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 BERNSTEIN & CO., INC. (incorrectly
 7 sued as Shapiro, Bernstein & Co.);
 RISTER EDITIONS and DAVID
 8 GUETTA

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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
 DEFENDANTS SHAPIRO,
 BERNSTEIN & CO., INC.'S,
 RISTER EDITIONS' AND DAVID
 GUETTA'S MOTION TO DISMISS
 THE FIRST AMENDED
 COMPLAINT**

Date: January 24, 2011
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 Trial Date: Not Assigned

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MEMORANDUM OF POINTS AND
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 Defendants Shapiro Bernstein & Co., Inc. (“Shapiro Bernstein”), David
4 Guetta,¹ and Rister Editions (collectively “Defendants”) respectfully submit this
5 Memorandum of Points and Authorities in support of their Motion to Dismiss the
6 First Amended Complaint (“FAC”) under Rule 12(b)(6) of the Federal Rules of
7 Civil Procedure, and to Dismiss the FAC as against Rister Editions under Rule
8 12(b)(5) of the Federal Rules of Civil Procedure.²

9
10 **PRELIMINARY STATEMENT**

11 Plaintiff’s infringement claim hinges on speculative and unsupported
12 allegations that Defendants had access to his unpublished song, “Take a Dive,”
13 through unsolicited and rejected submissions to three of the corporate defendants.
14 Indeed, Plaintiff does not even identify the individual at these companies to whom
15 he allegedly submitted his song, or even the month or year in which he allegedly did
16 so. Moreover, Plaintiff offers no allegations showing how the individual co-authors
17 of the allegedly infringing song “I Gotta Feeling” reasonably could have heard
18 Plaintiff’s song as a result of those unsolicited submissions. Because media
19 companies receive countless such unsolicited submissions, courts in this Circuit
20 have expressly held that allegations of bare corporate receipt, such as Plaintiff’s
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22 ¹ Square Rivoli Publishing is not a proper party to this action because it is no longer
23 affiliated with David Guetta and no longer administers compositions he authored,
24 including “I Gotta Feeling.”

25 ² This Motion is made without waiver, and with express reservation, of all defenses
26 and objections as to service of process, and/or the sufficiency thereof, on Rister
27 Editions. Moreover, Plaintiff has not served defendant Frederic Riesterer, either
28 personally or through any other defendant, none of whom are authorized to accept
service on his behalf.

1 allegations here, are insufficient to establish access to the allegedly infringed work.
2 This lawsuit is thus nothing more than a strike suit, which should be dismissed.

3 The FAC must also be dismissed as against Rister Editions, because Plaintiff
4 improperly attempted to serve Rister Editions through Shapiro Bernstein, an entirely
5 separate corporate entity.

6 BACKGROUND

7
8 Plaintiff alleges that in or around 1998, he wrote and recorded a song entitled
9 “Take a Dive.” (FAC ¶ 27.) Plaintiff claims to have registered the copyright to the
10 original 1998 version of “Take a Dive” as part of a compilation of seventeen other
11 songs, even though the registration attached to the FAC does not list “Take a Dive”
12 as among those songs. (*Id.* at ¶ 28, Ex. B.) Plaintiff allegedly created a new
13 instrumental version of “Take a Dive” in 1999, which he purported to register with
14 the Copyright Office only after commencing this lawsuit. (*Id.* at ¶ 29.)

15 On unspecified dates during the nine-year period of time between 1999 and
16 2008, Plaintiff allegedly submitted an unspecified number of demo CDs containing
17 “Take a Dive” to unidentified individuals at co-defendants UMG, Interscope and
18 EMI. (*Id.* at ¶ 31.) According to Plaintiff, on unspecified dates over that same nine-
19 year time period, he received written responses to his submissions, including
20 responses from Interscope, UMG and EMI stating that they were not interested in
21 Plaintiff’s music. (*Id.* at ¶ 33.) Plaintiff did not attach any of these alleged letters to
22 either his Complaint or FAC. Plaintiff also claims that, on unspecified dates and
23 times, he advertised his music, including “Take a Dive,” on unspecified music
24 websites, and that his music was played on unspecified radio stations and internet
25 sites. (*Id.* at ¶ 32.)

26 Plaintiff further alleges, solely “upon information and belief”, that Defendant
27 William Adams, a member of the musical group The Black Eyed Peas, acted as an
28 informal Artist and Repertoire representative for Interscope, and, also “[o]n

1 information and belief,” that Adams therefore had access to *all* music submitted to
2 Interscope during the nine-year time period from 1999 to 2008, which allegedly
3 included Plaintiff’s song “Take a Dive.” (*Id.* at ¶ 35.)

