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 11 FACEBOOK, INC.

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

16 FACEBOOK, INC.,

17 Plaintiff,

18 v.

19 STUDIVZ LTD., HOTLZBRINCK
 20 NETWORKS GmbH, HOLTZBRINCK
 VENTURES GmbH, DENNIS BEMMANN,
 21 MICHAEL BREHM, and DOES 1-25,

22 Defendants.

Case No. 5:08-cv-03468 JF

**FACEBOOK INC.'S REPLY IN
 SUPPORT OF MOTION TO
 COMPEL FURTHER RESPONSES
 RE: SECOND ROUND OF
 DISCOVERY REQUESTS**

Hearing: June 19, 2009

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1 **I. INTRODUCTION**

2 Defendants' oppositions to Facebook's second motion to compel are unavailing.
3 Defendants resuscitate eight month's worth of discovery objections, mixing and matching
4 disparate theories, facts and legal standards in a blatant attempt to make Facebook's
5 straightforward motion seem overcomplicated. In a further attempt to confuse and distract,
6 Defendants even invent new terms to a scheduling stipulation the parties entered into eight
7 months ago. Contrary to Defendants' arguments, the Court's role is not to micro-manage this
8 litigation or to divine the import and meaning of prior meet and confer exchanges, briefs, oral
9 arguments, and orders. The Court should decline Defendants' invitation to wade unnecessarily
10 into the quagmire and instead resolve this matter by applying straightforward and well-
11 established standards governing the production of discovery.

12 Moreover, most of Defendants' arguments are moot in light of Judge Fogel's May 4, 2009
13 Order in which he lifted the stay of personal jurisdiction discovery and invited Facebook to
14 introduce new evidence in its upcoming supplemental opposition brief. Despite Defendants'
15 claims to the contrary, Judge Fogel was well aware of Facebook's second round of discovery at
16 issue in the present motion. Indeed, Defendants themselves raised this discovery in their March
17 19, 2009 motion to stay, which was the basis for Judge Fogel's Order staying discovery. *See*
18 Docket Nos. 119 and 120. And Facebook addressed the issue in its March 24, 2009 opposition to
19 the motion. Therefore, when Judge Fogel lifted the stay, it necessarily applied to Facebook's first
20 and second rounds of discovery. Therefore, we are left with a simple inquiry: will responses to
21 Facebook's discovery requests "inform" Facebook's jurisdictional theories. Facebook
22 respectfully submits that it easily clears this broad standard and that Defendants should be
23 compelled forthwith to produce discovery responsive to both the first and second rounds of
24 discovery requests.

25 ///

26 ///

27 ///

28 ///

1 **II. ARGUMENT**

2 **A. Facebook Is Entitled to Discovery.**

3 **1. Judge Fogel Had Full Knowledge Of Facebook's Second Round of**
 4 **Discovery Prior To The May 1, 2009 Hearing on Defendants' Motion**
 5 **to Dismiss For *Forum Non Conveniens*.**

6 At the core of Defendants' oppositions is the notion that Facebook somehow intentionally
 7 misled Judge Fogel regarding its second round of discovery requests. They repeatedly speculate
 8 that Facebook purposefully kept its intention to serve the discovery a secret and then repeated that
 9 clandestine pattern with its secret motion to compel. "Facebook," Defendants argue, "was clearly
 10 lying in wait." StudiVZ's Opposition to Second Motion to Compel ("SVZ Opp.") at 10:13.
 11 Defendants conclude that because Facebook never apprised Judge Fogel of these hidden requests,
 12 he "never gave permission to serve new discovery." *Id.* at 10:7-8.

13 Contrary to Defendants' specious allegations, Judge Fogel had full knowledge of
 14 Facebook's second round of discovery as early as March 19, 2009. Judge Fogel gained that
 15 knowledge because Defendants themselves briefed the issue to him. In their March 19, 2009
 16 Motion to Stay the Personal Jurisdiction Portion of Their Motions to Dismiss, Defendants wrote:

17 Also, on February 2, 2009, Facebook served new sets of
 18 jurisdiction-related discovery on all Defendants. Defendants
 19 believe that this new discovery violates the Court's January 28,
 20 2009 Order and have, therefore, objected to it. That will inevitably
 21 cause more motion practice.

