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10 Attorneys for Plaintiff
 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., HOLTZBRINCK
 NETWORKS GmBH, HOLTZBRINCK
 20 VENTURES GmBH, and DOES 1-25,

21 Defendant.

Case No. 5:08-cv-03468 JF

**FACEBOOK, INC.'S MOTION TO
 ENLARGE TIME UNDER CIVIL L.R.
 6-3**

Room.: Courtroom 3, 5th Floor
 Judge: Honorable Judge Jeremy Fogel

1 continuance of the hearing date to provide Facebook additional time to conduct the discovery it
2 needs and allow Facebook to file supplemental opposition papers so that it can thoroughly and
3 adequately defend against Defendants' motions.

4 **II. DEFENDANTS RENEGE AT THE LAST MINUTE ON THEIR OFFER TO**
5 **CONTINUE THE BRIEFING SCHEDULE AND HEARING ON DEFENDANTS'**
6 **MOTION TO DISMISS.**

6 Facebook is a Delaware corporation headquartered in Palo Alto, California. Defendant
7 StudiVZ, Ltd. ("StudiVZ") is a British corporation headquartered in Berlin, Germany.
8 Defendants Holtzbrinck Networks and Holtzbrinck Ventures (the "Holtzbrinck Defendants") are
9 German entities headquartered in Munich, Germany. Facebook alleges that Defendants
10 intentionally trespassed on Facebook's California-based website and computer servers in order to
11 steal valuable intellectual property, including Facebook's trade dress, and subsequently used that
12 stolen property in the creation, development and implementation of a number of knockoff
13 websites in violation of the Lanham Act, the Computer Fraud and Abuse Act, California Penal
14 Code 502(c), in breach of contract, and in breach of the covenant of good faith and fair dealing.

15 In the weeks following the filing of this Complaint, the parties had a series of
16 conversations regarding Facebook's allegations and Defendants' likely defenses. *See* Declaration
17 of Julio C. Avalos In Support of Facebook's Motion to Enlarge Time ("Avalos Decl."), ¶¶ 2-6.
18 Defendants' counsel was adamant that the Court did not possess personal jurisdiction over his
19 German clients and that he would soon move to dismiss for lack of personal jurisdiction and
20 *forum non conveniens*. *Id.* The parties were in agreement that Facebook was entitled to at least
21 some discovery on the personal jurisdiction issue. *Id.* ¶ 3. The scope of personal jurisdiction
22 discovery continues to be a point of contention between the parties, and Facebook soon will be
23 filing a motion to compel the needed discovery. Supplemental Declaration of Thomas J. Gray in
24 Support of [Facebook's Motion to Enlarge Time Pursuant to L.R. 6-3](#) ("Supp. Gray Decl."), ¶ 3

Deleted: JULIO C. AVALOS

25 On October 22, 2008, Defendants StudiVZ and the Holtzbrinck filed separate motions to
26 dismiss for Lack of Personal Jurisdiction and *Forum non conveniens*. Avalos Decl., ¶ 6. In order
27 to allow time to take discovery and resolve discovery disputes, Facebook and Defendants
28 negotiated a proposed stipulation regarding the scheduling of Defendants' motions to dismiss and

1 the filing of Facebook's opposition thereto. *Id.* The Court entered the Proposed Stipulated
2 Scheduling Order on November 4, 2008, which provides that Facebook's deadline was to be
3 January 16, 2009 to file and serve its oppositions to Defendants' motions to dismiss. *Id.*; *see*
4 Docket No. 54. Defendants were given two weeks from that date to file their Reply papers. *Id.*
5 The hearing on Defendants' motions to dismiss was set for February 13, 2009. *Id.*

6 Additionally, Defendants filed a premature and confusing motion for protective order in
7 an effort to block Facebook's discovery. Avalos Decl., ¶ 13. During the hearing, Defendants,
8 conceded to Judge Lloyd that Facebook is entitled to discovery that goes to the merits if it also is
9 intertwined with jurisdictional issues. *Id.* ¶ 13, Ex. A. Ultimately, however, Defendants were
10 required to withdraw their motion. *Id.* Yet, they still refused to produce the needed discovery.
11 And the parties' disputes over the proper scope of jurisdictional discovery have become
12 increasingly contentious. Avalos Decl., ¶¶ 10-24.

13 On January 6, 2009, Facebook's counsel again raised the issue of a continuance of the
14 briefing schedule and hearing date on the motions to compel. Avalos Decl., ¶¶ 19-22; *See also*
15 Declaration of Thomas J. Gray In Support of Facebook's Opposition and Facebook's Motion to
16 Enlarge Time ("Gray Decl."), ¶¶ 2-4, filed on January 16, 2009 as Docket No. 74. Indeed,
17 Defendants' counsel initially agreed to take the motion off calendar, but then clarified that
18 although he would agree to take StudiVZ's motion off calendar, he would prefer not to do so with
19 respect to the Holtzbrinck Defendants. *Id.* Rather, he would only agree to a two or three week
20 continuance of the Holtzbrinck Defendants' motion. *Id.* In reliance on these representations,
21 Facebook did not move to change time. *Id.*

