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

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

Case No. 3:10-CV-00264 (WHA)

**FACEBOOK, INC.’S OPPOSITION
 TO PLAINTIFF’S MOTION FOR
 ADMINISTRATIVE RELIEF**

Court: Courtroom 9, 19th Floor
 Judge: Honorable William Alsup

1 **I. INTRODUCTION**

2 Daniel Miller's request to supplement his Opposition to Facebook's Motion to Dismiss
3 underscores why Facebook's motion should be granted. Facebook's motion was precipitated by
4 Miller's failure to make reasonable efforts to serve defendant Yeo, despite this Court's orders
5 requiring him to do so. Miller's belated request to append the second page of an agreement he
6 contends is "relevant and directly pertinent" to his Opposition is simply another example of his
7 lack of diligence in prosecuting his case. His request should be denied.

8 **II. BACKGROUND**

9 For the first seven months of this litigation, Miller made no effort to serve defendant Yeo.
10 3/18/10 Hr'g Trans. at 18:20-19:16. Facebook raised the issue with the Court, and the Court
11 instructed Miller to file an application for extending Rule 4(m)'s 120-day service limit (and
12 thereby providing good cause for having inexplicably delayed service). *Id.* Miller ignored the
13 Court's instructions. Dkt. No. 46 at 9:11-18. The Court then ordered Miller to serve Yeo by July
14 30 or face dismissal of this action. Dkt. No. 56 at 13:1-3. In response, Miller mailed a copy of
15 the summons and complaint to a New York UPS office where Yeo may have rented a mailbox.
16 Dkt. No. 72-2, ¶ 6. Miller did so despite having twice represented to this Court that Miller
17 learned Yeo no longer lives in New York (and receiving additional evidence indicating that Yeo
18 is not a New York resident). Dkt. No. 72-6, ¶ 5; Dkt. No. 75, Ex. A at 4:11-12; Dkt. No. 72-2 at
19 3:25-4:8.

20 July 30 has come and gone, and Yeo has not made an appearance in this case. On
21 August 4, 2010, Facebook filed its Motion to Dismiss pursuant to Rule 41(b). Dkt. No. 70. On
22 August 26, 2010, Miller filed his opposition, which included an incomplete UPS Mailbox Service
23 Agreement, among other materials. Dkt. No. 72-3, Ex. A. In his Opposition, Miller admitted the
24 agreement was incomplete, but stated that UPS indicated it had produced all documents in its
25 possession. *Opp.* at 5. Miller apparently took UPS's word as gospel and made no further effort
26 to secure a complete record on this issue until Facebook identified (in its September 2 Reply
27 memorandum) an evidentiary problem with the purported agreement between UPS and Yeo. Dkt.
28 No. 77, ¶¶ 1-4. Prompted by Facebook's concern about the failure of evidence, on September 7,

1 2010, Miller appears to have finally called UPS again to get the missing page of the agreement.
2 *Id.*, ¶ 4. Now, three months after UPS’s noticeably incomplete production, Miller asks the Court
3 to allow him to supplement the record. Dkt. No. 77. His belated request should be denied.

4 **III. ARGUMENT**

5 Miller’s request should be denied because A) it is not the proper subject of an
6 Administrative Motion but rather is a disguised sur-reply; B) Miller does not explain why “page
7 2” is “relevant and directly pertinent to the issues raised in Facebook’s Motion,” as he must; and
8 C) “page 2” does not rectify Miller’s failure to comply with this Court’s Order to serve Yeo by
9 July 30, which in this case means assure that Yeo actually received the summons and complaint.

10 **A. Miller’s Request Is Improper Under Civil L.R. 7-11**

11 Miller’s request to supplement the evidentiary record is not a simple administrative matter
12 that should be resolved by Local Rule 7-11 – a rule reserved for motions to seal, motions for
13 leave to file oversized briefs and other similar, *administrative* proceedings. Civ. L.R. 7-11.
14 Miller’s request, instead, is really a motion for leave to file a sur-reply. In his motion (which is
15 styled more as a declaration), Miller seeks substantive relief: Miller asks the Court to allow him
16 to modify the evidentiary record in a proceeding that depends entirely on whether or not he has
17 met his burden of proof. Dkt. No. 77. His request comes long after all authorized briefing is
18 complete and, if granted, deprives Facebook of an opportunity to respond meaningfully to the
19 new submission. Consequently, Miller’s request should be denied as improper under Local Rule
20 7-11.

21 **B. Miller’s Request Does Not Satisfy Rule 7-11’s Requirements**

22 Even if Miller’s request were properly made pursuant to Local Rule 7-11, he has not
23 satisfied the Rule’s requirement that he set forth the reasons supporting his motion. Civ. L.R. 7-
24 11(a). Instead, Miller merely concludes that “page 2” is “relevant and directly pertinent to the
25 issues raised in Facebook’s Motion.” Dkt. No. 77, ¶ 5. Miller does not, however, explain how or
26 why it is relevant and pertinent to Miller’s failure to serve Yeo by July 30, 2010, as the Court
27 ordered him to do. *Id.* Moreover, the vast majority of Miller’s motion demonstrates just how
28 little Miller has done to comply with the Court’s order to bring Yeo into this case.

1 Despite having received an incomplete copy of the MSA three months ago – an agreement
2 that Miller argues grants UPS authority to accept service on Yeo’s behalf – Miller’s counsel made
3 virtually no effort to obtain a complete copy until 10 days before Facebook’s motion is to be
4 heard. Dkt. No. 77, ¶¶ 1-4. Though Miller’s counsel asserts that he had called UPS shortly after
5 receiving the incomplete agreement and was told he had everything, recent events show that is
6 untrue. *Id.* ¶¶ 3-4. Indeed, it appears with a little perseverance, Miller could have obtained and
7 submitted “page 2” with his Opposition and explained its relevance. *Id.*, ¶ 4. Instead, he
8 accepted without question an indisputably incomplete agreement, which he now contends is
9 “relevant and directly pertinent.”

10 Miller has not satisfied Rule 7-11’s mandate to provide the basis for his request and, thus,
11 it should be denied.

12 **C. Page 2 Does Not Establish That Miller Served Yeo**

13 Even if the Court were to look past Miller’s oversight, his request still should be denied.
14 The Court ordered Miller to serve Yeo by July 30 or face dismissal of this case. Dkt. No. 56 at
15 13:1-3; Dkt. No. 69 at 3:16-21. Nothing in “page 2” establishes or even suggests that Miller
16 complied with this Court’s order. For instance, the agreement does not authorize UPS to accept
17 legal service of process on behalf of Yeo and specifically contemplates that the customer (Yeo)
18 can reject mail and packages that were previously “accepted” by UPS. Dkt. No. 77-2, ¶ 12 (“In
19 the event Customer refuses to accept any mail or package, the Center may return the mail or
20 package to the sender ...”). More importantly, because Yeo still has not appeared, this new page
21 does not overcome Miller’s failure to “establish actual delivery to the person to be served.” Cal.
22 Code Civ. Proc. § 417.20(a).

23 **IV. CONCLUSION**

24 Miller’s belated effort to supplement the record with a document he could have, with
25 reasonable diligence, obtained before the parties completed briefing should be rejected. His
26 improper motion for administrative relief should be denied.

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Dated: September 13, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

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