22 Dkt. No. 119 at 3:18-20. In his supporting declaration, Defense counsel Stephen S. Smith
 23 devoted a full four paragraphs alerting Judge Fogel of Facebook's second round of discovery.
 24 Dkt. 120 ¶¶ 6 – 9. In his declaration, Mr. Smith went into granular detail regarding the second
 25 round of discovery, listing each individual set as well as providing Judge Fogel with a full
 26 argument as to why that discovery was objectionable. *Id.*

27 ¶8. Therefore, in granting in part Facebook's request for a
 28 continuance on the hearing for the Motions to Dismiss, the Court
 made its decision based upon the then-pending discovery requests
 and without any knowledge of Facebook's intent to serve
 Defendants with additional jurisdictional discovery. Likewise,
 StudiVZ did not oppose Facebook's request to continue the hearing
 on the personal jurisdiction portion of StudiVZ's Motion to Dismiss
 based upon the existing discovery, and the disputes related thereto,
 and with no knowledge of Facebook's intent to serve Defendants

1 with additional jurisdictional discovery.

2 ¶9. Had StudiVZ been aware of Facebook’s plan to propound
3 six additional sets of discovery (including more document demands
4 to StudiVZ than had been propounded before) two days after the
5 Court issued its ruling on Facebook’s Motion to Enlarge Time,
6 StudiVZ would have opposed Facebook’s request to continue even
7 the personal jurisdiction portion of StudiVZ’s Motion to Dismiss.

8 *Id.*

9 In its Opposition to Defendants’ Motion, Facebook alerted Judge Fogel: “Defendants
10 point to the supposedly deepening discovery dispute between the parties, but whatever deepening
11 has occurred is of their own making . . . the new round of discovery did not expand the scope of
12 discovery – it was a direct response to Defendants’ refusal to comply with discovery and repeated
13 objections to the previous discovery requests. Facebook still seeks essentially the same
14 categories of discovery.” Dkt. No. 124 at 2:22 – 23; 3:4-6.

15 This record is indisputable. Far from being ignorant of the second round of discovery, as
16 Defendants outrageously claim, Judge Fogel was fully briefed on the subject. Indeed, Facebook’s
17 second round of discovery seems to have been *the impetus* behind the stay of personal jurisdiction
18 discovery ordered by Judge Fogel on March 30, 2009. Dkt. No. 138. In that Order, Judge Fogel
19 observed: “In the instance case, Defendants have shown that discovery related to personal
20 jurisdiction has grown complicated and burdensome.” *Id.* at 3:3-4. This is a direct reference to
21 the disputes arising from both rounds of Facebook discovery.¹

22 Accordingly, Judge Fogel’s May 4, 2009 Order lifting the stay of personal jurisdiction
23 discovery was issued with full knowledge of both rounds of discovery. In light of this
24 unambiguous evidence, Facebook respectfully submits that Defendants’ objections to Facebook’s
25 motion to compel should be denied and that Facebook be entitled to recovery of costs and fees
26 associated with combating Defendants’ unethical delay tactics.

27 ///

28 ///

¹ In light of their own unambiguous efforts to mislead the Court by failing to mention that Defendants themselves raised the issue of the second round of discovery, Defendants’ attempts to attack the credibility of Facebook’s counsel are particularly egregious.

1 2. **To Suit Their Specious Arguments, Defendants Invent a New Term**
 2 **For The October 23, 2008 Joint Stipulation.**

3 Adding further insult to injury, Defendants' next argument invents a stipulation term to
 4 suit there improper means. Defendants argue that "Facebook was not permitted to use the extra
 5 time created by the continuance of the motion to dismiss to propound new discovery." SVZ Opp.
 6 At 9:11-12; Holtzbrinck Defendants' Opposition to Second Motion to Compel ("Holtz. Opp.") at
 7 7:25-26. For support, Defendants write: "Facebook stipulated to 'take discovery' related to the
 8 motions to dismiss on a particular schedule." SVZ Opp. at 9:13-14, *citing*, Dkt. No. 77 at 2:26-
 9 3:5 (emphasis added). A reader presented with this sentence might reasonably assume that "Dkt.
 10 No. 77" refers to the October 23, 2008 Joint Stipulation entered into by the parties and that the
 11 quotation "take discovery" is a direct quote from that stipulation. However, neither of these
 12 assumptions would be correct. In fact, the phrase "take discovery" does not appear in the parties'
 13 Joint Stipulation and "Dkt. No. 77" refers not to the stipulation but to a January 23, 2009 motion
 14 to enlarge time.

