

1 I. NEEL CHATTERJEE (STATE BAR NO. 173985)
 nchatterjee@orrick.com
 2 THOMAS J. GRAY (STATE BAR NO. 191411)
 tgray@orrick.com
 3 JULIO C. AVALOS (STATE BAR NO. 255350)
 javalos@orrick.com
 4 ORRICK, HERRINGTON & SUTCLIFFE LLP
 1000 Marsh Road
 5 Menlo Park, CA 94025
 Telephone: 650-614-7400
 6 Facsimile: 650-614-7401

7 Attorneys for Defendant
 FACEBOOK, INC.

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

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

Case No. 5:10-CV-00264 (WHA)

**FACEBOOK INC.'S REPLY BRIEF
 IN SUPPORT OF ITS MOTION TO
 DISMISS PLAINTIFF'S SECOND
 AMENDED COMPLAINT**

Date: August 5, 2010
 Time: 8:00 A.M.
 Court: Courtroom 9, 19th Floor
 Judge: Honorable William Alsup

1 **I. INTRODUCTION**

2 On May 27, 2010, the Court permitted Plaintiff to file a third and final complaint on the
3 condition that Plaintiff explain, “how and why the ChainRxn video game is an unlawful ‘copy’ of
4 plaintiff’s copyright in *Boomshine*.” Dkt. 56 at 13:16-17. Rather than complying with the
5 Court’s Order, Plaintiff instead filed a Second Amended Complaint (“SAC”) that added a single
6 paragraph containing nothing but conclusory statements and rank speculation as to how
7 Defendant Yeo copied *Boomshine*. In his Opposition, Plaintiff now asks the Court to accept these
8 speculative conclusions because Plaintiff’s other allegations supposedly state a claim for direct
9 infringement by providing more detail than a form complaint. But Plaintiff’s arguments miss the
10 mark. The Court directly ordered Plaintiff to supplement his complaint with **factual allegations**
11 that would properly allege how Defendant Yeo copied Plaintiff’s computer code. This, Plaintiff
12 has failed to do.

13 In addition, Plaintiff clings to the theory that Yeo infringed Plaintiff’s copyright merely
14 because the two games look alike. This theory is unavailing. First, Plaintiff has already
15 conceded—and the Court itself already observed—that Plaintiff does not have a copyright in the
16 “look and feel” of the *Boomshine* game. Thus, Plaintiff is precluded from asserting any rights
17 relating to the visual aspects of *Boomshine*. Second, Plaintiff’s assertion that Yeo must have
18 copied Plaintiff’s computer code because *Boomshine* and *ChainRxn* allegedly look similar is an
19 unwarranted deduction of fact that the Court need not credit. Plaintiff offers no factual
20 allegations in his SAC that Yeo actually saw *Boomshine*, nor does he adequately allege that Yeo
21 somehow copied the *Boomshine* code even if he did see Plaintiff’s game. Plaintiff therefore fails
22 to state a claim of copyright infringement.

23 Plaintiff’s Opposition brief (“Opp. Br.”) emphasizes what has become obvious throughout
24 the course of this litigation: Plaintiff has no idea whether Yeo copied Plaintiff’s game, much less
25 how he did so. But because Yeo made the game available through Facebook, Plaintiff wants to
26 drag Facebook through expensive, unnecessary and futile (without Yeo appearing in the action)
27 discovery in the hopes of forcing a lucrative settlement. Plaintiff’s newly-added allegations,
28 however, do not comply with the Court’s Order and, accordingly, the SAC does not satisfy basic

1 pleading standards. Thus, Facebook respectfully requests that its Motion to Dismiss Plaintiff's
2 SAC be GRANTED.

3 **II. BRIEF RECITATION OF RELEVANT FACTS**

4 On May 27, 2010, at a hearing on his motion for leave to file a third complaint in this
5 matter, Plaintiff's counsel conceded that he did not know how Defendant Yeo had supposedly
6 copied *Boomshine's* source code. See Dkt. 63-1 at 10:16-18. On May 28, 2010, the Court issued
7 its Order granting Plaintiff leave to file a SAC, but required Plaintiff to explain "how and why the
8 ChainRxn video game is an unlawful 'copy' of plaintiff's copyright in Boomshine." Dkt. No. 56
9 at 13:16-17. The Court's Order "emphasize[d] that plaintiff's copyright appears to be limited to
10 the source code rather than the audiovisual aspects of Boomshine." *Id.* at 7:7-8. This conclusion
11 is supported by Plaintiff's own copyright registration for a computer "file," as well as Plaintiff's
12 counsel's concession that Plaintiff "has a copyright on the code." Dkt. 63-1 at 10:3. The Court
13 indicated this would be Plaintiff's final chance to amend his complaint, Dkt. 56. at 13:17-19, as
14 well as ordered that Plaintiff serve Yeo by July 30, 2010. *Id.* at 13:1-3. Should Plaintiff miss this
15 deadline, the Court ordered it would "take immediate action to dismiss the case." *Id.*

