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6 **Attorneys for Defendant**
 7 **Yao Wei Yeo**

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 10 **UNITED STATES DISTRICT COURT**
 11 **NORTHERN DISTRICT OF CALIFORNIA**
 12 **SAN FRANCISCO DIVISION**

13 **DANIEL M. MILLER,**

14 Plaintiff,

15 v.

16 **FACEBOOK, INC. and YAO WEI**
 17 **YEO,**

18 Defendants.

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

DECLARATION OF ANDREW P.
HOLLAND IN SUPPORT OF MOTION
TO SET ASIDE DEFAULT OF
DEFENDANT YAO WEI YEO

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

19 I, Andrew P. Holland, declare as follows:

20 1. I am an attorney at law, duly licensed to practice before this court and all courts of
 21 the State of California, and am a shareholder with the law firm of Thoits, Love, Hershberger &
 22 McLean, attorneys for defendant Yao Wei Yeo (“Yeo”). I am one of the attorneys responsible
 23 for this action.

24 2. Since the time that Yeo retained my law firm on April 14, 2011 and met with me
 25 for the first time on April 27, 2011, attorneys at my firm have worked diligently to investigate the
 26 claims against Yeo and prepare the instant motion and supporting documents.

1 3. As stated in the Points and Authorities in Support of the Motion to Set Aside
2 Default, I believe that Yeo has viable defenses against plaintiff's claims for copyright
3 infringement, which is supported by the expert declaration of David Crane previously filed in this
4 action, which Yeo has requested that the Court take Judicial Notice of pursuant to Rule 201 of
5 Federal Rules of Evidence, and the Declaration of Yao Wei Yeo filed herewith. In the event that
6 the Court grants Yeo's Motion to Set Aside Default, but does not dismiss the Second Amended
7 Complaint based on lack of personal jurisdiction, Yeo intends to file an Answer to Mr. Miller's
8 Second Amended Complaint and defend against Mr. Miller's claim of copyright infringement.
9 Attached as Exhibit A is a true and correct copy of that proposed Answer that would be filed on
10 Yeo's behalf.

11 4. On April 28, 2011 I spoke with Mr. Miller's counsel, Brian Hancock, and
12 requested that Mr. Miller stipulate to set aside the entry of default against Yeo so that the parties
13 could avoid the time and expense of the instant motion. I believe that this was a reasonable
14 request given the fact that only a few weeks earlier, on April 12, 2011, Mr. Hancock had advised
15 Yeo by email that he should retain an attorney to appear in the action to both discuss settlement
16 and present evidence to defend against Mr. Miller's claim. Notwithstanding his recent invitation
17 to Yeo to participate in the lawsuit, Mr. Hancock e-mailed me on April 28, 2011 that Mr. Miller
18 would not stipulate to set aside the entry of default.

19 5. On May 3, 2011 Mr. Hancock e-mailed me that Mr. Miller is willing to stipulate
20 to have Yeo's Motion to Set Aside Default heard on May 19, 2011, on shortened time, so that
21 said Motion and Mr. Miller's Motion for Entry of Default Judgment may be heard on the same
22 day.

23 6. I declare under penalty of perjury under the laws of the State of California that the
24 foregoing is true and correct, and that this Declaration is executed on May 5, 2011 in Palo Alto,
25 California.
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s/ Andrew P. Holland

Andrew P. Holland

EXHIBIT A

1 **Stephen C. Gerrish/Bar No. 061253**
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14 Plaintiff,

15 v.

16 **FACEBOOK, INC. and YAO WEI**
17 **YEO,**

18 Defendants.

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

ANSWER OF YAO WEI YEO TO
SECOND AMENDED COMPLAINT

19 Defendant Yao Wei Yeo. ("Yeo") answers the Second Amended Complaint filed by
20 Daniel M. Miller ("Miller") as follows:

21 **THE PARTIES**

22 1. Yeo is without sufficient knowledge or information to form a belief as to the truth
23 of the allegations contained in Paragraph 1 concerning where Miller resides and on those grounds
24 denies those allegations.

25 2. Yeo is without sufficient knowledge or information to form a belief as to the truth
26 of the allegations contained in Paragraph 2 concerning whether Facebook, Inc. ("Facebook") is a

1 corporation organized and existing under the laws of Delaware with its principal place of
2 business at 1601 S. California Avenue, Palo Alto, California 94304, and on those grounds denies
3 those allegations.

4 3. Yeo admits that he is an individual who resides in Singapore. Except as expressly
5 admitted herein, Yeo denies the allegations of Paragraph 3.

6 JURISDICTION AND VENUE

7 4. Yeo neither admits nor denies the allegations contained in Paragraph 4 because
8 those allegations are conclusions of law to which no response is required. To the extent those
9 allegations may be deemed allegations of fact, Yeo denies the allegations of Paragraph 4.

10 5. Yeo neither admits nor denies the allegations contained in Paragraph 5 because
11 those allegations are conclusions of law to which no response is required. To the extent those
12 allegations may be deemed allegations of fact, Yeo denies the allegations of Paragraph 5.