15 In actuality, the October 23 Stipulation contained only two terms, neither one of which
 16 features the "take discovery" language Defendants now wishfully seek to insert:

17 1. On or before Friday, January 16, 2009, Facebook will file and
 18 serve its Oppositions to Defendants' Motions to Dismiss for Lack
 19 of Personal Jurisdiction Or, In the Alternative, For *Forum Non*
 20 *Conveniens* which were e-filed with the Court on October 22, 2008;
 21 and

22 2. On or before Friday, January 30, 2009, Defendants will file their
 23 reply papers to Facebook's Oppositions to Defendants' motions.

24 Dkt. No. 48. The idea, of course, was that the parties would be able to complete personal
 25 jurisdiction discovery in the allotted three months. However, after Defendants reneged on their
 26 agreements and began to sabotage the discovery process, (*see* Dkt. No. 161 for a fuller factual
 27 history), it became clear that discovery would not be completed by January 16. Facebook
 28 accordingly sought and, on January 28, 2009, received permission from Judge Fogel "to file a
 supplemental opposition with respect to whether this Court has personal jurisdiction over
 StudiVZ in light of any newly discovered material." Dkt. No. 92. (emphasis added) Facebook

1 never requested a continuance only to complete the first round discovery that had already been
2 served, nor did Judge Fogel ever so order.

3 Other than their invented stipulation language, Defendants are unable to point to any
4 language in any order that would support the extreme position that Facebook was entitled to just
5 one round of jurisdictional discovery. Nor are Defendants able to point to any supporting case
6 law. This is unsurprising, as jurisdictional discovery is intentionally broad and intended to allow
7 a plaintiff to access evidence necessary to oppose Defendants' jurisdictional challenges. *See*
8 *Gibson v. Chrysler Corp.*, 877 F.2d 793, 801 (9th Cir. 1986).

9 **3. The Court Has Already Discounted Defendants' *Prima Facie***
10 **Objections.**

11 StudiVZ spends nearly a third of its brief arguing that Facebook is not entitled to personal
12 jurisdiction discovery because it has failed to make a *prima facie* showing of personal
13 jurisdiction. SVZ Opp. 15:5-19:25. It is certainly cause for concern (if not even more sanctions)
14 that after eight months of wrangling over *what* discovery Facebook is entitled to recover,
15 Defendants would still argue over *whether* Facebook is entitled to the discovery at all. Whatever
16 good faith dispute Defendants may have had for raising this objection early in the litigation has
17 long since extinguished. The argument is meritless. It is unsupported by relevant law. *See, e.g.*,
18 *Orchid Biosciences, Inc. v. St. Louis University*, 198 F.R.D. 670, 673 (S.D. Cal. 2001) (“[i]t
19 would . . . be counterintuitive to require a plaintiff, prior to conducting discovery, to meet the
20 same burden that would be required in order to defeat a motion to dismiss”).² It is contrary to
21 Defense counsel's unambiguous promises to Facebook's counsel regarding the imminent

22 _____
23 ² The logic of the rule is obvious. In order to defeat a motion to dismiss for lack of personal
24 jurisdiction, a plaintiff is required to make a *prima facie* showing of personal jurisdiction.
25 *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). The purpose of personal jurisdiction
26 discovery is to permit a plaintiff the opportunity to obtain evidence sufficient to make that
27 showing. *See, e.g.*, *Gibson v. Chrysler Corp.*, 261 F.3d 927, 948 (9th Cir. 2001) (personal
28 jurisdiction discovery is “available in federal court to establish the presence of personal
jurisdiction in that court); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801
(9th Cir. 1986) (“[w]here pertinent facts bearing on the question of jurisdiction are in dispute,
discovery should be allowed”). If Defendants' renewed objection were correct, no personal
jurisdiction discovery would ever issue as the plaintiff meeting the standard to obtain it would
have already made a showing sufficient to defeat the motion to dismiss itself. This illogical
conclusion is not the law.

