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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOE HAND PROMOTIONS, INC.,)	Case No. 11-2554-SC
)	
Plaintiff,)	ORDER DENYING MOTION FOR
)	ENTRY OF DEFAULT; ORDER TO
v.)	SHOW CAUSE RE DISMISSAL;
)	ORDER TO SHOW CAUSE RE
VIDURA TALAYARATHE a/k/a Vidura)	<u>SANCTIONS</u>
S. Talayarathe, individually and)	
d/b/a ME-N-ED'S PIZZA a/k/a ME N)	
EDS PIZZA PARLOR; and ITALIANO)	
RESTAURANTS, INC., an unknown)	
business entity d/b/a ME-N-ED'S)	
PIZZA a/k/a ME N EDS PIZZA)	
PARLOR,)	
)	
Defendants.)	
)	

I. INTRODUCTION

Now before the Court is a Motion for Entry of Default brought by Plaintiff Joe Hand Promotions, Inc. ("Plaintiff") against Defendants Vidura Talayarathe and Italiano Restaurants, Inc. (collectively, "Defendants"). ECF No. 21 ("MED"). For the reasons set forth below, the Court DENIES the motion. Moreover, pursuant to Federal Rule of Civil Procedure 4(m), the Court ORDERS Plaintiff to show cause why this case should not be dismissed for a failure to timely serve Defendants. As a separate matter, the Court ORDERS Plaintiff's counsel, Thomas P. Riley ("Riley"), to show cause why he should not be sanctioned pursuant to Rule 11(b) for making a

1 false representation to the Court in his affidavit of May 2, 2012,
2 as detailed below.

3
4 **II. BACKGROUND**

5 Plaintiff filed the instant lawsuit on May 26, 2011. ECF No.
6 1 ("Compl."). A summons issued the same day. ECF No. 3. The
7 Complaint alleges that Plaintiff owns the exclusive commercial
8 distribution rights for a televised, pay-per-view mixed-martial-
9 arts bout and that Defendants infringed on those rights by
10 unlawfully showing the bout in their pizza parlor located at 3800
11 Klose Way in Richmond, California ("3800 Klose"). Compl. ¶¶ 10,
12 13. Plaintiff seeks statutory damages of \$170,000, plus other
13 relief.¹ Id. at 9-10.

14 Federal Rule of Civil Procedure 4 provides 120 days for
15 service of a summons and complaint, unless the district court
16 extends the time for good cause shown. Fed. R. Civ. P. 4(c)(1),
17 4(m). Plaintiff therefore had until September 26, 2011 to perfect
18 service on Defendants. See Fed. R. Civ. P. 6. On September 13,
19 2011, Plaintiff moved for a sixty-day extension. ECF No. 10 ("Mot.
20 to Extend"). The motion bore Riley's electronic signature. Id. at
21 2. Riley described Plaintiff as having made "diligent" efforts to
22 serve Defendants and cited to declarations of due diligence

23
24

¹ The general contours of this lawsuit will be familiar to district
25 courts throughout California and, indeed, the United States.
26 Through its lead and, as far as this Court can tell, only attorney,
27 Riley, Plaintiff is a frequent litigant in district court. Other
28 courts have remarked on Plaintiff's penchant for seeking excessive
damages. E.g., Joe Hand Promotions, Inc. v. Streshly, 655 F. Supp.
2d 1136, 1136 (S.D. Cal. 2009) ("Plaintiff asks for a default
judgment to be entered in its favor for \$100,875. That amount is
manifestly excessive under existing law -- and Plaintiff probably
knows it.")

1 supplied by his process server. Id. (citing id. Ex. 1). The
2 declarations of due diligence recount a total of two unsuccessful
3 attempts, both made at 3800 Klose. At 10:00 a.m. on August 6,
4 2011, the process server made the notation "Business Closed. Sign
5 Says 'Flavor of Italia'." Id. Ex. 1. At 5:19 p.m. on August 8,
6 2011, the process server noted "Bad Address (Business)," followed
7 by the address, and the notation "Subject Sold the Business, No
8 Longer Involved." Id. On August 11, 2011, the process server
9 returned the job to the client, i.e., to Riley. Id.

