

HAMPTONHOLLEY LLP
2101 East Coast Highway, Suite 260
Corona del Mar, California 92625

1 Dean A. Dickie (appearing *Pro Hac Vice*)
Dickie@MillerCanfield.com
2 Kathleen E. Koppenhoefer (appearing *Pro Hac Vice*)
Koppenhoefer@MillerCanfield.com
3 MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
225 West Washington Street, Suite 2600
4 Chicago, IL 60606
Telephone: 312.460.4200
5 Facsimile: 312.460.4288

6 Ira Gould (appearing *Pro Hac Vice*)
gould@igouldlaw.com
7 Ryan L. Greely (appearing *Pro Hac Vice*)
rgreely@igouldlaw.com
8 GOULD LAW GROUP
120 North LaSalle Street, Suite 2750
9 Chicago, IL 60602
Telephone: 312.781.0680
10 Facsimile: 312.726.1328

11 George L. Hampton IV (State Bar No. 144433)
ghampton@hamptonholley.com
12 Colin C. Holley (State Bar No. 191999)
cholley@hamptonholley.com
13 HAMPTONHOLLEY LLP
2101 East Coast Highway, Suite 260
14 Corona del Mar, California 92625
Telephone: 949.718.4550
15 Facsimile: 949.718.4580

16 Attorneys for Plaintiff
BRYAN PRINGLE

17
18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA**
20 **SOUTHERN DIVISION**

21 BRYAN PRINGLE, an individual,) Case No. SACV 10-1656 JST(RZx)
22 Plaintiff,)
23 v.) **PLAINTIFF BRYAN PRINGLE'S**
24 WILLIAM ADAMS, JR.; STACY) **OPPOSITION TO DEFENDANT**
FERGUSON; ALLAN PINEDA; and) **RISTER EDITIONS' MOTION TO**
25 JAIME GOMEZ, all individually and) **DISMISS BASED UPON**
collectively as the music group The Black) **IMPROPER SERVICE**
26 Eyed Peas, *et al.*,)
27 Defendants.)
28

DATE: April 25, 2011
TIME: 10:00 a.m.
CTRM: 10A

1 **I. INTRODUCTION**

2 Defendant Rister Editions’ motion should be recognized for what it really is—
3 a blatant attempt to avoid having this case determined on the merits. Rister Editions’
4 gamesmanship in this regard is particularly evident from the fact that although Rule
5 4(m) only provides for potential dismissal of a complaint *without* prejudice, Rister
6 Editons’ proposed order provides for a dismissal *with* prejudice.

7 Rister Editions’ temerity aside, this is not the only example of Rister Editions’
8 intentional misrepresentation of the pertinent facts and the law relevant to the Court’s
9 determination of Rister Editions’ motion. Contrary to Rister Editions’
10 misrepresentations: the service of the summons and First Amended Complaint on
11 March 16, 2011 *was not* effected in exactly the same way as previous attempts at
12 service; plaintiff Bryan Pringle (“Pringle”) *does not* claim that the summons and
13 First Amended Complaint were served pursuant to Rule 3a of the Federal Rules of
14 Civil Procedure (“FRCP”); the Court’s January 27, 2011 Order *is not* dispositive as
15 to the issue of service on Shapiro Bernstein as Rister Editions’ agent; and the (120)
16 one hundred twenty day time limit articulated in Rule 4(m) *would not* apply if
17 Pringle were to serve Rister Editions in France pursuant to the Hague Convention.

18 Although Rister Editions states that Shapiro Bernstein did not have express
19 authorization to accept service of the summons and First Amended Complaint on its
20 behalf, the law is clear that such authorization may nevertheless be implied where, as
21 in this case, Shapiro Bernstein holds itself out as the managing agent and United
22 States representative of Rister Editions. Accordingly, the Court should exercise its
23 discretion and find good cause to extend the time for service by (19) nineteen days to
24 encompass the service of the summons and First Amended Complaint on March 16,
25 2011. Such a short extension of time is particularly appropriate in this case because
26 Rister Editions has not argued, let alone demonstrated, that it will suffer any
27 prejudice as a result of being served (139) one hundred thirty-nine days after the
28

1 filing of the Complaint and (117) one hundred seventeen days after filing of the First
2 Amended Complaint.

