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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACEBOOK, INC.,

Plaintiff,

v.

STUDIVZ LTD., , HOLTZBRINCK NETWORKS GmbH, HOLTZBRINCK VENTURES GmbH, and DOES 1-25,

Defendants.

Case No. 5:08-CV-03468 JF

Assigned To: Hon. Jeremy Fogel

REPLY IN SUPPORT OF MOTION OF DEFENDANTS FOR PROTECTIVE ORDER RE FACEBOOK'S THIRD PARTY SUBPOENAS

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

Complaint Filed: July 18, 2008

GREENBERG GLUSKER FIELDS CLAMAN & MACHTINGER LLP
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I. INTRODUCTION.

Facebook wrongly claims that this Court has no jurisdiction to hear this motion. Under Federal Rule of Civil Procedure 26, well-established case law, previous Orders of this Court and Facebook's own authority, this Court may do so.

In addition, Facebook ignores the stipulated time limits that the parties placed on discovery. Facebook admits that "to allow time to take discovery and resolve discovery disputes, Facebook and Defendants negotiated a proposed stipulation regarding the scheduling of Defendants' motions to dismiss and the filing of Facebook's opposition thereto," which the "Court entered" on November 4, 2008. (Dkt. 77 at 2:26-3:5; Dkt. 41, 42, 48 and 54). Although Facebook later got relief from the hearing date, it never asked the Court for, or got, relief from its stipulation to "take discovery" within the stipulated time. Indeed, before June 3, 2009, when it filed its most recent motion to enlarge time, Facebook ***never*** told the presiding Court about the Subpoenas or its intent to serve the Subpoenas.

Facebook also mischaracterizes Court Orders. Two Orders noted that Facebook's only basis to ask to continue the hearing was to get discovery that Facebook alleged Defendants "***were withholding***." (Dkt. 138 at 2:3-7; Dkt. 155 at 2:25-3:2). By definition, Defendants were ***not*** withholding anything related to the Subpoenas (or the second set of discovery), as they did not exist at that time.

Also, Judge Fogel ***never*** said "personal jurisdiction discovery is ***required***." (Opp. at 7:23-24) (emphasis added). The presiding Court lifted the stay and continued the hearing "out of prudence" until personal jurisdiction "fairly can be presented." (Dkt. 155 at 8:1-6). It left the decision of "required" discovery, if any, to the Magistrate Court. Judge Fogel also noted on March 30, 2009, before the Subpoenas were even served, that "Defendants have shown that discovery related to personal jurisdiction has grown complicated and burdensome." (Dkt. 138 at 3:3-4).

Finally, Facebook's claim that the Subpoenas are proper is meritless. The Subpoenas are a last minute, costly, overbroad, unduly burdensome diversion based

on speculation and suspicion. The Subpoenas (and Facebook's second set of discovery) clearly show that Facebook no longer pretends to seek jurisdictional discovery, but instead seeks discovery related solely to the merits. Black letter law, Facebook's authorities, this Court's Orders and the language of the Subpoenas show the Subpoenas are improper and should be quashed.

II. BACKGROUND.

Facebook's motion begins with 7 ½ pages of shrill accusations that Defendants have "reneged" on their "initial" and "second" agreements "to produce personal jurisdiction discovery." Facebook's accusations are false. Defendants' position has been clear and consistent from September 2008 until today. Defendants were always willing to produce discovery that fairly relates to the issues of personal jurisdiction and *forum non conveniens*. They agreed to Facebook's stipulation for the three months it requested to take such discovery. They agreed to move the motion to dismiss hearing date so that Facebook could seek to have its first motion to compel resolved. And, by the end of the stipulated time period, very few issues were left in dispute. It was ***after*** that point in time that Facebook first served its second set of discovery. It was long ***after*** that point in time that Facebook served the Subpoenas. With this new discovery, Facebook no longer even pretends to be interested in jurisdiction or forum.