16 On June 4, 2010, just days after the hearing, Plaintiff filed a SAC adding a new Paragraph
17 20 that purported to contain factual allegations detailing how Defendant Yeo had copied
18 *Boomshine's* source code.

19 On July 8, 2010, Plaintiff filed a "Proof of Service" claiming to confirm service of the
20 summons and complaint on Defendant Yeo. Dkt. 65. According to that "Proof of Service,"
21 "Defendant Yeo was served by certified mail at 353 3rd Avenue, Suite 246, New York, NY
22 10010 effective July 8, 2010 Pursuant to Rule 4(c)(1), FRCP, and § 415.40 of the California Code
23 (2009)." *Id.* According to the Declaration of Brian Hancock filed in support of Plaintiff's "Proof
24 of Service," Plaintiff mailed the summons and complaint to "UPS Store 5865" in Manhattan.
25 Dkt. 65-1 at 2:23. "On June 28, 2010, the Summons and Second Amended Complaint were
26 delivered to that address and the certified mail receipt was signed by 'Alex,' an employee of UPS
27 Store 5865." *Id.* at 3:3-4. Mr. Hancock attached to his declaration copies of the "track and
28

1 confirm” information from the www.usps.gov website for this letter as well as a certified mail
2 receipt bearing the signature, “Alex.” *Id.*, Exs. B-C.

3 **III. ANALYSIS**

4 **A. Legal Standard**

5 Plaintiff agrees with Facebook that “[w]hile a complaint attacked by a Rule 12(b)(6)
6 motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the
7 ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
8 recitation of the elements of a cause of action will not do.” *Opp. Br.* at 8:15-19 (emphasis
9 removed) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (“*Twombly*”).
10 Critically, in determining a motion to dismiss, the Court need not credit conclusory allegations,
11 unwarranted deductions of fact, or unreasonable inferences. *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
12 1949-50 (2009); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ; *see also*
13 *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (a complaint may not survive a
14 motion to dismiss based only on “conclusory ‘factual content’”).

15 **B. Plaintiff Has Failed To State A Claim For Direct Copyright Infringement.**

16 **1. Plaintiff Has Failed To Comply with The Court’s Order to Provide** 17 **Allegations Sufficient To Establish That Defendant Yeo Accessed and** 18 **Copied The Boomshine Source Code.**

19 In its opening brief, Facebook attacked the adequacy of Plaintiff’s newly-added Paragraph
20 on two fronts. First, Paragraph 20 fails to comply with the Court’s May 28 Order requiring
20 that Plaintiff explain “how and why the ChainRxn video game is an unlawful ‘copy’ of plaintiff’s
21 copyright in *Boomshine*.” *Dkt. 56* at 13:16-17. Second, Paragraph 20 contains nothing but
22 “conclusory allegations and unwarranted deductions of fact” that the Court must reject under
23 *Iqbal*. *See Iqbal*, 129 S. Ct. at 1949-50. In addition to being intrinsically conclusory and
24 speculative, Facebook also pointed to the fact that just one week prior to filing the SAC,
25 Plaintiff’s counsel had not known how or even if Defendant Yeo had actually copied *Boomshine*.
26 *Dkt. 63-1* at 10:16-17. Due to the timing of the SAC — and the fact that Plaintiff did not denote
27 Paragraph 20 as one requiring “further investigation or discovery” pursuant to Rule 11(b)(3) —
28

1 common sense dictates that Plaintiff merely made up the conclusions in Paragraph 20 in order to
2 save his case.

