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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 SOUTHERN DIVISION

BRYAN PRINGLE, an individual,
 Plaintiff,
 v.
 WILLIAM ADAMS, JR.; STACY
 FERGUSON; ALLAN PINEDA; and
 JAIME GOMEZ, all individually and
 collectively as the music group The
 Black Eyed Peas, et al.,
 Defendants.

Case No. SACV 10-1656 JST(RZx)
 Hon. Josephine Staton Tucker
 Courtroom 10A

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 NONPARTY RISTER EDITIONS'
 MOTION TO DISMISS BASED ON
 IMPROPER SERVICE**

Hearing Date: April 25, 2011
 Time: 10:00 A.M.
 Dept.: 10A

Complaint Filed: October 28, 2010
 Trial Date: Not Assigned

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Nonparty Rister Editions respectfully submits this Memorandum of Points
3 and Authorities in support of its Motion to Dismiss the First Amended Complaint
4 (“FAC”) as against Rister Editions under Rule 12(b)(5) of the Federal Rules of Civil
5 Procedure, and to recover its attorneys’ fees and costs incurred in making this
6 motion.

7 **PRELIMINARY STATEMENT**

8 If this motion sounds familiar, that’s because it is. Plaintiff previously
9 attempted to serve Rister Editions by delivering a summons and complaint to
10 Defendant Shapiro, Bernstein & Co., Inc. (“Shapiro Bernstein”) on November 5,
11 2010 and December 2, 2010. Rister Editions then moved for dismissal because
12 Shapiro Bernstein is an entirely separate entity, and is not authorized to accept
13 service on Rister Editions’ behalf. The Court granted the motion in its January 27,
14 2011 Order (Dkt. No. 95), ruling that Plaintiff must properly serve Rister Editions, if
15 at all, by February 25, 2011 (120 days from commencement of the action on
16 October 28, 2010). Plaintiff has ignored the Court’s Order outright, not only by
17 attempting to serve Rister Editions on March 16, 2011—well past the 120 day
18 deadline—but by again attempting to serve Rister Editions through Shapiro
19 Bernstein—that is, in *exactly the same way the Court previously rejected*.¹ Of
20 course, neither the facts nor the law have changed here. Plaintiff cannot serve Rister
21 Editions through Shapiro Bernstein—an entirely separate corporate entity—nor can
22 Plaintiff serve process after the deadline imposed by Rule 4(m) and this Court. The
23 FAC should once again be dismissed as against Rister Editions, which respectfully
24 requests that it be awarded its attorneys’ fees and costs associated with contesting
25 Plaintiff’s plainly improper and vexatious service.

26 _____
27 ¹ Plaintiff also purported to serve Square Rivoli in this very same way, and filed a
28 purported proof of service. (Dkt. No. 118.) This purported service is defective for
the same reasons identified herein.

BACKGROUND

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2 The facts of the case and Plaintiff’s allegations have been described at length
3 in extensive motion practice. Rister Editions need not repeat them in full here,
4 except to note that Plaintiff alleges ownership of one or more copyrights in the song
5 titled “Take a Dive” (FAC ¶¶ 27-29), and that the song “I Gotta Feeling” by the
6 musical group The Black Eyed Peas, David Guetta, and/or Frederic Riesterer
7 infringes Plaintiff’s song. (FAC ¶¶ 35, 37, 40).

8 Plaintiff also seeks to add as a party defendant Rister Editions, a French
9 music publishing company involved in licensing certain musical compositions
10 written by Frederic Riesterer (FAC ¶ 25-26). But rather than attempt to properly
11 serve Rister Editions in France, Plaintiff first attempted to serve Rister Editions on
12 November 5, 2010 by delivering a copy of the summons and complaint to the New
13 York offices of Shapiro Bernstein, a music publishing company that has contracted
14 to sub-license in the United States certain musical compositions controlled by Rister
15 Editions. *See* Proof of Service (Dkt. No. 40) (claiming compliance with “Rule 3.a”
16 of the Federal Rules of Civil Procedure—which does not exist).

17 On December 8, 2010, Shapiro Bernstein informed Plaintiff that it is not
18 authorized to accept service on Rister Editions’ behalf. When Plaintiff refused to
19 withdraw his improper service, Rister Editions was forced to file a Motion to
20 Dismiss on December 13, 2010 based, in part, on Plaintiff’s improper service. (Dkt.
21 No. 53). Plaintiff did not oppose that portion of Rister Editions’ motion, and the
22 Court granted it in its January 27, 2010 Order (Dkt. No. 95). The Court ruled that
23 service on Shapiro Bernstein is not effective service on Rister Editions, and ordered
24 Plaintiff to properly serve Rister Editions, if at all, no later than February 25, 2011
25 (120 days from Plaintiff’s commencement of the action on October 28, 2010).
26 January 27 Order (Dkt. No. 95).

