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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

REPLY MEMORANDUM IN FURTHER 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

REPLY MEMORANDUM

Nonparty Rister Editions respectfully submits this Reply Memorandum in support of its Motion to Dismiss the First Amended Complaint ("FAC") as against Rister Editions under Rule 12(b)(5) of the Federal Rules of Civil Procedure, and to recover its attorneys' fees and costs incurred in making this motion.

PRELIMINARY STATEMENT

Plaintiff either admits or does not dispute that (i) on two prior occasions in 2010, he attempted to serve process on Rister Editions by delivering the summons and complaint to Shapiro Bernstein, (ii) the Court rejected that service as improper in its January 27, 2011 Order and directed Plaintiff to properly serve Rister Editions, if at all, within 120 days of the commencement of the action (i.e. by February 25, 2011), and (iii) on March 16, 2011, Plaintiff nevertheless attempted for a *third time* – and beyond the 120-day deadline – to serve Rister Editions by delivering copies of the summons and complaint to Shapiro Bernstein. For these reasons alone, Rister Editions' motion should be granted.

Nothing in Plaintiff's opposition changes that conclusion. First, Plaintiff tries to justify his repeated improper service attempts by arguing that his March 2011 service attempt was "not effected in *exactly* the same way as previous attempts" (Opp. 1) (emphasis added) because his March 2011 proof of service used the word "agent," while his 2010 proofs of service used the words "authorized person to accept service of process[.]" (*Compare* Dkt. Nos. 40, 50 *with* 117). Clearly, this is a distinction without a difference and nothing more than a transparent attempt to justify service in a manner that had already been rejected by the Court.

Second, relying on a blurb on Shapiro Bernstein's website and CD "liner notes" that were neither written nor approved by Shapiro Bernstein or Rister Editions, Plaintiff asserts that Shapiro Bernstein is Rister Editions' "managing agent" and is therefore impliedly authorized to accept service on Rister Editions'

behalf. But as detailed in the accompanying declaration of Shapiro Bernstein's President, Michael Brettler, Shapiro Bernstein is nothing more than a conduit which Rister Editions uses to collect various licensing revenues in the United States, and has absolutely no control over Rister Editions' business decisions or operations. Indeed, the license to record the song at issue in this case was obtained from The Black Eyed Peas, not Shapiro Bernstein. Plaintiff thus fails to carry his burden of proving that Shapiro Bernstein is authorized to accept service for Rister Editions' as its "managing agent."

If Plaintiff wanted to add Rister Editions to this case as a party defendant, he had every right to serve Rister Editions through the appropriate channels, as set forth in the Hague Convention and the Federal Rules. Three times now, Plaintiff has attempted to sidestep these requirements. If anyone is attempting to "game the system" here, it is Plaintiff, not Rister Editions.

ARGUMENT

A. Plaintiff's Purported Service Is Identical To His Earlier Attempts Which Have Been Rejected by the Court

Plaintiff claims that his most recent service attempt was somehow different from his two prior attempts because his third proof of service "states that the summons was served on Shapiro Bernstein in its capacity as 'the agent, United States representative for and United States administrator of Rister Editions'" (Opp at 2) whereas his first two proofs of service stated that Shapiro Bernstein was an "authorized person to accept service of process" for Rister Editions (Dkt. Nos. 40, 50).[1] But even assuming the proof of service's description of the person served has

[1] As an initial matter, by claiming that his first two proofs of service "did not indicate the relationship between Shapiro Bernstein and Rister Editions and did not specify the capacity in which Shapiro Bernstein was served with Rister Editions' summons and First Amended Complaint" (Opp. 3), Plaintiff *admits* that his first two attempts at service were completely without any basis. For this reason alone,

any bearing on the manner of service, these are clearly two ways of saying the same thing – *i.e.*, a person authorized to accept service of process is nothing more than a type of agent. Moreover, all three of Plaintiff's service attempts involved ***precisely*** the same method of service – delivering one or more copies of Rister Editions' summons and complaint to Shapiro Bernstein. Thus, the fact remains that Plaintiff simply repeated the same purported service which the Court had already ruled ineffective in its January 27, 2011 Order. (Dkt. No. 95.)[2]

B. <u>Shapiro Bernstein Is Not A "Managing Agent" Of Rister Editions</u>

Plaintiff acknowledges, as he must, that he bears the burden of proving proper service. *See, e.g.*, *Bacon v. City and County of San Francisco*, No. C04-3437 (TEH), 2005 WL 1910924, at *3, (N.D. Cal. Aug. 10, 2005) (citing *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985)). In an attempt to meet that burden, Plaintiff asserts that "Shapiro Bernstein holds itself out as the managing agent and United States representative of Rister Editions" (Opp. 1) and that "Shapiro [Bernstein] has substantial responsibility for Rister Editions' business affairs" (*Id.* at 4.) As purported "evidence" supporting that broad assertion, Plaintiff relies only on: (i) a printout of Shapiro Bernstein's website stating "Shapiro Bernstein is representing … Rister Editions of France for the USA" (Declaration of Jeremy T. Katz, Exhs. A and B) and (ii) the "liner notes" from The Black Eyed Peas album "The E.N.D." which state that "Rister Editions [is] administered in the United States by Shapiro,

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Shapiro Bernstein should be awarded its costs and attorneys fees incurred in making this motion.