3 In response, Plaintiff argues that the allegations set forth in the SAC satisfy notice
4 pleading standards and go beyond a form complaint. Plaintiff, however, ignores the fact that the
5 Court specifically ordered Plaintiff to provide detailed factual allegations to explain how
6 Defendant Yeo improperly copied Plaintiff's copyright in *Boomshine*. Plaintiff's unwarranted
7 deductions of fact do not comply with the Court's May 28, 2010 Order or the pleadings standards
8 set forth in *Iqbal* and *Twombly*.¹

9 Plaintiff argues that his new allegations are sufficient because they are "based on the
10 information Mr. Miller's [sic] acquired without the benefit of formal discovery ... and Mr.
11 Miller's belief based on the knowledge he possesses as a highly-educated programmer of gaming
12 applications." Opp. Br. at 10:3-6. But whatever knowledge Mr. Miller may possess of his own
13 gaming experiences could not possibly translate into knowledge of Defendant Yeo's actions vis-
14 à-vis the *Boomshine* game. And Plaintiff's argument that these allegations are based on evidence
15 it will obtain through "formal discovery," *id.* at 11:19, is unavailing; federal law requires that all
16 "factual contentions have evidentiary support or, if specifically so identified, will likely have
17 evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R.
18 Civ. P. 11(b)(3). None of the allegations in Paragraph 20 are identified as requiring further
19 investigation or discovery.

20 Plaintiff cites to *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010), for
21 support. But *Arista* does not help Plaintiff. The Doe defendant in *Arista* sought to quash a
22 subpoena seeking his or her personal identifying information. *Id.* at 113. According to Doe No.
23 3, the First Amendment granted Internet users a right to anonymity that could only be overcome
24 "by a substantial and particularized showing" of copyright infringement. *Id.* 113-14.

25 ¹ Despite Plaintiff's assertion, the use of an approved template does not ensure that the
26 substantive contents of a complaint will meet judicial muster. *See, e.g., Halton Co. v. Streivor,*
27 *Inc.*, No. C 10-00655, 2010 U.S. Dist. LEXIS 50649, at *7 (N.D. Cal. May 21, 2010) (Alsup, J.)
28 (granting a motion to dismiss a patent infringement complaint that used Form 18 and noting that
the use of a Rule 84 form is not a blanket "shield" to a motion to dismiss) (*citing Bender v. LG*
Elects. USA, Inc., Case No. C 09-02114 JF (PVT) 2010 U.S. Dist. LEXIS 33075, 2010 WL
889541 (N.D. Cal. Mar. 11, 2010))

1 Specifically, Doe No. 3 sought to convince the Second Circuit Court of Appeals that the
2 presumption of anonymity could only be overcome by a complaint attaching an affidavit
3 testifying to a litany of details relating to the allegedly infringed copyrights as well as the Doe
4 defendant's actions. *Id.* at 114. The *Arista* court refused Defendant's invitation to create such a
5 heightened pleading standard. The court found that the allegations in Plaintiff's complaint "made
6 on information and belief" were "all of them supported by factual assertions" in an exhibit to the
7 complaint that detailed each defendant's unique IP address and date of access to the illegal files.
8 *Id.* at 121.

9 Plaintiff presents the Court with nothing akin to the *Arista* complaint's various allegations
10 made on "information and belief" that were supported by factual assertions detailing defendants'
11 actions. Instead, Plaintiff offers up the allegations in Paragraph 20 are precisely the sort of
12 "unwarranted deductions of fact" decried by the Supreme Court in *Iqbal*.

13 **2. Plaintiff Should Not Be Permitted To Maintain An Action on**
14 **Boomshine's "Look and Feel."**

15 In his Opposition, Plaintiff also attempts to revive his claim that he has copyright
16 protection for the visual elements (the "look and feel") of *Boomshine*. Plaintiff's registration,
17 however, is only for the *Boomshine* computer "file," i.e., its source code, as both Plaintiff's
18 counsel and the Court have previously observed. Dkt. 63-1 (Plaintiff's counsel admitting that Mr.
19 Miller "has a copyright on the code") and Dkt. 56 at 7:7-8 ("this order emphasizes that plaintiff's
20 copyright appears to be limited to the source code rather than the audiovisual elements of
21 Boomshine."). Plaintiff also does not dispute that he did not deposit screenshots of the visual
22 elements of *Boomshine* with the Copyright Office. *See* Dkt. 62 at 6:14-20 (citing 37 CFR
23 202.20(c)(2)(vii)(C)) ("Where the application to claim copyright in a computer program includes
24 a specific claim in related computer screen displays, the deposit ... shall consist of: (1) Visual
25 reproductions of the copyrightable expression in the form of printouts, photographs, or
26 drawings."). Indeed, the records at the Copyright Office reveal that Plaintiff did not make this
27 deposit. *See* Declaration of Julio C. Avalos In Support of Facebook's Reply Brief ("Avalos
28 Decl."), Ex. A. To the contrary, in addition to depositing a copy of the *Boomshine* computer file,