A. The Discovery Dispute Has Existed Since September 2008.

Facebook first sought discovery via its September 9, 2008 Motion for Expedited Discovery. (Dkt. 11). In opposition, Defendants argued "Facebook's true motive was to take massive early discovery on issues that go well beyond personal jurisdiction." (Dkt. 22 at 11:20-14:4). Defendants argued that Facebook's discovery was improper because it was overbroad and was not limited to material disputed issues concerning personal jurisdiction. (*Id.*)

This dispute was expressly discussed in the parties' October 9, 2008 Rule 26(f) conference. The Joint Rule 26(f) Report notes that the parties ***disagreed*** about

the scope of discovery. Again, Defendants believed discovery should be limited to material disputed issues of personal jurisdiction. (Dkt. 50 at 1:4-3:1).

B. The Dispute Existed When Facebook Served Its First Set of Discovery

On October 14, 2008, before the motions to dismiss were filed, Facebook served written discovery that it claimed was related to personal jurisdiction. The parties then met and conferred about an appropriate hearing date for the motions to dismiss. Facebook wrote:

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

(Dkt. 77 at 2:26-3:5 (emphasis added); Dkt. 41, 48 and 54). Facebook's suggestion that Defendants initially agreed in October to produce documents in response to all of Facebook's discovery, only to then renege on that agreement later (Opp. at 3:4-4:7), contradicts its ***own*** description of the parties' stipulation.

C. Defendants Produced Most of What Facebook Requested.

Defendants timely answered the discovery on November 17, 2008. Facebook complained that the responses were inadequate. The parties then resolved most disputes. Facebook served 30 document demands and 23 interrogatories. StudiVZ answered 18 interrogatories (78%) and 22 document demands (73%) to Facebook's satisfaction. (Dkt. 94 at 5:5-11; Dkt. 91). Facebook ***never*** moved to compel on

those responses. The Holtzbrinck Defendants answered everything initially to Facebook's satisfaction. (Dkt. 95 at 2:4-21; Dkt. 97 at ¶¶ 27-28; Dkt. 92). As Facebook told the Court: "We have largely been able to work out every issue, and there remain, I believe, Your Honor, very few issues that would come back before this court . . . ." (Ex. A to Avalos Decl., Dkt. 78-2 [Reporter's Transcript] at 4:23-5:4). So, again, Facebooks' cries of obstructionism and "reneging" on deals to produce jurisdictional discovery (Opp. at 4:8-20) are wrong.

D. Facebook Canceled Every Deposition It Ever Noticed

In October 2008, Facebook served Rule 30(b)(6) deposition notices on each Defendant covering 18 topics each, but later withdrew them. Facebook implied that it might re-draft and re-serve them, but never did. (Dkt. 97 at ¶ 31). Facebook also said that it would seek the depositions of Dennis Bemmann and Ehssan Dariani, the two people that Facebook claims founded StudiVZ, through the Hague Evidence Convention. But, again, it never did. (*Id.*). Facebook then asked to depose Michael Brehm and Martin Weber, the main declarants in support of the motions to dismiss. Defendants agreed to produce them on the dates Facebook requested. Facebook noticed the depositions, but canceled them two days later. (Smith Decl. in Support of Defendants' Motion for Sanctions, Dkt. 84, at ¶¶ 2-20; and 84-2).

E. Facebook's First Motion to Continue

On January 23, 2009, Facebook filed its first motion to continue the hearing on the motions to dismiss. (Dkt. 77 at 1:25-2:3; Dkt. 77-2). Facebook did not say it needed time to propound new discovery; the entire focus was the ***then-existing*** discovery dispute. (Dkt. 77 at 1:4, 1:8-9, 1:24-25; 2:22-23, 4:9-10, 4:18-19).

This is also how the presiding Court read Facebook's request. The Court's March 30 Order states: "By a previous administrative motion, Facebook requested a continuance of the hearing on Defendants' motions on the ground that it required additional discovery that it claimed Defendants ***were*** withholding improperly." (Dkt. 138 at 2:3-7) (emphasis added). The Court's May 4 Order says: "In an earlier

administrative motion, Facebook requested a continuance of the hearing on Defendants' motions, claiming that it required additional discovery that Defendants improperly ***were*** withholding." (Dkt. 155 at 2:25-3:2). By definition, the discovery Defendants allegedly "were withholding" could only have been that which they had already been asked to produce.

