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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.) **MEMORANDUM IN SUPPORT**
24 WILLIAM ADAMS, JR.; STACY) **OF PLAINTIFF BRYAN**
25 FERGUSON; ALLAN PINEDA; and) **PRINGLE’S MOTION TO**
26 JAIME GOMEZ, all individually and) **RECONSIDER THE COURT’S**
collectively as the music group The Black) **APRIL 12, 2011 ORDER**
Eyed Peas, *et al.*,) **AWARDING SANCTIONS**
27 Defendants.) **PURSUANT TO 28 U.S.C. § 1927**
28)
DATE: June 13, 2011
TIME: 10:00 a.m.
CTRM: 10A

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1 **I. INTRODUCTION**

2 Plaintiff, Bryan Pringle (“Plaintiff” or “Pringle”), respectfully requests that
3 this Court reconsider its April 12, 2011 Order awarding sanctions against Plaintiff’s
4 counsel. As appears from the facts set forth below, Plaintiff’s counsel at all times
5 material acted in good faith in a professionally appropriate manner under the
6 circumstances. Moreover, there was no evidence presented by Defendants that
7 supports or suggests that Plaintiff acted in “bad faith,” thereby justifying the extreme
8 measure of sanctions pursuant to 28 U.S.C. § 1927.

9 Plaintiff’s counsel requests that the Court reverse its April 12, 2011 Order for
10 several reasons. Pringle’s counsel did not disregard this Court’s January 27, 2011
11 Order intentionally. To the contrary, Plaintiff’s counsel believed in good faith that
12 they were following the January 27, 2011 Order by remedying the proof of service
13 issues identified initially by the Court. Counsel’s actions thereafter in attempting to
14 effectuate prompt, effective service on Rister Editions (“Rister”) were based on
15 counsel’s honestly held and good faith interpretation of the Court’s January 2011
16 order and were not done in derogation thereof. If counsel erred in its belief that
17 Shapiro, Bernstein & Co. (“Shapiro”) was the lawful representative of Rister under
18 Rule 4 based upon public statements on the Internet, their mistake was neither
19 reckless nor done for the purpose of intentionally ignoring the Court’s January 27,
20 2011 Order.

21 Moreover, Plaintiff’s counsel’s conduct certainly did not rise to the level of
22 “bad faith” warranting draconian sanctions. To the contrary, each of Plaintiff’s
23 counsel’s actions researching applicable law regarding service on implied or
24 designated agents was taken in good faith. Plaintiff’s counsel believed that service
25 on Shapiro was appropriate due to its implied authority as Rister’s United States
26 representative and as such, had authority to accept service on Rister’s behalf. In
27 opposing Rister’s motion to dismiss, Plaintiff asserted clearly that Shapiro had
28 implied authority to accept service for Rister as its managing agent for all purposes

1 in the United States. Plaintiff’s counsel provided the Court with the specific
2 evidence upon which Plaintiff’s counsel relied in proceeding as they did. Regardless
3 of whether Shapiro took the position that there was no *express* authorization to
4 accept service of the summons and First Amended Complaint on behalf of Rister, the
5 law recognizes that such authorization may nevertheless be *implied* where, as in this
6 case, Shapiro holds itself out as the United States representative of Rister and is even
7 identified by Rister’s attorney as Rister’s “sub-publisher” in the United States. The
8 Court’s April 12, 2011 Order demonstrates that Plaintiff’s clear evidence as
9 submitted in its opposition was not considered by the Court in its analysis of
10 Plaintiff’s conduct. Accordingly, the Court’s conclusion that Plaintiff did not submit
11 evidence and that sanctions were proper based on the “recklessness” of Plaintiff
12 should be reconsidered to remedy what was clear error and represents a manifest
13 injustice against Plaintiff. At all times material, counsel for Plaintiff sought to
14 comply with the Court’s order.

