

1 D. GILL SPERLEIN (172887)
 2 THE LAW OFFICE OF D. GILL SPERLEIN
 3 584 Castro Street, Suite 879
 4 San Francisco, California 94114
 5 Telephone: (415) 404-6615
 6 Facsimile: (415) 404-6616
 7 gill@sperleinlaw.com

8 DOUGLAS L. BRIDGES (*pro hac vice*)
 9 HENINGER GARRISON DAVIS, LLC
 10 1 Glenlake Parkway, Suite 700
 11 Atlanta, Georgia 30328
 12 Telephone: (678) 638-6309
 13 Facsimile: (678) 638-6142
 14 dbridges@hgdlawfirm.com

15 BRIAN D. HANCOCK (*pro hac vice*)
 16 HENINGER GARRISON DAVIS, LLC
 17 2224 1st Avenue North
 18 Birmingham, Alabama 35203
 19 Telephone: (205) 326-3336
 20 Facsimile: (205) 326-3332
 21 bdhancock@hgdlawfirm.com

22 Attorneys for Plaintiff,
 23 DANIEL M. MILLER

17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19 SAN FRANCISCO DIVISION

21 DANIEL M. MILLER,
 22 Plaintiff,
 23 vs.
 24 FACEBOOK, INC. and YAO WEI YEO,
 25 Defendants.

) CASE NO.: CV-10-264 (WHA)
)
) **PLAINTIFF'S RESPONSE IN**
) **OPPOSITION TO DEFENDANT**
) **FACEBOOK, INC.'S MOTION TO**
) **DISMISS PURSUANT TO RULE 41(B),**
) **FED.R.CIV.P.**
)
) Date: September 16, 2010
) Time: 8:00 A.M.
) Court: Courtroom 9, 19th Floor
) Judge: Honorable William Alsup

1 COMES NOW Plaintiff Daniel M. Miller ("Plaintiff"), by and through undersigned
2 counsel, and Responds in Opposition to Defendant Facebook, Inc.'s Motion to Dismiss Pursuant
3 to Rule 41(b), Fed.R.Civ.P. ("Facebook's Motion") (Dkt. No. 70) as follows:

4 **I. INTRODUCTION**

5 Unsurprisingly, now that the Court has definitively deemed the Plaintiff's Second
6 Amended Complaint ("SAC") to comport with the minimum pleading requirements of the Federal
7 Rules of Civil Procedure, and applicable case law (*see* Dkt. No. 69), Facebook desperately
8 attempts yet another ploy to try and have this litigation dismissed before the Plaintiff can conduct
9 any meaningful discovery. This attempt is no different in its frivolousness and disregard for the
10 law than was Facebook's previous attempt to have the SAC dismissed with prejudice (Dkt. Nos.
11 62 and 67). Had Facebook troubled to consult applicable California case law interpreting
12 §§ 415.40 and 417.20 of the California Code of Civil Procedure concerning effective service of a
13 defendant, it would have realized that no legitimate grounds exist upon which to challenge the
14 Plaintiff's Proof of Service (Dkt. No. 65, attached hereto as Plaintiff's Exhibit "1") of the SAC on
15 Defendant Yao Wei Yeo ("Yeo") which was filed with the Court on July 8, 2010 (22 days prior to
16 July 30th, the deadline set for serving Yeo in the Court's May 27th Order (Dkt. No. 56)).
17 Unfortunately, Facebook failed to consult applicable California law, and this Motion was the
18 result, the disposition of which will require the parties and the Court to waste more time, money,
19 and judicial resources while at the same time further delaying the progress of this litigation. It is
20 difficult for the Plaintiff to draw any conclusion other than that Facebook's present Motion, like
21 its June 21st Motion to Dismiss the SAC (Dkt. No. 62), has been filed for improper purposes such
22 as to harass, cause unnecessary delay, and needlessly increase the Plaintiff's costs in prosecuting
23 this litigation.
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1 **II. BACKGROUND**