13 6. Yeo neither admits nor denies the allegations contained in Paragraph 6 because
14 those allegations are conclusions of law to which no response is required. To the extent those
15 allegations may be deemed allegations of fact, Yeo denies the allegations of Paragraph 6.

16 7. Yeo is without sufficient knowledge or information to form a belief as to the truth
17 of the allegations contained in Paragraph 7 and on those grounds denies those allegations.

18 8. Yeo denies the allegations contained in Paragraph 8.

19 FACTUAL BACKGROUND

20 9. Yeo is without sufficient knowledge or information to form a belief as to the truth
21 of the allegations contained in Paragraph 9 concerning who authored the Boomshine video game
22 and on those grounds denies those allegations.

23 10. Yeo admits that Boomshine is a game played on the Internet. Except as expressly
24 admitted herein, Yeo is without sufficient knowledge or information to form a belief as to the
25 truth of the remaining allegations and on those grounds denies those allegations.

26 11. Yeo is without sufficient knowledge or information to form a belief as to the truth

1 of the allegations contained in Paragraph 11 and on those grounds denies those allegations.

2 12. Yeo is without sufficient knowledge or information to form a belief as to the truth
3 of the allegations contained in Paragraph 12 and on those grounds denies those allegations.

4 13. Yeo admits that he maintained a website known as www.zwigglers.com and that
5 he authored a game that was available for play on the Internet through Facebook and said site.
6 Except as expressly admitted herein, Yeo denies the allegations of Paragraph 13.

7 14. Yeo admits that at least as early as April, 2009 Yeo published an application
8 entitled ChainRxn that was available through Facebook's Platform. Except as expressly admitted
9 herein, Yeo denies the allegations of Paragraph 14.

10 15. Yeo admits that ChainRxn is a game played on the Internet using Adobe Flash™
11 technology and that among other things the game allows players to click on circles. Except as
12 expressly admitted herein, Yeo denies the allegations of Paragraph 15.

13 16. Yeo admits that he published an application entitled ChainRxn that was available
14 through Facebook's Platform. Except as expressly admitted herein, Yeo denies the allegations of
15 Paragraph 16.

16 17. Yeo admits that until sometime after the initial filing of this action on October 9,
17 2009, an application entitled ChainRxn was available through Facebook's Platform located at
18 www.facebook.com/zwigglers. Yeo is without sufficient knowledge or information to form a
19 belief as to the truth of the remaining allegations contained in Paragraph 17 and on those grounds
20 denies those allegations.

21 18. Yeo admits that until sometime after the initial filing of this action, an application
22 titled ChainRxn was available through Facebook's Platform located at
23 www.facebook.com/zwigglers. Yeo is without sufficient knowledge or information to form a
24 belief as to the truth of the remaining allegations contained in Paragraph 18 and on those grounds
25 denies those allegations.

26 19. Yeo admits that ChainRxn was available through Facebook's Platform located at

1 www.facebook.com/zwigglers. Yeo denies that ChainRxn infringes any intellectual property
2 rights that Miller may have in the Boomshine game. Yeo is without sufficient knowledge or
3 information to form a belief as to the truth of the remaining allegations contained in Paragraph
4 19 and on those grounds denies those allegations.

5 20. Yeo denies the allegations contained in Paragraph 20.

6 21. Yeo is without sufficient knowledge or information to form a belief as to the truth
7 of the allegations contained in Paragraph 21 and on those grounds denies those allegations.

8 22. Yeo is without sufficient knowledge or information to form a belief as to the truth
9 of the allegations contained in Paragraph 22 and on those grounds denies those allegations

10 23. Yeo is without sufficient knowledge or information to form a belief as to the truth
11 of the allegations contained in Paragraph 23 and on those grounds denies those allegations

12 24. Yeo is without sufficient knowledge or information to form a belief as to the truth
13 of the allegations contained in Paragraph 24 and on those grounds denies those allegations.

14 25. Yeo denies the allegations contained in Paragraph 25.

15 26. Yeo denies that ChainRxn infringes any intellectual property rights that Miller
16 may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a
17 belief as to the truth of the remaining allegations contained in Paragraph 26 and on those grounds
18 denies those allegations.

19 27. Yeo denies that ChainRxn infringes any intellectual property rights that Miller
20 may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a
21 belief as to the truth of the remaining allegations contained in Paragraph 27 and on those grounds
22 denies those allegations.

23 28. Yeo is without sufficient knowledge or information to form a belief as to the truth
24 of the allegations contained in Paragraph 28 and on those grounds denies those allegations.

25 29. Yeo is without sufficient knowledge or information to form a belief as to the truth
26 of the allegations contained in Paragraph 29 and on those grounds denies those allegations.

1 30. Yeo denies that ChainRxn infringes any intellectual property rights that Miller
2 may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a
3 belief as to the truth of the remaining allegations contained in Paragraph 30 and on those grounds
4 denies those allegations.

5 31. Yeo admits that a letter from Miller to Yeo dated May 7, 2009 is attached to
6 Miller’s Second Amended Complaint. Except as expressly admitted herein, Yeo denies the
7 remaining allegations of Paragraph 31.

8 32. Yeo denies the allegations contained in Paragraph 32.