15 As is further noted in Plaintiff’s opposition to Defendants’ Motion to Dismiss,
16 the proper procedure in cases such as this one is to quash service of the summons and
17 complaint and give the Plaintiff additional time to complete service pursuant to the
18 Hague Convention. Here, the Court awarded sanctions even though Defendants
19 *unsuccessfully* sought a remedy to which they were never entitled, *i.e.*, dismissal.
20 The award of sanctions against Plaintiff’s counsel is a particularly harsh penalty
21 given the circumstances in this matter, and Plaintiff’s counsel requests that this Court
22 reconsider its position.

23 **II. PROCEDURAL BACKGROUND**

24 This action was filed on October 28, 2010. [ECF Docket Entry Number
25 (“Doc.”) #1]. On November 5, 2010, the summons and complaint for Rister were
26 served on Defendant Shapiro. [Doc. #40]. The proof of service for the November 5,
27 2010 service on Rister did not, however, indicate that Shapiro was being served as
28 the agent or representative of Rister. As it did not specify the capacity in which

1 Shapiro was served with Rister’s summons and complaint, this Court held that
2 service was improper and ordered Plaintiff to serve Rister promptly. [*See* Doc.
3 #126].

4 On November 19, 2010, Pringle filed the First Amended Complaint in this
5 action. [Doc. #9]. On December 1, 2010, the summons and First Amended
6 Complaint for Rister were served on Shapiro. [Doc. #50]. The proof of service for
7 the December 1, 2010 service on Rister did not indicate the relationship between
8 Shapiro and Rister and did not specify the capacity in which Shapiro was served with
9 Rister’s summons and First Amended Complaint. [*See* Doc. #50].

10 On December 13, 2010, Rister filed a motion to dismiss based on improper
11 service. [Docs. #53 and #58]. On January 27, 2011, the Court issued an order
12 denying Rister’s motion to dismiss. [Doc. #95].

13 On February 28, 2011, Defendant Shapiro and the collective Black Eyed Peas
14 Defendants served their initial disclosures pursuant to Rule 26. In the Shapiro
15 disclosures, individual Defendant Frederic Riesterer is identified as having
16 discoverable information, but no address was provided in contravention of the Rule’s
17 requirements. (*See* Declaration of Dean A. Dickie in Support of Motion to
18 Reconsider the Court’s April 12, 2011 Order (“Dickie Decl.”) at ¶ 18 & Ex. A.)
19 The Black Eyed Peas Defendants, like Shapiro, also identified individual Defendant
20 Frederic Riesterer as a person with discoverable information. The Black Eyed Peas
21 Defendants identified Loeb & Loeb, counsel for Shapiro, as the address for
22 Defendant Riesterer. (*See* Dickie Decl. at ¶ 19 & Ex. B.) Pursuant to this
23 information, Plaintiff sought to serve Defendant Riesterer at Loeb & Loeb. Loeb &
24 Loeb refused service, however, as improper and demanded that Plaintiff withdraw
25 service. (*See* Dickie Decl. at ¶ 20 & Ex. C.)

26 In response, Plaintiff’s counsel wrote to Mr. Slotnick, indicating that Loeb &
27 Loeb was served pursuant to information contained within Defendants’ Rule 26
28 disclosures, and requesting that the information be provided. (*See* Dickie Decl. at

1 ¶ 21 & Exh. D.) **In response, Mr. Slotnick refused to provide Mr. Riesterer’s**
2 **contact information so that Plaintiff could properly serve him.** (*See* Dickie Decl.
3 at ¶ 22 & Exh. E.) Finally, only after Mr. Dickie persisted and again followed up
4 reminding counsel of his obligations under Rule 26, did Mr. Slotnick provide
5 Mr. Riesterer’s address. Once Mr. Riesterer was served, after refusing service and
6 refusing to provide Mr. Riesterer’s address, Mr. Slotnick, along with Donald Miller
7 and Tal Dickstein, all of Loeb & Loeb, appeared for Mr. Riesterer and filed an
8 Answer and Affirmative Defenses on his behalf. [Doc. #127].