4 Based on these allegations, Plaintiff claims that one of the members of The
5 Black Eyed Peas, David Guetta or Frederic Riesterer accessed one of his demo CDs,
6 listened to his song “Take a Dive”, and copied portions of the song when writing
7 and recording the song “I Gotta Feeling,” which Plaintiff claims is substantially
8 similar to “Take a Dive.” (*Id.* at ¶¶ 37, 40.)

9
10 **ARGUMENT**

11 **I. JOINDER IN CO-DEFENDANTS’ MOTION TO DISMISS**

12 Defendants hereby adopt, and incorporate by reference, the Memorandum of
13 Points and Authorities in Support of Defendants’ Motion to Dismiss First Amended
14 Complaint; Motion to Strike; and Motion for More Definite Statement of William
15 Adams, Jr., Stacy Ferguson, Allan Pineda, Jaime Gomez, Tab Magnetic Publishing,
16 Headphone Junkie Publishing, LLC, Will.I.Am. Music, LLC, Jeepney Music, Inc.,
17 Cherry River Music Co. and EMI April Music, Inc. (collectively “Co-Defendants”),
18 dated December 13, 2010, and ask that any relief requested therein be granted with
19 respect to Defendants with equal force and effect.

20 **II. PLAINTIFF’S SPECULATIVE ALLEGATIONS OF ACCESS FAIL**
21 **TO STATE A PLAUSIBLE CLAIM FOR RELIEF**

22 “To state a claim for copyright infringement, Plaintiff[] must allege: ‘(1)
23 ownership of a valid copyright, and (2) copying of constituent elements of the work
24 that are original.’” *Zella v. E.W. Scrips Co.*, 529 F. Supp. 2d 1124, 1132 (C.D. Cal.
25 2007) (quoting *Feist Publ’ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 361, 111
26 S. Ct. 1282, 113 L.Ed.2d 358 (1991)). “The second prong . . . requires Plaintiffs to
27 allege that ‘the infringer had access to plaintiff’s copyrighted work and that the
28

1 works at issue are substantially similar in their protected elements.” *Id.* at 1132-33
2 (quoting *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)).

3 To allege access, the plaintiff “must show more than that the defendant had a
4 ‘bare possibility’ of access . . . instead, the plaintiff must demonstrate that the
5 defendant had a ‘reasonable possibility’ to view the plaintiff’s work.” *Meta-Film*
6 *Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984) (citations
7 omitted); see *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp.
8 1287, 1297 (C.D. Cal. 1995) (“Access may not be inferred through mere
9 “speculation or conjecture.”) (quoting *Ferguson v. Nat’l Broad. Co.*, 584 F.2d 111,
10 113 (5th Cir. 1978)); 4 Melville B. Nimmer & David Nimmer, *Nimmer on*
11 *Copyright* § 13.02[A], at 13-22 (Rev. ed. 2010) (same).³ To show a “reasonable
12 possibility” of access, the plaintiff must allege that “he submitted his work to an
13 intermediary who is in a position to transmit it to the creators [of the allegedly
14 infringing work,]” as well as a “specific time frame” during which the work was
15 allegedly submitted. *Merrill v. Paramount Pictures Corp.*, No. CV 05-1150 SWW
16 (MANx), 2005 WL 3955653, at *7, 9 (C.D. Cal. Dec. 19, 2005).

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19 ³ Because access to plaintiff’s work is necessary to establish unauthorized copying,
20 complaints will be dismissed where they do not contain plausible and non-
21 speculative allegations of access. See, e.g., *Martinez v. McGraw*, No. 3:08-0738,
22 2010 WL 1493846, at *5 (M.D. Tenn. Apr. 14, 2010) (“Plaintiff failed to state a
23 plausible claim of copyright infringement, as he fails to allege beyond mere
24 speculation that Defendants had access to his copyrighted work.”); *Feldman v.*
25 *Twentieth Century Fox Film Corp.*, C.A. No. 09-10714, 2010 WL 2787698, at *7
26 (D. Mass. July 13, 2010) (granting motion to dismiss where “[p]laintiff has failed to
27 allege facts sufficient to demonstrate a reasonable opportunity of access . . . and
28 therefore cannot prove actual copying”); *Bailey v. Black Entm’t Television*, C.A. No.
3:09CV787, 2010 WL 1780403, at *3 (E.D. Va. May 3, 2010) (“Plaintiff’s claim
must fail as he has not submitted any evidence or alleged any facts of Defendants’
access prior to [creation of the allegedly infringing work.]”), *aff’d*, 2010 WL
3452526 (4th Cir. Sept. 1, 2010)