On January 28, 2009, the Court issued its Order, finding that "Facebook has failed to demonstrate any reason to continue the February 13, 2009 hearing as to either defendant with respect to *forum non conveniens*, or as to Holtzbrinck with respect to personal jurisdiction." (Order, Dkt. 92, at 2:15-17). Facebook was only "permitted to file a supplemental opposition with respect to whether this Court has personal jurisdiction over StudiVZ in light of any newly discovered material." (*Id.* 2:20-22). The Court moved the hearing for "judicial economy" and "because a brief continuance is unlikely to prejudice any party." (*Id.* at 2:18-19).[1]

F. Facebook's Second Motion to Continue

Two months later, on March 20, 2009, Facebook filed its second motion to continue the hearing of the motions to dismiss. Facebook referenced no need for the Subpoenas or any other discovery. (Dkt. 122). Facebook argued "in light of the ***pending*** threshold discovery issue, Facebook respectfully requests that the Court hold in abeyance or take off calendar Defendants' Motions to Dismiss currently scheduled for April 10, 2009." (Dkt. 122 at 2:19-21) (emphasis added). In its proposed order, Facebook asked that the motions to dismiss be continued "until such time as the underlying discovery dispute ***currently pending*** before Magistrate Judge Lloyd is resolved." (Dkt. 122-2 at 1:6-8) (emphasis added). The only "pending" dispute was the motion to compel that was heard on March 3, 2009.

On March 30, 2009, the Court denied Facebook's motion, and granted StudiVZ's cross-motion for administrative relief, staying personal jurisdiction in

[1] The Court never said Facebook showed that it was entitled to a continuance of StudiVZ's motion to dismiss, even as to personal jurisdiction. The Court simply noted StudiVZ had not opposed that part of Facebook's motion.

order to hear *forum non conveniens* first. (Dkt. 138). The Court noted "Defendants have shown that discovery related to personal jurisdiction has grown complicated and burdensome." (*Id.* at 3:3-4).

G. The Hearing of the Motions to Dismiss

At the May 1, 2009 hearing of the motions to dismiss, the Court expressly raised with Facebook the subject of outstanding discovery. The Court noted that "you're in the midst of objections and motions and so forth." The Court twice asked Facebook how much time it needed to get personal jurisdiction "teed up" and "ready to be heard." (Dkt. 157 at 11:14-17, 12:11-12). Facebook downplayed the disputes, responding: "I think we are beyond that. . ." (i.e., beyond being in the "midst of objections and motions and so forth."). Facebook only referenced the existing dispute before the Magistrate Court, saying that jurisdiction could be ready "relatively quick if Defendants comply with the discovery issues." (*Id*. at 11:16 - 13:2). It never mentioned the Subpoenas or the second set of discovery.

On May 4, 2009, the Court issued an Order stating that it was "inclined to dismiss" the action on *forum non conveniens* grounds, but deferred the final decision until the personal jurisdiction issues could be "fairly presented." The Court set a new hearing date for July 10, 2009 and lifted the stay. (Dkt. 155).

The Court did ***not*** find that ***any*** further jurisdictional discovery was "required" as Facebook presumptuously contends. (Opp. at 7:23-24). Nor did the Court "invite[] Facebook to take and produce personal jurisdiction discovery that might meaningfully inform the Court's *forum non conveniens* analysis as well as its jurisdictional analysis." (Opp. at 9:27-10:4). ***Nowhere*** does Facebook cite to ***anything*** in the May 4 Order that "invites" Facebook to do that.[2]

[2] Judge Fogel's complete sentence on the issue is instructive. It says: "***[t]he efficiency considerations raised by Defendants are legitimate***, but it is possible, as Facebook has suggested, that the personal jurisdiction inquiry meaningfully will inform the Court's ultimate decision with respect to *forum non conveniens*. Out of prudence, the Court will defer its ruling on *forum non conveniens* until the issue of personal jurisdiction fairly can be presented." (Dkt. 155 at 7:21-8:2) (emphasis added). Defendants' efficiency considerations were legitimate even when the only discovery being considered was the four categories of materials in Facebook's motion to compel. Facebook's scorched earth, merits-based Subpoenas make things much worse, and to scant purpose. Given their great overbreadth and focus on the merits, they are not necessary to "fairly" present the jurisdiction issue, and are not designed to do so.

On May 8, 2009, Facebook served the Subpoenas. On May 19, 2009, Defendants moved for a protective order under Rule 26, ***not*** Rule 45. (Dkt. 159 at i:12).

