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

10
 11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA**
 13 **SOUTHERN DIVISION**

14 BRYAN PRINGLE, an individual,
 15 Plaintiff,
 16 v.
 17 WILLIAM ADAMS, JR.; STACY
 FERGUSON; ALLAN PINEDA; and
 18 JAIME GOMEZ, all individually and
 collectively as the music group The
 19 Black Eyed Peas, et al.,
 20 Defendants.

Case No. SACV 10-1656 JST(RZx)
 Hon. Josephine Staton Tucker
 Courtroom 10A

**REPLY MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 FURTHER 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
 Time: 10:00 A.M.
 Dept.: 10A

Complaint Filed: October 28, 2010
 Trial Date: Not Assigned

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 Reply Memorandum of Points and Authorities in Further Support of their Motion to
6 Dismiss the First Amended Complaint (“FAC”) under Rule 12(b)(6) of the Federal
7 Rules of Civil Procedure, and to Dismiss the FAC as against Rister Editions under
8 Rule 12(b)(5) of the Federal Rules of Civil Procedure.²

9 **I. PLAINTIFF’S VAGUE AND UNSUPPORTED ALLEGATIONS OF**
10 **BARE CORPORATE RECEIPT ARE INSUFFICIENT AS A MATTER**
11 **OF LAW**

12 As Defendants established in their opening brief, access to the plaintiff’s
13 work is an essential element of a copyright infringement claim, which must be pled
14 in order to survive a motion to dismiss. *See Zella v. E.W. Scripps Co.*, 529 F. Supp.
15 2d 1124, 1132-33 (C.D. Cal. 2007) (“The second prong [of an infringement claim]
16 *requires* Plaintiffs to *allege* that ‘the infringer had access to plaintiff’s copyrighted
17 work[.]’”) (quoting *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir.
18 2002)) (emphasis added). To adequately plead access, an infringement plaintiff
19 must allege facts that give rise to a “reasonable possibility,” not merely “bare
20 possibility,” that the defendant viewed, and therefore could have copied, the
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22 _____
23 ¹ Square Rivoli Publishing is not a proper party to this action because it is no longer
24 affiliated with David Guetta and no longer administers compositions he authored,
25 including “I Gotta Feeling.”

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

1 plaintiff's work. *Meta-Films Assocs., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1355
2 (C.D. Cal. 1984).

3 Courts in this Circuit and elsewhere have therefore held that unsolicited
4 submissions to a large corporate defendant—without identifying the individual to
5 whom the work was sent, when it was sent, or how the work was shared with the
6 alleged infringer—are insufficient as a matter of law to establish access, and have
7 thus rejected the ‘bare corporate receipt’ doctrine. *See, e.g., Merrill v. Paramount*
8 *Pictures Corp.*, No. CV 05-1150 SVW (MANx), 2005 WL 3955653, at *7 (C.D.
9 Cal. Dec. 19, 2005); *Meta-Film Assocs., Inc.*, 586 F. Supp. at 1357-58; *Jorgensen v.*
10 *Epic/Sony Records*, 351 F.3d 46, 51-52 (2d Cir. 2003); *Ferguson v. Nat’l Broad.*
11 *Co.*, 584 F.2d 111, 113 (5th Cir. 1978).

12 Tellingly, Plaintiff does not dispute that the allegations in his First Amended
13 Complaint amount to nothing more than bare corporate receipt, or that that theory is
14 insufficient as a matter of law to establish access.³ Instead, Plaintiff attempts to
15 distinguish the cases cited above on procedural grounds. But even though these
16 cases were decided on summary judgment, they nevertheless mandate dismissal of
17 Plaintiff’s claim.⁴ This is because, in order to survive a motion to dismiss, a

18 ³ Moreover, Plaintiff does not dispute that he offers absolutely no allegations as to
19 how Defendants Shapiro Bernstein, Rister Editions, Frederic Reisterer or David
20 Guetta supposedly had access to Plaintiff’s work. Plaintiff’s infringement claim
21 against these Defendants should be dismissed for this reason alone.

22 ⁴ Plaintiff also fails to distinguish Defendants’ cases where infringement claims
23 were dismissed for failure to adequately allege access. For example, in *Feldman v.*
24 *Twentieth Century Fox Film Corp.*, 723 F. Supp. 2d 357, 365 (D. Mass. 2010), the
25 plaintiff alleged, as Plaintiff does here, that the defendants may have obtained access
26 to her work through her appearance on the radio or from her website. The court
27 nevertheless concluded that these allegations were “not enough to create more than a
28 ‘bare possibility’ of access” and dismissed plaintiff’s infringement claim. Similarly,
in *Martinez v. McGraw*, No. 3:08-0738, 2010 WL 1493846, at *5 (M.D. Tenn. Apr.
14, 2010) the court dismissed plaintiff’s claims where he “d[id] not allege any facts
regarding how his song . . . got into the hands of Ms. Clark’s personnel and
songwriters or even that his song was played in hearing range of Ms. Clark’s