2 As set forth in undersigned counsel’s Declaration Supplementing Proof of Service of the
3 SAC on Yeo (“Hancock Declaration”) that is contemporaneously filed herewith, the Plaintiff
4 served a subpoena duces tecum on Media Temple, Inc., a website hosting and software application
5 services company in Culver City, California, on June 4, 2010, seeking all information in its
6 possession pertaining to Yeo. *See* Hancock Declaration, ¶ 4. Media Temple responded on June
7 8th by providing information showing that Yeo is the listed account owner for the
8 “ZWIGGLERS.COM” domain name. *Id.* The address listed by Media Temple for Yeo is 353
9 Third Avenue, Suite 246, New York, NY 10010. *Id.* This is the address for UPS Store 5865 in
10 Manhattan. *See* Hancock Declaration, ¶ 5. The “Suite” number is a mailbox number. *Id.* On
11 June 10, 2010, the Plaintiff served a subpoena duces tecum on this UPS store to which UPS
12 responded on June 18th by providing a “Mailbox Service Agreement” and “Application for
13 Delivery of Mail Through Agent” form that are attached to the Hancock Declaration as Plaintiff’s
14 Exhibit “A”. *Id.* The documents produced by UPS show that Mailbox #246 was obtained by Yeo
15 on or about March 21, 2010. *Id.*

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19 On June 18, 2010, the Plaintiff issued the Summons and SAC via Certified Mail to “Yao
20 Wei Yeo, 353 3rd Avenue, Suite 246, New York, NY 10010”. *See* Hancock Declaration, ¶ 6. On
21 June 28, 2010, the Summons and SAC were delivered to that address and the certified mail receipt
22 was signed by “Alex”, an employee of UPS Store 5865. *Id.* A copy of the “Track & Confirm”
23 information from the United States Postal Service’s website evidencing the June 28th delivery is
24 attached to the Hancock Declaration as Plaintiff’s Exhibit “B”. A copy of the certified mail
25 receipt is attached to the Hancock Declaration as Plaintiff’s Exhibit “C”. As evidenced by the
26 Declaration of Douglas L. Bridges previously submitted to the Court on May 27, 2010, and
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1 contemporaneously filed herewith, as well as the remaining paragraphs of the Hancock
2 Declaration, it is quite clear that the Plaintiff has diligently sought to locate Yeo and effect service
3 of the complaint by all means available to him. Any insinuations or suggestions by Facebook to
4 the contrary are blatantly false and in direct conflict with the evidence before the Court. The
5 method of service set forth above pursuant to Rule 4(e)(1), Fed. R. Civ. P., and §415.40 of the
6 California Code of Civil Procedure was a legally proper and effective means by which to serve
7 Yeo and was more than appropriate considering the difficulty the Plaintiff has had in locating Yeo
8 as stated in the Bridges and Hancock Declarations.
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10 **III. ARGUMENT**

11 It would appear that the thrust of Facebook's Motion is that the Plaintiff has failed to
12 proffer any evidence that the Summons and SAC were served on Yeo within the July 30th deadline
13 set by the Court (Dkt. No. 56). Facebook simply discounts out of hand the Proof of Service, and
14 accompanying declaration and exhibits, that were filed with the Court on July 8, 2010 (Dkt. No.
15 65), by contending that the Plaintiff's filing does not contain any evidence that the UPS employee
16 who signed the certified mail receipt was authorized by Yeo to accept service on Yeo's behalf or
17 that Yeo actually received a copy of the Summons and SAC. As posited on Page 4 of Facebook's
18 Motion, the Plaintiff allegedly "did not ensure that the summons and complaint were 'actually
19 delivered' to Yeo", and in order to prove that service was perfected, the Plaintiff must provide
20 "evidence satisfactory to the court establishing actual delivery to the person to be served, by a
21 signed return receipt or other evidence."
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25 Facebook's arguments reveal an ignorance of, if not a total disregard for, applicable law
26 directly pertinent to this issue. Rule 4(e)(1), Fed. R. Civ. P., provides that an "individual...may
27 be served in a judicial district of the United States by following state law for serving a summons
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1 in an action brought in courts of general jurisdiction in the state where the district court is
2 located....” Section 415.40 of the California Code of Civil Procedure reads as follows:

3 A summons may be served on a person outside this state in any manner provided
4 by this article or by sending a copy of the summons and the complaint to the person
5 to be served by first-class mail, postage prepaid, requiring a return receipt. Service
6 of a summons by this form of mail is deemed complete on the 10th day after such
7 mailing.