III. ARGUMENT.

A. This Court May Issue the Requested Protective Order.

Rule 26(c) states that a protective order may be sought in the court where the underlying action is pending "in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Federal Rule of Civil Procedure 45(c) does not change that. The Advisory Committee Notes to Rule 45 show that when Rule 45(c) was added in 1991, it was "not intended to diminish rights conferred by Rules 26-37 or any other authority." Fed. R. Civ. P. 45, Advisory C'ttee Notes, 1991 Amendment, Subdivision (c); *see also Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 434 (M.D. N.C. 2001) (granting motion for protective order under Rule 26(c); although Rule 45(c) directs the court which issued the subpoena to rule on motions to quash, this "rule does not alter the broader concept that the district court in which an action is pending has the right and responsibility to control the broad outline of discovery.").

In *Wells v. GC Services Ltd. Partnership*, 2007 U.S. Dist. LEXIS 29447, Case No. C06-03511 RMW HRL (N.D. Cal. Apr. 10, 2007), this Court faced the same issue. There, defendant served seven nonparty subpoenas through district courts outside of the Northern District of California. *Id*. at *1. Plaintiff moved to quash the subpoenas. *Id*. This Court decided that "***this court could properly address a motion for a protective order***, ***and this court has the right to define the scope of discovery***. Federal Rule of Civil Procedure 26 allows 'the court in which the action is pending' to make 'any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense….Therefore, the court deems plaintiff's motion to be a motion for a protective order against defendant ... and addresses the matter on its merits." *Id*. at *2 (emphasis added). Ultimately,

this Court ordered the defendant to "withdraw all subpoenas served on [the] creditors" and stated that defendant could later issue new subpoenas complying with the proper scope of discovery as defined by this Court. *Id*. (citations omitted). This Court can address, and decide, the issues raised in defendants' motion.[3]

Moreover, a prior ruling of this Court in another Facebook case (involving the same counsel that represents Facebook here) supports Defendants' right to bring the instant motion. In a case brought by social networking website ConnectU against Facebook and Facebook founder Mark Zuckerberg for stealing ConnectU's intellectual property, ConnectU issued four nonparty subpoenas from the Northern District of California and moved to compel as to each (N.D. Cal. Case Nos. C07-80055-MISC RMW (HRL) -- C07-800585-MISC RMW (HRL)). Case No. C07-80055-MISC, Dkt. 15 at 1 (April 19, 2007 "Interim Order on Plaintiff's Motions to Compel Discovery from Nonparties"). The subpoenas concerned the underlying lawsuit *ConnectU LLC v. Zuckerberg, et al.*, Case No. C07-10593 DPW, pending in the District of Massachusetts. *Id*. Because motions to compel were pending in the underlying Massachusetts case, "this court STAY[ED] the nonparty subpoenas and administratively terminate[d] the associated discovery motions. Once the Massachusetts court rules on the related discovery issues, plaintiff may renotice its four discovery motions before this court on the normal law and motion calendar." *Id*. at 2:10-13. This Court added that:

> "Parenthetically, this court is of the opinion that the Massachusetts District Court, with its greater familiarity with the core factual and legal issues in the underlying case, would likely be a better forum to rule on the allowable scope of the discovery from the four nonparties located in this District. That is particularly so where, apparently, plaintiff is looking for some of the same discovery from the defendants

[3] *Keithley v. Homestore.com, Inc.*, 2006 U.S. Dist. LEXIS 42101, Case No. C-03-04447 MJJ (EDL) at *4-*5 (N.D. Cal. June 12, 2006), cited by Facebook (Opp. 8:21, 9:2), is not contrary. There, the court addressed neither Rule 26 nor its inherent power to define the scope of discovery.

> themselves as it is from the four nonparties. It is this court's belief that, if they choose to submit to the jurisdiction of the Massachusetts court, the four nonparties could move there for a protective order under Federal Rule of Civil Procedure 26(c) and in that manner obtain a ruling on the allowable scope of plaintiff's discovery from them."

Id. at 2:14-21.

Accordingly, this Court may hear Defendants' motion and, as discussed herein and in the motion, should issue the requested protective order.

