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 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. 3:10-CV-00264 (WHA)

**FACEBOOK, INC.’S REPLY IN
 SUPPORT OF 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

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1 **I. INTRODUCTION**

2 This case should now be dismissed. The Court ordered Miller to serve Yeo by July 30,
3 2010, because absent Yeo’s appearance, it is “unclear how plaintiff would be able to prove” his
4 claims. What is clear is that Miller has not complied with this Court’s order. In his opposition
5 papers, Miller contorts California law and argues that as long as *someone* signs for a certified
6 letter, process is effective. Under California law more is required. Specifically, Miller must
7 submit evidence that Defendant Yeo actually received the summons and complaint. In his
8 opposition papers, Miller relies on an incomplete, unsigned, outdated mailbox rental agreement
9 and a certified mail receipt from a UPS store worker named “Alex” as evidence that the
10 complaint was actually delivered to Defendant Yeo. None of Miller’s “evidence,” however,
11 supports such a conclusion.

12 Recognizing the failings of his “evidence,” Miller seemingly blames Facebook for Yeo
13 not appearing in the case and makes another plea for additional time to serve Yeo. Miller now
14 has had nearly a year to serve Yeo. Yet he has failed to do so, despite the clear warnings from this
15 Court. His complaint should be dismissed.

16 **II. ARGUMENT**

17 **A. Miller Failed To Proffer Evidence Of Actual Delivery To Yeo**

18 Miller incorrectly argues that he has complied with C.C.P. § 415.40, which authorizes him
19 to serve out-of-state defendant Yeo by certified mail. Merely placing the summons and complaint
20 in the mail, however, is not enough. Miller must proffer *evidence* “establishing actual delivery to
21 the person to be served.” Cal. Code Civ. Proc. 417.20. Evidence of delivery to just anyone is not
22 enough. The “plaintiff must provide separate evidence establishing the authority of the person
23 who signed the return receipt on defendant’s behalf.” *Taylor-Rush v. Multitech*, 217 Cal. App. 3d
24 103, 110 (1990) *citing Neadeau v. Foster*, 129 Cal. App. 3d 234, 237-238 (1982); *see also*
25 *Malletier v. Pierce*, No. 2:07-CV-2732-JAM-DAD, 2008 WL 4330455 *3 (E.D.Cal. Sep. 19,
26 2008) (“finding delivery of summons to UPS Store mailbox ineffective service on responsible
27 party”). These “statutory requirements . . . are to be strictly construed.” *Taylor-Rush*, 217 Cal.
28 App. 3d at 111. Based on these principles, Miller’s attempted service on Yeo falls far short.

1 The only evidence of actual delivery Miller offers is: a) an incomplete copy of a “Mailbox
2 Service Agreement,” (“MSA”) purportedly between Yeo and UPS, but which is not signed by
3 Yeo (Dkt. No. 72-3 at 1); b) an incomplete copy of an “Application for Delivery of Mail Through
4 Agent,” which may or may not contain Yeo’s signature and which is not signed by the “agent”
5 (*id.* at 2); and, c) a receipt signed by “Alex,” who Miller argues is an employee at UPS in New
6 York where Yeo may have rented a mailbox. Dkt. No. 72-5. None of these documents, by
7 themselves or taken together, establishes that the summons and complaint were actually delivered
8 to Yeo. Nor do they establish that “Alex” was acting as Yeo’s agent and was authorized to
9 “accept” these papers on Yeo’s behalf. *See Malletier*, 2008 WL 4330455 *2 citing *Dill v.*
10 *Berquist Constr. Co.*, 24 Cal. App. 4th 1426, 1438, (1994) (“Agents are not fungible. A person
11 who is authorized to perform one function on behalf of a principal may have no authority at all
12 regarding a different function”).

13 Miller admits that the copy of the MSA is incomplete. *Opp.* at 5. It is impossible to
14 discern from the document just how many pages are missing, but it is clear that Yeo’s signature
15 does not appear on it. *Id.* At best, the incomplete documents that Miller offers show that Yeo
16 may have rented a mailbox at a UPS store a few months before Miller sent his papers and that
17 “Alex” and other employees at UPS may have been permitted to put such documents in Yeo’s
18 mailbox, if Yeo was still a customer at the time. *Dill*, 24 Cal. App. 4th at 1438. This falls far
19 short of Miller’s requirement to show that Yeo actually received the summons and complaint.

20 Furthermore, even assuming Yeo signed this particular MSA, nothing in the agreement
21 suggests that Yeo authorized UPS or Alex to accept legal service of process on his behalf. *Id.*
22 Quite the contrary, the MSA explicitly requires the customer – here, Yeo – to complete “any
23 required acknowledgement form relating to service of process.” Dkt. No. 72-3 at 1, ¶ 3. Miller
24 has not proffered any such “acknowledgment.” Thus, to the extent Yeo entered into the MSA at
25 all, the agreement itself requires express authorization for UPS to accept service of process,
26 which Miller has not produced.