1 production of discovery. *See, e.g.*, Dkt. No. 12 ¶ 15-17. And, more importantly, it is contrary to
2 Defense counsel’s clear and repeated representations to this Court that he understood that
3 Facebook is entitled to and should get jurisdictional discovery that also goes to the merits of the
4 case. *See, e.g.*, Dkt. No. 78; Ex. A at 3:14-12:14 (defense counsel Stephen S. Smith clarifying
5 that his motion for protective order was not intended to block personal jurisdiction discovery that
6 is intertwined with merits); Dkt. No. 162; Ex. A at 34:13-14 (Defense counsel stating that he was
7 “quite willing to work with your Honor to get them something”); Dkt. No. 164, Ex. B at 17:19-24
8 (Defense counsel stating: “My proposal is that he – that access [categories of documents relating
9 to StudiVZ’s accessing of the Facebook website] is okay if it is for the purpose of copying the
10 design, look, feel, whatever other word we want to use, of Facebook’s own website, and as long
11 as it is limited to a fair group of people and a fair amount of time, meaning a particular period of
12 time”). Moreover, the “*prima facie* objection” has already been rejected by this Court, which has
13 indicated that it is struggling not with whether Facebook is entitled to personal jurisdiction
14 discovery but what the scope of that discovery should be. *See* Dkt. No. 164, Ex. B at 17:15-18
15 (Excerpt from the March 3, 2009 hearing transcript where the Court observed, “I’m not inclined
16 to give him [Facebook’s counsel] nothing, and I’m struggling to define a something in a way
17 that’s reasonable”); *see also* Dkt. No. 155 at 8:1-10 (May 4, 2009 Judge Fogel Order lifting the
18 stay of personal jurisdiction discovery so as to allow the “fair presentation” of the jurisdictional
19 issues in this case).

20 **4. The *Calder* “Effects Test” Applies.**

21 With a similar intention of over-complicating Facebook’s motion, Defendants next build
22 on their *prima facie* objection, putting forth a series of unsupported arguments that conflate,
23 confuse, or misstate at least three different legal concepts.

24 First, Defendants argue that Facebook cannot make a *prima facie* argument of personal
25 jurisdiction because “Facebook has never made any attempt to show that it suffered the brunt of
26 alleged harm in California or the United States because it is undisputed that it did not.” SVZ
27
28

1 Opp. at 18:5-7.³ For starters, Defendants’ “focus on the brunt of the harm,” SVZ Opp. at 18:22,
2 fn 9, is misplaced. This Circuit does not employ that test. *See Yahoo! Inc. v. La Ligue Contre Le*
3 *Racisme et L’Antisemitisme*, 433 F.3d 1199, 1207 (9th Cir. 2006). In *Yahoo!*, the Ninth Circuit
4 held:

5 We take this opportunity to clarify our law and to state that the
6 “brunt” of the harm need not be suffered in the forum state. If a
7 jurisdictionally sufficient amount of harm is suffered in the forum
8 state, it does not matter that even more harm might have been
9 suffered in another state. In so stating, we are following *Keeton*,
10 [*Keeton v. Hustler Magazine*, 465 U.S. 770 (1984)] decided on the
11 same day as *Calder*, in which the Court sustained the exercise of
12 personal jurisdiction in New Hampshire even though “it is
13 undoubtedly true that the bulk of the harm done to petitioner
14 occurred outside New Hampshire.

15 *Id.*, citing, *Keeton*, 465 U.S. at 780. Thus, Defendants’ argument that *Calder* somehow does not
16 apply in this case because the harm caused to Facebook in Germany may outweigh the substantial
17 harm suffered by Facebook in California is meritless.

18 Second, it is hardly “undisputed” that Facebook did not suffer significant harm in
19 California. Nor is it true that that “Facebook has never made any attempt” to show that it suffered
20 significant harm here in its home forum. For instance, in its recent supplemental opposition to
21 Judge Fogel on the *forum non conveniens* issue, Facebook wrote that it had suffered harm here in
22 California “in the form of lost revenues and increased marketing and promotional costs because
23 of Defendants’ infringing copycat websites. [Further,] Defendants do business here and
24 consumer confusion likely has occurred in this forum.” Dkt. No. 145 at 4:9-18, *citing*,
25 *Panavision Int’l L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (although alleged
26 trademark violations occurred in cyberspace, harm was suffered at principal place of business in
27 California) (citing *Dakota Indus., Inc. v. Dakota Sportswear*, 946 F.2d 1384, 1388-89 (8th Cir.
28 1991) (finding that economic injury is suffered in forum where plaintiff resides); *see also*
Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244, 1248-49 (10th Cir. 2000)

³ This puzzling argument is made all the more so by the section’s title: “The *Calder v. Jones* ‘Effects Test’ Does Not Apply.” Although the heading states that the test does not apply, the body of the opposition (to the extent Facebook understands it) argues that the test does apply but that Facebook has not made the requisite showing to meet it.