B. Facebook's Authorities Confirm That This Court May Grant the Requested Relief.

Facebook's own authorities show that this Court may grant the requested relief. *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318 (Fed. Cir. 1990) (Opp. at 11:7-8) is particularly instructive.

There, the plaintiff (Micro Motion) in a California district court case filed an ancillary proceeding to compel damages discovery from a New Jersey nonparty ("K-Flow") on which Micro Motion had served a subpoena through the U.S. District Court for the District of New Jersey. *Id*. at 1319-1320. The ancillary court denied most of a motion to quash by K-Flow, finding "Micro Motion need only show that the requested information sought 'somehow relates to its pending California action.'" *Id*. at 1320, 1321.

The Federal Circuit reversed, ruling "[w]e conclude that Micro Motion has established no right under the Federal Rules of Civil Procedure to the discovery it requested and hold that K-Flow's motion to quash should have been granted in its entirety." *Id*. at 1320. Notably, the Federal Circuit said that "***[t]he California court*** did not rule on whether any of Micro Motion's proposed theories were too tenuous or too burdensome on court proceedings to be tried. ***Unquestionably it [i.e. the California court] is in the best position to determine*** whether Micro Motion's damages theories are viable." *Id*. (emphasis added). The Federal Circuit found that

"[w]hile we could remand for the New Jersey court to consider remitting the parties ***to the California court*** at Micro Motion's expense, it is unnecessary to do so"; and ordered that the entire motion be granted. *Id*. (emphasis added).

As in *Micro Motion*, this Court - which presides over the underlying action - "is in the best position to determine" the scope of discovery. Fed.R.Civ.P. 26(c).

C. Facebook's Nonparty Discovery is *Not* "Narrowly Tailored".

Facebook's claim that the Subpoenas are "narrowly tailored" is absolutely false; rather, they are part of a scorched earth plan to get merits discovery, based on mere suspicion and speculation. The Subpoenas seek, *inter alia*:

- "All documents relating to StudiVZ or the StudiVZ websites."
- "All documents relating to Facebook and the Facebook websites."
- "All documents relating to similarities between the Facebook website and the StudiVZ websites."
- "All communications between you and StudiVZ Ltd., Holtzbrinck Ventures GmbH, Holtzbrinck Networks GmbH, Verlagsgruppe Georg von Holtzbrinck and/or any other entities or persons reasonably related to StudiVZ or the StudiVZ websites."
- "All documents relating to any litigations or lawsuits, whether pending, ongoing, or otherwise, between Facebook, StudiVZ, and/or the other Defendants to this matter."
- "All documents and/or communications between you and any person or persons employed by, representing, or otherwise associated with StudiVZ Ltd., Holtzbrinck Ventures GmbH, Holtzbrinck Networks GmbH, Verlagsgruppe Georg von Holtzbrinck and/or any other entity or persons reasonably related to StudiVZ or the StudiVZ websites whether currently or previously so employed."

(Dkt. 160-1). These demands are accompanied by wildly overbroad "Definitions and Instructions" that make their scope infinite and indiscernible.

This discovery is not tailored to jurisdiction or *forum non conveniens*. How does it comply with Facebook's burden to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena"? FRCP 45(c)(1).

Facebook cites *Micro Motion* for the notion that "discovery 'is allowed to flesh out a pattern of facts already known to a party to an issue necessarily in the case.'" (Opp. at 11:6-8). But Facebook hides what came next: "At the other extreme, requested information is not relevant to 'subject matter involved' in the pending action ***if the inquiry is based on the party's mere suspicion or speculation***"; the court also said that Rule 26(b)(1) "does not justify wholly speculative discovery." 894 F.2d at 1326 & n.7. It further stated "[a] bare allegation of wrongdoing ... is not a fair reason for requiring a defendant to undertake financial burdens and risks to further a plaintiff's case…. The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery,* not to find out if it has any basis for a claim…. That the discovery might uncover evidence showing that a plaintiff has a legitimate claim does not justify the discovery request." *Id*. at 1327 (emphasis in original; citations omitted). The Federal Circuit added "a litigant may not engage in merely speculative inquiries in the guise of relevant discovery" and go "unmoored and trolling" on a fishing expedition. *Id*. at 1328.