1 rather than depositing the requisite “printouts, photographs, or drawings,” Plaintiff deposited
2 excerpts from the *Boomshine* source code. *Id.*² Accordingly, Plaintiff has not registered the
3 visual elements of his game and is precluded from enforcing alleged rights on those elements in
4 this litigation. *See, e.g., Kema, Inc. v. Koperwhats, et al.*, 658 F. Supp. 2d 1022, (N.D. Cal. Sep.
5 10, 2009); *Reed Elsevier, Inc. et al. v. Muchnick et al.*, 559 U.S. ____, Slip Op. No. 08-103 (2010)
6 (affirming that registration of a copyright is necessary prior to instituting an action for
7 infringement of that copyright).

8 Plaintiff relies on *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173,
9 1175 (9th Cir. 1989), to suggest that, because he owns a copyright in the *Boomshine* code, he
10 automatically acquires copyright protection over the visual elements of his game. But *Johnson*
11 *Controls* says no such thing. Rather, the *Johnson Controls* court merely stated that “[w]hether the
12 non-literal components of a program, including the structure, sequence and organization and user
13 interface, are protected depends on whether, *on the particular facts of each case*, the component
14 in question qualifies as an expression of an idea or the idea itself.” *Id.*, citing *Harper Row*
15 *Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985)
16 (emphasis added). Plaintiff has failed to allege any underlying facts to support a claim that the
17 non-literal elements of his game (i.e., the look and feel) are protectible under the copyright laws.

18 Even if his copyright extended to the visual elements of *Boomshine*, which it does not,
19 Plaintiff has failed to provide any factual allegations supporting his claim that Defendant Yeo
20 copied *Boomshine*’s visual elements. Plaintiff has not alleged – and cannot allege – that
21 *Boomshine* was the first and only chain reaction-type game available on the internet or elsewhere.
22 Yet, he simply concludes that because he alleged a similarity between the visual elements of
23 *Boomshine* and *ChainRxn*, the only plausible conclusion is that Yeo copied *Boomshine*. The leap
24 is improper. *See Twombly*, 550 U.S. at 570 (finding that although one possible inference from

25 ² Documents referenced in a complaint are properly attached to a Rule 12(b)(6) motion to dismiss
26 to show that those documents do not support plaintiff’s claim. *See, e.g., Branch v. Tunnell*, 14
27 F.3d 449, 454 (9th Cir. 1994) (*overruled on other grounds, Galbraith v. County of Santa Clara*,
307 F.3d 1119, 1127 (9th Cir. 2002); *see also Amparan v. Plaza Home Mortgage, Inc.*, Case No.
28 C 07-4498 JF (RS) 2008 U.S. Dist. LEXIS 109148, at *5-6 (N.D. Cal. Dec. 17, 2008) (Fogel, J.)
(considering document attached by defendant to its motion to dismiss even though plaintiff had
made reference to it, but not attached it to her complaint).

1 plaintiff's claims was an alleged conspiracy, an equally plausible inference was a legal, "natural,
2 unilateral reaction" and that as such Plaintiffs had failed to state a cause of action for
3 anticompetitive conspiracy); *Iqbal*, 129 S. Ct. 1937, at 1949-50 (holding that the court need not
4 credit conclusory allegations, unwarranted deductions of fact, or unreasonable inferences).

5 **C. Plaintiff Has Not Properly Served Defendant Yeo.**

6 In his Opposition brief, Plaintiff claims that "Yeo was effectively served with the SAC on
7 July 8, 2010." Opp. Br. at 6:27-28. Substituted service on "Alex" at a UPS Store in New York
8 City does not constitute proper service and does not comply with the Court's requirement that
9 Plaintiff bring Yeo into this action by July 30, 2010. Very soon we will know whether Plaintiff
10 has actually served Yeo and whether he appears. If he does not, Facebook intends to file a
11 supplemental motion to dismiss based on Plaintiff's failure to properly serve Yeo.

12 **IV. CONCLUSION**

13 For the foregoing reasons, Facebook respectfully requests that the Court dismiss the
14 Second Amended Complaint with prejudice based on Plaintiff's failure to comply with the
15 Court's May 28, 2010 Order and the requisite pleading requirements.

16 Dated: July 22, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

18 /s/ Julio C. Avalos

19 Julio C. Avalos
20 Attorneys for Defendant
21 FACEBOOK, INC.