1 (holding that out-of-state defendant's continued transmission of email over plaintiff's servers
2 cause injury to plaintiff in its home state even though all of the harmful activity occurred
3 elsewhere).

4 Third, in their baseless attempt to distinguish *Calder*, Defendants once again revive the
5 misguided "merits-based discovery" arguments that they unequivocally withdrew in open Court
6 on December 16, 2008. *See* Dkt. No. 78; Ex. A (transcript from December 16, 2008 hearing
7 where they withdraw their motion). In support of their *prima facie* objection, Defendants
8 complain that Facebook is seeking to conduct "discovery about all issues" in the case. SVZ Opp.
9 at 17:22-26.

10 This worn-out argument is nonsense. Facebook is not seeking "discovery about all issues
11 in a case." Facebook is not seeking discovery related to damages, confusion in the relevant
12 markets, performance and quality complaints by Defendants' customers, and a host of other
13 issues not related to the creation, design and development of the StudiVZ sites. As Facebook has
14 previously briefed, and Defendants conceded, the fact that jurisdictional discovery may also go
15 the merits of the dispute does not bar such discovery. *See* Dkt. No. 59. This Court has held that
16 merits-based discovery should not be denied when discovery on the merits "may inform"
17 plaintiff's opposition to a jurisdictional motion. *Id.* at 8:16-17, *quoting*, *Lofton v. Bank of*
18 *America Corp.*, 2008 U.S. Dist. LEXIS 41005, *4-5 (N.D. Cal., May 12, 2008) (Illston, J.).
19 Facebook is accordingly entitled to its requested discovery.

20 **5. Fielding v. Hubert Is Inapposite To The Current Facts.**

21 Defendants seek to liken this case to *Fielding v. Hubert Burda Media, Inc.*, 2004 WL
22 532714, Case No. Civ.A.3:03-CV-0872 (N.D. Tex. Feb. 11, 2004). In fact, Defendants claim that
23 "this case is identical in all relevant respects" to *Fielding*. That conclusion is grossly in error.

24 In *Fielding*, a former Swiss ambassador to Germany and his Texan wife sued a number of
25 German publishing companies for libel, intentional infliction of emotional distress, tortious
26 interference with prospective business relations and civil conspiracy. *Id.* at *1. The claims arose
27 out of Plaintiffs' allegations that the German companies "undertook a campaign to impugn the
28 reputations of Plaintiffs in Europe and the United States" by publishing magazine articles

1 detailing an alleged affair between the former Swiss ambassador and a European model. *Id.*
2 “[T]he articles were originally published by the German media” in Germany. *Id.* Afterwards,
3 “some of the allegations set forth in those stories were published in the United States via the
4 Associated Press, Dallas Morning News, and other domestic media.” *Id.* The Court found that
5 Texas was not the “geographic focus” of the complaint as “[t]he articles were published in
6 Germany, in German, and distributed almost exclusively to readers in Europe.”

7 Not only is *Fielding* not “identical in all relevant respects” to the instant case, it isn’t even
8 close. Facebook has alleged that Defendants committed **intentional torts** aimed at Facebook’s
9 computer servers located in California, knowing that Facebook was located in California and
10 knowing that Facebook would be harmed here. The *Fielding* defendants did nothing similar. In
11 fact, the *Fielding* court expressly observed that “Plaintiffs’ allegations of republication **do not**
12 **invoke an intentional tort**,” and cited to language from the *Calder* opinion “specifically noting”
13 that “mere untargeted negligence” did not amount to “intentional and allegedly tortious actions.”
14 *Id.*, citing, *Calder v. Jones*, 465 U.S. 783, 789 (1984).

15 On the other hand, courts have repeatedly confirmed that the type of conduct alleged by
16 Facebook constitutes a tort and that the harm from that tort is felt in Facebook’s home residence.
17 *See, e.g., Licciardello v. Lovelady*, 2008 U.S. App. LEXIS 21376, *20, Case No. 07-14086 (11th
18 Cir. October 10, 2008) (holding that the out-of-state Defendant’s unauthorized use of the
19 plaintiff’s trademark and misappropriation of his name and reputation for commercial gain
20 satisfied the *Calder* effects test); *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1321-22 (9th
21 Cir.1998) (affirming the exercise of jurisdiction in a trademark infringement action over a
22 nonresident defendant whose sole contact with the forum was his posting of plaintiff’s trademarks
23 on his internet website); *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244,
24 1248-49 (10th Cir. 2000) (holding that out-of-state defendant’s continued transmission of email
25 over plaintiff’s servers caused injury to plaintiff in its home state); *Peridyne Tech. Solutions, LLC*
26 *v. Matheson Fast Freight, Inc.*, 117 F. Supp. 2d 1366, 1371-73 (N.D. Ga. 2000) (exercising
27 jurisdiction over non-resident defendants who accessed plaintiff’s computer system over the
28 Internet in furtherance of their tortious activity); *Flowsolve Corp. v. Midwest Pipe Repair*, 2006