That is what Facebook is doing. Facebook bases its Subpoenas on mere suspicion and speculation. Facebook has no idea whether its Subpoenas will turn up anything of use on personal jurisdiction or *forum non conveniens*.

For example, Facebook says that the ten nonparties are "likely to possess information regarding Defendants' California and U.S.-based contacts" and that "[t]he former employers (*i.e*. Spreadshirt and Xilinx), who hired StudiVZ's founders at precisely the time that they are alleged to have begun pirating Facebook's intellectual property, are also likely to possess emails and other documents evidencing the beginning of StudiVZ's counterfeiting efforts." (Opp. at 7-11). ***Nowhere***, though, does Facebook say why these things are "likely."

Facebook states that it "learned" that StudiVZ founders Dariani and Bemmann "hatched [a] plan to copy Facebook while working" as interns in the U.S. But it gives no support for that claim, other than a cite to its own, unverified first amended complaint. (Opp. at 12:6-8) (*citing* Dkt. 140). Facebook states that it "believes" that they "developed their plan" while they were interns "through email communications on Spreadshirt email accounts." (Opp. at 12:8-9). But, again, nowhere does Facebook say on what this belief is based.

Facebook says that the outsourcing firm Intetics, which sends its work to Ukrainian companies (May 4, 2009 Order, Dkt. 155, at 5:16-18), "is believed to be at least partly in charge of scripting StudiVZ's infringing source code" and "likely" has data about "possible misappropriation of Facebook's source code." (Opp. at 12:20-23). Again, on what is this speculation and suspicion based? How can one "likely" have information about something that is merely "possible"? As to Xilinx and the two Xilinx employees subpoenaed, Facebook speculates that they "provided tutorship and programming resources to Mr. Bemmann and it is likely that they possess information relevant to Facebook's jurisdictional arguments." Based on what? And what is the basis for Facebook's speculation that a former Duke University undergraduate intern and a former employee who worked at StudiVZ for a limited time have anything relevant to jurisdiction and forum? (Opp. at 13:1-5).

This is why courts do not allow discovery, or strictly limit its scope, unless the plaintiff first proves a *prima facie* case that personal jurisdiction exists. *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000) ("Foreign nationals should not be subjected to extensive discovery in order to determine whether personal jurisdiction over them exists."); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185-86 (2d Cir. 1998) (denying discovery where the plaintiff "did not establish a prima facie case that the district court had jurisdiction"); *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 402-03 (4th Cir. 2003); *Mitan v. Feeney*, 497 F.Supp.2d 1113,

1118 (C.D. Cal. 2007) ("In order to obtain discovery on jurisdictional facts, the plaintiff must at least make a 'colorable' showing that the Court can exercise personal jurisdiction over the defendant."); *Protrade Sports, Inc. v. Nextrade Holdings, Inc.*, 2006 U.S. Dist. LEXIS 6631, Case No. C05-04039 MJJ at *9 (N.D. Cal. Feb. 2, 2006) (a plaintiff is not entitled to early discovery concerning personal jurisdiction unless it first makes a "colorable" showing of personal jurisdiction).[4]

D. Facebook Was Not Permitted to Serve the Subpoenas

The motion and Facts above show Facebook was not allowed to use the extra time from the continuance of the motions to dismiss to propound new discovery.

Facebook admits that it stipulated to take the discovery related to the motions to dismiss and resolve the disputes related thereto by January 16, 2009. (Dkt. 77 at 2:26-3:5). Facebook never asked Defendants to modify or amend that stipulation. And, Facebook's January 23 motion to enlarge time made no such request to the Court; as of then, no other discovery existed, and Facebook mentioned no need for new discovery. Facebook simply said it wanted further responses to earlier discovery. (Dkt. 77 at 1:4, 1:8-9, 1:24-25; 2:22-23, 4:9-10, 4:18-19).

