

1 **Stephen C. Gerrish/Bar No. 061253**
 sgerrish@thoits.com
 2 **Andrew P. Holland/Bar No. 224737**
 aholland@thoits.com
 3 **THOITS, LOVE, HERSHBERGER & McLEAN**
 A Professional Law Corporation
 4 285 Hamilton Avenue, Suite 300
 Palo Alto, California 94301
 5 Telephone: (650) 327-4200
 Facsimile: (650) 325-5572

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

8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT OF CALIFORNIA**
 10 **SAN FRANCISCO DIVISION**

11 **DANIEL M. MILLER,**
 12
 Plaintiff,
 13
 v.
 14 **FACEBOOK, INC. and YAO WEI**
 15 **YEO,**
 16
 Defendants.

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

DEFENDANT YAO WEI YEO'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
DEFAULT JUDGMENT

Date: June 9, 2011
 Time: 2:00 p.m.
 Courtroom: 9, 19th Floor
 Judge: Hon. William Alsup

THOITS, LOVE, HERSHBERGER & McLEAN
 A PROFESSIONAL LAW CORPORATION
 285 Hamilton Avenue, Suite 300
 PALO ALTO, CALIFORNIA 94301
 (650) 327-4200

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

	<u>Page</u>
I. STATEMENT OF THE ISSUES.....	1
II. RELEVANT FACTS.....	1
III. DISCUSSION	3
A. Introduction.....	3
1. The Substantive Merits of Plaintiff’s Claim	3
2. The Sufficiency of the Complaint	5
3. The Amount of Money at Stake	6
4. The Possibility of Prejudice	6
5. Disputed Material Facts.....	7
6. The Default Was the Result of Excusable Neglect.....	7
7. Public Policy Favors Resolution on the Merits	9
B. The Court Lacks Personal Jurisdiction	9
IV. CONCLUSION.....	11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Allen v. Academic Games League of America, Inc.
89 F.3d 614, 617 (9th Cir. 1996)5

Atari, Inc. v. Amusement World, Inc.
547 F. Supp 222, 229 (D. Md. 1981)5

Bateman v. U.S. Postal Service
231 F.3d 1220, 1225 (9th Cir. 2000)6

Calder v. Jones
465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984)..... 10

Data Disc, Inc. v. Sys. Tech. Assocs.
557 F.2d 1280, 1285 (9th Cir. 1977)9

Data East USA, Inc., v. EPYX
862 F.2d 204, 206 (9th Cir. 1988) 4,5

Eitel v. McCool,
782 F.2d 1470 (9th Cir. 1986).....3,6,8

Falk v. Allen
739 F.2d 461, 463 (9th Cir. 1984)6

Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.
499 U.S. 340, 361 (1991)3

In re Tuli,
172 F.3d 707, 712 (9th Cir. 1999)9

Incredible Technologies, Inc. v. Virtual Technologies, Inc.
400 F.3d 1007 (7th Cir. 2005)5

IO GROUP, Inc. v. Jordon
708 F.Supp.2d 989, 994 (N.D.Cal. 2010)9, 10

Lake v. Lake
817 F.2d 1416, 1421 (9th Cir. 1987)9

Mazer v. Stein
347 U.S. 201, 218 (1954)3

Pena v. Seguros La Comercial, S.A.
770 F.2d 811, 814 (9th Cir. 1985)8

Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship
507 U.S. 380, 395 (1993)8

Schwarzenegger
374 F.3d at 8029,10

Scott v. Breeland
792 F.2d 925, 927 (9th Cir. 1986)9

Silberstein v. Fox Entm’t Group, Inc.
424 F. Supp. 2d 616, 628-29 (S.D.N.Y. 2004)3

Sid & Marty Krofft Television Products, Inc. v. McDonald’s Corp.
562 F.2d 1157, 1162 (9th Cir. 1977)4

TCI Group Life Ins. Plan v. Knoebber
244 F.3d 691, 701 (9th Cir. 2001)6,7,8

Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme
433 F.3d 1199 (9th Cir. 2006) 10

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21
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24
25
26

