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

13 DANIEL M. MILLER,

14 Plaintiff,

15 v.

16 FACEBOOK, INC. and YAO WEI YEO,

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

**FACEBOOK, INC.' MOTION TO
DISMISS PURSUANT TO
FED.R.CIV.P. 41(B)**

Date: September 16, 2010
Time: 8:00 A.M.
Court: Courtroom 9, 19th Floor
Judge: Honorable William Alsup

1 **I. INTRODUCTION**

2 Facebook requests that this case be dismissed pursuant to Federal Rule of Civil Procedure
3 41(b). This Court has discretion to dismiss for failure to comply with the Federal Rules or a
4 Court Order. This Court also has discretion to dismiss the case for failure to prosecute a case.
5 Despite this Court's Order and repeated warnings to serve Defendant Yeo by July 30, plaintiff has
6 not effected service. At this point, dismissal of this case is warranted.

7 The facts underlying this motion are straightforward. Miller originally filed this action
8 nearly one year ago. In violation of Rule 4(m), Miller made virtually no effort to serve defendant
9 Yeo for the first seven months. The Court then ordered Miller to complete service on Yeo by
10 July 30, 2010, or face dismissal of the entire action. Miller responded by placing a copy of the
11 summons and complaint in an envelope and delivering it to a UPS store. Someone named Alex,
12 who does not appear to be Yeo's agent, signed for the package. Miller proffers no evidence, as he
13 must, that the summons and complaint were actually properly served upon Yeo. As of today, Yeo
14 has not been properly served.

15 As the Court recently recognized, Yeo's participation in this lawsuit is essential. Yeo, not
16 Facebook, is accused of copying Miller's copyrighted work. As the alleged direct infringer, Yeo
17 is uniquely in possession of critical evidence. Such evidence also is required to prove indirect
18 infringement by Facebook. As a result, Yeo's participation is crucial and, without it, Facebook
19 will be prejudiced in its ability to defend this action. Pursuant to Rule 41(b), therefore, the Court
20 should dismiss this case.

21 **II. BACKGROUND**

22 Daniel Miller originally filed this action on October 9, 2009. Dkt. No. 1. He named two
23 defendants: Yao Wei Yeo and Facebook, Inc. *Id.* Though Miller served Facebook four days later
24 on October 13, 2009, (Dkt. No. 4), he still has not served defendant Yeo.¹ Facebook is alleged to
25 have contributorily infringed Miller's Boomshine video game, and Yeo alone is alleged to have

26 ¹ Facebook has provided all contact information in its possession that would assist Miller in
27 locating Yeo. Originally, Facebook provided Miller with the contact information it had. In
28 addition, Facebook provided Miller's counsel with Yeo's telephone number. Yeo contacted
Facebook on July 2, 2010, via telephone and provided a telephone number. Within hours,
Facebook turned the information over to Miller.

1 directly infringed it. Dkt. No. 58.

2 Regarding Yeo, the Court found:

3 ... locating defendant Yeo appears essential to plaintiff's case,
4 since a prerequisite to plaintiff's indirect infringement claim against
5 Facebook is proof of direct infringement of plaintiff's copyright by
6 a third party — in this case, Mr. Yeo. This will necessarily require
7 proof that Mr. Yeo unlawfully “reproduced” the protected elements
8 of Boomshine's source code to create the accused ChainRxn video
game. Without Mr. Yeo in the case to provide testimony and the
ChainRxn source code, however, it is unclear how plaintiff would
be able to prove such unlawful copying. Without such proof that
ChainRxn is an unlawful “reproduction” of Boomshine, plaintiff's
remaining claims all crumble.

9 Dkt. No. 56 at 12:16-23. The Court also ordered Miller to serve Yeo by July 30, 2010, after
10 which “the Court will take immediate action to dismiss the case.” *Id.* at 13:1-3. This instruction
11 was restated recently by this Court in a separate order. Dkt. 69 at 3:16-21.

12 Despite the Court's instruction, Miller has failed to effect service by the Court-prescribed
13 deadline. Instead, he mailed a copy of the summons and complaint to a UPS store in New York,
14 where an individual named “Alex” received the package. Dkt. Nos. 65; 65-1, ¶¶ 5, 6. Miller
15 proffers no evidence that Alex is Yeo's agent authorized to accept service on Yeo's behalf or that
16 Yeo actually received the summons and complaint. Dkt. No. 65-1, ¶ 6.