9 33. Yeo denies the allegations contained in Paragraph 33.

10 34. Yeo denies that ChainRxn infringes any intellectual property rights that Miller
11 may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a
12 belief as to the truth of the remaining allegations contained in Paragraph 34 and on those grounds
13 denies those allegations.

14 **COUNT ONE**
15 **Copyright Infringement by Defendant Yeo**

16 35. Yeo realleges and incorporates by reference each and every response contained in
17 each of the above paragraphs as if fully set forth herein.

18 36. Yeo denies the allegations contained in Paragraph 36.

19 37. Yeo denies that ChainRxn infringes any intellectual property rights that Miller
20 may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a
21 belief as to the truth of the remaining allegations contained in Paragraph 37 and on those grounds
22 denies those allegations.

23 38. Yeo denies the allegations contained in Paragraph 38.

24 39. Yeo denies the allegations contained in Paragraph 39.

25 40. Yeo denies the allegations contained in Paragraph 40.

26 41. Yeo denies the allegations contained in Paragraph 41.

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42. Yeo denies the allegations contained in Paragraph 42.

COUNT TWO
Contributory Copyright Infringement as to Defendant Facebook, Inc.

43. Yeo realleges and incorporates by reference each and every response contained in each of the above paragraphs as if fully set forth herein.

44. Yeo denies the allegations contained in Paragraph 44.

45. Yeo denies that ChainRxn infringes any intellectual property rights that Miller may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 45 and on those grounds denies those allegations.

46. Yeo denies that ChainRxn infringes any intellectual property rights that Miller may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 46 and on those grounds denies those allegations.

47. Yeo denies that ChainRxn infringes any intellectual property rights that Miller may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 47 and on those grounds denies those allegations.

48. Yeo denies that ChainRxn infringes any intellectual property rights that Miller may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 48 and on those grounds denies those allegations.

49. Yeo denies that ChainRxn infringes any intellectual property rights that Miller may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a belief as to the truth of the remaining allegations contained in Paragraph 49 and on those grounds denies those allegations.

1 50. Yeo denies that ChainRxn infringes any intellectual property rights that Miller
2 may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a
3 belief as to the truth of the remaining allegations contained in Paragraph 50 and on those grounds
4 denies those allegations.

5 51. Yeo denies that ChainRxn infringes any intellectual property rights that Miller
6 may have in the Boomshine game. Yeo is without sufficient knowledge or information to form a
7 belief as to the truth of the remaining allegations contained in Paragraph 51 and on those grounds
8 denies those allegations.

9 **AFFIRMATIVE DEFENSES**

10 Further answering the Second Amended Complaint, Yeo asserts the following defenses.
11 Yeo reserves the right to amend its Answer with additional defenses as further information is
12 obtained.

13 **First Defense**

14 Each of Miller’s claims fails to state facts sufficient to constitute a claim for relief.

15 **Second Defense**

16 Each of Miller’s claims is barred by the doctrine of waiver.

17 **Third Defense**

18 Each of Miller’s claims is barred by the doctrine of estoppel.

19 **Fourth Defense**

20 Each of Miller’s claims is barred by the doctrine of unclean hands.

21 **Fifth Defense**

22 Each of Miller’s claims is barred by the doctrine of copyright misuse.

23 **Sixth Defense**

24 Each of Miller’s claims is barred by the doctrine of fraud on the Copyright Office.

25 **Seventh Defense**

26 Each of Miller’s claims is barred by the doctrine of laches.

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Eighth Defense

Miller's claim for Copyright Infringement is barred, in whole or in part, because he has not pursued his claims in good faith.

Ninth Defense

Each of Miller's claims is barred, in whole or in part, because Defendant's alleged actions come within the doctrine of fair use and/or de minimis copying of protectable elements, if any.

Tenth Defense

Each of Miller's claims is barred, in whole or in part, because Miller's alleged copyrighted work lacks originality.

Eleventh Defense

Each of Miller's claims is barred, in whole or in part, because Miller's alleged copyrighted work constitutes nothing more than unprotectable "Scènes à faire".

Twelfth Defense

Each of Miller's claims is barred, in whole or in part, because Miller lacks standing to bring this action.

Thirteenth Defense

Each of Miller's claims is barred, in whole or in part, because Miller has failed to prosecute this action and/or comply with court orders.

Fourteenth Defense

Each of Miller's claims is barred, in whole or in part, by licenses, express and implied, granted or authorized to be granted by Miller.

Fifteenth Defense

Each of Miller's claims is barred, in whole or in part, because the accused work was independently created without reference to the claimed work.

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Sixteenth Defense

Each of Miller’s claims is barred, in whole or in part, because the claimed work was abandoned.

Seventeenth Defense

Each of Miller’s claims is barred, in whole or in part, as Miller heretofore waived, licensed, abandoned or forfeited any rights in the claimed work.

Eighteenth Defense

Miller’s damages, if any, are limited by Defendant’s innocent intent.

Dated: May ___, 2011.

**THOITS, LOVE,
HERSHBERGER & McLEAN**

By _____

**Andrew P. Holland
Attorneys for Defendant
Yao Wei Yeo**