3 Even assuming, however, that Shapiro Bernstein did not have the implied
4 authority to accept service on Rister Editions' behalf, the Court should still deny the
5 motion because Rister Editions may still be served pursuant to the Hague Convention
6 and will not be prejudiced by any delay in service. As discussed below, the preferred
7 procedure in such cases is not to dismiss the case, but rather to simply quash service
8 of the summons and complaint and give the plaintiff additional time to complete
9 service pursuant to the Hague Convention, as the (120) one hundred twenty day time
10 limit articulated in FRCP Rule 4(m) would no longer apply.

11 Rister Editions' request for sanctions should also be denied. Notwithstanding
12 Rister Editons' representations to the contrary, Pringle did not simply effect service
13 of the summons in the same manner that had been previously rejected by the Court.
14 The proof of service for the summons served on March 16, 2011, unlike the previous
15 proofs of service, specifically states that the summons was served on Shapiro
16 Bernstein in its capacity as "the agent, United States representative for and United
17 States administrator of Rister Editions."

18 Nor did Pringle purport to serve the summons pursuant to FRCP Rule 3a. The
19 proof of service's reference to "3.a." in connection with "Manner of Service" is a
20 reference to section 3.a. of United States District Court for the Central District of
21 California Form CV-01 ("Form CV-01"), not a reference to FRCP Rule 3a, which
22 does not exist.

23 The Court should reject each of Rister Editions' arguments and order that the
24 case proceed without further delay.

25 **II. PROCEDURAL BACKGROUND**

26 This action was filed on October 28, 2010. [ECF Docket Entry Number
27 ("Doc.") #1].
28

1 On November 5, 2010, the summons and complaint for Rister Editions were
2 served on defendant Shapiro Bernstein. [Doc. #40]. The proof of service for the
3 November 5, 2010 service on Rister Editions did not indicate the relationship
4 between Shapiro Bernstein and Rister Editions and did not specify the capacity in
5 which Shapiro Bernstein was served with Rister Editions' summons and complaint.
6 [See Doc. #40].

7 On November 19, 2010, Pringle filed the First Amended Complaint in this
8 action. [Doc. #9].

9 On December 1, 2010, the summons and First Amended Complaint for Rister
10 Editions were served on Shapiro Bernstein. [Doc. #50]. The proof of service for the
11 December 1, 2010 service on Rister Editions did not indicate the relationship
12 between Shapiro Bernstein and Rister Editions and did not specify the capacity in
13 which Shapiro Bernstein was served with Rister Editions' summons and First
14 Amended Complaint [See Doc. #50].

15 On December 13, 2010, Rister Editions filed a motion to dismiss based on
16 improper service. [Docs. #53 and #58]. On January 27, 2011, the Court issued an
17 order denying Rister Editions' motion to dismiss. [Doc. #95]. In ruling on Rister's
18 motion to dismiss, the Court expressly noted that:

19 Plaintiff's proofs of service on Rister state that
20 service was made not on any employee or service agent of
21 Rister, but rather on Defendant Shapiro. (Shapiro et al.
22 Mot. at 8; see Docs. 40 & 50.)

23 [Doc. #95 at page 16].

24 On March 16, 2011, Pringle served a copy of the summons and First Amended
25 Complaint on Rister Editions by personally serving a copy of the summons and First
26 Amended Complaint on Shapiro Bernstein.

27 The proof of service for the March 16, 2011 service on Rister Editions
28 indicates that Shapiro Bernstein was served as "the agent, United States

1 representative for and United States administrator of Rister Editions.” [Doc. # 117 at
2 page 3].

3 **III. ARGUMENT**

4 **A. Shapiro Bernstein Has the Implied Authority to Accept Service on**
5 **Behalf of Rister Editions**

6 The FRCP authorize service of process by delivering a copy of the summons
7 and operative complaint “to an agent authorized by appointment or by law to receive
8 service of process.” FRCP 4(e)(2). Service on a foreign entity’s managing agent is
9 also proper. FRCP(h)(1). Under FRCP 4(e)(2), an agent may have the implied
10 authority to accept service of process on behalf of a foreign entity. *See United States*
11 *v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 881 (Fed. Cir. 1997) (“An agent’s
12 authority to accept service may be implied in fact”). *See also Volkswagenwerk*
13 *Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 706–707, 108 S. Ct. 2104, 100 L. Ed. 2d
14 722 (1988) (upholding service on an implied agent of a foreign corporation); 4A
15 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE §
16 1097, at 84-85 (2d ed. 1987) (“Although authority to accept process need not be
17 explicit, it must either be express or implied from the type of relationship between
18 defendant and the alleged agent.”)