22 On January 13, 2009, three days before Facebook's deadline to oppose Defendants'
23 motions to dismiss, counsel for the parties had a telephone conversation in which Defendants'
24 counsel stated for the first time that Defendants would agree to a continuance of the hearing on
25 the Holtzbrinck Defendants' motion to dismiss only if Facebook agreed to "bifurcate"
26 Defendants' *forum non conveniens* arguments from Defendants' personal jurisdiction arguments.
27 Gray Decl. (Docket No. 74), ¶ 5. On January 14, just two days before Facebook's opposition was
28 due, the parties had a follow up conversation, but were unable to reach an agreement with respect

1 to Defendants' new proposal to bifurcate the issues. *Id.* Losing his temper, Defendants' counsel,
2 Mr. Smith, shouted and cursed at Mr. Gray, stated that he no longer agreed to continue any of
3 Facebook's oppositions or the February 13 hearing, and said that Facebook would have to file its
4 oppositions on the deadline of January 16, 2009. *Id.*

5 Through emails exchanged the week of January 19, 2009, Defendants have conceded that
6 Facebook likely will win this request at least as to the personal jurisdiction issue as it relates to
7 Defendant StudiVZ. Supp. Gray Decl., ¶ 2, Ex. A. They continue, however, to stubbornly refuse
8 to produce discovery or continue the hearing on the motions to dismiss as a whole. *Id.* In
9 addition, the parties have agreed to file discovery motions, including Facebook's motion to
10 compel on January 27, 2009 with an anticipated hearing date of March 3, 2009. *Id.*

11 Without most of the critical discovery that Facebook was seeking to oppose the motions to
12 dismiss, Facebook drafted and filed its opposition in two days. Gray Decl. (Docket No. 74), ¶ 6.
13 Facebook feels confident that its opposition to Defendants' motions to dismiss stands on its own
14 and establishes (1) the Court's personal jurisdiction over Defendants, and (2) that Defendants
15 have not met their heavy burden to overcome Facebook's choice of forum. However, to the
16 extent that the Court believes Defendants may have met their considerable burdens, Facebook
17 respectfully requests that the Court continue the February 13 hearing on Defendants' motions to
18 dismiss for at least 90 days in order to allow the parties to resolve their jurisdictional discovery
19 disputes and allow Facebook the opportunity to file supplemental opposition papers in order to
20 overcome the prejudice it has suffered as a result of Defendants' gamesmanship and improper
21 tactics throughout this litigation.

22 **III. FACEBOOK WILL SUFFER SUBSTANTIAL PREJUDICE IF THE COURT**
23 **DOES NOT GRANT ITS CONTINUANCE.**

24 Before dismissing Facebook's complaint, the Court should exercise its discretion to allow
25 Facebook more time to conduct the discovery that Defendants have obstinately and improperly
26 blocked. *See Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135
27 (9th Cir. 2003) (finding that it was an abuse of discretion to refuse discovery regarding personal
28 jurisdiction where jurisdiction has been the subject of an initial challenge by way of motion to

1 dismiss); *K-Swiss Inc. v. GTFM, Inc.*, 2008 U.S. App. LEXIS 10810, at *2 (9th Cir., May 15,
2 2008) (reversing district court’s holding of lack of personal jurisdiction where plaintiff “had no
3 opportunity to conduct jurisdictional discovery.”).

4 Here, discovery related to the creation, design and development of the Defendants'
5 websites will help establish jurisdiction under the *Calder* effects test and will also help to show
6 additional connections to California and the United States. Such discovery relates directly to the
7 personal jurisdiction and forum issues raised in Defendants' motions to dismiss and will help to
8 more thoroughly flesh out Facebook’s arguments in opposition to the motions. Facebook would
9 suffer substantial prejudice if Defendants’ motions to dismiss are granted as a result of
10 Defendants’ counsel’s bad faith tactics. Of course, the current Motion to Enlarge Time would be
11 moot if the Court denies Defendants’ motions to dismiss based on Facebook’s opposition as filed,
12 which Facebook believes is the proper outcome. Defendants should not be rewarded for their
13 unprofessional and improper conduct.

14 **IV. REQUESTED RELIEF**

15 For the above reasons, if the Court is inclined to reject Facebook’s opposition, filed
16 January 16, 2009, and grant Defendants’ motions to dismiss, Facebook respectfully requests an
17 order (1) continuing the February 13, 2009 hearing on Defendants’ motions to dismiss for 90 days
18 in order to allow the parties to complete personal jurisdiction and forum discovery, and (2)
19 granting Facebook the right to file a supplemental opposition once it receives the necessary
20 discovery from Defendants. Alternatively, even if the Court does not believe additional discovery
21 is warranted, Facebook respectfully requests additional time to file supplemental opposition
22 papers in order to mitigate the significant prejudice that Facebook suffered as a result of
23 Defendants’ last-minute renegeing on their agreement to allow Facebook additional time to oppose
24 the motions to dismiss.

1 Dated: January 23, 2009

ORRICK, HERRINGTON & SUTCLIFFE LLP

2
3 /s/ Thomas J. Gray
4 _____
5 THOMAS J. GRAY
6 Attorneys for Plaintiff
7 FACEBOOK, INC.
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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 January 23, 2009.

Dated: January 23, 2009

Respectfully submitted,

/s/ Thomas J. Gray

Thomas J. Gray