained this discovery in October, November, December or January, but gave
 6 up that opportunity by not propounding it and by canceling the deposition. Facebook
 7 waited over three months to serve this discovery and another almost four months to
 8 move to compel for the purpose of delaying the inevitable dismissal of the
 9 Holtzbrinck Defendants from the case. Accordingly, the motion should be denied.

10 **II. FACTS**

11 **A. The First Set of Discovery**

12 On October 14, 2008, before the motions to dismiss were filed, Facebook
 13 served written discovery that it claimed was related to personal jurisdiction. The
 14 parties then met and conferred for the purpose of setting a mutually-agreeable
 15 hearing date and briefing schedule for the motions to dismiss. Facebook admits that
 16 the parties stipulated to take discovery related to the motions to dismiss by January
 17 16, 2009. In its first Motion to Enlarge Time, Facebook described this stipulation as
 18 follows:

19 *“In order to allow time to take discovery and resolve discovery*
 20 *disputes*, Facebook and Defendants negotiated a stipulation regarding
 21 the scheduling of Defendants' motions to dismiss and the filing of
 22 Facebook's opposition thereto. The Court entered the Proposed
 23 Stipulated Scheduling Order on November 4, 2008, which provides
 24 that Facebook's deadline was to be January 16, 2009 to file and serve
 25 its opposition to Defendants' motions to dismiss. *Id.*; *see* Docket No.
 26 54. Defendants were given two weeks from that date to file their
 27 Reply papers. *Id.* The hearing on Defendants motions to dismiss was
 28 set for February 13, 2009. *Id.*”

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

2 The Holtzbrinck Defendants timely responded to the discovery on November
3 17, 2008. Facebook initially believed the responses were inadequate. The parties
4 met and conferred and resolved the disputes related to the Holtzbrinck Defendants.
5 As part of that resolution, the Holtzbrinck Defendants produced any portions of the
6 agreement by which they purchased StudiVZ, and any due diligence documents
7 associated therewith, that made any implicit or explicit reference to Facebook. These
8 documents did, in fact, include references to the legal claims that had been asserted
9 by Facebook against StudiVZ as of that time. (Dkt. No. 132, fn. 2. at 4:23-26; Dkt.
10 No. 134, ¶¶ 3-4 and Exs. L-M thereto; and Dkt. No. 134, ¶ 8 and Ex. J thereto).

11 **B. The Deposition of Martin Weber**

12 Facebook also asked to depose a single Holtzbrinck witness, Martin Weber,
13 the declarant in support of the Holtzbrinck Defendants' motion to dismiss. The
14 parties agreed that Mr. Weber's deposition would take place in Germany on January
15 13, 2009, and Facebook noticed the deposition accordingly. (Smith Decl. in Support
16 of Defendants' Motion for Sanctions, Dkt. No. 84, at ¶¶ 2-3; Dkt. No. 84-2). On
17 January 8, 2009 (and after defense counsel had already flown to Germany), Facebook
18 canceled the deposition. The reason had nothing to do with Mr. Weber or the
19 Holtzbrinck Defendants. The stated reason related to a single topic that was relevant
20 only to StudiVZ's witness, Michael Brehm, whose deposition was scheduled for
21 January 12, 2009. (Dkt. No. 84, ¶¶ 7-20).¹

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

23 On January 23, 2009, Facebook filed its first motion to continue the hearing of
24 the Holtzbrinck Defendants' motion to dismiss and StudiVZ's motion to dismiss
25 (collectively, the "Motions to Dismiss"). It also asked for permission to file
26 supplemental opposition papers to "Defendants' motions". (Dkt. No. 77 at 1:25-2:3).

27
28 ¹ Facebook has agreed in prior pleadings and in email communications at the time that the issue -- "access" -- was not
an issue with respect to Mr. Weber's deposition. (Dkt. No. 102 at 2:18-3:1; Dkt. No. 100 at ¶ 13; and Dkt. No. 84-2).

1 Facebook made no argument about the Holtzbrinck Defendants. It did not claim that
 2 there was any discovery dispute with respect to the Holtzbrinck Defendants or that it
 3 needed additional discovery from them (or StudiVZ). (*Id.* at 1:23-24). The entire focus
 4 was on the *then-existing* disputes related to discovery that Facebook had theretofore
 5 sought to take. (Dkt. No. 77 at 1:4, 1:8-9, 1:24-25; 2:22-23, 4:9-10, 4:18-19).

