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Yao Wei Yeo

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DANIEL M. MILLER,

Plaintiff,

v.

FACEBOOK, INC. and YAO WEI YEO,

Defendants.

No. **3:10-CV-00264 (WHA)**

NOTICE OF MOTION AND MOTION TO SET ASIDE DEFAULT OF DEFENDANT YAO WEI YEO; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: June 9, 2011
Time: 8:00 a.m.
Courtroom: 9, 19th Floor
Judge: Hon. William Alsup

TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

Please take notice that on June 9, 2011, at 8:00 a.m., or as soon thereafter as the matter can be heard, in Courtroom 9, 19th Floor of the above entitled court located at 450 Golden Gate Avenue, San Francisco, California 94102, Defendant Yao Wei Yeo (hereinafter "Defendant" or "Yeo") will by special appearance, without waiving his contention that this court lacks personal jurisdiction over him, move to set aside the entry of default previously entered against him in favor of Plaintiff Daniel M. Miller (hereinafter "Plaintiff" or "Miller"), and, as necessary,

oppose any motion for entry of default judgment that may be pending at the time this motion is filed or heard. The parties have filed a stipulation with the court seeking to have Yeo's Motion to Set Aside Entry of Default heard on shortened time, on May 19, 2011 at 8:00 a.m. at the above entitled court, which is currently pending.

Yeo seeks by this motion to have this court enter its order setting aside any default or default judgment entered against him on such terms or conditions that are reasonable and just in order that the matter may be heard on the merits or dismissed for lack of personal jurisdiction. Yeo also intends this motion as his response or opposition to plaintiff's motion to enter a default judgment against him.

This motion is made pursuant to Rule 55 subsection (c) of the Federal Rules of Civil Procedure on the grounds that (i) good cause exists to set aside said default in that Yeo's failure to file a responsive pleading was the result of his excusable neglect and the default so entered should be set aside in order that the matter may be heard on the merits, and (ii) this court lacks personal jurisdiction over Yeo and any purported prior service of process was improper and in any event of no effect. This motion is based on the accompanying points and authorities, the Declaration of Yao Wei Yeo ("Yeo Decl."), the Declaration of Andrew P. Holland and the Notice of Request for Judicial Notice served and filed herewith.

Dated: May 5, 2011.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SETTING ASIDE DEFAULT AND IN OPPOSITION TO ENTRY OF DEFAULT JUDGMENT

I. STATEMENT OF THE ISSUES

The controlling issue before the court is whether the default of Yeo entered on September 22, 2010, or any judgment sought to be entered thereon, should be set aside, and if so, whether any conditions should be applied to that order.

As this motion is filed, Miller has pending a motion for entry of judgment based on the aforesaid default set to be heard on May 19, 2011 – thus, unless time is advanced for the hearing of Yeo's motion, pursuant to the stipulation entered into between the parties, this motion will apply to any such judgment entered.

II. RELEVANT FACTS

The facts are presented through Yeo's declaration. In summary, Yeo is a citizen of Singapore who did not know he should take any action in this case until April 12, 2011, when he received an email from Plaintiff's counsel with an attached copy of Plaintiff's motion to have default judgment entered against Yeo on May 19, 2011. Over the next 24 hours, Yeo exchanged emails with Plaintiff's counsel, who, despite refusing to dismiss Plaintiff's case at Yeo's request, encouraged Yeo to retain counsel, file an appearance and share any evidence that would establish that he has no liability, or discuss a reasonable monetary settlement. Within 24 hours, Yeo had retained counsel in Palo Alto, California in order to attempt to defend himself on the merits. Shortly thereafter, on April 18, 2011, Yeo collected mail from his UPS mail box in New York City while there on holiday. His mail had been accumulating since he opened the box in March 2010 – this was his first visit to pick up mail. In the mail, he found two envelopes with legal papers relating to this case; one contained copies of the summons and complaint and the other contained papers related to the motion to enter a default judgment. Apart from the April 12, 2011 e-mail, this was the first time Yeo had personally received any documents related to the case.

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As Yeo's declaration details, nearly two years earlier – before any lawsuit was filed – Yeo received emails from both Miller and Miller's counsel. Those messages demanded that Yeo cease and desist any activities relating to the game he created known as *Chain Rxn*. Yeo replied to those messages, disputing the contentions, and did not hear from Miller or his counsel again until April 12, 2011.

In the interval, Yeo learned that Miller filed the lawsuit against Facebook and himself. Yeo discovered this by accident, while searching the Internet for information related to himself, his game and his Facebook relationship. As a foreign citizen residing in Singapore, he did not believe he needed to take any action, since he had not personally received any papers from Miller related to the lawsuit. In 2010 he even called Facebook to find out about the status (while he was on holiday in California), and was told, in summary, that if he had not been served he did not need to respond.

