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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)**

REPLY OF DEFENDANT YAO WEI
YEO IN SUPPORT OF MOTION TO
SET ASIDE DEFAULT

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

19 **I. INTRODUCTION**

20 Plaintiff's opposition consists primarily of speculative attacks on the credibility and
 21 character of Yaowei Yeo. However, the undisputed evidence belies Plaintiff's arguments.
 22 Since 2009, every time Plaintiff or Plaintiff's counsel contacted Yeo about this lawsuit, Yeo
 23 responded immediately, directly, and honestly. Had Plaintiff or his counsel contacted Yeo when
 24 they were leaving papers in a New York mail box, Yeo would have responded to them. But
 25 because they did not do so, Yeo did not know about the papers, and so he did not respond to
 26 them. When Yeo finally was contacted, he once again responded immediately.

1 Plaintiff's theory of dishonesty rests simply on Plaintiff speculating, without evidence,
2 that Yeo is lying when he says he did not visit the New York mailbox. Meanwhile, Plaintiff's
3 novel theory of culpability is apparently that Yeo deviously manipulated the system to his own
4 detriment, since not responding sooner simply put Yeo in a procedural hole. None of that adds
5 up. Yeo is the only person who actually knows the facts, and his explanation is more obvious
6 and more compelling: he simply did not visit the New York mail box.

7 II. ANALYSIS

8 a. Legal Standard

9 Rule 55(c) of the Federal Rules of Civil Procedure provides that "[t]he court may set
10 aside an entry of default for good cause." This requires consideration of three factors: (1)
11 whether the defendant engaged in culpable conduct that led to the default; (2) whether the
12 defendant had a meritorious defense; and (3) whether reopening the default judgment would
13 prejudice the plaintiff. *Franchise Holding II, LLC. v. Huntington Restaurants Group, Inc.* 375
14 F.3d 922, 925-26 (9th Cir. 2004). That legal standard is not disputed. It is also not disputed
15 that default judgments are disfavored, and that trial on the merits is preferred. *Eitel v. McCool*,
16 782 F.2d 1470, 1472 (9th Cir. 1986).

17 b. Undisputed Factors: Meritorious Defense and Prejudice

18 As detailed in Yeo's motion, Plaintiff would not be prejudiced by setting aside the
19 default. In opposition, Plaintiff does not attempt to argue otherwise. Similarly, Plaintiff does
20 not attempt to deny in his opposition that Yeo's substantive arguments are sufficient to support
21 setting aside the default. Yeo has consistently and forcefully denied Plaintiff's accusations, and
22 Yeo's innocence is evidenced not only by his own declaration, but also by independent sources,
23 including the expert declaration of David Crane.

24 c. Disputed Factor: Culpability

25 For Yeo's application to be denied, Yeo must be found culpable. Culpability requires
26 the willful seeking or obtaining of advantage over, manipulation of or interference with the

1 court's process - a devious, deliberate, willful, or bad faith failure to respond. *TCI Group Life*
2 *Ins. Plan v. Knoebber*, 244 F.3d 691, 697-98 (9th Cir. 2001). No evidence has been presented
3 that Yao had such an intent, and his words and actions show he did not:

4 • In May 2009, Plaintiff e-mailed Yeo. Yeo responded immediately and denied
5 wrongdoing.

6 • Next, also in May 2009, Plaintiff's counsel e-mailed Yeo. Yeo again responded
7 immediately and directly.

8 • Next, in April 2011, Yeo was again contacted by e-mail. Once again, Yeo promptly
9 responded, spoke directly about the case and, as suggested by Plaintiff's counsel, took action to
10 defend himself.

11 Plaintiff does not dispute these facts. Nor does Plaintiff deny that Yeo is a Singapore
12 resident who rented a New York mail box only to catch any stray U.S. correspondence (not as
13 his regular mailing address). Nonetheless, Plaintiff argues as follows: (1) Plaintiff speculates
14 that Yeo is lying as to when he visited the mail box, and (2) if Yeo is lying then Yeo is culpable.

15 Plaintiff does not claim to actually know or have any evidence about when Yeo visited
16 the New York mail box. Rather, the culpability argument rests entirely on Plaintiff's
17 speculation. Merely positing that another party might be lying, without any evidence at all, is
18 obviously insufficient to show culpability (or anything else). Further, Plaintiff's explanation
19 does not make sense. If Yeo wanted to "hide" from Plaintiff, why did he immediately answer
20 every communication he received? And what strategic advantage would Yeo gain by letting a
21 default judgment be entered against him before defending himself on the merits?

22 Plaintiff's theory is also inconsistent with Plaintiff's own conduct. Plaintiff and his
23 counsel knew they could communicate with Yeo by e-mail, and Plaintiff's opposition shows that
24 by July 2, 2010, they also had his telephone number. The issue of service on Yeo was
25 apparently significant in the discussions before the court at that time. Nonetheless, Plaintiff did
26 not attempt to contact Yeo after May 2009. It is customary and appropriate to make every effort

1 to contact a defendant and warn him that service has been accomplished and if he does nothing a
2 default will be entered and judgment obtained. Plaintiff could have easily done this between
3 July 2010 and September 2010. He and his counsel knew from experience that when contacted
4 directly, Yeo would respond. Yet, after mailing the summons and complaint to the UPS drop in
5 New York, Plaintiff did not call or e-mail Yeo. Clearly Plaintiff wanted to be able to argue that
6 Yeo had been served, but it is not clear whether he wanted Yeo to know about it.

7 It was only after Plaintiff filed his application for a default judgment that he sent Yeo a
8 communication he knew Yeo would receive, i.e., an e-mail to the e-mail address he knew Yeo
9 checked and used. The predictable result was immediate action: Yeo communicated with
10 Plaintiff's counsel, retained his own legal counsel, and attempted to undo the damage caused by
11 the failure to receive Plaintiff's prior filings. Once again, it is bizarre to suggest that Yeo had
12 already received those filings but deliberately chose to wait until that time to act. How would
13 Yeo benefit from having a default judgment entered against him?

14 Plaintiff's other attempts to suggest Yeo is lying suffer from the same defects, but even
15 more so. The fact that Yeo knew a lawsuit existed obviously does not mean he scrutinized and
16 understood every docket entry for that case. And the fact that he called Facebook to find out the
17 status of the case while visiting friends in California obviously does not mean he was in New
18 York the week before picking up mail.

19 In sum, Plaintiff's theory about Yeo's motives is not based on evidence, but on the
20 simple assertion that Plaintiff thinks Yeo is lying. There is no coherent story to explain such
21 alleged manipulation by Yeo, since failing to respond sooner gained him nothing and forced him
22 to overcome a default judgment.

23 Yeo's actions are much better explained by the declaration testimony of the one person
24 who knows what happened, Yeo himself. He denied the accusations against him immediately
25 and directly whenever they were made. He knew he was being sued but did not think he needed
26 to hire a lawyer and go to court until he was served with papers. And he did not see those

1 papers until Plaintiff emailed them to him, at which time he immediately took action.

2 **III. CONCLUSION**

3 Defaults can be set aside, and, in fact, courts prefer to try cases on the merits. Yeo has
4 always insisted on his innocence and has produced substantial evidence to that effect. Plaintiff
5 does not attempt to deny Yeo has a substantial defense on the merits. Plaintiff will not be
6 prejudiced by setting aside the default. Yeo has acted in good faith and he should be permitted
7 to defend himself on the merits.

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9 Dated: May 26, 2011.

**THOITS, LOVE,
HERSHBERGER & McLEAN**

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12 By s/ Andrew P. Holland

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Attorneys for Defendant
Yao Wei Yeo

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