1 Accordingly, generalized allegations of unsolicited submissions to large
2 corporate defendants are insufficient to state a claim for infringement. *See Merrill*,
3 2005 WL 3955653, at *7 (“A plaintiff cannot create a triable issue merely by
4 showing ‘corporate receipt’ of his work by an individual who shares a common
5 employer with the alleged copier.”) (quoting *Jorgensen v. Epic/Sony Records*, 351
6 F.3d 46, 51-52 (2d Cir. 2003)); *Ferguson*, 585 F.2d at 113 (access would be “based
7 on speculation or conjecture” where plaintiff allegedly submitted his musical
8 composition to various entities including BMI, which showed no interest in
9 plaintiff’s work, even though BMI had contacts with noted composer who allegedly
10 copied plaintiff’s composition). Courts have thus rejected the ‘bare corporate
11 receipt’ doctrine because:

12 [C]ountless unsolicited scripts are submitted to numbers of
13 individuals on studio lots every day. Under these circumstances, it is
14 clearly unreasonable to attribute the knowledge of any one individual—
15 especially a non-employee—to every other individual just because they
16 occupy offices on the same studio lot. To the extent that any cases
17 suggests a contrary result—that is, that ‘bare corporate receipt’ is
18 sufficient as a matter of law to preclude a finding of non-access—the
19 court rejects such reasoning. *Meta-Film Assocs.*, 586 F. Supp. at 1357-
20 58.

19 Here, Plaintiff’s speculative and conjectural allegations are plainly
20 insufficient to establish access. First, Plaintiff alleges that he sent various derivative
21 versions of “Take a Dive” to three of the corporate Co-Defendants, UMG, EMI and
22 Interscope, without identifying any individual or even department at those
23 companies to whom he allegedly sent his song, or on what dates during a *nine-year*
24 time period from 1999 to 2008 he claims to have submitted his song. Plaintiff also
25 fails to identify which of the “numerous derivative versions” of “Take a Dive” that
26 he claims to have sent to those Co-Defendants was allegedly copied, or to provide a
27 copyright registration for that derivative version. Moreover, Plaintiff himself
28 alleges that those companies told him that they were not interested in him or his

1 music, and Plaintiff does not allege any facts tending to show that his work was
2 passed on to any of the composers of “I Gotta Feeling.” Plaintiff’s allegations thus
3 amount to nothing more than ‘bare corporate receipt,’ which courts in this Circuit
4 have expressly rejected. *See Meta-Film Assocs.*, 586 F. Supp. at 1357-58; *Merrill*,
5 2005 WL 3955653, at *7, 9. Indeed, courts have rejected the doctrine of “bare
6 corporate access” precisely to dismiss lawsuits, such as the instant action, that
7 amount to nothing more than a “specious strike suit.” 4 *Nimmer on Copyright* §
8 13.02[A], at 13-18 (quotation omitted).

9 Second, Plaintiff alleges, solely on “information and belief”, that Co-
10 Defendant William Adams, Jr. worked as an informal Artist and Repertoire
11 representative or talent scout for Co-Defendant Interscope at some unspecified time.
12 From that unsupported allegation, Plaintiff speculates that Adams had access to
13 “Take a Dive” because it was one of the countless unsolicited songs received by
14 record companies such as Interscope over a nine-year time period. *See Meta-Film*
15 *Assocs.*, 586 F. Supp. at 1357-58. These generalized and speculative allegations
16 clearly do not create a “reasonable possibility” that Adams actually listened to
17 “Take a Dive” and copied from that song when he created “I Gotta Feeling.” *Id.* at
18 1355; *see Metro-Goldwyn-Mayer, Inc.*, 900 F. Supp. at 1297 (“Access may not be
19 inferred through mere ‘speculation or conjecture.’”).⁴

20 Finally, Plaintiff’s vague allegation that he advertised his music on
21 unspecified internet websites and radio stations, on unspecified dates and for
22 unspecified periods of time, are insufficient to establish that “Take a Dive” achieved
23 “considerable commercial success” or was “readily available in the market” such

24 ⁴ Plaintiff does not allege that any of the other co-authors of “I Gotta Feeling” had
25 access to “Take a Dive”, even though Frederic Riesterer has submitted a declaration
26 stating that he obtained the “guitar twang sequence” from a French music library,
27 and that he and Defendant David Guetta composed the musical background of “I
28 Gotta Feeling” in France, and never heard any of Plaintiff’s music. (Nov. 23, 2010
Decl. of Frederic Riesterer, Dkt. No. 22)

1 that the Court could presume that Defendants had access to Plaintiff's song. *Mestre*
2 *v. Vivendi Universal U.S. Holding Co.*, No. CV 04-442, 2005 WL 1959295, at *4
3 (D. Or. Aug. 15, 2005); *see, e.g., Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d
4 1138, 1144 (9th Cir. 2009) (infringement claimant's work not sufficiently
5 disseminated to create more than a "bare possibility" of access, even though
6 claimant sold 2,000 T-shirts per year and had a website that displayed its allegedly
7 infringed design); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003)
8 (rejecting plaintiff's claim of access where the subject work "only sold
9 approximately 17,000 copies between 1986 and 1999; therefore, the video cannot be
10 considered widely disseminated."); *Jason v. Fonda*, 526 F. Supp. 774, 776-77 (C.D.
11 Cal. 1981) (the fact that 200 to 700 copies of plaintiff's book were available in
12 Southern California bookstores "creates no more than a 'bare possibility' that
13 defendants may have had access to plaintiff's book"), *aff'd*, 698 F.2d 966 (9th Cir.
14 1982).