10 On September 15, 2011, the Court granted Plaintiff's motion
11 for a sixty-day extension of time and moved the deadline for
12 service to November 15, 2011. See ECF No. 11. This date came and
13 went without Plaintiff serving either Defendant or asking the Court
14 for more time.

15 On March 2, 2012 -- more than three months after the deadline
16 for service -- Plaintiff, through Riley, filed proofs of service
17 for both Defendants. ECF Nos. 15, 16 (together, "POS"). The POS
18 are identical in every material respect. Both recount three
19 unsuccessful service attempts at a purported residential address,
20 followed by three more unsuccessful service attempts at 3800 Klose.
21 On February 24, 2012, Plaintiff's process server left the papers
22 with an adult female who refused to give her name, and made the
23 notation: "Substituted Service. Recipient Instructed to Deliver
24 Documents to Defendant as Named." POS at 3. Three days later, on
25 February 27, 2012, the process server mailed the documents to 3800
26 Klose. Id. at 4.

27 On March 8, 2012, Plaintiff submitted an Ex Parte Application
28 to continue a status conference that had been scheduled for March

1 16, 2012. ECF No. 17 ("Mar. 8 EPA"); see also ECF Nos. 13, 14
2 (Court twice continuing conference sua sponte). The March 8 Ex
3 Parte Application bore Riley's digital signature. Mar. 8 EPA at 2.
4 Riley, citing the POS, represented to the Court that Defendants had
5 received "service of suit papers." Id. at 1. The Court approved
6 the March 8 Ex Parte Application and continued the status
7 conference to April 20, 2012. ECF No. 18.

8 At the April 20, 2012 status conference, Riley did not appear.
9 Instead, he sent an attorney who had not, and has not, entered an
10 appearance in this case and who is not Plaintiff's attorney of
11 record. ECF No. 20. The Court continued the status conference
12 again to May 4, 2012, and specifically instructed the attorney to
13 communicate to Riley that Riley, as the attorney of record, was to
14 appear personally at the next status conference. Id.

15 On May 2, 2012 -- two days before the scheduled status
16 conference -- Riley filed with the Court three documents bearing
17 his electronic signature. One was the instant Motion for Entry of
18 Default. MED at 2. The second was an Affidavit by Riley
19 supporting the instant Motion. ECF No. 21-1 ("Riley Aff."). In
20 the Affidavit, Riley represented to the Court that "[o]n February
21 24, 2012, Defendants were duly served with the Summons, Complaints
22 [sic], and supplemental suit papers filed in this action." Id. ¶
23 2. Lastly, Riley filed an Ex Parte Application to vacate the May
24 4, 2012 status conference at which the Court had specifically
25 ordered him to appear. ECF No. 22 ("May 2 EPA"). The May 2 Ex
26 Parte Application argued that the conference would be "futile"
27 because Defendants were "facing default" and Riley planned to move
28 for default judgment shortly after default was entered. Id. at 3.

1 On May 3, 2012, the Clerk of the Court rescheduled the conference
2 for July 27, 2012.

3 On May 4, 2012, the Court received a document styled as a
4 "Request Not to Enter Default" filed by non-party Flavour of Italia
5 LLC ("Flavour of Italia"), who purports to be the proprietor of the
6 Me-An-Eds pizza establishment at 3800 Klose. ECF No. 24
7 ("Request"). On May 14, 2012, Plaintiff objected to Flavour of
8 Italia's request. ECF No. 26 ("Obj.").

9
10 **III. DISCUSSION**

11 **A. Motion for Entry of Default**

12 "When a party against whom a judgment for affirmative relief
13 is sought has failed to plead or otherwise defend, and that failure
14 is shown by affidavit or otherwise, the clerk must enter the
15 party's default." Fed. R. Civ. P. 55(a). "Because a party has no
16 duty to plead until properly served, sufficient service of process
17 is a prerequisite to entry of default." Fisher v. Lynch, 531 F.
18 Supp. 2d 1253, 1269 n.12 (D. Kan. 2008). Under the Federal Rules,
19 a plaintiff must perfect service "within 120 days after the
20 complaint is filed," unless the district court extends the time for
21 good cause shown. Fed. R. Civ. P. 4(m).