19 Under the facts of this case, Shapiro Bernstein has the implied authority to
20 accept service on Rister Editions’ behalf pursuant to FRCP Rule 4(e)(2). Shapiro
21 Bernstein holds itself out as Rister Editions’ United States representative and United
22 States administrator, as evidenced in content posted on Shapiro Bernstein’s website
23 and in the liner notes for The Black Eyed Peas album *The End*. *See* Declaration of
24 Jeremy T. Katz (“Katz Declaration”) at ¶¶ 2-3 & Exhs. A-D.

25 Similarly, Shapiro Bernstein may be deemed Rister Editions’ “managing
26 agent” under FRCP 4(h)(1) because, as their representative in the United States,
27 Shapiro has substantial responsibility for Rister Editions’ business affairs. Under
28 FRCP 4(h)(1), “service is sufficient when made upon an individual who stands in

1 such a position as to render it fair, reasonable and just to imply the authority on his
2 part to receive service.” *Montclair Electronics, Inc. v. Electra/Midland Corp.*, 326 F.
3 Supp. 839, 842 (S.D.N.Y. 1971); *see also American Football League v. National*
4 *Football League*, 27 F.R.D. 264, 269 (D. Md. 1961) (ruling that a football coach is a
5 managing agent for the team because “each coach was in charge of the activities
6 which rendered his employer amenable to suit in this district”).

7 According to Shapiro Bernstein’s press release and the Black Eyed Peas,
8 Shapiro Bernstein is in charge of, and represents, Rister Editions in connection with
9 Rister Editions’ business activities in the United States. Accordingly and because
10 these business activities are the basis for naming Rister Editions as a defendant and
11 make Rister Editions amenable to suit in the Central District of California., Shapiro
12 Bernstein may be deemed to be a managing agent for purposes of effecting service
13 on Rister Editions. *Montclair Electronics*, 326 F. Supp. at 842; *American Football*
14 *League*, 27 F.R.D. at 269.

15 Rister Editions has failed to submit any admissible evidence to properly
16 contest Shapiro Bernstein’s implied authority to accept service on its behalf. As
17 explained in *McKinney v. Law Office of James Duncan*, 2010 U.S. Dist. LEXIS
18 14589, at *8-*9 (N.D. Cal. Feb. 19, 2010), unless some defect in service is shown on
19 the face of the return of service, a Rule 12 motion to dismiss for improper service
20 must be supported by declaration or other admissible evidence establishing the
21 improper service. Where the validity of service is properly contested in a motion to
22 dismiss, the burden is on the plaintiff to establish validity of service or to create an
23 issue of fact requiring an evidentiary hearing to resolve. *See Aetna Business Credit,*
24 *Inc. v. Universal Decor & Interior Design, Inc.*, 635 F.2d 434, 435 (5th Cir. 1981);
25 *Naufahu v. City of San Mateo*, 2008 U.S. Dist. LEXIS 53633, at *5 (N.D. Cal. May
26 14, 2008) (relying on *Aetna Business Credit*). A plaintiff normally meets this burden
27 by producing the process server’s return of service, which is generally accepted as
28 prima facie evidence that service was effected, and of the manner in which it was

1 effected. *See, e.g., Blair v. City of Worcester*, 522 F.3d 105, 112 (1st Cir. 2008); *see*
2 *also S.E.C. v. Internet Solutions for Business Inc.*, 509 F.3d 1161, 1166 (9th Cir.
3 2007) (signed return of service constitutes prima facie evidence of proper service in
4 context of default judgment). Rister Editions’ failure to offer any admissible
5 evidence to properly contest Pringle’s prima facie evidence of proper service is fatal
6 to its motion.

7 The cases upon which Rister Editions attempts to rely to refute Shapiro
8 Bernstein’s implied authority to accept service on Rister Edition’s behalf are
9 inapposite. Rister Editions cites *Thomas v. Furness Pac. Ltd.*, 171 F.2d 434 (9th Cir.
10 1949) for the proposition that service may be quashed when not on a managing
11 agent. But in *Thomas*, the plaintiff produced no evidence to controvert testimony
12 that the person on whom process was served was not the defendant’s officer, agent,
13 general manager, or authorized to accept service of process for the defendant. Here,
14 Shapiro Bernstein holds itself out as Rister Editions’ United States representative and
15 United States administrator. *See* Katz Declaration at ¶¶ 2-3 & Exhs. A-D.
16 Therefore, Shapiro Bernstein’s own statements refute Rister Editions’ argument that
17 Shapiro Bernstein did not have the implied authority to accept service of process.