15 In sum, Plaintiff offers nothing more than vague and speculative allegations
16 which raise no more than a bare possibility that one of the Co-Defendants had
17 access to "Take a Dive." Plaintiff's FAC should therefore be dismissed.

18 **III. PLAINTIFF'S PURPORTED SERVICE ON RISTER EDITIONS IS**
19 **DEFECTIVE**

20 It is hornbook law that service of process must be effected on each defendant
21 named in the action. *See* 1 James W.M. Moore, *Moore's Federal Practice* § 4.50[3
22 (3d ed. 2010) ("If an action is commenced against more than one defendant, plaintiff
23 must either serve one summons that lists each defendant or serve separate
24 summonses on each defendant, each with one defendant's name. Regardless of
25 which method is used, each defendant in an action must receive a summons.");
26 *Imperial v. City and County of San Francisco*, No. 08-05644 (CW), 2010 WL
27 1572760, at *1 (N.D. Cal. Apr. 20, 2010) ("Under Rule 4(c)(1), a plaintiff must
28

1 serve *each* defendant with a summons and a copy of the complaint.”) (emphasis
2 added); *Allen v. Mayhew*, No. Civ. S040322, 2009 WL 426091, at *12 (E.D. Cal.
3 Feb. 20, 2009) (“Rule 4 . . . requires *each* defendant to be personally served.”)
4 (emphasis added). Moreover, the “[p]laintiff bears the burden of proving
5 sufficiency of service.” *Bacon v. City and County of San Francisco*, No. C04-3437
6 (TEH), 2005 WL 1910924, at *3, (N.D. Cal. Aug. 10, 2005) (citing *Wei v. Hawaii*,
7 763 F.2d 370, 372 (9th Cir. 1985)).

8 Despite this basic requirement, Plaintiff’s purported Proofs of Service on
9 Defendant Rister Editions state that service was made not on any employee or
10 service agent of Rister Editions, but on Defendant Shapiro Bernstein. (Dkt. Nos. 40,
11 50.)⁵ Although Shapiro Bernstein has contracted with Rister Editions to sub-license
12 certain musical compositions in the United States, Plaintiff himself acknowledges
13 that those corporations are separate entities (FAC ¶¶ 25-26) and provides no basis
14 on which to conclude that Shapiro Bernstein was authorized to accept service of
15 process on behalf of Rister Editions.⁶ Indeed, Plaintiff filed a Proof of Service of
16 the FAC on Rister Editions based on service on Shapiro Bernstein even after
17 Shapiro Bernstein informed Plaintiff that it is not authorized to accept service on
18 Rister Editions’ behalf. (Declaration of Karen R. Thorland, submitted herewith, Ex.
19 1.) Such service is clearly improper. *See 2 Moore’s Fed. Prac.* § 12.33[5], at 12-71
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24 ⁵ As noted above, no service has been effected on defendant Frederic Riesterer,
25 either personally or through any of the Defendants or Co-Defendants, none of whom
26 are authorized to accept service on his behalf.

27 ⁶ Plaintiff’s purported Proofs of Service state that service was performed in
28 compliance with 3.a of the Federal Rules of Civil Procedure, yet no such rule exists.
(Dkt. Nos. 40, 50.)

1 (“Examples of improper service include serving the wrong person [and] serving an
2 individual not authorized to accept service on behalf of a corporation[.]”)⁷

3 The purported Proofs of Service on Defendant Rister Editions should
4 therefore be stricken, and the FAC should be dismissed as against Rister Editions.

5
6 **CONCLUSION**

7 For all the foregoing reasons, Defendants respectfully ask that the Court
8 dismiss Plaintiff’s FAC under Rule 12(b)(6), and dismiss the FAC as against Rister
9 Editions under Rule 12(b)(5).

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13 Dated: December 13, 2010

LOEB & LOEB LLP
KAREN R. THORLAND
RACHEL A. RAPPAPORT

14
15 By: */s/ Karen R. Thorland*

16 Karen R. Thorland
17 Attorneys for Defendants
18 SHAPIRO, BERNSTEIN & CO., INC.
19 (incorrectly sued as Shapiro, Bernstein &
20 Co.); RISTER EDITIONS and DAVID
21 GUETTA

22
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26 _____
27 ⁷ The purported Proofs of Service on defendant Square Rivoli Publishing, which
28 purport to have been served on Defendant Shapiro Bernstein, are defective for the
same reasons explained herein.