Yeo is confident that he has valid defenses to Miller's claims of copyright infringement. He also disputes that this court has a proper basis to exercise personal jurisdiction over him, given his minimal contacts with the United States since he graduated from Cornell University in 2008.

III. DISCUSSION

A. Good Cause Exists

Rule 55(c) of the Federal Rules of Civil Procedure provides that "[t]he court may set aside an entry of default for good cause." The Ninth Circuit has held that to determine "good cause" under Rule 55(c) requires consideration of three factors: (1) whether the defendant engaged in culpable conduct that led to the default; (2) whether the defendant had a meritorious defense; and (3) whether reopening the default judgment would prejudice the plaintiff. *Franchise Holding II, LLC. v. Huntington Restaurants Group, Inc*. 375 F.3d 922, 925-26 (9th Cir. 2004). Because these elements are satisfied in this case, there is good cause for setting aside the default.

1. No Culpable Conduct

Regarding "culpable conduct," the Ninth Circuit has stated that:

> Neglectful failure to answer as to which the defendant offers a credible, good faith explanation negating any intention to take advantage of the opposing party, interfere with judicial decision-making, or otherwise manipulate the legal process is not "intentional" under our default cases, and is therefore not necessarily-although it certainly may be, once the equitable factors are considered-culpable or inexcusable. . . . In contrast, we have typically held that a defendant's conduct was culpable for purposes of the *Falk* factors where there is no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond.

TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 697-98 (9th Cir. 2001).

Plaintiff might attempt to argue that the fact that Yeo read about the lawsuit on the Internet and talked with Facebook's counsel about it meant that Yeo had to take action, or that his failure to take action renders him culpable. This argument has been rejected. Faced with a similar argument, the Ninth Circuit in *TCI* stated that one might think, based on certain articulations of the standard of culpability, that "… a litigant who receives a pleading, reads and understands it, and takes no steps to meet the deadline for filing a responsive pleading acted intentionally in failing to answer, without more, and therefore cannot meet the culpability standard." *TCI, supra*, 244 F.3d at 697. But, the court made clear that such an interpretation is incorrect, based on the United States Supreme Court decision *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 395 (1993). Rather, culpability requires evidence of a "devious, willful, or bad faith failure to respond," and is typically found only when there is no other explanation for the default. *TCI, supra*, 244 F.3d at 697-98.

Here, there is no evidence of any purpose on Yeo's part to be devious, willful or in bad faith. Moreover, there is another explanation for Yeo's failure to respond, and it is a very simple one: Yeo did not receive the summons and complaint until April 18, 2011. Whenever Yeo did actually received communications from Plaintiff and Plaintiff's counsel, Yeo responded quickly and definitively, denying liability and expressing unwillingness to admit any fault through a settlement. Yeo has not done anything to take advantage of Plaintiff, to interfere with

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judicial decision-making or to manipulate the legal process. Within one day of Plaintiff's counsel's admonition that he should retain counsel and file an appearance, Yeo retained counsel and began the process of submitting this motion. As a citizen and resident of Singapore, Yeo was justified in his belief that he needn't respond to this lawsuit, since he had not personally received service of papers. See, e.g., *Gregorian v. Izvestia*, 871 F.2d 1515, 1525 (9th Cir. 1989) ("culpability" involves "not simply nonappearance following receipt of notice of the action, but rather conduct which hindered judicial proceedings as to which subject matter jurisdiction was unchallenged"). Yeo simply has not been culpable in any regard.

2. Meritorious Defense

In order to satisfy the second element of "good cause" and set aside a default or vacate a default judgment, a defendant "need only show facts or law in support of a viable defense; it is not necessary that the defendant prove that [he] will prevail on that defense." *United States v. Approximately $73,562 in U.S. Currency*, No. C 08-2458 SBA, 2010 WL 503040 at *3 (N.D. Cal. Feb. 5, 2010) (citing *TCI*, *supra*, 244 F.3d at 700). Yeo is confident that he will successfully defeat Plaintiff's claim of direct copyright infringement, and at the very least he has a viable defense. Facts supporting Yeo's defenses are set forth in his accompany declaration as well as the expert declaration of David Crane ("Crane Decl.") which was submitted in support of Facebook's Motion for Summary Judgment re: Contributory Copyright Infringement, which Yeo has requested that the Court take Judicial Notice of pursuant to Rule 201 of the Federal Rules of Evidence.

(a) Legal Argument re: Non-Infringement

To establish direct copyright infringement, a plaintiff must prove "(1) ownership of a valid copyright, and (2) copying of constituent elements of the works that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Evidence that an alleged infringer created his work independently of the copyrighted work precludes a finding of infringement. *Silberstein v. Fox Entm't Group, Inc.*, 424 F. Supp. 2d 616, 628-29 (S.D.N.Y.