8 Section 417.20 of the California Code of Civil Procedure requires that if service is made
9 by mail pursuant to §415.40, proof that a summons was served on a person outside of California
10 shall include “evidence satisfactory to the court establishing actual delivery to the person to be
11 served, by a signed return receipt or other evidence.” In *Nadeau v. Foster*, 129 Cal.App.3d 234,
12 236-37, 180 Cal.Rptr. 806, 807 (Cal. Ct. App. 1982), the California Court of Appeals specifically
13 held that §§415.40 and 417.20, when read together, permit completion of service by mail when the
14 return receipt is signed by a person so authorized by the defendant. In doing so, the court
15 determined that the personal signature of the defendant is not required. *Nadeau*, 180 Cal.Rptr. at
16 807. The *Nadeau* court held that “actual delivery” to the defendant of the summons and complaint
17 had been accomplished where the return receipt was signed by the defendant’s office manager
18 who was “*authorized to receive and accept mail on his behalf.*” *Id.*

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20 The Proof of Service for Yeo that was filed with the Court on July 8th (Dkt. No. 65,
21 attached hereto as Plaintiff’s Exhibit “1”) contains documents received from UPS in response to
22 the Plaintiff’s subpoena. These documents are separately entitled “Mailbox Service Agreement”
23 and the United States Postal Service’s “Application for Delivery of Mail Through Agent” form.
24 Only the first page of the Mailbox Service Agreement was produced by UPS, but it is evident
25 from a review of this document that Yeo entered into an agreement to obtain a mailbox with UPS
26 Store #5865 which is located at 353 3rd Avenue, New York, New York 10010. *See Hancock*
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1 Declaration, ¶ 5. The second document, “Application for Delivery of Mail Through Agent”,
2 contains information about Yeo and appears to have been signed by him on March 21, 2010.¹
3 Clearly, in Paragraph 4 of this document, Yeo authorizes delivery of his mail to, and in care of,
4 UPS Store #5865. It is indisputable, from a review of these documents, that Yeo designated UPS
5 Store #5865 as an agent authorized to receive delivery of his mail. The summons and SAC were
6 delivered to this store on June 28, 2010, and an employee of UPS Store #5865 signed the certified
7 mail receipt. *See* Hancock Declaration, ¶ 6. Pursuant to §417.20 of the California Code of Civil
8 Procedure, Rule 4(l)(1) of the Federal Rules of Civil Procedure, and *Nadeau*, the Plaintiff filed
9 with the Court on July 8th the following: a Proof of Service form; a copy of the duly issued
10 summons by the clerk of court dated June 17, 2010; a declaration of undersigned counsel attesting
11 to the facts surrounding the service of the Summons and SAC on Yeo; copies of the UPS
12 documents obtained via subpoena evidencing Yeo’s designation of UPS Store #5865 as his agent
13 for delivery of mail; confirmation from the United States Postal Service that the Summons and
14 SAC were delivered via Certified Mail to UPS Store #5865; and a copy of a certified mail return
15 receipt signed by “Alex”, an employee of UPS Store #5865. Pursuant to §415.40, Yeo was
16 effectively served with the summons and SAC on July 8, 2010, and was required to file a
17 responsive pleading with the Court by July 29th pursuant to Rule 12(a), Fed. R. Civ. P. He has
18 failed to do so.

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Clearly, the Plaintiff cannot control whether or not Yeo chooses to respond to the SAC and
take an active role in this litigation. As the Court has noted previously, such a failure on the part
of Yeo “is not procedurally fatal to plaintiff’s claims of contributory infringement against
defendant Facebook moving forward.” *See* Dkt. No. 56 at p. 12. However, in its Motion,

¹ From the documents at hand, it can only be presumed that the “Mailbox Service Agreement” was entered into by
Yeo on this same date.