FEDERAL STATUTES

35 U.S.C. §102(b).....4

MISCELLANEOUS

Federal Rules of Civil Procedure, Rule 55.....7

Federal Rules of Evidence, Rule 2013

1 **I. STATEMENT OF THE ISSUES**

2 The controlling issue before the court is whether plaintiff Daniel Miller has carried his
3 burden in establishing that this court should exercise its discretion to grant a default judgment
4 against defendant Yao Wei Yeo, notwithstanding said defendant’s pending motion to set aside
5 the existing default against him and his argument submitted therein, as well as in this
6 memorandum, which he contends establish that justice is best served by ordering the default set
7 aside, no judgment entered, and this trial proceeding on the merits.

8 In this motion defendant Yao Wei Yeo (“Yeo”) argues that the factors that must be
9 considered by this court weigh in favor of refusing to enter judgment, and that in any event this
10 court lacks personal jurisdiction over him. Yeo reserves all his rights regarding his contention
11 that this court lacks jurisdiction.

12 **II. RELEVANT FACTS**

13 The facts are presented in Yeo’s declaration, as well as the declaration of David Crane
14 filed previously in this action and concurrently filed herewith in support of Yeo’s Opposition to
15 plaintiff Miller’s Motion for Default Judgment. Those declarations establish that: (i) Yeo has a
16 substantial defense to this action on the merits; (ii) there is no prejudice to plaintiff Miller in
17 denying his request for default judgment in favor of a trial on the merits; (iii) the default entered
18 against Yeo was due to his excusable neglect, and he was not guilty of any culpable conduct;
19 and (iv) the foregoing factors, in combination with the court’s preference for trial of disputed
20 matters on the merits, justify denial of Plaintiff’s current motion.

21 Yeo is a citizen of Singapore who did not know he should take any action in this case
22 until April 12, 2011, when he received an email from Plaintiff’s counsel with an attached copy
23 of Plaintiff’s motion to have default judgment entered against Yeo on May 19, 2011. Over the
24 next 24 hours, Yeo exchanged emails with Plaintiff’s counsel, who, despite refusing to dismiss
25 Plaintiff’s case at Yeo’s request, encouraged Yeo to retain counsel, file an appearance and share
26 any evidence that would establish that he has no liability, or discuss a reasonable monetary

1 settlement. Within 24 hours, Yeo had retained counsel in Palo Alto, California in order to
2 attempt to defend himself on the merits. Shortly thereafter, on April 18, 2011, Yeo collected
3 mail from his UPS mail box in New York City while there on holiday. His mail had been
4 accumulating since he opened the box in March 2010 – this was his first visit to pick up mail.
5 In the mail, he found two envelopes with legal papers relating to this case; one contained copies
6 of the summons and complaint and the other contained papers related to the motion to enter a
7 default judgment. Apart from the April 12, 2011 e-mail, this was the first time Yeo had
8 personally received any documents related to the case.

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

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

21 Yeo is confident that he has valid defenses to Miller’s claims of copyright infringement.
22 He also disputes that this court has a proper basis to exercise personal jurisdiction over him,
23 given his minimal contacts with the United States since he graduated from Cornell University in
24 2008.

1 **III. DISCUSSION**

2 **A. Introduction**

3 Plaintiff Miller accurately states the rule of *Eitel v. McCool*, 782 F.2d 1470 (9th Cir.
4 1986) requiring this court to consider seven listed factors in determining whether to grant a
5 default judgment. Those factors are discussed below. In addition, Yeo incorporates into this
6 opposition to Plaintiff’s motion Yeo’s own arguments in support of his motion to set aside the
7 default entered against him, previously served and to be heard concurrently with Plaintiff’s
8 motion.

9 **1. The Substantive Merits of Plaintiff’s Claim**

10 The record in this case already contains sufficient information to establish the validity of
11 Yeo’s substantive defenses. Yeo is confident that he will successfully defeat Plaintiff’s claim of
12 direct copyright infringement. Facts supporting Yeo’s defenses are set forth in his
13 accompanying declaration as well as the expert declaration of David Crane (“Crane Decl.”)
14 which was submitted in support of Facebook’s Motion for Summary Judgment re: Contributory
15 Copyright Infringement, which Yeo has requested that the Court take Judicial Notice of pursuant
16 to Rule 201 of the Federal Rules of Evidence.