17 **III. ARGUMENT**

18 “If the plaintiff fails to prosecute or to comply with [the Federal] rules or a court order, a
19 defendant may move to dismiss the action or any claim against it.” Fed.R.Civ.P. 41(b). The
20 purpose behind Rule 41(b) is to avoid Court congestion, as well as to safeguard against delay in
21 litigation and harassment of a defendant. *In re Silicon Valley Telecom & Internet Exch., LLC*,
22 No. C 06-2566 JF, 2007 WL 735715, *1 (N.D. Cal. Mar. 7, 2007) citing *Link v. Wabash Railroad*
23 *Co.*, 370 U.S. 626, 629-30 (1962) (holding that a court's authority to dismiss for lack of
24 prosecution is necessary in order to prevent undue delays in the disposition of pending cases and
25 to avoid congestion in the calendars of the district courts); *Ferdik v. Bonzelet*, 963 F.2d 1258,
26 1260 (9th Cir. 1992) (holding that a district court may dismiss an action for failure to comply
27 with any order of the court); *see also Nealey v. Transportacion Maritima Mexicana, S.A.*, 662
28 F.2d 1275, 1279 (9th Cir. 1980).

1 In exercising discretion pursuant to Rule 41(b), Ninth Circuit courts consider:

- 2 1. the public's interest in expeditious resolution of litigation;
- 3 2. the trial court's need to manage its docket;
- 4 3. the risk of prejudice to the defendants;
- 5 4. the public policy favoring disposition of cases on their merits; and
- 6 5. the availability of less drastic alternatives.

7 *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1451 (9th Cir. 1994). Dismissal is warranted
8 because Miller has failed to comply with the Federal Rules and with the Court's Order. Through
9 his dilatory approach to this case, Miller also has failed to prosecute this action. As the Court has
10 observed, Yeo's participation in this case is essential. Dkt. No. 56 at 12:16-18. Consequently,
11 Facebook has been and continues to be prejudiced by having to defend this action without
12 participation from the alleged primary wrongdoer.

13 **1. Public's Interest in Expeditious Resolution Favors Dismissal**

14 The greatest obstacle to Miller's prosecution of this case has been Miller himself. Miller's
15 failure to comply with the most basic service rules is the antithesis of expeditious resolution.
16 Despite his ability to serve Facebook immediately after the original complaint was filed in
17 October 2009, (Dkt. No. 4), Miller made virtually no effort to serve Yeo – the individual alleged
18 to have stolen Miller's video game. Declaration of Thomas J. Gray in Support of Motion to
19 Dismiss ("Gray Decl"), Ex. A. Initially, Miller offered a variety of excuses for why he was
20 unable to serve Yeo, but the record demonstrates that Miller essentially did nothing. *See*,
21 *generally, id.; see also* Dkt. No. 65.

22 Rule 4(m) requires service within 120 days after the complaint is filed. Fed.R.Civ.P.
23 4(m). Miller filed this action on October 9, 2009, requiring service to be made on Yeo no later
24 than February 6, 2010. *Id.; see also* Dkt. No. 1. Yeo was not served by February 6 (or anytime
25 thereafter). As a result, Yeo should have been dismissed. Fed.R.Civ.P. 4(m).

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1 Despite Miller's failure to serve Yeo within the time frames prescribed by Rule 4(m), the
2 Court granted Miller additional time to perfect service and set a deadline of July 30, 2010.² Dkt.
3 No. 56 at 13:1-3. Miller has now had 294 days to serve Yeo. Despite this extraordinary amount
4 of time for service, Yeo remains unserved. Moreover, based on Miller's counsel's declaration, it
5 appears Miller has exhausted his service efforts and intends to do no more. Dkt. No. 65-1, ¶ 8.