9 Concurrently, on March 16, 2011, Pringle served a copy of the summons and
10 First Amended Complaint on Rister by personally serving a copy of the summons
11 and First Amended Complaint on Shapiro as agent for Rister. The proof of service
12 for the March 16, 2011 service on Rister specifically indicates that Shapiro was
13 served as “the agent, United States representative for and United States administrator
14 of Rister Editions.” [Doc. #117 at page 3]. Service was effectuated pursuant to and
15 in reliance upon Rule 4 of the Federal Rules of Civil Procedure.

16 On March 28, 2011, Rister filed a second motion to dismiss and for sanctions
17 based on improper service rehashing the same arguments presented in its first motion
18 to dismiss. [Docs. #121 and #122].

19 In Plaintiff’s opposition to the second motion to dismiss, Plaintiff attached the
20 Declaration of Jeremy Katz for purposes of demonstrating the evidence upon which
21 Plaintiff’s counsel relied in determining that Shapiro was the implied agent of Rister.
22 [Doc. #123-1] The declaration specifically sets forth the facts as follows:

23 2. On or about February 24, 2011, I visited defendant Shapiro
24 Bernstein and Co., Inc.’s (“Shapiro Bernstein”) website, located at
25 <http://www.shapirobernstein.com>. Using the “site search” function on
26 Shapiro Bernstein’s website, I performed a search for the term “Rister
27 Editions.” My search returned a link to a news post -- titled “Shapiro
28 Bernstein Representing Square Rivoli Music and Rister Editions” (the
“News Post”) – located at the website address
<http://www.shapirobernstein.com/newspost/2/Shapiro-Bernstein-Representing-Square-Rivoli-Music-and-Rister-Editions>. The News Post

1 states that “Shapiro Bernstein is representing Square Rivoli Music and
2 Rister Editions of France for the USA.” A true and correct copy of
3 contents of the News Post is attached hereto as Exhibit “A.” An
4 enlarged and highlighted copy of the contents of the News Post is
attached hereto as Exhibit “B.”

5 3. Also on or about February 24, 2011, I reviewed the liner notes for
6 the album “*The E.N.D.*” by the Black Eyed Peas which contains the song
7 “I Gotta Feeling” that is at issue in this lawsuit. The liner notes contain,
8 among other things, a description of the producers, writers, publishers,
9 and those administrating the rights related to the song “I Gotta Feeling.”
The liner notes expressly state that:

10 Square Rivoli Publishing and Rister Editions [are] administered in
11 the United States by Shapiro, Bernstein & Co., Inc. (ASCAP).

12 A true and correct copy of the liner notes that I reviewed is attached
13 hereto as Exhibit “C.” An enlarged and highlighted copy of the relevant
14 portion of the liner notes is attached hereto as Exhibit “D.”

15 *See* Declaration of Jeremy T. Katz attached to Plaintiff’s Opposition
16 (“Katz Declaration”) at ¶¶ 2-3 & Exhs. A-D [Doc. #123-1].

17 On April 12, 2011, the Court entered an order denying Defendants’ motion to
18 dismiss but quashing service on Rister and granting Rister’s attorneys’ fees pursuant
19 to 28 U.S.C. §1927. [Doc. #126] In its order, the Court stated that Plaintiff
20 proceeded recklessly by intentionally ignoring the January 27, 2011 Order and
21 ordered that Plaintiff pay sanctions to Rister. *Id.* Despite the evidence that was
22 presented to the Court in the Katz Declaration attached to Plaintiff’s opposition as
23 mentioned above, the Court’s order also specifically stated: “Here, Plaintiff has
24 failed to provide any evidence that Shapiro is Rister’s managing agent or that it had
25 any express or implied authority to accept service for Rister.” *Id.* That statement is
mistaken, factually incorrect and ignores the Katz Declaration.