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2004) (summary judgment of defendants where "copious undisputed testimonial and documentary evidence" detailing creative process established independent creation). "Absent copying there can be no infringement of copyright." *Mazer v. Stein*, 347 U.S. 201, 218 (1954). Miller cannot prove that Yeo illegally copied any constituent elements of the Boomshine game.

As Yeo sets forth in his Declaration, he has never even had access to the source code for the Boomshine game, and he certainly didn't copy any portion of the Boomshine source code. Yeo Decl., ¶17. Yeo's position is supported by David Crane's findings, summarized in Crane's Declaration, that there is absolutely no commonality between the Boomshine and ChainRxn computer code. Crane Decl., ¶¶83-100.

Similarly, Yeo did not copy any expressive constituent elements of the Boomshine game when developing Chain Rxn. He did not refer to the Boomshine game when developing Chain Rxn or use it as a template to create Chain Rxn. Yeo Decl., ¶20. To the contrary, Yeo's Declaration outlines the tedious steps that Yeo took to independently create the Chain Rxn game. Yeo Decl., ¶¶17-27. In fact, prior to 2007, which is when Miller claims that the Boomshine game was authored, Yeo had already worked on several relevant Adobe Flash™ technology experiments, including creating graphic content that moved beyond simple linear motion with balls, simulating complex mathematical movement and utilizing 3-D movement and graphics. These experiments included the use of circular objects in strong bright colors which are similar to the monochrome background motif that Chain Rxn features. Yeo Decl., ¶19; Second Amended Complaint, ¶11.

Because Miller has no direct evidence of copying, he must prove "(1) the defendant's access to the copyrighted work prior to defendant's creation of its work, and (2) the substantial similarity of both the general ideas and expression between the copyrighted work and defendant's work." *Data East USA, Inc., v. EPYX,* 862 F.2d 204, 206 (9th Cir. 1988); *Sid & Marty Krofft Television Products, Inc. v. McDonald's Corp.,* 562 F.2d 1157, 1162 (9th Cir. 1977). Miller cannot satisfy the second criterion.

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Although Yeo played the Boomshine game on a few occasions, the material differences between Boomshine and Chain Rxn make it impossible for Miller to show that any protectable elements were copied. Boomshine is a very simplistic game which utilizes the same mechanics as other "chain reaction" type games such as Missile Command. The similarity between such games arises from the similar game mechanics, which copyright does not protect. 35 USC § 102(b); *Data East, supra*, 862 F.2d 204. Game procedures are not protectable expression. *See Incredible Technologies, Inc. v. Virtual Technologies, Inc.,* 400 F.3d 1007 (7th Cir. 2005) (finding no infringement after filtering protectable from non-protectable elements despite the fact "it is pretty clear that [defendant] set out to copy [plaintiff s golf simulator] game"); *Atari, Inc. v. Amusement World,* Inc., 547 F. Supp 222, 229 (D. Md. 1981). This is because game mechanics, which are no more than procedures and methods of operations, are not protected under the Copyright Act. *See* Section 102(b) (precluding copyright protection for "processes," "procedures," "systems," or "methods of operations"); *see also, e.g., Allen v. Academic Games League of America, Inc.,* 89 F.3d 614, 617 (9th Cir. 1996).

Again, the findings enumerated in Crane's Declaration support the fact that the only similarities between Boomshine and Chain Rxn are not protectable elements, thus precluding a finding of copyright infringement. Based on a comparison of the nine elements that Miller claims Yeo copied from Boomshine, Crane's Declaration explains how the accused features are either necessary features of the game or are expressed differently, and thus there is no infringement. "I have reviewed the two games in question, Boomshine and ChainRxn, to determine what similarities exist between the two games and what the nature of those similarities are. After carefully reviewing the games in detail, I have concluded that the only similarities in the two games relate to the concepts and ideas of the games (and thus procedures). To the extent the games have expression independent of the concepts and procedures, the expression in the two games are totally different." Crane Decl., ¶2.

Based on the facts and law submitted by Yeo in support of his legal defenses to Miller's

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claim of direct copyright infringement, Yeo has satisfied the requirement that he has a viable defense in this matter.

3. No Prejudice to Plaintiff

Plaintiff Miller will not be prejudiced by setting aside the default. First, in his recent correspondence with Yeo, Plaintiff's counsel suggested that Yeo retain counsel, appear in the action and both discuss settlement and share evidence that Yeo relies on to support his claim that he has not infringed any rights of Plaintiff. This suggests a complete absence of any prejudice. "To be prejudicial, the setting aside of a judgment must result in greater harm than simply delaying resolution of the case. Rather, 'the standard is whether [plaintiff's] ability to pursue his claim will be hindered.'" *TCI*, *supra*, 244 F.3d at 701 (citing *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984)). Delay in trial or being forced to litigate the substance on the merits are not deemed prejudice under the good cause standard of Rule 55(c). *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1225 (9th Cir. 2000).