6 **2. The Court's Need to Manage its Dockets Favors Dismissal**

7 On May 28, 2010, and again on July 26, the Court unambiguously ordered Miller to serve
8 Yeo by July 30 or the Court would take immediate action to dismiss this case in its entirety. Dkt.
9 No. 56 at 13:1-3; Dkt. No. 69 at 3:16-21. A district court has power to dismiss an action when
10 the plaintiff fails to comply with "any order of court." Fed.R.Civ.P. 41(b); *Fendler v. Westgate-*
11 *California Corp.*, 527 F.2d 1168, 1170 (9th Cir. 1975) ("The decision to dismiss for failure to
12 comply with an order is within the discretion of the trial judge") *citing Von Poppenheim v.*
13 *Portland Boxing & Wrestling Com'n*, 442 F.2d 1047 (9th Cir. 1971).

14 July 30th has come and gone. Yeo remains unserved. Miller has not complied with this
15 Court's express order related to service. Although Miller's counsel has submitted a declaration in
16 which he claims to have effected service (Dkt. No. 65-1), service was defective because Miller
17 did not ensure that the summons and complaint were "actually delivered" to Yeo. Fed.R.Civ.P.
18 4(e)(1); C.C.P. § 417.20. Miller erroneously claims to have served Yeo pursuant to Fed.R.Civ.P.
19 4(e)(1) and C.C.P. Section 415.40. Dkt. No. 65-1 at ¶¶ 6, 7. In order to prove such service was
20 perfected, Miller must provide "evidence satisfactory to the court establishing actual delivery to
21 the person to be served, by a signed return receipt or other evidence." Cal. Code Civ. Proc.
22 § 417.20(a). The only "evidence" Miller submitted is a receipt indicating that a UPS employee
23 named Alex received the summons and complaint. Dkt. No. 65-1 ¶ 6. This evidence is
24 insufficient to establish "actual delivery" to Yeo, as he is required to do. Cal. Code Civ. Proc.
25 § 417.20(a).

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27 ² Rule 4(m) requires a court to grant an "appropriate" extension if a plaintiff makes a "good cause
28 showing" for failing to comply with the 120-day rule. The Court did not expressly find that
Miller made such a showing, but nonetheless provided him additional time to serve Yeo. Dkt.
No. 56 at 12.

1 **3. Facebook Will be Prejudiced Absent Dismissal**

2 Facebook will suffer prejudice if this case is permitted to remain on the docket, despite
3 Yeo’s absence. As the Court recognized, “Yeo appears essential to plaintiff’s case, since a
4 prerequisite to plaintiff’s indirect infringement claim against Facebook is proof of direct
5 infringement of plaintiff’s copyright by a third party — in this case, Mr. Yeo.” Dkt. No. 56 at
6 12:16-18. The Court also observed that Miller appears to have named Facebook primarily to “go
7 after the deep pockets and make life miserable for [Facebook].” Gray Decl. Ex. B at 26:8-13.

8 Facebook already has expended significant time and expense in defending against Miller’s
9 claims. Despite failing to bring Yeo into the case, Miller has recently propounded discovery on
10 Facebook. Facebook should not be required to continue participating in this matter and expend
11 significant time, money and resources when Miller has failed to comply with the Court’s order or
12 undertaken the most basic step for prosecuting his case.

13 **4. Public Policy Dictates Dismissal**

14 Miller’s failure to comply with the Federal Rules to bring Yeo before this Court favors
15 dismissal. Resolution on the merits is virtually impossible without Yeo. Dkt. No. 56 at 12:16-23,
16 fn6. Miller has shown no signs that he is capable of serving Yeo, leaving the Court and Facebook
17 in limbo.

18 Public policy considerations are further weighted in favor of dismissal because public
19 policy should not reward a dilatory plaintiff. Miller delayed *any* efforts to serve Yeo until the
20 Court ordered him to do so upon penalty of dismissal. Dkt. No. 65-1. Miller has had nine
21 months to serve Yeo. He has not done so, and he appears to have abandoned all efforts to effect
22 service. Dkt. No. 65-1 at ¶ 8.

23 **5. No Less Drastic Alternatives Exist**

24 No less drastic alternatives exist. Monetary sanctions will not aid in the resolution of this
25 action on the merits. Dismissal is the only available means of redress for Miller’s inability to
26 bring the allegedly responsible person before the Court.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Facebook respectfully requests that the Court dismiss this
3 action pursuant to Federal Rule of Civil Procedure 41(b).

4 Dated: August 4, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

6 /s/ Thomas J. Gray /s/

7 Thomas J. Gray
8 Attorneys for Defendant
9 FACEBOOK, INC.