[2] Plaintiff makes the highly disingenuous claim that the Court denied Rister Editions' prior motion to dismiss in its January 27 Order. Plaintiff neglects to mention that the Court ruled that Rister Editions had not been served, but that the 120-day limit of Rule 4(m) had not yet run, and so Plaintiff still had time to effect proper service at the time that Order issued. That 120-day deadline has now passed, and Rister Editions still has not been served.

Bernstein & Co., Inc." (*Id.* at Exhs. C and D.) Neither of those sources supports Plaintiff's assertions.

As an initial matter, neither Shapiro Bernstein nor Rister Editions drafted, reviewed or approved the "liner notes" to The Black Eyed Peas album. (Declaration of Michael Brettler ("Brettler Decl.") at ¶ 8.) Furthermore, the terms "administered" and "representing" are widely used terms of art in the music industry, which mean only that Shapiro Bernstein acts as Rister Editions' sub-publisher in the United States, not as any sort of "managing agent." (*Id.* ¶¶ 3, 8) In that capacity, Shapiro Bernstein merely acts as a conduit to transfer licensing payments from various third parties in the United States to Rister Editions in France, and Shapiro Bernstein has no authority to make business decisions on Rister Editions' behalf. (*Id.* at ¶¶ 2-6.) Rister Editions is a French entity, with its own business operations, assets, and personnel in France, and is not a parent, subsidiary, or affiliate of Shapiro Bernstein (*Id.* at ¶ 7) – which is not, and never has been, authorized to accept service of process on Rister Editions' behalf. (*Id.* at ¶ 2.)

Plaintiff's lengthy legal contortions do not change this reality. Plaintiff does not contest that an agent must have specific authority to accept service of process. *See, e.g.*, *In re Focus Media Inc.*, 387 F.3d 1077, 1082 (9th Cir. 2004) (purported agent must possess actual authority to accept service of process); *U.S. v. Ziegler Bolt and Parts Co.*, 111 F.3d 878, 881 (Fed.Cir. 1997) ("[T]he mere appointment of an agent, even with broad authority, is not enough; it must be shown that the agent had specific authority, express or implied, for the receipt of service of process.") (citing 2 Moore's Federal Practice ¶ 4.10[4], at 4-174 to 4-175); *see also Moody v. Finander*, 2010 WL 5535703, at *2 (S.D. Cal. Dec. 1, 2010) ("Similar to the federal rule, being a person's agent for purposes other than to accept service is not enough to establish actual or implied authority to accept service of process ….") (citing *Summers v. McClanahan*, 140 Cal. App. 4th 403, 414 (2006)).

Further, many courts have confirmed that "implied" authority to accept service is the exception rather than the rule, and only applies in specific and unusual factual scenarios. For example, in *Kruska v. Perverted Justice Foundation Inc.*, 2009 WL 4041941 (D. Ariz. Nov. 16, 2009), the court noted that it is possible for an attorney to have implied authority to accept service of process, but made clear that "[a] party … cannot fabricate such implied authority from whole cloth to cure a deficient service, but must present facts and circumstances showing the proper relationship between the defendant and its alleged agent." *Id*. at *2 (citation omitted). And *In re Smith*, 350 Fed. Appx. 162 (9th Cir. 2009) affirmed the bankruptcy court's finding that service on an attorney in bankruptcy proceedings was not effective as service on the attorney's client, when the record did not establish express or implied authority to accept service. *See also Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 93-94 (B.A.P. 9th Cir. 2004) (concluding that an attorney's representation of a corporation in an action giving rise to a judicial lien did not establish implied authority by the attorney to accept service on behalf of the corporation for a motion to avoid the judicial lien in a bankruptcy case); *Pochiro v. Prudential Ins. Co. of Am*., 827 F.2d 1246, 1248-49 (9th Cir. 1987) (service on attorney is insufficient unless attorney had actual authority from client to accept service on client's behalf).