26 **III. STANDARD FOR MOTION TO RECONSIDER**

27 The Court has discretion to reconsider and vacate a prior order. *Barber v.*
28 *Hawaii*, 42 F.3d 1185, 1198 (9th Cir. 1994); *United States v. Nutri-cology, Inc.*, 982

1 F.2d 394, 396 (9th Cir. 1992). Rule 60(b) permits reconsideration of a district court
2 order based on: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly-
3 discovered evidence that supports grounds for a new trial under Rule 59; (3) fraud by
4 an adverse party; (4) the judgment is void; (5) the judgment has been satisfied,
5 released or discharged; or (6) any other reason justifying relief from the operation of
6 the judgment. *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111 (E.D.
7 Cal. 2001); *see also* Fed. R. Civ. P. 60(b)(1)-(b)(6). Rule 60 reconsideration is
8 generally appropriate in three instances: (1) when there has been an intervening
9 change of controlling law, (2) new evidence has come to light, or (3) when necessary
10 to correct a clear error or prevent manifest injustice (emphasis added). *Westlands*,
11 134 F. Supp. 2d at 1130 (citing *School Dist. No. 1J, Multnomah County, Or. v.*
12 *ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993)); *see also* E.D. Cal. L.R. 78-230(k).
13 Imposition of sanctions against Plaintiff for bad faith pursuant to 28 U.S.C. § 1927
14 under the attendant circumstances and the express language of the Court’s
15 January 27, 2011 Order represents clear error by the Court and is manifestly unjust
16 based on the facts presented to this Court. The Court’s April 12, 2011 Order
17 awarding attorneys’ fees to Defendant Rister should be reconsidered.

18 **IV. ARGUMENT**

19 Section 1927 sanctions “must be supported by a finding of subjective bad
20 faith.” *Pratt v. California*, 11 Fed. Appx. 833 (9th Cir. 2001) (citing *In re: Keegan*
21 *Mgmt. Co., Securities Litigation*, 78 F.3d 431, 436 (9th Cir. 1995) (quoting *New*
22 *Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989))). “Bad faith
23 is present when an attorney knowingly or recklessly raises a frivolous argument, or
24 argues a meritorious claim for the purpose of harassing an opponent.” *Id.* at 835
25 (quoting *Estate of Blas v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986)). For sanctions
26 to apply in the face of 28 U.S.C. § 1927, “a filing submitted recklessly, that filing
27 must be frivolous, or if not frivolous, it must be intended to harass.” *Id.* A filing is
28 frivolous if it “is *both* baseless and made without a reasonable and competent

1 inquiry.” *Id.* at 434. Plaintiff’s counsel’s conduct here was neither baseless nor made
2 without a reasonable inquiry. (*See* Dickie Decl. at ¶¶ 1-17.) Indeed, the filing and
3 service at issue was duly made after discovery of the public admission by Shapiro
4 that it was Rister’s United States representative.

5 The Ninth Circuit emphasizes the fact that an award of attorney fees under the
6 “bad faith” exception “is punitive, and the penalty can be imposed ‘only in
7 exceptional cases and for dominating reasons of justice.’” *Beaudry Motor Co. v.*
8 *Abko Properties, Inc.*, 780 F.2d 751 (9th Cir. 1986) (citing *United States v. Standard*
9 *Oil Co.*, 603 F.2d 100, 103 (9th Cir. 1979) (quoting 6 J. MOORE, MOORE’S FEDERAL
10 PRACTICE ¶ 54.77[2] (2d ed. 1972))); *see Hall v. Cole*, 412 U.S. 1, 5 (1973). By way
11 of example, in *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293 (9th Cir. 1982), the
12 district court found bad faith on Safeway’s part only because one of its employees
13 *lied*, and because Safeway pursued the action after it discovered the lie, by bringing
14 needless, frivolous motions.