6 The Holtzbrinck Defendants opposed Facebook's motion, arguing there was
 7 no need for a continuance because there were no outstanding discovery issues with
 8 respect to the Holtzbrinck Defendants. (Dkt. No. 80 at 1:6-10).

9 On January 28, 2009, the District Court issued its Order on Facebook's Motion
 10 to Enlarge Time. The Court ruled:

11 "A review of the record and the parties' papers reveals that Facebook
 12 has failed to demonstrate any reason to continue the February 13, 2009
 13 hearing as to either defendant with respect to *forum non conveniens*, or
 14 as to Holtzbrinck with respect to personal jurisdiction."

15 (Order, Dkt. No. 92, at 2:15-17). The Court ruled that Facebook would only be
 16 "permitted to file a supplemental opposition with respect to whether this Court has
 17 personal jurisdiction over StudiVZ in light of any newly discovered material." (*Id.* at
 18 2:20-22). The Court moved the hearing date of the Motions to Dismiss to April 10,
 19 2009 for reasons of "judicial economy" and "because a brief continuance is unlikely
 20 to prejudice any party." (*Id.* at 2:18-19).

21 **D. The Second Set of Discovery**

22 Two days later, on Friday, January 30, 2009, Facebook signed and sent out for
 23 service its second set of discovery, which was then served on Defendants on
 24 Monday, February 2, 2009.²

25 Facebook served the Holtzbrinck Defendants with the following new requests
 26 for admissions:

27 _____
 28 ² 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).

1 **REQUEST FOR ADMISSION NO. 1:**

2 Admit that at the time YOU acquired an interest in STUDIVZ you
 3 were aware of accusations by FACEBOOK that STUDIVZ was
 4 infringing FACEBOOK’S legal rights, including, but not limited to,
 5 intellectual property rights.

6 **REQUEST FOR ADMISSION NO. 2:**

7 Admit that YOU have knowledge that STUDIVZ accessed the
 8 FACEBOOK WEBSITE for commercial purposes.

9 **REQUEST FOR ADMISSION NO. 3:**

10 Admit that YOU have knowledge that STUDIVZ accessed the
 11 FACEBOOK WEBSITE for the purpose of modeling at least one of
 12 the STUDIVZ WEBSITES after the FACEBOOK WEBSITE.

13 **REQUEST FOR ADMISSION NO. 4:**

14 Admit that YOU have knowledge of similarities between the
 15 FACEBOOK WEBSITE and the STUDIVZ WEBSITES, including,
 16 but not limited to, visual similarities, functional similarities, feature
 17 similarities, and layout similarities.

18 **REQUEST FOR ADMISSION NO. 5:**

19 Admit that at the time YOU acquired an interest in STUDIVZ you
 20 were aware of similarities between the FACEBOOK WEBSITE and
 21 the STUDIVZ WEBSITES, including, but not limited to, visual
 22 similarities, functional similarities, feature similarities, and layout
 23 similarities.³

24 On March 4, 2009, the Holtzbrinck Defendants responded to these requests.
 25 They objected and did not answer the requests. (Dkt. No. 164-1).

26
 27
 28 ³ Facebook also served the Holtzbrinck Defendants with requests for production of documents, but Facebook does not move to compel further responses thereto.

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

2 On March 20, 2009, Facebook filed its second motion to continue the hearing
3 of the Motions to Dismiss. Facebook did not reference the second set of discovery.
4 It made no reference to the Holtzbrinck Defendants. It did not argue it needed more
5 time in order to move to compel further responses to the second set of discovery.
6 (Dkt. No. 122). To the contrary, Facebook argued that “in light of the *pending*
7 threshold discovery issue, Facebook respectfully requests that the Court hold in
8 abeyance or take off calendar Defendants’ Motions to Dismiss currently scheduled
9 for April 10, 2009.” (*Id.* at 2:19-21) (emphasis added). And, in its proposed order,
10 Facebook proposed that the Motions to Dismiss be taken off calendar “until such
11 time as the underlying discovery dispute *currently pending* before Magistrate Judge
12 Lloyd is resolved.” (Dkt. No. 122-2 at 1:6-8) (emphasis added).