27 Rather than comply with the Court’s Order by properly and promptly serving
28 Rister Editions, Plaintiff allowed the Court’s 120 day deadline to pass, and then, on

1 March 16, 2011, purported to serve Rister Editions through Shapiro Bernstein once
2 again. Plaintiff again claimed reliance on “Rule 3.a” of the Federal Rules of Civil
3 Procedure, which rule does not exist. (Dkt. No. 117). Shapiro Bernstein again
4 informed Plaintiff that it is not authorized to accept service on Rister Editions.
5 Plaintiff nevertheless refused to withdraw his improper service, and proceeded to
6 file a purported Proof of Service on March 23, 2011 (Dkt. No. 117). This Motion
7 followed.

8 ARGUMENT

9 I. PLAINTIFF’S PURPORTED SERVICE ON RISTER EDITIONS IS 10 DEFECTIVE

11 A. Plaintiff’s Purported Service on Rister Editions is Untimely

12 As the Court confirmed in its January 27 Order, Rule 4 of the Federal Rules
13 of Civil Procedure requires that the plaintiff serve each defendant with a summons
14 and complaint within 120 days after the complaint is filed. Fed. R. Civ. P. 4(c),
15 4(m). Because Plaintiff commenced this action on October 28, 2010, the Court
16 ruled in its January 27 Order that Plaintiff had “120 days from then [*i.e.*, February
17 25, 2011] to serve Rister [Editions] with the summons and First Amended
18 Complaint,” and the Court directed Plaintiff to do so “promptly ... so as to not
19 unduly delay litigation.” Jan. 27, 2011 Order at 11 (Dkt. No. 95). As confirmed by
20 its purported Proof of Service (Dkt. No. 117), Plaintiff did not comply with this
21 Order, and did not attempt its purported service on Rister Editions until March 16,
22 2011. Plaintiff’s belated attempted service is thus in violation of both the Court’s
23 January 27 Order and Rule 4 itself.

24 B. Plaintiff’s Purported Method of Service on Rister Editions is 25 Ineffective

26 Even if Plaintiff’s delay is somehow excusable—which it is not—Plaintiff’s
27 purported service would still be defective because it has again failed to actually
28 serve Rister Editions. It is hornbook law that service of process must be effected on

1 each defendant named in the action. *See* 1 James W.M. Moore, *Moore’s Federal*
2 *Practice* § 4.50[3] (3d ed. 2010) (“If an action is commenced against more than one
3 defendant, plaintiff must either serve one summons that lists each defendant or serve
4 separate summonses on each defendant, each with one defendant’s name.
5 Regardless of which method is used, each defendant in an action must receive a
6 summons.”); *Imperial v. City and County of San Francisco*, No. 08-05644 (CW),
7 2010 WL 1572760, at *1 (N.D. Cal. Apr. 20, 2010) (“Under Rule 4(c)(1), a plaintiff
8 must serve *each* defendant with a summons and a copy of the complaint.”)
9 (emphasis added); *Allen v. Mayhew*, No. Civ. S040322, 2009 WL 426091, at *12
10 (E.D. Cal. Feb. 20, 2009) (“Rule 4 . . . requires *each* defendant to be personally
11 served.”) (emphasis added).

12 Moreover, the “[p]laintiff bears the burden of proving sufficiency of service.”
13 *Bacon v. City and County of San Francisco*, No. C04-3437 (TEH), 2005 WL
14 1910924, at *3, (N.D. Cal. Aug. 10, 2005) (citing *Wei v. Hawaii*, 763 F.2d 370, 372
15 (9th Cir. 1985)).

16 Despite this basic requirement, Plaintiff’s purported Proof of Service on
17 Defendant Rister Editions states that service was made not on any employee or
18 service agent of Rister Editions, but on Defendant Shapiro Bernstein. (Dkt. No.
19 117). Plaintiff was advised as early as December 8, 2010, and again in Rister
20 Editions’ December 13, 2010 Motion to Dismiss (Dkt. No. 53), that Shapiro
21 Bernstein is not authorized to accept service on Rister Editions’ behalf. (Dkt. No.
22 53-2, Ex. 1.) Plaintiff offered absolutely no argument in opposition, and the Court
23 accordingly found in its January 27 Order that service on Shapiro Bernstein is not
24 service on Rister Editions. Yet Plaintiff has ignored this ruling completely, and
25 purported to serve Rister Editions through Shapiro Bernstein *again*, and filed
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1 *another* Proof of Service to this effect. Such service was invalid then, and it
2 remains invalid now.²