The January 28 Order neither relieved Facebook from its prior stipulation, nor allowed Facebook to serve new discovery. The "discovery" addressed in the January 28 Order could only be the discovery that Facebook had already served. The Court would not have known to consider other discovery because Facebook never mentioned it. That is why Local Rule 6-3 requires the movant to state the bases for its motion "with particularity." As the only reason stated was the need to resolve

[4] Facebook's other cases either support defendants or are distinguishable. Facebook cites *Utstarcom, Inc. v. Starent Networks Corp.*, 2005 WL 1397507, Case No. C-04-1122PVT (N.D. Cal. June 14, 2005) for the notion that the discovery test is "intentionally broad," but fails to mention the next sentence, which says "[d]iscovery, however, is not unlimited. The Court may 'make any order which justice requires to protect a party ... from annoyance, embarrassment, oppression, or undue burden or expense, including … that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters. Fed.R.Civ.P. 26(c)(4)." The Court granted the protective order on all deposition questions except one. *Id.* at 1-2. *See also Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) (party witness deposition ordered to proceed; unlike here, case did not involve overbroad and unduly burdensome nonparty discovery based only on speculation and suspicion); *Lofton v. Bank of America Corp.*, 2008 U.S. Dist. LEXIS 41005, Case No. C 07-05892 SI (N.D. Cal. May 12, 2008) (cited by Facebook for proposition that "party seeking to prevent discovery must make more than a 'conclusory statement that discovery would cause undue burden and expense'" (Opp. at 11:17-18); defendants respectfully submit that they have done so here).

disputes about pre-existing discovery, Facebook should be held to that basis alone.

The Court thought Facebook wanted more time ***only*** to have the discovery dispute on the first set of discovery heard. The Court's March 30 Order states: "By a previous administrative motion, Facebook requested a continuance of the hearing on Defendants' motions on the ground that it required additional discovery that it claimed Defendants ***were*** withholding improperly." (Dkt. 138 at 2:3-7) (emphasis added). In its May 4 Order, the Court wrote: "In an earlier administrative motion, Facebook requested a continuance of the hearing on Defendants' motions, claiming that it required additional discovery that Defendants improperly ***were*** withholding." (Dkt. 155 at 2:25-3:2). The only discovery Defendants "were withholding" as of January 23, 2009 was discovery that had been served by that date.

In sum, the Subpoenas violate the parties' stipulation, and were not a basis for Facebook's request to continue the hearing date or the Court's Order continuing the hearing date. The motion should be granted.

E. Facebook's Remaining Arguments are Meritless.

1. Facebook Bears the Burden of Justifying the Subpoenas.

It is Facebook's burden to "take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena". FRCP 45(c)(1). As shown above, Facebook did not meet this burden.

As also shown, Facebook's case, *Micro Motion*, says "Rule 26(g) specifically requires that the party or his attorney seeking discovery must *certify* that he has made a 'reasonable inquiry' that the request is warranted. This 'reasonable inquiry' is also imposed by Rule 11." 894 F.2d at 1322, 1323 (emphasis in original; citations omitted). Facebook did not do so; the Subpoenas are grossly overbroad and burdensome, merits based, and improperly based on speculation and suspicion.[5]

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[5] Facebook tries to impose a "heavy burden" on defendants on this motion, but its cases do not concern a protective order directed at improper nonparty subpoenas and so are inapplicable. (Opp. at 11:13-16). Rather, the burdens lie with Facebook.

2. A Protective Order Cannot Save Facebook's Subpoenas.

Facebook claims a protective order can save its Subpoenas. But Facebook's own case, *Micro Motion*, aptly states "a protective order which limits to whom information may be disclosed ***does not eliminate*** the requirements of relevance and need for the information." *Micro Motion*, 894 F.2d at 1325 (emphasis added). Indeed, "[i]ts purpose … is to prevent harm by limiting disclosure of *relevant* and *necessary* information." *Id*. (emphasis in original). In other words, protective orders cannot somehow make non-discoverable information discoverable.

3. Facebook Violated Federal Rule of Civil Procedure 45(b)(1).

Lastly, Facebook's subpoenas are invalid because they did not comply with FRCP 45(b)(1). Facebook does not try to argue that it complied with that rule; instead, it says that it mailed the subpoenas to defendants at 3:30 p.m. on Friday afternoon, May 8 -- ensuring that defense counsel would not see them until the next week -- while the subpoenas had apparently already been sent out for personal service on the nonparties, with the first personal service on a nonparty effected at 4:30 p.m. that same day. That does not meet the requirements of Rule 45(b)(1).

IV. CONCLUSION.

Defendants respectfully ask that the Court issue the requested protective order.

DATED: June 9, 2009

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