13 On March 30, 2009, the Court stayed the personal jurisdiction portion of the case
14 in order to hear the *forum non conveniens* portion of the Motions to Dismiss first. The
15 Court found that “Defendants have shown that discovery related to personal jurisdiction
16 has grown complicated and burdensome.” (Dkt. No. 138 at 3:3-4). The Court
17 continued the hearing of the Motions to Dismiss to April 17, 2009 and gave Facebook a
18 further opportunity to file a supplemental brief about *forum non conveniens*. (Dkt. No.
19 138). The parties then moved the hearing date again to May 1, 2009 via stipulation
20 requested by Facebook due its counsel’s vacations. (Dkt. No. 144).

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

22 At the May 1, 2009 hearing of the *forum non conveniens* portions of the Motions
23 to Dismiss, the Court raised with Facebook the subject of the outstanding discovery and
24 asked Facebook two separate times how much time it needed to get the jurisdiction
25 portion of the motions “teed up” and “ready to be heard.” (Dkt. Nos. 157/168-1 at
26 11:14-17, 12:11-12). The Court also noted that “you’re in the midst of objections and
27 motions and so forth.” Facebook responded: “I think we are beyond that...” (i.e.,
28 beyond being in the “midst of objections and motions and so forth”). It then only

1 mentioned the already-existing dispute pending in front of “Judge Lloyd.” (*Id.* at
 2 11:16-13:2). It stated that the jurisdiction issue could be ready to be heard “relatively
 3 quick if Defendants comply with the discovery issues.” (*Id.* at 13:1-2). Facebook
 4 made no mention of the second set of discovery (or any third party subpoenas). It did
 5 not argue that it needed such discovery in order to oppose the motions to dismiss.

6 On May 4, 2009, the Court issued an Order stating that it was “inclined to grant”
 7 the Motions to Dismiss on *forum non conveniens* grounds, but deferred the final
 8 decision until the personal jurisdiction issues could be “fairly presented.” The Court
 9 noted that the “efficiency concerns raised by Defendants are legitimate,” but then added
 10 that “it is possible . . . that the personal jurisdiction inquiry meaningfully will inform the
 11 Court’s ultimate decision with respect to *forum non conveniens*.” (Dkt. No. 155 at
 12 7:21-8:1). The Court set a new hearing date for July 10, 2009 and lifted the stay. The
 13 Court allowed Facebook to file another supplemental brief on or before June 26, 2009.

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

15 Facebook waited another 22 days, until May 26, 2009, to move to compel.
 16 (Dkt. No. 163). By that time, the motion could not be heard on normal notice before
 17 Facebook’s supplemental opposition would be due. For that reason, Facebook moved
 18 to shorten time, which the Court granted in part. (Dkt. No. 165).

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

20 On June 3, 2009, Facebook filed another motion to enlarge time, asking the
 21 Court to move the Motions to Dismiss hearing to a *sixth* date. (Dkt. No. 170).

22 **III. ARGUMENT**

23 **A. Facebook Was Not Permitted to Serve New Discovery on the**
 24 **Holtzbrinck Defendants.**

25 Facebook was not permitted to use the extra time created by the continuance
 26 of the Motions to Dismiss to propound new discovery.

27 Facebook fully admits that it stipulated to take discovery related to the
 28 Motions to Dismiss within a particular schedule. That was the reason February 13,

1 2009 was chosen as the hearing date. That was the reason January 16, 2009 was
 2 chosen as the due date for Facebook's opposition. (Dkt. No. 77 at 2:26-3:5; Dkt.
 3 Nos. 41, 42, 48, 54). Facebook never requested that Defendants modify or amend
 4 that part of the stipulation, either in connection with the meet and confer concerning
 5 Facebook's motions to enlarge time or otherwise. Facebook did not make such a
 6 request to the Court in its January 23, 2008 motion to enlarge time or in its March
 7 20, 2009 motion to enlarge time. It did not mention any need to take new discovery.
 8 Facebook simply stated that it wished to obtain further responses to the discovery it
 9 had already served. (Dkt. No. 77 at 1:4, 1:8-9, 1:24-25; 2:22-23, 4:9-10, 4:18-19;
 10 Dkt. No. 122 at 2:19-21; Dkt No. 122-2 at 1:6-8).