Facebook has been dismissed from the action. There is no prejudice related to the pending prosecution of that claim. The trial dates were set when Facebook was a party, and Yeo had not appeared. The issues related to the discrete issue of direct infringement of Plaintiff's game have not changed, nor has the evidence become unavailable or been altered or lost.

B. The Court Lacks Personal Jurisdiction

Yeo's declaration describes his very limited contacts with the United States and, in particular, California. He attended Cornell University in New York. After graduation he returned to Singapore and, in March 2009, he introduced broadly his game Chain Rxn, through a website hosted in California that offered no interaction with consumers, and through its availability on Facebook. Yeo was unaware of Miller as the creator of Boomshine in March 2009, that he was a resident of Georgia or that Yeo's game had any specific contact with Georgia or California, beyond the web hosting and advertising revenue.

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In this setting, the district court has an affirmative duty to look into its jurisdiction over both the subject matter and the parties. *In re Tuli,* 172 F.3d 707, 712 (9th Cir.1999).

A recent Northern District decision outlines the requirements:

> As the party seeking to invoke this Court's jurisdiction, Plaintiff bears the burden of establishing that this Court has personal jurisdiction over Defendant. *Scott v. Breeland,* 792 F.2d 925, 927 (9th Cir.1986) (citing *Data Disc, Inc. v. Sys. Tech. Assocs.,* 557 F.2d 1280, 1285 (9th Cir.1977)). In the context of a motion for default judgment, the Court may dismiss an action *sua sponte* for lack of personal jurisdiction. *In re Tuli,* 172 F.3d at 712. Where there are questions about the existence of personal jurisdiction, however, a court should allow the plaintiff the opportunity to establish that jurisdiction is proper. *Id.* at 713.
>
> …
>
> The Ninth Circuit has articulated a three-prong test to determine whether a party has sufficient minimum contacts to be susceptible to specific personal jurisdiction: (1) The non-resident defendant must purposefully direct his activities or consummate some transaction in the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, *i.e.,* it must be reasonable. *Schwarzenegger,* 374 F.3d at 802 (quoting *Lake v. Lake,* 817 F.2d 1416, 1421 (9th Cir.1987)).

IO GROUP, Inc. v. Jordon, 708 F.Supp.2d 989, 994 (N.D.Cal. 2010).

As to the first prong, it cannot be said from the evidence that Yeo "purposefully availed" himself of or "purposefully directed" his action at either Georgia or California, other than his use of a web hosting company for his non-interactive website and relationship with Facebook by which his game is made available. Yeo does not deny that the Facebook activity generated income, but asserts that it does not reach the level of contact necessary to justify jurisdiction.

The "purposeful direction" analysis is applicable to a case involving copyright infringement. *IO Group, supra,* 708 F.Supp.2d at 995. As stated by the court in IO Group:

> To evaluate purposeful direction, the Court applies a three-part *"Calder*-effects" test, articulated in the Supreme Court's decision in *Calder v. Jones,* 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). Under this test, "the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*

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> *L'Antisemitisme,* 433 F.3d 1199, 1206 (9th Cir.2006) (internal quotes omitted). There is no requirement that the defendant have any physical contacts with the forum. *Schwarzenegger,* 374 F.3d at 803.
>
> *IO Group, supra*, 708 F.Supp.2d at 995.

This test cannot be met in this case. Whether Georgia or California is considered the forum state, plaintiff has not submitted sufficient evidence, or any evidence, that Yeo committed an intentional act expressly aimed at the forum state that caused harm that Yeo was likely to know would be caused in that state. Yeo respectfully submits that the second and third prongs of the personal jurisdiction test also cannot be met. There is no showing that the claims necessarily arose from forum related activities. The game was available via the Facebook internet portal to a wide, geographically dispersed audience. There is no evidence that Yeo intended the activities to be directed at California, which issued the summons against him, or Georgia, where the case was originally filed, or that he had any knowledge of where any alleged infringement was likely to be suffered. Even using a broad interpretation of the purposeful direction of internet reach or activity, in the present setting it would be unreasonable to impose personal jurisdiction when there has been so little specific intent regarding the alleged harm within a forum state.

IV. CONCLUSION

Defendant Yao Wei Yeo respectfully submits that, consistent with this court's policy of allowing disputes to be resolved on the merits, the default entered against him should be set aside, with this matter then to proceed in due course toward resolution or be dismissed for lack of personal jurisdiction. There is no prejudice to Plaintiff. The interests of justice are served by such an order.

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Dated: May 5, 2011.

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