15 **A. Plaintiff’s Counsel’s Conduct Does Not Constitute Bad Faith**
16 **Warranting the Exceptional Penalty of Sanctions**

17 As is evident from Plaintiff’s argument in his Opposition to Rister’s Motion to
18 Dismiss, and as set forth again below, Plaintiff’s counsel’s service on Shapiro was
19 based on a reasonable and competent inquiry as to Shapiro’s implied authorization to
20 accept service on Rister’s behalf. Plaintiff respectfully contends that the Court’s
21 failure to acknowledge the reasonableness and competence of Plaintiff’s counsel’s
22 inquiry, conclusions and subsequent conduct (as set forth in the Katz Declaration) in
23 its analysis of the appropriateness of an award of sanctions represents clear error and
24 must be reconsidered. There is no evidence that Plaintiff’s counsel made a frivolous
25 or baseless claim or acted to harass Rister. Simply stating that an act is reckless
26 without identified factual support does not make it so. Nor is there any discussion of
27 the facts upon which the Court determined that Plaintiff’s counsel failed to make a
28 reasonable or competent inquiry, or lied about the basis for the conclusion that

1 Shapiro was Rister’s agent. The Court’s statement “Here, Plaintiff has failed to
2 provide any evidence that Shapiro is Rister’s managing agent or that it had any
3 express or implied authority to accept service for Rister” suggests that the Court did
4 not consider the evidence presented by Plaintiff at all during its analysis. [Doc. #126]
5 In actuality, no facts are set forth from which anyone could fairly or reasonably
6 conclude that Plaintiff’s counsel’s reliance upon a public statement available via the
7 Internet setting forth Shapiro’s representative capacity was in any way untruthful or
8 an uneducated basis for concluding that Shapiro had implied authority to serve as
9 Rister’s agent for receiving a summons and Amended Complaint.

10 **1. Plaintiff’s Counsel’s Honest Interpretation of the Court’s**
11 **January 27, 2011 Order**

12 This Court’s conclusion that Plaintiff’s counsel made a “bad faith” decision to
13 disregard the Court’s order likewise is without any factual basis. In the Court’s
14 Order of January 27, 2011 the Court expressly stated:

15 Defendants argue that Plaintiff’s proofs of service on Rister state
16 that service was made not on any employee or service agent of Rister,
17 but rather on Defendant Shapiro. (Shapiro, et al. Mot. at 8; see Docs.
18 #40 & #50.) Plaintiff does not dispute this. [Doc. #95] (emphasis

19 The clear impact of that statement was read by Plaintiff’s counsel to mean that
20 the proof of service was inadequate as it failed to denote any agency or
21 representative. Therefore, this Court’s January 27, 2011 Order stated:

22 Plaintiff shall promptly serve Rister with the summons and First
23 Amended Complaint so as to not unduly delay litigation.

24 Plaintiff’s counsel did promptly serve Rister and by so doing did not in any
25 way intend to delay the litigation.

26 Based on the language of the Order, Plaintiff’s counsel in good faith believed
27 that the Court had taken issue with the adequacy of the proofs of service as attacked
28 by Defendants for failing to indicate upon what basis Shapiro was served or that

1 service was made on an employee or service agent of Rister. No one on Plaintiff's
2 legal team interpreted the Court's Order to take issue with the method of service.
3 *See Dickie Decl.* at ¶¶ 1-17. Since the Court's discussion of the issue is devoid of
4 explanation, it never understood by Plaintiff's counsel that the Court disputed the
5 form of service itself. Given this lack of clarity, it cannot be said that Plaintiff
6 proceeded recklessly by identifying Shapiro as Rister's agent. Instead, the obvious
7 conclusion from the express language of the January 27, 2011 Order is that the lack
8 of capacity in which Shapiro was served was the problem which needed to be
9 corrected. Plaintiff's counsel in good faith believes that was what it did. In fact, the
10 entire litigation team for Plaintiff interpreted the Court's Order to mean that service
11 was quashed because the proof of service failed on its face to state the basis under
12 which Shapiro was served and for no other reason. *See id.* None of Plaintiff's
13 attorneys read the order to mean that the service on Shapiro was improper. *See id.*