11 In its January 28, 2009 Order, the Court noted that Facebook failed to
 12 demonstrate "any reason" to continue the hearing date as to the Holtzbrinck
 13 Defendants. The Court gave Facebook permission to file a supplemental brief only
 14 as to StudiVZ. The Court continued the hearing date of the Holtzbrinck Defendants'
 15 motion to dismiss only for reasons of judicial economy and because it determined
 16 that a continuance would not prejudice any party.⁴

17 There can be no doubt about the nature of Facebook's request or the Court's
 18 Order. The Court understood Facebook to be asking for more time solely to have the
 19 discovery dispute concerning the first set of discovery heard. It is also clear that the
 20 Court denied Facebook's request as to the Holtzbrinck Defendants. In its March 30,
 21 2009 Order, the Court described its January 28, 2009 Order as follows: "By a previous
 22 administrative motion, Facebook requested a continuance of the hearing on
 23 Defendants' motions on the ground that it required additional discovery that it claimed
 24 Defendants *were* withholding improperly. The Court *denied* Facebook's request
 25 except with respect to the issue of personal jurisdiction over Defendant StudiVZ"
 26 (Dkt. No. 138 at 2:3-7) (emphasis added). In its May 4, 2009 Order, the Court again

27 _____
 28 ⁴ The prejudice comment is telling. Moving the hearing date would prejudice the Holtzbrinck Defendants if it resulted in them being subject to new discovery requests.

1 described its January 28, 2009 Order as follows: “In an earlier administrative motion,
 2 Facebook requested a continuance of the hearing on Defendants’ motions, claiming
 3 that it required additional discovery that Defendants improperly *were* withholding.
 4 The Court *denied* Facebook’s request except with respect to the issue of personal
 5 jurisdiction over StudiVZ” (Dkt. No. 155 at 2:25-3:2).⁵

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
 10 enlarge time, requires the moving party to state the bases for its motion “with
 11 particularity.” Given that the only reason ever stated was the need to resolve the
 12 pending dispute with StudiVZ about the already-existing discovery, Facebook
 13 should be held to that basis.

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

20 In sum, Facebook’s original stipulation, Facebook’s request in its January
 21 motion to enlarge time, the Court’s expressed understanding of that request and the
 22 Court’s ruling thereon demonstrate that the extension of time was granted solely in
 23 order to allow Facebook to seek to obtain the discovery it believed StudiVZ *was*
 24 withholding *at that time*. The Court did not give Facebook more time to take new
 25 discovery, let alone new discovery from the Holtzbrinck Defendants.

26 ///

27 _____
 28 ⁵ 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 the Holtzbrinck Defendants if it would have subjected them to new discovery requests.

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

2 Facebook's motion to compel should also be denied as untimely because
3 Facebook intentionally delayed filing it and consciously misled the presiding Court
4 concerning its intent to file it.

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

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

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

23 The fact that Facebook consciously misled the Court is also indisputable.
24 Facebook misled the Court for the first time in its January 23, 2009 motion to
25 continue. It asked for a continuance only for the purpose of resolving the already-

26 _____
27 ⁶ 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 existing dispute about the already-existing discovery requests. It made no mention of
 2 any need to take new discovery. Two days later, it signed the second set of
 3 discovery. Facebook misled the Court a second time in its March 20, 2009 motion to
 4 continue. It again asked for a continuance only for the purpose of resolving the
 5 discovery dispute that was then “pending” in the Magistrate Court. It made no
 6 mention at all of the second set of discovery (or the Subpoenas). Facebook misled
 7 the Court a third time at the May 1, 2009 hearing. In response to two questions from
 8 the Court about how much time it needed to make the jurisdiction portion of the
 9 motions to dismiss ready to be heard, Facebook mentioned only the motion to
 10 compel that was pending in front of the Magistrate Court. It made no mention of the
 11 second set of discovery (or the Subpoenas).