1 U.S. Dist. LEXIS 4315, *10, Case No. 3:05-cv-1357-N (N.D. Tex. 2006) (jurisdiction proper
2 over a “hacker” who accessed plaintiff’s servers, where the servers were related to plaintiff’s
3 claims). Thus, the trespass to Facebook’s California servers and the financial harm that Facebook
4 suffered in Palo Alto, California significantly distinguishes the current case from *Fielding*.

5 In addition, Defendants have directly entered the California market with their infringing
6 product. StudiVZ has admitted to having well over 11,000 income-generating users in California.
7 Dkt. No. 71; Ex. 2. The *Fielding* defendants sent fewer than 40 copies of their magazines to
8 Texas. *Id.* at *6. The *Fielding* magazines were written entirely in German and intended merely
9 for a German audience; the StudiVZ defendants now operate one of their primary websites in
10 English, also have sites in Spanish, and regularly enter into contracts with, correspond with, and
11 alter their source code to cater to thousands of registered users in California. Even if the StudiVZ
12 sites were entirely in German, the *Fielding* court noted that “there might be instances where an
13 article written in a foreign language is directed towards the State of Texas.” *Id.*

14 In sum, Defendants’ claim that this case is “identical in all relevant respects” to *Fielding*
15 is absurd in the extreme.

16 **B. The Second Round of Discovery Relates to Personal Jurisdiction.**

17 Defendants argue that “*most* of Facebook’s new discovery requests have nothing to do
18 with personal jurisdiction.” SVZ Opp. at 13:6-7 (emphasis in original).⁴ Consistent with their
19 pattern of substituting hyperbole for reasoned analysis, Defendants enumerate a number of
20 Facebook discovery requests that they argue are so unrelated to personal jurisdiction as to cross
21 “the line from aggressive advocacy to a violation of Rule 11.” *Id.* at 15:1-4. According to
22 Defendants, “[t]here is no conceivable argument that these requests are directed at personal
23 jurisdiction.” *Id.* at 15:1-4. Given that the majority of these requests deal with categories of
24 discovery that the Court was inclined to grant to Facebook at the March 3, 2009 hearing, the
25 Court would do well to look skeptically upon Defendants’ conclusions.

26
27 ⁴ By identifying the 22 discovery requests they feel do not relate to personal jurisdiction,
28 Defendants impliedly concede that they agree that the remaining requests do in fact relate to
personal jurisdiction.

1 For instance, a number of the requests that Defendants dismiss as outlandish in fact relate
2 to so-called “access” or “design” documents. Such documents, as discussed extensively at the
3 March 3 hearing before this Court, directly relate to StudiVZ’s tortious acts aimed at computer
4 servers located in California and that are likely to reveal that StudiVZ copied Facebook’s trade
5 dress and perhaps even its source code in violation of federal and state law. *See* RFP Nos. 42, 45-
6 47, 51-52, 58, 60-62; RFA Nos. 4, 21. Other allegedly sanctionable discovery requests are
7 tailored to uncover the truth about Defendants’ consumer contacts with California and the United
8 States as well as its business connections with U.S. investors or business partners. *See* RFP Nos.
9 43-44, 53, 57, 59; RFA Nos. 18-20. They clearly relate to Defendants’ contacts with, and
10 conduct in, California and the U.S., and, as such, are relevant to personal jurisdiction.

11 Request for Admission No. 16, which Defendants argue has no conceivable relation to the
12 Court’s personal jurisdiction analysis, reads: “Admit that users of StudiVZ are required to agree
13 to terms of use prior to receiving full access to the StudiVZ websites.” StudiVZ has admitted to
14 having over 11,000 registered users in California alone. Dkt. No. 71; Ex. 2. Facebook believes
15 that each and every one of these users was first required to enter into a contract with StudiVZ
16 prior gaining full access to the site. Accordingly, not only is the connection between this request
17 and personal jurisdiction analysis “conceivable,” it is self-evident.