27 Miller unfittingly likens Alex at UPS to the *Neadeau* defendant’s office manager. *Opp.* at
28 6. In *Neadeau*, the court found that the plaintiff had met his evidentiary burden by showing that

1 the summons and complaint had been actually delivered to the defendant because the papers were
2 received by the defendant's *office manager* and that the manager was authorized to accept
3 delivery of the defendant's mail. *Neadeau*, 129 Cal. App. 3d at 237. Alex is not Yeo's office
4 manager and was not authorized to "accept" Yeo's mail. At most Alex was authorized to receive
5 mail addressed to defendant Yeo and place such mail in Yeo's mailbox. This is a far cry from the
6 authorization provided to the defendant's office manager in the *Neadeau* case. *See Dill*, 24 Cal.
7 App. 4th at 1438; *Malletier*, 2008 WL 2008 WL 4330455 *2-3. Presumably, the office manager
8 also was authorized to open the mail and knew how to contact the defendant to discuss the
9 contents of the mail. *Neadeau*, 129 Cal. App. 3d at 237. Miller offers no evidence that Alex at
10 UPS had the ability to perform either function.

11 Further, unlike Miller, the *Neadeau* plaintiff offered evidence through the submission of
12 declarations that the defendant had *actually received* the summons and complaint. *Id.* The
13 defendant did not deny the facts set forth in plaintiff's declaration, despite having an opportunity
14 to do so when he appeared to contest the default judgment entered against him. *Id.* Indeed, the
15 *Neadeau* court found that the defendant's appearance and failure to contest plaintiff's declarations
16 constituted compelling evidence that the defendant did actually receive the complaint. *Id.*

17 Moreover, Miller offers no evidence that Yeo still had a mailbox with UPS in June 2010,
18 when Alex signed for the summons and complaint. In fact, the post office application that Miller
19 attached to his Opposition is dated March 2010. Dkt. No. 72-3 at 2. Yet, in May 2010, Miller's
20 counsel submitted a declaration in which he stated that he was "told that Mr. Yeo had graduated
21 [from Cornell University] and was no longer living in New York." Dkt. No. 72-6, ¶ 5. The
22 following day, Miller's counsel explained to this Court that Miller was "not even sure [Yeo] is in
23 the United States" after having conducted an investigation into Yeo's whereabouts.¹ Declaration
24 of Julio Avalos in Support of Reply, Ex. A at 4:11-12. Nonetheless, less than a month later,
25 Miller placed the summons and complaint in the mail to a New York address and now claims that

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27 ¹ These statements are consistent with Miller's post-mailing investigation, as well. Specifically,
28 a) Apple Computer indicated that Yeo has an address in Singapore, and b) someone living at
Yeo's former college address informed Miller's investigator that Yeo does not live at that New
York address. Dkt. No. 72-2 at 3:25-4:8.

1 such “service” was proper. At best, Miller establishes that he mailed papers to a UPS Store. The
2 law requires more.

3 *Malletier* is instructive here. In *Malletier*, the court found a UPS Store clerk’s
4 acknowledgment insufficient to establish service on a corporation, because there was no
5 indication that UPS was authorized to receive process. *Malletier*, 2008 WL 4330455 *2. The
6 court reached that result despite the fact that the putatively-served defendant actually used the
7 UPS Store mailbox. *Id.* Here, Miller fails to show the required authority and all but admits that
8 Yeo did not use the mailbox in June 2010. Dkt. No. 72-6, ¶ 5; Avalos Decl. Ex. A at 4:11-12.

9 Miller simply has not submitted the evidence required to establish that Defendant Yeo
10 received the summons and complaint and, consequently, has not satisfied his burden of showing
11 that he has complied with C.C.P. § 415.40. Thus, he did not perfect service by July 30, and the
12 case should be dismissed.

13 **B. Miller Should Not Be Afforded Another Opportunity To Serve Yeo**

14 Having failed to serve Yeo as this Court ordered, Miller attacks Facebook, *a defendant*,
15 for not doing enough to “encourage” Yeo to appear in this case and, incredibly (though
16 indirectly), asks this Court for another extension of time in which to serve Yeo. Opp. at 7-8. His
17 request should be denied.

18 As Facebook pointed out in its opening brief, Miller has had ample time, nearly a year, to
19 serve Yeo. In his Opposition, Miller blames Facebook for its failure to serve Yeo and insinuates
20 that Facebook has not provided Miller with all of the information it possesses regarding
21 Defendant Yeo. Opp. at 7, n2. In fact, Miller requests that Facebook provide information
22 regarding “Yeo’s whereabouts, or his intentions with regard to this lawsuit. . . .” Opp. at 8.
23 Miller is grasping at straws.

24 As Facebook’s attorney said at the March hearing, Facebook does not know where Yeo is
25 and, importantly, any information that Facebook could obtain would come from public sources.
26 Opp. at 7, n2. Further, as discussed in the Declaration of Craig Clark, filed concurrently with this
27 Reply, Facebook already has provided Miller with all of the information in its possession
28 regarding Defendant Yeo. Indeed, Miller appears to be in possession of more information about

1 Yeo than is Facebook. *See* Dkt. No. 72-6, generally; *see also* Declaration of Craig Clark, filed
2 herewith, ¶¶ 2-3. Yet, Miller still has not been able to find, much less serve, Yeo. Miller has had
3 sufficient time to comply with this Court’s Order requiring service by July 30, 2010. Dkt. No. 56
4 at 13. He has not done so.

5 **III. CONCLUSION**

6 The Court ordered Miller to serve Yeo by the end of July because Yeo appears essential to
7 Miller’s case. Miller has provided insufficient evidence to establish that Yeo actually received
8 the complaint. Consequently, Miller has failed to properly serve Yeo and the case should be
9 dismissed.

10 Dated: September 2, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

12 */s/ Thomas J. Gray /s/*

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14 Thomas J. Gray
15 Attorneys for Defendant
16 FACEBOOK, INC.

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