18 Similarly, Rister Editions cites *Saez Rivera v. Nissan Mfg. Co.*, 788 F.2d 819,
19 821 (1st Cir. 1986) for the proposition that service is invalid when the “recipient
20 lacked actual authority, even though he claimed to be a presiding officer.” *See*
21 Motion to Dismiss at 5:13-15. But again, the plaintiff in *Saez Rivera* offered no
22 proof beyond the process server’s declaration that the person served could accept
23 service of process. Here, Pringle presents Shapiro Bernstein’s statements in which
24 Shapiro Bernstein holds itself out as the United States representative for, and United
25 States administrator of, Rister Editions’ business interests.

26 Rister Editions next cites *Direct Mail Specialists, Inc. v. Eclat Computerized*
27 *Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988), but ignores its central holding
28 that service is proper when the recipient has the implied authority to accept the

1 service of process. *Id.* at 688. In fact, the court in *Direct Mail Specialists* upheld
2 service on the non-employee receptionist in a shared office because the recipient
3 demonstrated apparent authority. *Id.* at 689 (citing 2 J. MOORE, J. LUCAS, H. FINK &
4 C. THOMPSON, MOORE’S FEDERAL PRACTICE ¶¶ 4-201 through 22[2], at 4-205 (2d ed.
5 1987)). As discussed by the court, “[d]espite the language of the Rule, service of
6 process is not limited solely to officially designated officers, managing agents, or
7 agents appointed by law for the receipt of process.” *Id.* In other words and contrary
8 to Rister Editions’ argument, Shapiro Bernstein can properly receive service for
9 Rister Editions even if Rister Editions has not expressly designated Shapiro as its
10 agent for service of process.

11 Rister Editions cites *Kourkene v. American BBR, Inc.*, 313 F.2d 769, 772 (9th
12 Cir. 1963) for the proposition that a mere licensee is not an agent for service of
13 process. But Shapiro Bernstein does not stand in the same shoes as the person who
14 received service in *Kourkene*. In *Kourkene*, the foreign defendants created a
15 Pennsylvania corporation named BBR to “act as their representative and agent in the
16 United States in connection with” the foreign defendants’ intellectual property. *Id.* at
17 771. In turn, BBR granted Ryerson a non-exclusive oral license to use the
18 defendants’ intellectual property. *Id.* The plaintiff served Ryerson as the foreign
19 defendants’ agent and the *Kourkene* court quashed the service because Ryerson was
20 “a mere licensee” and not the foreign defendants’ agent. *Id.* at 772.

21 Here, *Shapiro Bernstein* is more akin to BBR than Ryerson. While Ryerson
22 was two-steps removed from the foreign defendants in *Kourkene*, Shapiro Bernstein
23 is only one-step removed from Rister Editions. While Ryerson was a non-exclusive
24 licensee, Shapiro Bernstein is the United States representative for, and United States
25 administrator of Rister Editions’ business. Unlike in *Kourkene*, where Ryerson was
26 as non-exclusive sub-licensees, Shapiro Bernstein is the sole conduit by which Rister
27 Editions conducts business in the United States. Therefore, Rister Editions’ reliance
28 on *Kourkene* is misplaced. Likewise, Rister Editions’ reliance on *Lopinsky v. Hertz*

1 *Drive-Ur-Self Systems*, 194 F.2d 422, 424 (2d Cir. 1951) (quashing service
2 effectuated on one of the “hundreds of local individuals and corporations throughout
3 the United States and Canada” who license intellectual property from Hertz) is also
4 misplaced.