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

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

27 ///

28 ///

1 documents show on their face that the Holtzbrinck Defendants were aware of the
 2 existence of Facebook’s June 2006 demand letter to StudiVZ and the general nature
 3 of the claims raised therein as of the time the sale closed. The purchase agreement
 4 makes explicit reference to Facebook’s claims and contains a warranty and
 5 representation from the sellers that those claims had been resolved. (Dkt. No. 132, fn.
 6 2. at 4:23-26; Dkt. No. 134, ¶¶ 3-4 and Exs. L-M thereto; and Dkt. No. 134, ¶ 8 and
 7 Ex. J thereto). So, again, there is no need for new discovery on this undisputed topic.

8 Finally, Facebook already knows (or has at least heretofore assumed) that the
 9 Holtzbrinck Defendants were *not* aware of any access by StudiVZ of Facebook’s
 10 website because that point was expressly discussed in connection with Martin
 11 Weber’s deposition. During the meet and confer leading up to their depositions, *both*
 12 sides agreed that their dispute about “access” did not impact the questioning of
 13 Martin Weber, because they both assumed that Mr. Weber knew nothing about any
 14 alleged access by StudiVZ of Facebook’s website. (Dkt. No. 102 at 2:18-3:1; Dkt.
 15 No. 100 at ¶ 13; and Dkt. No. 84-2). Had Facebook simply deposed Martin Weber, it
 16 could have confirmed that assumption via a live witness under oath. But Facebook
 17 canceled the deposition without justification.

18 **D. Facebook Forfeited the Right to This Discovery When It Canceled**
 19 **the Deposition of Martin Weber.**

20 Indeed, *each* of the topics contained in the requests for admissions easily
 21 could have been explored in detail in the deposition of Martin Weber. Facebook had
 22 already filed its list of supposed “similarities” in the German court and had in its
 23 possession expert reports discussing them at length. It could have gone through each
 24 of those similarities with Mr. Weber and simply asked whether or not the
 25 Holtzbrinck Defendants were aware of them at the time they purchased StudiVZ.
 26 Facebook was also well-aware of the nature of its own legal claims against StudiVZ.
 27 It could have asked Mr. Weber about the nature and extent of the Holtzbrinck
 28 Defendants’ knowledge of those topics at the time they purchased StudiVZ.

1 Had Facebook simply taken that deposition, there would have been no need
 2 for the second set of discovery. And Facebook would have had this information by
 3 January 13, 2009, in time to incorporate into its *original* opposition. That was the
 4 whole reason that the deposition was scheduled for January 13, 2009. But Facebook
 5 canceled it without justification, and now seeks to obtain the same information via a
 6 motion to compel further responses to written discovery filed over four months later.

7 **E. The Discovery is Not Relevant to Jurisdiction or Forum.**

8 Knowledge or awareness of a subsidiary's tortious conduct does not confer
 9 jurisdiction on a parent. *See, e.g., Heritage Copy Products, Inc. v. Savin Corp.*,
 10 661 F.Supp. 463, 472 (M.D. Pa. 1987) ("Heritage . . . cites no cases supporting the
 11 proposition that a parent's knowledge of a subsidiary's tort subjects the parent to
 12 jurisdiction in the forum where the subsidiary is subject to jurisdiction."). Such a rule
 13 would eviscerate the limited liability law that is a hallmark of separate corporate
 14 existence. As explained in the Motions to Dismiss (*and never disputed by Facebook*),
 15 the rule is that personal jurisdiction over the subsidiary does not confer jurisdiction
 16 over the parent.

17 "[W]here a parent and a subsidiary are separate and distinct corporate entities,
 18 the presence of one . . . in a forum state may not be attributed to the other." *Holland*
 19 *America Line Inc. v. Wartsila North America, Inc.*, 485 F.3d 450, 459 (9th Cir.
 20 2007); *see also Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1274 (6th Cir. 1998)
 21 ("[A] company does not purposefully avail itself merely by owning all or some of a
 22 corporation subject to jurisdiction"). For example, in *Kramer Motors, Inc. v. British*
 23 *Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980), the Ninth Circuit held that there
 24 was no jurisdiction in this forum over a British company even though it owned a U.S.
 25 subsidiary, had general executive control over that subsidiary, placed several of its
 26 own directors on the subsidiary's board, and approved the U.S. marketing proposal
 27 from which the plaintiff's injuries allegedly arose.

28 There are two exceptions to this rule. A subsidiary's contacts may be imputed