18 In sum, there is no doubt that Facebook’s requests “may inform” its jurisdictional
19 oppositions. Accordingly, Defendants’ objections as to relevance should be overruled.

20 **C. Facebook Has Not Waived Its Right to Compel Discovery.**

21 Facebook vigorously denies that it ever misled the Court, consciously or otherwise,
22 concerning the second round of discovery. That Facebook chose not to burden the Court with a
23 second discovery dispute while the first was pending does not support Defendants’ inflammatory
24 charges of a vast conspiracy to pull the wool over the Court’s eyes. Indeed, Defendants’ logic
25 would implicate them in the conspiracy as well, as they never mentioned the then already-pending
26 second round of discovery either at the March 3 hearing on Facebook’s first motion to compel or
27 in the briefing leading up to that hearing. Moreover, as discussed above, Judge Fogel was fully
28 apprised of the second round of discovery as of March 19, when **Defendants** filed their motion to

1 stay.

2 Defendants cite to case law that purportedly supports the notion that “[u]nder these
3 circumstances, the Court should find that Facebook has waived its right to compel.” SVZ Opp. at
4 12:17-22. However, Defendants’ reliance on these cases is misplaced. In each one, the court
5 found that a party had waived the right to compel further production because it had brought its
6 motion either after or on the eve of the discovery cut-off. *See Gault v. Nabisco Biscuit Co.*, 184
7 F.R.D. 620, 622 (D. Nev. 1999) (finding untimely a motion to compel served “seventy-six (76)
8 days after the close of discovery and one hundred thirty-six (136) days after the receipt” of
9 [Defendant’s] discovery responses); *Purnell v. Arrow Financial Services, LLC*, 2007 U.S. Dist.
10 LEXIS 7630, at *1 (E.D. Mi., Jan. 23, 2007) (finding untimely a motion to compel brought nearly
11 five months after the discovery deadline); *In re Sulfuric Acid Antitrust Litigation*, 231 F.R.D. 331
12 (N.D. Ill. 2005) (finding untimely a motion to compel brought on the last day of discovery,
13 responses to which would have required an extension of the discovery deadline); *West v. Miller*,
14 2006 U.S. Dist. LEXIS 56243, at *17 (N.D. Ill., Aug. 11, 2006) (finding untimely a motion to
15 compel brought just eleven days before the discovery cutoff after “four months of discovery
16 inaction”). This precedent is inapposite here, where Facebook’s second motion to compel was
17 brought well before the discovery cutoff and shortly after Judge Fogel lifted the five-week stay of
18 discovery. Indeed, in Defendants’ *Gault* opinion, the court expressly noted that “[a] motion to
19 compel filed during the discovery period would rarely be considered untimely.” 184 F.R.D. at
20 622. Given the vigorous dispute over discovery in this matter, and the temporary stay of
21 discovery, it is preposterous for Defendants to claim that Facebook has somehow slept on its
22 rights or otherwise not been diligent in pursuing production.

23 **D. The Requests for Admissions to the Holtzbrinck Defendants Are Not**
24 **Duplicative.**

25 The Holtzbrinck Defendants raise a series of misguided objections to Facebook’s
26 Requests for Admissions. Facebook’s argument for personal jurisdiction over the Holtzbrinck
27 Defendants relies in part on the theory that they knowingly and intentionally contributed to the
28 ongoing piracy of Facebook’s product and services. Facebook also alleges that the Holtzbrinck

1 Defendants knowingly and intentionally contributed to, profited from, and abetted StudiVZ's
 2 unlawful access to Facebook's California servers. These assertions would, if proven, plainly be
 3 sufficient to establish personal jurisdiction because Defendants would have *knowingly harmed a*
 4 *California resident in California and caused harm here*. See *Licciardello v. Lovelady*, 2008 U.S.
 5 App. LEXIS 21376, *20, Case No. 07-14086 (11th Cir. Oct. 10, 2008) (holding that the out-of-
 6 state Defendant's unauthorized use of the plaintiff's trademark and misappropriation of his name
 7 and reputation for commercial gain satisfied the *Calder* effects test).