3 Plaintiff apparently seeks to salvage this gross error by claiming that Shapiro
4 Bernstein is the “agent” of Rister Editions. Rule 4, however, permits service on a
5 business entity, such as Rister Editions, only by personal delivery to an “officer, a
6 managing or general agent, or any other agent authorized by appointment or by law
7 to receive service of process.” Fed. R. Civ. P. 4(h)(1)(B). “[T]he burden is on the
8 plaintiff to show a basis for an inference that the defendant has authorized a
9 particular person to accept service of process on its behalf,” *American Institute of*
10 *Certified Public Accountants v. Affinity Card, Inc.*, 8 F.Supp.2d 372, 376 (S.D.N.Y.
11 1998), and the purported agent must have actual—not merely apparent—authority to
12 accept service. *See, e.g., Thomas v. Furness Pac. Ltd.*, 171 F.2d 434 (9th Cir. 1949)
13 (service quashed when not on a managing agent); *Saez Rivera v. Nissan Mfg. Co.*,
14 788 F.2d 819, 821 (1st Cir. 1986) (service invalid when recipient lacked actual
15 authority, even though he claimed to be a “presiding officer”). The Ninth Circuit
16 has held that service may be made “upon a representative so integrated with the
17 organization that he will know what to do with the papers,” and that “[g]enerally,
18 service is sufficient when made upon an individual who stands in such a position as
19 to render it fair, reasonable and just to imply the authority on his part to receive
20 service.” *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*,
21 840 F.2d 685, 688 (9th Cir. 1988) (citations omitted).

22 Here, Plaintiff presents no evidence whatsoever that Shapiro Bernstein is a
23 “managing agent” of Rister Editions, or that it has somehow otherwise actually been
24 authorized to accept service on Rister Editions’ behalf. Nor can Plaintiff show that
25 Shapiro Bernstein is in any way “within the organization” of Rister Editions.

26 _____
27 ² Notably, Plaintiff has even claimed compliance with the same “3.a Federal Rules
28 of Civil Procedure” in its new Proof of Service. Then, as now, “Rule 3.a” does not
exist.

1 Indeed, Plaintiff himself acknowledges that those corporations are separate entities
2 (FAC ¶¶ 25-26) and provides no basis on which to conclude that Shapiro Bernstein
3 was authorized to accept service of process on behalf of Rister Editions.³

4 Plaintiff presents only the bare assertion in its purported Proof of Service that
5 Shapiro Bernstein is the “the agent, United States representative for and United
6 States administrator of Rister Editions.” Proof of Service at 3 (Dkt. No. 117).
7 Although Shapiro Bernstein has contracted with Rister Editions to sub-license
8 certain musical compositions in the United States, this does not transform Shapiro
9 Bernstein into a “managing agent” or “general agent” of Rister Editions; in fact, it is
10 well-settled that a mere licensee is not an agent for service of process. *See*
11 *Kourkene v. American BBR, Inc.*, 313 F.2d 769, 772 (9th Cir. 1963); *Lopinsky v.*
12 *Hertz Drive-Ur-Self Systems*, 194 F.2d 422, 424 (2d Cir. 1951).

13 **C. Rister Editions Should be Awarded Its Attorneys’ Fees For**
14 **Making This Motion**

15 In sum, Plaintiff has attempted to serve Rister Editions (a) after the deadline
16 set by the Court’s January 27 Order, (b) in a method the Court has already expressly
17 rejected, and (c) again claiming reliance on “Rule 3.a” of the Federal Rules—which
18 does not exist. This is the very definition of unreasonable and vexatious conduct
19 that multiplies proceedings, and thus can and should be sanctioned under 28 U.S.C.
20 § 1927 by awarding Rister Editions its costs, expenses and attorneys’ fees incurred

21 ³ Even service on an actual *subsidiary* corporation of the party to be served—which
22 Shapiro Bernstein is not—is often found ineffective, for example, when the
23 subsidiary operates independently. *See, e.g., Akzona, Inc. v. E.I. Du Pont de*
24 *Nemours & Co.*, 607 F.Supp. 227, 238-40 (D. Del. 1984) (service on U.S. subsidiary
25 not valid service on foreign parent when subsidiary maintained separate books,
26 observed separate corporate formalities, and possessed significant assets); *Lasky v.*
27 *Continental Products Corp.*, 97 F.R.D. 716, 717 (E.D. Pa. 1983) (same). Nor does
28 the mere fact that two separate entities have entered a music publishing contract
give rise to an agency or fiduciary relationship. *Nolan v. Sam Fox Pub. Co., Inc.*,
499 F.2d 1394 (2d Cir. 1974) (no fiduciary relationship between music publisher
and copyright owner).

1 in objecting to Plaintiff's improper service and bringing this motion. *See, e.g.,*
2 *Boress v. Reynolds*, 2004 WL 1811193, at *3-4 (N.D. Cal. 2004) (awarding
3 sanctions under 28 U.S.C. § 1927 for “[r]epeated filing of materially identical
4 complaints despite an adverse judgment”). Such conduct also rises to the level of
5 bad faith, and thus also merits an award of sanctions under the Court’s inherent
6 powers. *See, e.g., Fink v. Gomez*, 239 F.3d 989, 991-94 (9th Cir. 2001).

7
8 **CONCLUSION**

9 For all the foregoing reasons, Rister Editions respectfully asks that the Court
10 dismiss the FAC under Rule 12(b)(5), and award Rister Editions its attorneys’ fees
11 and costs incurred in connection with this motion.

12 Dated: March 28, 2011

LOEB & LOEB LLP

13 By: /s/ Barry I. Slotnick

14 Barry I. Slotnick
15 Donald A. Miller
16 Tal E. Dickstein

17 Attorneys for RISTER EDITIONS
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