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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES – GENERAL**

Case No. SACV 10-1656-JST (RZx)

Date: April 12, 2011

Title: Bryan Pringle v. William Adams, Jr. et al.

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Present: **Honorable JOSEPHINE STATON TUCKER, UNITED STATES DISTRICT JUDGE**

Ellen Matheson

Deputy Clerk

N/A

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:      ATTORNEYS PRESENT FOR DEFENDANT:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER (1) DENYING MOTION TO  
DISMISS AND QUASHING SERVICE ON DEFENDANT  
RISTER EDITIONS AND (2) GRANTING RISTER'S  
MOTION FOR ATTORNEYS' FEES (Doc. 121)**

Before the Court is Rister Editions' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(5) for Plaintiff's failure to effect proper service. (Doc. 121.) Rister also seeks, pursuant to 28 U.S.C. section 1927, the expenses, costs, and attorneys' fees it incurred in making this motion. Plaintiff has filed an opposition (Doc. 123), and Rister has replied (Doc. 124). The Court finds this matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. Accordingly, the hearing scheduled for April 25, 2011 at 10:00 a.m. is vacated.

Rister, a foreign corporation based in France, has filed its second motion to dismiss pursuant to Rule 12(b)(5). Rister previously moved for dismissal on the same grounds, arguing, as it does here, that Plaintiff improperly attempted to serve it through Defendant Shapiro Bernstein & Company, a New York music publishing company with whom Rister has a business relationship. (Doc. 53). Plaintiff did not oppose that motion or provide any explanation as to why it attempted to serve Rister through Shapiro. Nor did Plaintiff ask, as it does now, for leave from the Court to allow service pursuant to the Hague Convention. Nonetheless, the Court denied the motion to dismiss, and ordered Plaintiff to "promptly serve" Rister by no later than February 25, 2011. (Doc. 95 at 11.)

In response, Plaintiff disregarded the Court's Order and waited until March 16, 2011 to attempt, for the third time, to serve Rister through Shapiro, asserting that Shapiro has the implied authority to accept service as the "managing agent" and "United States representative" for Rister, and that service was proper under Rule 4(h)(1)(B). (Doc. 117; *see* Pl.'s Opp. at 1-2, 4.) Plaintiff argues that Shapiro is Rister's managing agent because "as [Rister's] representative in the United States, Shapiro has substantial responsibility for Rister Editions' business affairs." (Pl.'s Opp. at 4.) Plaintiff argues further that, because Rister has failed to submit any evidence contesting

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Shapiro's implied authority to accept service on its behalf, service through Shapiro is proper. (*Id.* at 5.) Rister maintains that Shapiro is not its managing agent, and that Plaintiff has failed to carry its burden in showing that service through Shapiro is proper under Rule 4(h)(1)(B). The Court agrees with Rister.

"Once service is challenged, [a] plaintiff[] bear[s] the burden of establishing that service was valid under Rule 4." *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004); *see* 4A C. Wright & A. Miller, Federal Practice & Procedure § 1101 (3d ed. 2010) ("As is true in other contexts, the burden of showing the required agency is on the plaintiff."). Rule 4(h)(1)(B) holds that a plaintiff may serve a foreign corporation "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process . . ." Fed. R. Civ. P. 4(h)(1)(B). "To be an agent of a corporation, partnership, or other unincorporated association within the meaning of Rule 4(h), an individual ordinarily must be in the current employ of the organization upon whom service of the summons and complaint is to be made." 4A C. Wright & A. Miller, Federal Practice & Procedure § 1101 (3d ed. 2010).

Here, Plaintiff has failed to provide any evidence that Shapiro is Rister's managing agent or that it had any express or implied authority to accept service for Rister. Nor has Plaintiff addressed why it completely failed to assert this argument, or its current desire to attempt service on Rister through the Hague Convention pursuant to Rule 4(f), in response to Rister's previous motion to dismiss. The fact that Plaintiff's March 16, 2011 proof of service listed Shapiro as Rister's "agent" and "United States representative," which the two previous proofs of service did not (*see* Doc. 40), does not differentiate this third attempt or make it any less unavailing.<sup>1</sup> It is undisputed that Shapiro and Rister are separate, independent corporations. Although Shapiro may represent Rister as a client in certain capacities, this does not make it Rister's managing agent for purposes of service under Rule 4. Thus, Plaintiff has failed to serve Rister in this action.

When a plaintiff cannot satisfy its burden of demonstrating effective service, a district court has the discretion to dismiss the action, or, alternatively, to retain the action, quash the ineffective service, and allow the plaintiff to properly serve the defendant. *See Stevens v. Sec. Pac. Nat'l Bank*, 538 F.2d 1387, 1389 (9th Cir. 1976). The Court previously held that service on Rister through Shapiro was inappropriate and ordered Plaintiff to serve properly Rister, which Plaintiff has failed to do. Although the Court recognizes that Plaintiff has disregarded the Court's order and has forced Rister to file a second motion to dismiss pursuant to Rule 12(b)(5), it nonetheless finds that dismissing the action is inappropriate as there exists a reasonable prospect that Plaintiff will be able to serve Rister. *Umberhauer v. Woog*, 969 F.2d 25, 31 (3d Cir. 1992) (holding that "dismissal of a complaint is inappropriate when there exists a reasonable

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<sup>1</sup> Indeed, if Plaintiff's previous attempts to serve Rister through Shapiro were not based on Plaintiff's argument that Shapiro was a managing agent, then the Court can only assume that the earlier service attempts had no good faith basis whatsoever.

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prospect that service may yet be obtained” and that “[i]n such instances, the district court should, at most, quash service, leaving the plaintiffs free to effect proper service”). Accordingly, the Court DENIES Rister’s Motion to Dismiss, quashes Plaintiff’s ineffective service, and orders Plaintiff to serve Rister promptly pursuant to Rule 4(f), as Rister is a foreign corporation.

However, the Court GRANTS Rister’s motion for attorneys’ fees pursuant to 28 U.S.C. section 1927, which states that any “attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” 28 U.S.C. § 1927. Here, Plaintiff’s decision to disregard this Court’s order with regard to its service on Rister amounts to recklessness, and unreasonably and vexatiously multiplied the proceedings by requiring Rister to file this second motion for dismissal pursuant to Rule 12(b)(5). *See R.P. ex rel. C.P. v. Prescott Unified School Dist.*, 631 F.3d 1117, 1128 (9th Cir. 2011) (holding that sanctions under 28 U.S.C. section 1927 require evidence of recklessness or bad faith). Thus, Plaintiff’s counsel shall pay to Rister sanctions in the amount of the reasonable expenses, costs, and attorneys’ fees Rister incurred in filing this motion. The Court orders Rister to file promptly a detailed declaration as to those costs and expenses, so that the Court may determine the sanctions amount to be paid by Plaintiff’s counsel to Rister.

Initials of Preparer: enm