PLAINTIFF’S RESPONSE IN OPPOSITION TO DEFENDANT
FACEBOOK, INC.’S MOTION TO DISMISS PURSUANT TO
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1 Facebook repeatedly complains that it will be unfairly prejudiced if Yeo doesn't make an
2 appearance in this action and defend against the Plaintiff's direct infringement claim. If this threat
3 of prejudice exists, then why didn't Facebook inquire as to Yeo's whereabouts or whether or not
4 he planned on entering an appearance in the case when Yeo called Facebook on July 2nd and
5 discussed the case with unknown Facebook personnel? See Hancock Declaration, ¶ 8, fn. 1 at p.5.
6
7 Yeo apparently feels comfortable enough to contact Facebook by phone and discuss this matter
8 with them as evidenced by Mr. Clark's voicemail to undersigned counsel on July 2nd. Without the
9 benefit of discovery, the Plaintiff can only speculate as to the number and content of Facebook's
10 contacts with Yeo, such as the phone call on July 2nd, but there's certainly nothing in the record to
11 suggest that Facebook has done anything whatsoever to encourage Yeo's appearance and avoid
12 this unfair prejudice of which they repeatedly complain in their Motion. In reality, despite
13 Facebook's protestations to the contrary, Yeo's absence is in Facebook's best interest since it not
14 only provides them with yet another specious argument by which they can try and have this action
15 dismissed, it also has the potential of rendering the Plaintiff's case against Facebook more difficult
16 to prosecute since Yeo's absence makes it unlikely that the Plaintiff will be able to obtain any
17 discovery from Yeo pertinent to the factual and legal issues in controversy.² If Facebook has any
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22 ² As an aside, it strikes the Plaintiff as highly implausible that Facebook's knowledge of Yeo and his whereabouts is
23 limited to a telephone number and/or e-mail address. At the hearing on March 18, 2010, the Court expressed similar
24 doubts when questioning Julio Avalos, one of Facebook's attorneys:

25 **The Court:** The whereabouts of Mr. Yeo, or whatever information you have on him. You must have some
26 information on him.

27 **Mr. Avalos:** Your honor, it's my understanding that we do not know the whereabouts of Mr. Yeo. What I
28 know about Mr. Yeo is simply what I was able to find on Google.

The Court: You must know where his server is.

Mr. Avalos: Whatever information that we have relating to Mr. Yeo's servers is similarly available to the
Plaintiff. It's simply I'd go on *whois.net*.

The Court: I'm going to order you to provide a -- all of the identifying information you have. You have a
link. You must know something. What if terrorists came onto Facebook, and I wanted to put up a terrorist
site? You're saying you wouldn't know anything about them? That makes no sense. You must know
something about these people. So whatever you know, I'm going to give you one week to turn it over to the
other side so they can track down the defendant.

1 knowledge as to Yeo's whereabouts, or his intentions with regard to this lawsuit, the Plaintiff
2 would ask that Facebook fully disclose this information, by way of a formal declaration, not only
3 to the Plaintiff, but to the Court, as well.

4 WHEREFORE PREMISES CONSIDERED, the Plaintiff respectfully moves this Court to
5 DENY Facebook's Motion and for all further and additional relief deemed appropriate and just by
6 the Court.
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8 Dated: August 26, 2010

Respectfully submitted,

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10 s/ Brian D. Hancock

11 BRIAN D. HANCOCK (*pro hac vice*)
12 HENINGER GARRISON DAVIS, LLC
13 2224 1st Avenue North
14 Birmingham, Alabama, 35203
15 Telephone: (205) 326-3336
16 Facsimile: (205) 326-3332
17 E-Mail: bdhancock@hgdlawfirm.com

18 ATTORNEY FOR PLAINTIFF
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24 (cont'd from previous page)

25 **The Court:** People come in here with these orders all the time. It's usually the other way around, and it's
26 usually the people on your side that want to track down these people. And so often, it's done *ex parte*. No,
27 I'm going to make you turn this over. If you want a protective order, I will sign it, but I know you have
28 something there. You've got to have something, because otherwise, you'd be wide open to terrorism and
criminal activity. So you've got to – you've got to have some way to track these people down.

See Transcript of Hearing on March 18, 2010, pp. 17-18.