17 To establish direct copyright infringement, a plaintiff must prove “(1) ownership of a
18 valid copyright, and (2) copying of constituent elements of the works that are original.” *Feist*
19 *Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Evidence that an alleged
20 infringer created his work independently of the copyrighted work precludes a finding of
21 infringement. *Silberstein v. Fox Entm’t Group, Inc.*, 424 F. Supp. 2d 616, 628-29 (S.D.N.Y.
22 2004) (summary judgment of defendants where “copious undisputed testimonial and
23 documentary evidence” detailing creative process established independent creation). “Absent
24 copying there can be no infringement of copyright.” *Mazer v. Stein*, 347 U.S. 201, 218 (1954).
25 Miller cannot prove that Yeo illegally copied any constituent elements of the Boomshine game.

26 As Yeo sets forth in his Declaration, he has never even had access to the source code for

1 the Boomshine game, and he certainly didn't copy any portion of the Boomshine source code.
2 Yeo Decl., ¶17. Yeo's position is supported by David Crane's findings, summarized in Crane's
3 Declaration, that there is absolutely no commonality between the Boomshine and ChainRxn
4 computer code. Crane Decl., ¶¶83-100.

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

16 Because Miller has no direct evidence of copying, he must prove “(1) the defendant's
17 access to the copyrighted work prior to defendant's creation of its work, and (2) the substantial
18 similarity of both the general ideas and expression between the copyrighted work and
19 defendant's work.” *Data East USA, Inc., v. EPYX*, 862 F.2d 204, 206 (9th Cir. 1988); *Sid &*
20 *Marty Krofft Television Products, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir.
21 1977). Miller cannot satisfy the second criterion.

22 Although Yeo played the Boomshine game on a few occasions, the material differences
23 between Boomshine and Chain Rxn make it impossible for Miller to show that any protectable
24 elements were copied. Boomshine is a very simplistic game which utilizes the same mechanics
25 as other “chain reaction” type games such as Missile Command. The similarity between such
26 games arises from the similar game mechanics, which copyright does not protect. 35 USC

1 §102(b); *Data East, supra*, 862 F.2d at 204. Game procedures are not protectable expression.
2 See *Incredible Technologies, Inc. v. Virtual Technologies, Inc.*, 400 F.3d 1007 (7th Cir. 2005)
3 (finding no infringement after filtering protectable from non-protectable elements despite the fact
4 "it is pretty clear that [defendant] set out to copy [plaintiff's golf simulator] game"); *Atari, Inc.*
5 *v. Amusement World, Inc.*, 547 F. Supp 222, 229 (D. Md. 1981). This is because game
6 mechanics, which are no more than procedures and methods of operations, are not protected
7 under the Copyright Act. See Section 102(b) (precluding copyright protection for "processes,"
8 "procedures," "systems," or "methods of operations"); see also, e.g., *Allen v. Academic Games*
9 *League of America, Inc.*, 89 F.3d 614, 617 (9th Cir. 1996).

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

21 Based on the facts and law submitted by Yeo in support of his legal defenses to Miller's
22 claim of direct copyright infringement, Yeo has satisfied the requirement that the substantive
23 merits of Plaintiff's claim are woefully deficient.

24 2. The Sufficiency of the Complaint

25 Yeo understands that with a default entered against him the law presumes the truth of all
26 properly pleaded facts in the complaint. However, while the complaint may be sufficient to

1 state a claim on which relief may be granted, the factors this court must find require testing both
2 the complaint's legal sufficiency and its "merit." This is a factual and legal analysis of the
3 likelihood of success. To say that the default necessarily forecloses a review of the complaint's
4 sufficiency and its merit makes meaningless the rule that those factors must be considered before
5 a default judgment may be entered. As demonstrated in the Yeo and Crane declarations, the
6 technical requirements of Plaintiff's claim cannot be satisfied.