14 Based on Plaintiff's counsel's assumption that its earlier service was proper
15 but for a failure to designate Shapiro's relationship with Rister as "service agent" or
16 "employee" properly on the proof of service, Plaintiff's litigation team obtained
17 evidence of the agency, amended the proof of service designating Shapiro as an
18 "agent" and concluded that it was in compliance with the Court's January 27, 2011
19 Order. *Id.* Consistent with Rule 4(e)(2) of the Federal Rules of Civil Procedure,
20 Plaintiff's counsel's actions demonstrate nothing but, at most, an honest and
21 reasonable misinterpretation of this Court's January 27th Order, and certainly not an
22 intentional, bad faith, reckless disregard for the Court's order. *See Edinburgh Assur.*
23 *Co. v. R. L. Burns Corp.*, 669 F.2d 1259 (9th Cir. 1982) (where the district court
24 found that the defendant had not acted in bad faith by refusing to pay out on an
25 insurance policy due to a good faith but erroneous interpretation of the language of
26 the policy). The Court's conclusion that Plaintiff's counsel intentionally and
27 recklessly disregarded this Court's January 27th Order demonstrates clear error and
28

1 should be reconsidered in light of the manifest injustice it would cause Plaintiff’s
2 counsel and the absence of real prejudice to Rister.

3 2. **Evidence that Plaintiff’s Counsel Reasonably Relied in Good**
4 **Faith on Available Evidence Regarding the Implied Authority**
5 **of Shapiro Was Erroneously Excluded from the Court’s**
6 **Analysis**

7 As set forth in Plaintiff’s Opposition and the Katz Declaration attached
8 thereto, Plaintiff’s counsel properly relied in good faith on the available evidence in
9 effectuating service on Shapiro as an implied agent. The Federal Rules of Civil
10 Procedure authorize service of process by delivering a copy of the summons and
11 operative complaint “to an agent authorized by appointment or by law to receive
12 service of process.” Fed. R. Civ. P. 4(e)(2). Service on a foreign entity’s managing
13 agent is also proper. Fed. R. Civ. P. 4(h)(1). Under Rule 4(e)(2), an agent may have
14 the implied authority to accept service of process on behalf of a foreign entity. *See*
15 *United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 881 (Fed. Cir. 1997) (“An
16 agent’s authority to accept service may be implied in fact”); *see also*
17 *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 706–707 (1988)
18 (upholding service on an implied agent of a foreign corporation); 4A CHARLES A.
19 WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1097, at 84-85
20 (2d ed. 1987) (“Although authority to accept process need not be explicit, it must
21 either be express or implied from the type of relationship between defendant and the
22 alleged agent.”). Given the Defendants’ various Rule 26 filings and exchange with
23 Shapiro regarding Riesterer, Plaintiff’s counsel had a good faith basis to believe that
24 Shapiro was the United States agent for Rister.

25 Under the facts of this case, Plaintiff’s counsel, based on their reasonable
26 reliance on available evidence as shown in the Katz Declaration, asserted the position
27 that Shapiro has the implied authority to accept service on Rister’s behalf pursuant to
28 Rule 4(e)(2) in good faith. Indeed, by citing directly to content posted on Shapiro’s
own website specifically advertising “**Shapiro Bernstein Representing Square**

1 **Rivoli and Rister Editions**” in the form of an announcement of its relationship as
2 Rister’s representative in the United States, together with the reference to liner notes
3 for The Black Eyed Peas album *The E.N.D.* (which states that “**Square Rivoli and**
4 **Rister Editions [are] administered in the United States by Shapiro, Bernstein &**
5 **Co., Inc. (ASCAP)**”), Plaintiff provided direct evidence as to the implied authority
6 of Shapiro. *See* Katz Declaration [Doc. 123-1]. Plaintiff’s counsel maintains that
7 Shapiro holds itself out as Rister’s United States representative and United States
8 administrator. As such, based on that evidence Plaintiff’s counsel concluded that at
9 the very least, Shapiro had implied authority to accept service of process. Plaintiff’s
10 counsel further maintains their position that Rister’s counsel’s disavowal of
11 Shapiro’s agency relationship with Rister is disingenuous based on the evidence
12 available. Indeed, a similar disavowal was repeatedly made by Loeb & Loeb as to its
13 representation of Frederic Riesterer when Plaintiff initially attempted to effectuate
14 service on Riesterer.¹