1 plaintiff must allege facts, which, if true, would entitle him to relief under the
2 substantive law. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007)
3 (“[W]hen the allegations in a complaint, however true, could not raise a claim of
4 entitlement to relief, ‘this basic deficiency should . . . be exposed at the point of
5 minimum expenditure of time and money by the parties and the court.’”) (quoting
6 *Wright & Miller* § 1216, at 233-234); *Johnson v. Riverside Healthcare Sys., LP*, 534
7 F.3d 1116, 1122 (9th Cir. 2008) (“At the motion to dismiss stage, [the plaintiff] need
8 not support his allegations with evidence, but his complaint must allege sufficient
9 facts to state the elements of [his] claim.”) (citing *Twombly*, 127 S.Ct. at 1974); *see*
10 *also Dura Pharmaceuticals, Inc. v. Bruodo*, 544 U.S. 336, 346 (2005) (“Our holding
11 about plaintiffs’ need to *prove* proximate causation and economic loss leads us also
12 to conclude that the plaintiffs’ complaint here failed adequately to *allege* these
13 requirements.”) (emphasis in original). Indeed, the Supreme Court in *Twombly* held
14 that a complaint cannot survive a motion to dismiss where it merely “left open the
15 possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to
16 support recovery.” 550 U.S. at 561.

17 Plaintiff utterly fails to meet this standard. Even taking Plaintiff’s non-
18 speculative allegations as true – *i.e.*, that he sent unsolicited copies of the derivative
19 version of “Take a Dive” to unspecified individuals at Interscope, EMI and UMG
20 during unspecified times over a 10-year time period – Plaintiff would *still* not be
21 entitled to any relief because such unsolicited submissions to large corporate
22 defendants are insufficient as a matter of law to establish that the alleged infringer
23 had access to the plaintiff’s work. *See Merrill*, 2005 WL 3955653, at *7; *Meta-Film*

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25 personnel and songwriters or that Ms. Clark’s personnel and songwriters had any
26 contact with Plaintiff or Plaintiff’s Collection.” *Id.* Here too, Plaintiff fails to offer
27 any facts showing how his song got into the hands of, or was heard by, the co-
28 authors of “I Gotta Feeling”, Frederic Riesterer and David Guetta. Plaintiff’s
infringement claim should therefore be dismissed.

1 *Assocs., Inc.*, 586 F. Supp. at 1357-58; *Jorgensen*, 351 F.3d at 51-52; *Ferguson*, 585
2 F.2d at 113.⁵

3 Indeed, the bare corporate receipt doctrine has been rejected precisely to
4 “dismiss what the courts view as a specious ‘strike suit,’ notwithstanding that
5 plaintiff may have managed to tender his work to a branch of the defendant
6 corporation[.]” 4 *Nimmer on Copyright* § 13.02[A], at 13-18. This policy is directly
7 applicable here, because Plaintiff seeks a substantial damage award and an
8 injunction based on nothing more than his undocumented and self-proclaimed
9 unsolicited submissions to unnamed individuals at UMG, Interscope and EMI.
10 Indeed, Plaintiff’s pleading is completely bereft of any allegations as to how the co-
11 authors Frederic Reisterer and David Guetta, or the music publishers Shapiro
12 Bernstein and Rister Editions, ever obtained access to Plaintiff’s work. If the Court
13 were to allow Plaintiff’s lawsuit to proceed, it would thereby encourage
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15 ⁵ After Defendants pointed out in their moving papers that David Guetta and
16 Frederic Riesterer independently created the musical bed of “I Gotta Feeling” in
17 France, Plaintiff now suddenly asserts on his preliminary injunction motion that he
18 traveled to France in March 1999 and distributed CDs containing the derivative
19 version of “Take a Dive” to “all major music labels in France, as well as French
20 independent music labels, publishing companies, DJ’s, nightclubs, songwriters and
21 radio stations” including “EMI and several music labels which are now owned by
22 UMG” and that Plaintiff’s brother had the song “played on the radio in several
23 European countries[.]” (Pringle Decl., dated Jan. 3, 2011, ¶ 8.) These newfound
24 assertions are no help to Plaintiff. First, they are outside the four corners of his
25 complaint and therefore cannot be considered on a motion to dismiss. *See Alunan v.*
26 *Yolo County*, No. Civ. S-10-356 FCD, 2010 WL 4157146, at *1 (E.D. Cal. Oct. 19,
27 2010) (refusing to consider additional facts proffered by plaintiff via declaration,
28 and stating “for purposes of a Rule 12(b)(6) motion to dismiss, the court may only
consider the factual information in plaintiff’s first amended complaint and
information that has been judicially noticed”). Second, even if these assertions
could be considered, like his earlier allegations, they do not identify any individual
to whom Plaintiff delivered his song, when it was delivered, or how the song was
supposedly given to Guetta or Reisterer, and therefore amount to nothing more than
bare corporate receipt, which is insufficient as a matter of law to establish access.