7 3. The Amount of Money at Stake

8 Plaintiff argues that the amount sought is reasonable under the statutory authority.
9 Nevertheless, it is a substantial sum to be imposed in these circumstances without the
10 opportunity of Yeo to offer his defenses. The substantiality must be weighed in light of the
11 substantial doubt as to the validity of the claim if a trial on the merits is conducted. In that
12 sense, the amount is high, and unreasonably so, given the facts. The court in *Eitel* made clear
13 that the amount of money at stake is viewed in relation to the seriousness of the defendant's
14 conduct. *Eitel, supra*, 782 F.2d at 1471-72. Defendant contends he has valid defenses – the
15 seriousness of the amount of money at stake cannot be judged in the abstract without
16 consideration of the context of Plaintiff's specious claims.

17 4. The Possibility of Prejudice

18 Plaintiff Miller will not be prejudiced by setting aside the default. "To be prejudicial,
19 the setting aside of a judgment must result in greater harm than simply delaying resolution of the
20 case. Rather, 'the standard is whether [plaintiff's] ability to pursue his claim will be hindered.'" *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9th Cir. 2001) (citing *Falk v. Allen*,
21 739 F.2d 461, 463 (9th Cir. 1984)). Delay in trial or being forced to litigate the substance on
22 the merits are not deemed prejudice under the good cause standard of Rule 55(c). *Bateman v.*
23 *U.S. Postal Service*, 231 F.3d 1220, 1225 (9th Cir. 2000).

24 Facebook has been dismissed from the action. There is no prejudice related to the
25 pending prosecution of that claim. The trial dates were set when Facebook was a party, and
26

1 Yeo had not appeared. The issues related to the discrete issue of direct infringement of
2 Plaintiff’s game have not changed, nor has the evidence become unavailable or been altered or
3 lost. In his recent correspondence with Yeo, Plaintiff’s counsel suggested that Yeo retain
4 counsel, appear in the action and both discuss settlement and share evidence that Yeo relies on
5 to support his claim that he has not infringed any rights of Plaintiff. Plaintiff’s counsel’s
6 invitation to participate in the litigation suggests a complete absence of any prejudice. Plaintiff
7 argues that if a default judgment is denied, “Yeo’s conduct will remain unchecked and he will
8 be free to pursue similar activities.” Moreover, Plaintiff never sought a temporary restraining
9 order or preliminary injunction at any time in this case. It is well established that mere delay in
10 reaching the merits is not prejudice, without other exigent circumstances. None has been
11 presented. This factor also weighs in Yeo’s favor.

12 **5. Disputed Material Facts**

13 Yeo’s and Crane’s declarations establish substantial material questions of fact and law.
14 As with the “merits” factor described above, this court is required to consider disputed facts
15 before exercising its discretion to enter a default judgment. That must require more than
16 determining whether a default was entered. Plaintiff’s argument is based on false logic. In
17 addition, it disregards the court’s obligation to review the court’s basis for personal jurisdiction,
18 concerning which there are material factual issues.

19 **6. The Default Was the Result of Excusable Neglect**

20 Under Rule 55(c) of the Federal Rules of Civil Procedure a court may set aside a default
21 for “good cause.” Good Cause requires, among other things, that the moving party was not
22 guilty of “culpable conduct.” Regarding “culpable conduct,” the Ninth Circuit has stated that
23 “neglectful failure” and a defendant’s offering of a “...credible, good faith explanation:”

24 negating any intention to take advantage of the opposing party, interfere with
25 judicial decision-making, or otherwise manipulate the legal process is not
26 "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

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the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond.

TCI, supra, 244 F.3d at 697-98.

Aligning the facts of this case with the standard applied to what is and is not excusable conduct, Yeo submits he has satisfied the factor by establishing that the default entered against him was a result of his excusable neglect. 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’s decision in *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. Yeo did not receive the summons and complaint until April 18, 2011. Whenever Yeo did actually receive 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 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. Yeo’s neglect was excusable.