5 **B. Alternatively, the Court Should Quash Service of the Summons and**
6 **Allow Service Pursuant to the Hague Convention**

7 When a court determines that service of process is insufficient, it has broad
8 discretion to either dismiss the action without prejudice or retain the case but quash
9 the service of process. *Oyama v. Sheehan*, 253 F.3d 507, 513 (9th Cir. 2001); *see*
10 *also* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1354, at 585-
11 86 (1969). A court should generally quash service of process instead of dismissing
12 the action when there is a reasonable prospect that the plaintiff ultimately will be
13 able to serve the defendant properly. *Brockmeyer*, 383 F.3d at 801 *McKinney v.*
14 *Apollo Group, Inc.*, 2008 U.S. Dist. LEXIS 56324, at *16-*17 (S.D. Cal. July 22,
15 2008)

16 As explained in *Motley v. Parks*, 2001 U.S. Dist. LEXIS 12479, at *17-*19
17 (C.D. Cal. July 23, 2001)

18 The Ninth Circuit has found it “unnecessary . . . to
19 articulate a specific test that a court must apply in
20 exercising its discretion under Rule 4(m),” and has “noted
21 only that, under the terms of the rule, the court’s discretion
22 is broad.” *In re Sheehan, supra*, 253 F.3d 507, 2001 WL
23 682453. District courts in the Ninth Circuit have exercised
24 their discretion to extend the time for service where
25 defendants “have not suffered any prejudice resulting from
26 the delay” and where the extension will give plaintiffs “an
27 opportunity to litigate the merits of this action, a desirable
28

1 goal.” *Matasareanu v. Williams*, 183 F.R.D. 242, 247
2 (C.D. Cal. 1998).

3 In *Motley*, the court denied the defendants’ motion to dismiss and extended the
4 time for service because the defendants had failed to demonstrate they would suffer
5 prejudice if the time for service was extended. Here, Rister Editions has failed to
6 argue, let alone demonstrate, that it would suffer any prejudice if the time for service
7 is extended. Discovery has only recently begun and ample time remains for Rister
8 Editions to prepare for trial. Accordingly, the time for service should be extended so
9 that this case may be litigated on its merits.

10 It should be noted that if the Court requires Pringle to serve Rister Editions
11 pursuant to the Hague Convention, the (120) one hundred twenty day time limit set
12 forth in Rule 4(m) would not apply by its express terms.

13 **C. Sanctions are Not Warranted**

14 Notwithstanding Rister Editions’ protestations to the contrary, the service of
15 the summons and First Amended Complaint was not unreasonable, vexatious or done
16 in bad faith. Pringle’s service of the summons and First Amended Complaint on
17 Shapiro Bernstein was based upon Shapiro Bernstein’s implied authority to accept
18 service on Rister Editions’ behalf, and Pringle has never claimed any reliance on
19 Rule 3.a. of the FRCP.

20 As set forth on the proof of service filed with the Court, the summons and First
21 Amended Complaint were personally served on Shapiro Bernstein on March 16,
22 2011. The proof of service, unlike the previous proofs of service, shows that Shapiro
23 Bernstein was served as the agent for Rister Editions. The proof of service also
24 simply states that the manner of service was the FRCP. No specific rule is cited.
25 The proof of service’s reference to “3.a.” in connection with “Manner of Service” is
26 a reference to section 3.a. of the Court’s Form CV-01, not a reference to FRCP Rule
27 3a, which does not exist. *See* Katz Declaration at ¶ 4 & Exh. E.

28

1 Although service on Rister Editions was completed (19) nineteen days after
2 the time prescribed in Rule 4(m). The Court has discretion to extend the deadline so
3 cases may be heard on their merits rather than dismissed without prejudice and re-
4 filed at a later time. In any event and as discussed above, if Pringle is required to
5 serve Rister Editions in France pursuant to the Hague Convention, the time limit set
6 forth in Rule 4(m) is of no consequence.

7 **IV. CONCLUSION**

8 Based upon the foregoing Pringle respectfully requests that the Court deny
9 Rister Editions' motion to dismiss in its entirety. Alternatively, Pringle requests that
10 the Court quash service of the Summons and First Amended Complaint and allow
11 Pringle to serve the complaint on Rister Editions pursuant to the Hague Convention.

12
13 Dated: April 4, 2011

Dean A. Dickie (appearing *Pro Hac Vice*)
Kathleen E. Koppenhoefer (appearing *Pro Hac Vice*)
MILLER, CANFIELD, PADDOCK AND STONE,
P.L.C.

Ira Gould (appearing *Pro Hac Vice*)
Ryan L. Greely (appearing *Pro Hac Vice*)
GOULD LAW GROUP

George L. Hampton IV (State Bar No. 144433)
Colin C. Holley (State Bar No. 191999)
HAMPTONHOLLEY LLP

17
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19
20 By: /s/ George L. Hampton IV
George L. Hampton IV

21
22 Attorneys for Plaintiff
BRYAN PRINGLE