1 infringement claims by countless unknown artists who have submitted unsolicited
2 songs to large record companies—even where they cannot show that the alleged
3 infringer ever actually heard their work—in the hopes that the defendant will settle
4 in order to avoid litigation and discovery costs. Because Plaintiff’s allegations, even
5 if presumed true, do not entitle him to relief, his claim should be dismissed.

6 **II. PLAINTIFF’S CONTENTION THAT CERTAIN DEFENDANTS**
7 **SAMPLED FOUR NOTES FROM HIS SONG DOES NOT EXCUSE**
8 **HIS FAILURE TO ALLEGE ACCESS**

9 Recognizing that he does not and cannot allege any facts which would
10 establish that Defendants had access to the derivative version of “Take a Dive”,
11 Plaintiff argues that this failure should be excused because he asserts that certain
12 defendants sampled a portion of his sound recording. In support of that proposition,
13 Plaintiff relies solely on a case from the Sixth Circuit, *Bridgeport Music v.*
14 *Dimensions Films*, 410 F.3d 792 (6th Cir. 2005), which departed from the widely-
15 accepted substantial similarity test for copyright infringement, and instead adopted a
16 *per se* rule for digital sampling of sound recordings. *Id.* at 798.

17 In expanding the scope of sound recording copyrights, the Sixth Circuit,
18 ironically, relied on sections of the Copyright Act which *limit* the scope of those
19 rights. *See id.* at 799 (“The exclusive right of the owner of copyright in a sound
20 recording under clause (1) of section 106 is *limited* to the right to duplicate the
21 sound recording in the form of phonorecords or copies that directly or indirectly
22 recapture the actual sounds fixed in the recording.”) (quoting 17 U.S.C. § 114(b))
23 (emphasis added); *Id.* at 800 (“the rights of sound recording copyright holders under
24 clauses (1) and (2) of section 106 ‘*do not extend* to the making or duplication of
25 another sound recording that consists *entirely* of an independent fixation of other
26 sounds, even though such sounds imitate or simulate those in the copyrighted sound
27 recording.”) (quoting 17 U.S.C. § 114(b)) (first emphasis added). In reaching this
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1 conclusion, the court acknowledged that “there were no existing sound recording
2 judicial precedents to follow[.]” *Id.* at 802.

3 Not surprisingly, *Bridgeport Music* has been roundly criticized by courts and
4 the leading commentator on copyright law, and has not been followed by any court
5 in this Circuit. In his leading treatise, Professor Nimmer derides the Sixth Circuit’s
6 decision in *Bridgeport Music* as “rest[ing] on a logical fallacy” and a
7 “misapprehension of the statutory structure.” 4 *Nimmer on Copyright* §
8 13.03[A][2][b], at 13-62. Nimmer explains that *Bridgeport Music* ignores both
9 Congressional intent and Supreme Court jurisprudence requiring a showing of both
10 copying and substantial similarity, and eschewing any *per se* rule with respect to
11 sound recordings. *See id.* at 13-61 to 13-62. Similarly, the court in *Saregama India,*
12 *Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1338-1341 (S.D. Fla. 2009) refused to follow
13 *Bridgeport Music* as contrary to established precedent and unsupported by the
14 statutory text. *Bridgeport Music* was incorrectly decided and should not be
15 followed. As a result, Plaintiff cannot rely on any rule that, merely because he
16 alleges digital sampling of his sound recording, he does not have to allege (and
17 prove) both substantial similarity and copying, including that Defendants had access
18 to his work.⁶ Because Plaintiff cannot adequately allege that any Defendants had
19 access to his work, his claim should be dismissed.

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21 **III. PLAINTIFF CONCEDES THAT HE FAILED TO PROPERLY SERVE**
22 **DEFENDANT RISTER EDITIONS**

23 ⁶ The Court should also note that the expert report of Paul Geluso, dated January 10,
24 2011, submitted in connection with Defendants’ opposition to Plaintiff’s Motion for
25 a Preliminary Injunction, demonstrates that it would have been technologically
26 impossible for Defendants to have sampled the four-note “guitar twang” sequence
27 that appears in the derivative version of “Take a Dive” which Plaintiff claims to
28 have distributed. (Declaration of Paul Geluso, dated January 10, 2011, at ¶¶ 7-12.)
Indeed, it is far more likely that *Plaintiff* copied from *Defendant’s* work, than visa
versa.

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Plaintiff does not dispute, and therefore concedes, that his purported service on Rister Editions through Shapiro Bernstein was improper.⁷ Plaintiff’s claim against Rister Editions must therefore be dismissed.

CONCLUSION

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

Dated: January 10, 2011

LOEB & LOEB LLP

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

⁷ Nor does Plaintiff dispute that he did not properly serve Square Rivoli Publishing, or that he has not served Frederic Riesterer in any manner whatsoever.