Here, Plaintiff presents two pieces of purported "evidence" that Shapiro Bernstein is authorized to accept service on behalf of Rister Editions: a blurb from Shapiro Bernstein's website and "liner notes" from a pop album indicating that Shapiro Bernstein is Rister Editions' "agent" in the United States. But as the above-cited authority establishes, Shapiro Bernstein only acts as the "agent" of Rister Editions in a very narrow and specific way—namely, as a conduit for licensing revenue. (Brettler Decl. at ¶¶ 2-6.) There is nothing in any of the "evidence" Plaintiff cites that even suggests Shapiro Bernstein is authorized to accept service of

process as an "agent" of Rister Editions, and therefore, there is no basis in the record to believe that Shapiro Bernstein was somehow "impliedly" authorized to do so.[3]

Nor does any of Plaintiff's cited authority permit a contrary conclusion. Plaintiff relies principally on *Direct Mail Specialists*, where the Court upheld service on a receptionist in a small office and when the receptionist was the only person in the office when the process server arrived. 840 F.2d 685, 688-89 (9th Cir. 1988). But there is no basis for an extension by analogy here. Shapiro Bernstein is hardly in the same small office as Rister Editions—as Plaintiff well knows, they are different entities in different countries and share no facilities or personnel. Plaintiff also seeks to distinguish *Thomas v. Furness Pac. Ltd.*, 171 F.2d 434 (9th Cir. 1949) and *Saez Rivera v. Nissan Mfg. Co.*, 788 F.2d 819 (1st Cir. 1986) on the ground that the defendants failed to produce any evidence disputing the recipient's authority to accept service. This is unavailing, because Plaintiff here has also failed to present any evidence that Shapiro Bernstein was authorized to accept service; as above, merely being an "agent" is insufficient, and Plaintiff points to no evidence that Shapiro Bernstein had any specific authority—express or implied, actual or apparent—to accept service of process for Rister Editions. Plaintiff lastly attempts to explain away *Kourkene v. American BBR, Inc.*, 313 F.2d 769 (9th Cir. 1963) and *Lopinsky v. Hertz Drive-Ur-Self Systems*, 194 F.2d 422 (2d Cir. 1951), on the ground that Shapiro Bernstein is more analogous to parties other than the recipients of process in those cases. But these cases are not authority that any other party in fact would be authorized to accept service, and Plaintiff of course does not dispute

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[3] Indeed, Plaintiff can hardly claim a basis of "implied" authority when it has been informed, repeatedly and expressly, that Shapiro Bernstein is not authorized to accept service for Rister Editions. *See, e.g.* Thorland Declaration (Dkt. No. 53-2) at Exh. 1 (12/8/10 Letter to Plaintiff's counsel stating that "Shapiro Bernstein is not an agent for service of process and is not authorized to accept service on [Rister Editions'] behal[f]").

that these cases do establish that a mere licensee is not an agent for service of process.

In sum, as above, Shapiro Bernstein is merely a sub-publisher of certain of Rister Editions' musical compositions and a conduit of licensing revenue earned therefrom in the United States. Plaintiff cites no authority whatsoever establishing that such a relationship establishes any authority, implied or otherwise, to accept service of process.

C. Plaintiff's Complaint Should Be Dismissed With Prejudice

As a last-ditch effort to salvage its untimely and improper service, Plaintiff claims that any dismissal should be without prejudice because Rister Editions has not been prejudiced by its conduct. Although the Court has discretion to dismiss for insufficient service with or without prejudice, and to extend the 120-day service deadline upon a showing of good cause, Plaintiff makes no such showing. This is Plaintiff's third attempt at serving Rister Editions through Shapiro Bernstein, an entirely separate entity having no control over Rister Editions' business operations. The Court's January 27 Order established that this form of service is invalid. Plaintiff still had time to cure the deficiency, but instead allowed the 120-day period to lapse, and then repeated the same improper method of service that the Court had previously rejected. Rister Editions is merely insisting that it be served with process in the legally proper manner, as is its right under the law. Plaintiff's conduct is harassing and vexatious, and has imposed significant burdens on Rister Editions, requiring multiple motions to dismiss and further delaying progress in this case.

Plaintiff claims that he wants to get to the merits, but it is Plaintiff who has repeatedly ignored the Hague Convention, the Federal Rules, and the Court's January 27 Order. Rister Editions' second motion to dismiss should be granted, and Rister Editions should be awarded its costs, expenses and attorneys' fees incurred in objecting to Plaintiff's improper service and bringing this motion. *Boress v.*

Reynolds, 2004 WL 1811193, at *3-4 (N.D. Cal. 2004); *Fink v. Gomez*, 239 F.3d 989, 991-94 (9th Cir. 2001).

CONCLUSION

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

Dated: April 11, 2011

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By: /s/ *Barry I. Slotnick*
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