15 The conduct of Loeb & Loeb, as counsel for Shapiro in (1) refusing to
16 accept service for Riesterer, (2) refusing to provide Riesterer’s address; and
17 (3) subsequently appearing for and answering on Riesterer’s behalf, raises a
18 legitimate question as to whether Shapiro at the very least had implied authority to
19 accept service for Rister under Rule 4(h)(1). According to Shapiro’s press release,
20 the Black Eyed Peas and Mr. Slotnick, Shapiro represents Rister in connection with
21 Rister’s business activities in the United States. Those activities would of course

22
23 ¹ Co-defendants disclosed Frederic Riesterer in their Rule 26 disclosure with the
24 address of Loeb & Loeb in New York, NY. (*See* Exhibits A and B to Dickie Decl.).
25 When Plaintiff’s counsel attempted to serve Riesterer at that address, the managing
26 partner for Loeb & Loeb stated that Loeb & Loeb was not representing Riesterer.
27 *See* copies of Group correspondence between Dean A. Dickie and Barry Slotnick
28 attached as Exhibits C-E to Dickie Decl. Attorneys from Loeb & Loeb have since
filed their appearance on Riesterer’s behalf despite their repeated assurances that
they did not represent Mr. Riesterer and their initial refusal to even provide his
address. *See also* ¶¶ 8-16 of the Declaration of Dean A. Dickie filed April 26, 2011
in Opposition to the Barry Slotnick Declaration [Doc. #129].

1 ostensibly include dealing with the claims involved in the instant Amended
2 Complaint, especially those claims that relate to its sub-publishing activities. Based
3 on this information and the fact that Rister's business activities form the basis for
4 naming Rister as a defendant and making it amenable to suit in the Central District of
5 California, Plaintiff's counsel had a legitimate basis to conclude that Shapiro had
6 implied authority to accept service and was a managing agent for purposes of
7 effecting service on Rister. *Montclair Electronics, Inc. v. Electra/Midland Corp.*,
8 326 F. Supp. 839, 842 (S.D.N.Y. 1971); *Am. Football League v. Nat'l Football*
9 *League, Inc.*, 27 F.R.D. 264, 269 (D. Md. 1961). The Court's failure to discuss its
10 analysis of this evidence in concluding that Plaintiff's conduct was reckless suggests
11 this evidence was never considered.

12 Plaintiff's counsel appropriately relied on the case law which is clear that even
13 where the relationship is *expressly denied*, it may be nonetheless implied. *Ziegler*
14 *Bolt & Parts Co.*, 111 F.3d at 881. Shapiro's counsel's past actions in denying any
15 relationship with Rister himself, only to file an appearance subsequently on his
16 behalf, support a basis for finding implied agency despite Shapiro's assertions to the
17 contrary. Furthermore, it was not until after the second attempt at service on Shapiro
18 with the correct proof of service that Rister provided a declaration as evidence of the
19 lack of agency relationship with Shapiro. [Doc. #125] Plaintiff's counsel
20 appropriately proceeded in attempting to serve Rister promptly. Given the prior
21 exchange between Plaintiff's counsel and Loeb & Loeb, Plaintiff's counsel could not
22 take Loeb & Loeb's express denial at face value since its representations were in
23 conflict with the representations offered to the public on the Internet.

24 The assumption by Plaintiff's counsel as to the relationship between Shapiro
25 and Rister and their subsequent attempt at service on Shapiro based thereon certainly
26 does not constitute subjective bad faith on the part of Plaintiff's counsel warranting
27 the imposition of sanctions. The Court's failure to consider evidence of Plaintiff's
28

1 counsels' good faith as presented in the opposition was clear error and should be
2 reconsidered.

3 **V. CONCLUSION**

4 Based upon the foregoing, Pringle's counsel respectfully requests that the
5 Court reconsider its April 12, 2011 Order awarding the very harsh penalty of
6 sanctions pursuant to 28 U.S.C § 1927.

7 Dated: May 10, 2011

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