8 Accordingly, it is important for Facebook to establish the Holtzbrinck Defendants'
 9 knowledge of, and participation in, StudiVZ's infringing activities. To that end, Facebook served
 10 the Holtzbrincks with five, narrowly tailored Requests for Admissions.⁵ Defendants rebuff these
 11 Requests by citing mainly to expert reports filed in the German action pending between the
 12 parties. According to Defendants, "there can be no doubt that the Holtzbrinck Defendants would
 13 have noticed similarities simply by being aware that both sites existed." Holtz. Opp. at 12:12-18.
 14 But a representation by an attorney in an opposition brief does have near the same evidentiary
 15 value as an admission from the parties themselves. Defendants inexplicably feel vindicated in
 16 ignoring their duty to answer the Requests for Admissions because "[t]his topic is already
 17 thoroughly developed by both parties in the German case. Thus, there is no need for a new,
 18 separate set of discovery in this case on the same topic." *Id.* at 12:22-23. Defendants provide no
 19 support for this astonishing conclusion. The German matter is different than the present case. If,
 20 however, Defendants are correct and the issues have been "thoroughly developed" in Germany,

21
 22 ⁵ "(1) Admit that at the time YOU acquired an interest in STUDIVZ you were aware of
 23 accusations by FACEBOOK that STUDIVZ was infringing FACEBOOK'S legal rights,
 24 including, but not limited to, intellectual property rights;
 25 (2) Admit that YOU have knowledge that STUDIVZ accessed the FACEBOOK WEBSITE for
 26 commercial purposes.
 27 (3) Admit that YOU have knowledge that STUDIVZ accessed the FACEBOOK WEBSITE for
 28 the purpose of modeling at least one of the STUDIVZ WEBSITES after the FACEBOOK
 WEBSITE.
 (4) Admit that YOU have knowledge of similarities between the FACEBOOK WEBSITE and the
 STUDIVZ WEBSITES, including, but not limited to, visual similarities, functional similarities,
 feature similarities, and layout similarities.
 (5) Admit that the time YOU acquired an interest in STUDIVZ you were aware of similarities
 between the FACEBOOK WEBSITE and the STUDIVZ WEBSITES, including, but not limited
 to, visual similarities, functional similarities, feature similarities, and layout similarities."

1 responding to give requests for admission would seem remarkably easy. Facebook respectfully
2 requests that the Court order Defendants to vacate their specious objections and answer
3 Facebook's Requests for Admissions relating to their knowledge of StudiVZ's wrongdoing.

4 The Holtzbrinck Defendants' remaining objections are equally meritless. Defendants
5 argue that because they have produced some evidence indicating that they were aware of
6 Facebook's claims against StudiVZ, they are precluded from responding to a Request for
7 Admission confirming this fact to be the case. Holtz. Opp. at 12:24-13:7. This objection is
8 contrary to Federal Rule of Civil Procedure 36 and is unsupported by precedent. Defendants then
9 argue that they should not have to respond to additional requests regarding StudiVZ's access of
10 Facebook because "Facebook already knows (or has at least assumed) that the Holtzbrinck
11 Defendants were not aware of any access by StudiVZ of Facebook's website." *Id.* at 13:8-11.
12 The opposite true. Facebook has alleged that the Holtzbrinck Defendants did have knowledge.
13 Defendants claim that Facebook could have pried answers from these requests by deposing
14 Martin Weber. But prior to that deposition Defendants flip-flopped on the issue of questioning
15 regarding "access." *See* Dkt. No. 96. And in any event, that aborted deposition has nothing to do
16 with Defendants' responsibility to answer Facebook's Requests. Parties are permitted to use all
17 forms of discovery. Even in the Weber deposition had gone forward, that would not preclude
18 Facebook from subsequently serving Requests for Admission.

19 Accordingly, Facebook respectfully requests that the Holtzbrinck Defendants be
20 compelled to comply with their discovery obligations and respond to Facebook's Requests for
21 Admissions.

22 **III. CONCLUSION**

23 Under clear federal law originating out of this very Court, Facebook is entitled to any
24 discovery that "may inform" its oppositions to Defendants' motions to dismiss for lack of
25 personal jurisdiction. For the foregoing reasons, Facebook respectfully submits that its discovery
26 requests easily clear this standard. Accordingly, Facebook requests that the Court grant its
27 motion to compel further responses to Facebook's Second Round of Discovery Requests.
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Dated: June 11, 2009

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on June 11, 2009.

Dated: June 11, 2009.

Respectfully submitted,

/s/ Julio C. Avalos /s/
Julio C. Avalos