1 7. **Public Policy Favors Resolution on the Merits**

2 The cases cited by Plaintiff clearly state this truth: “Our starting point is the general rule
3 that default judgments are ordinarily disfavored. Cases should be decided upon their merits
4 whenever reasonably possible.” *Eitel, supra*, 782 F.2d at 1472; *Pena v. Seguros La Comercial*,
5 *S.A.*, 770 F.2d 811, 814 (9th Cir. 1985). In combination with the other factors weighing in
6 Yeo’s favor, this factor is compelling in his favor.

7 **B. The Court Lacks Personal Jurisdiction**

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

15 The district court has an affirmative duty to look into its jurisdiction over both the subject
16 matter and the parties. *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). A recent Northern
17 District decision outlines the requirements:

18 As the party seeking to invoke this Court’s jurisdiction, Plaintiff bears the
19 burden of establishing that this Court has personal jurisdiction over Defendant.
20 *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (citing *Data Disc, Inc. v.*
21 *Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). In the context of a
22 motion for default judgment, the Court may dismiss an action *sua sponte* for
23 lack of personal jurisdiction. *In re Tuli*, 172 F.3d at 712. Where there are
24 questions about the existence of personal jurisdiction, however, a court should
25 allow the plaintiff the opportunity to establish that jurisdiction is proper. *Id.* at
26 713.

27 ...

28 The Ninth Circuit has articulated a three-prong test to determine whether a party
29 has sufficient minimum contacts to be susceptible to specific personal
30 jurisdiction: (1) The non-resident defendant must purposefully direct his
31 activities or consummate some transaction in the forum or resident thereof; or
32 perform some act by which he purposefully avails himself of the privilege of
33 conducting activities in the forum, thereby invoking the benefits and protections

1 of its laws; (2) the claim must be one which arises out of or relates to the
2 defendant's forum-related activities; and (3) the exercise of jurisdiction must
3 comport with fair play and substantial justice, *i.e.*, it must be reasonable.
4 *Schwarzenegger*, 374 F.3d at 802 (quoting *Lake v. Lake*, 817 F.2d 1416, 1421
5 (9th Cir. 1987)).

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

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

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

14 To evaluate purposeful direction, the Court applies a three-part “*Calder-effects*”
15 test, articulated in the Supreme Court's decision in *Calder v. Jones*, 465 U.S.
16 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984). Under this test, “the defendant
17 allegedly must have (1) committed an intentional act, (2) expressly aimed at the
18 forum state, (3) causing harm that the defendant knows is likely to be suffered
19 in the forum state.” *Yahoo! Inc. v. La Ligue Contre Le Racisme Et*
20 *L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (internal quotes omitted).
21 There is no requirement that the defendant have any physical contacts with the
22 forum. *Schwarzenegger*, 374 F.3d at 803.

23 *IO Group, supra*, 708 F.Supp.2d at 995.

24 This test cannot be met in this case. Whether Georgia or California is considered the
25 forum state, plaintiff has not submitted sufficient evidence, or any evidence, that Yeo committed
26 an intentional act expressly aimed at the forum state that caused harm that Yeo was likely to
27 know would be caused in that state. Yeo respectfully submits that the second and third prongs
28 of the personal jurisdiction test also cannot be met. There is no showing that the claims
29 necessarily arose from forum related activities. The game was available via the Facebook
30 Internet portal to a wide, geographically dispersed audience. There is no evidence that Yeo
31 intended the activities to be directed at California, which issued the summons against him, or
32 Georgia, where the case was originally filed, or that he had any knowledge of where any alleged

1 infringement was likely to be suffered. Even using a broad interpretation of the purposeful
2 direction of Internet reach or activity, in the present setting it would be unreasonable to impose
3 personal jurisdiction when there has been so little specific intent regarding the alleged harm
4 within a forum state.

5 **IV. CONCLUSION**

6 Defendant Yeo respectfully submits that Plaintiff's application for a default judgment
7 should be denied and that this matter should proceed in due course toward resolution or be
8 dismissed for lack of personal jurisdiction. There is no prejudice to Plaintiff. The interests of
9 justice are served by such an order.

10 Dated: May 19, 2011.

**THOITS, LOVE,
HERSHBERGER & McLEAN**

By s/ Andrew P. Holland
Andrew P. Holland
Attorneys for Defendant
Yao Wei Yeo

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