22 Here, Plaintiff moves for entry of default on the ground that
23 Defendants have not pled or otherwise defended. What Plaintiff
24 fails to acknowledge is that Defendants are not required to do so
25 because Plaintiff did not serve Defendants within the time limits
26 prescribed by the Federal Rules. Plaintiff claims to have effected
27 service pursuant to Rule 4 by delivering the summons, complaint,
28 and related court papers to Defendants at 3800 Klose on February

1 24, 2012, and mailing copies of the same papers three days later.²
2 Plaintiff entirely fails to address that service was nowhere near
3 timely. Plaintiff had until November 15, 2011 to complete service,
4 but it did not do so until March 2012.³ In fact, the Court sees no
5 evidence that Plaintiff even attempted service between August 8,
6 2011 and February 1, 2012. Compare Mot. to Extend Ex. 1 at 1, 2
7 with POS at 2. In any event, Plaintiff cannot credibly claim
8 ignorance of the November 15, 2011 deadline for service because it
9 specifically moved for an extension of time to that date. See Mot.

10
11 _____
12 ² Rule 4(e) permits service of an individual by any means
13 authorized by the law of the state in which the district court
14 sits, and service of most businesses by the same means. See Fed.
15 R. Civ. P. 4(e)(1), 4(h)(1)(A). This Court sits in California, and
California law permits a party who has already made reasonably
diligent attempts at personal service to effect substituted
service. See Cal. Civ. Proc. Code § 415.20(b). The relevant code
section provides, in pertinent part, that substitute service is
accomplished

16 by leaving a copy of the summons and complaint at the
17 person's . . . usual place of business . . . in the
18 presence of . . . a person apparently in charge of . . .
19 [the] place of business, at least 18 years of age, who
20 shall be informed of the contents thereof, and by
21 thereafter mailing a copy of the summons and of the
complaint by first-class mail, postage prepaid to the
person to be served at the place where a copy of the
summons and complaint were left. Service of a summons in
this manner is deemed complete on the 10th day after the
mailing.

22 Id. The Court has concerns about whether service would have been
23 proper even if timely, given the suggestion in the record that 3800
24 Klose is no longer the "usual place of business" of either
Defendant. The Court, however, need not and does not decide that
issue here, because the timeliness issue is dispositive.

25 ³ Riley affirms that service was completed on February 24, 2012,
26 the day the process server left the papers at 3800 Klose. Riley
27 Aff. ¶ 2. But under California law, substitute service is not
28 complete when the process server leaves the papers. It is complete
ten days after the papers are mailed. Cal. Civ. Proc. Code §
415.20(b). Here, the papers were mailed on February 27, 2012, so
substituted service would have been complete, if at all, on March
8, 2012.

1 to Extend.

2 In short, Plaintiff's failure to serve Defendants within the
3 allotted time may be excusable, but it is inexcusable for
4 Plaintiff, and Plaintiff's counsel Riley, to bring a motion for
5 entry of default when they had every reason to know that service
6 was untimely and therefore inadequate under Rule 4. Accordingly,
7 the Court ORDERS the Clerk not to enter default against Defendants
8 until further order of this Court.

9 **B. Order to Show Cause Re Dismissal of Action**

10 Rule 4(m) provides that if service is not completed within the
11 prescribed time limits, a district court "must dismiss the action
12 without prejudice against that defendant or order that service be
13 made within a specified time." Fed. R. Civ. P. 4(m) (emphasis
14 added). The district court may do so sua sponte following notice
15 to plaintiff. Id.

16 The Court is not inclined to grant Plaintiff more time to
17 effect service in the instant action. Plaintiff has already
18 received one extension of time and then, after failing to effect
19 service within the extended period, represented to the Court that
20 service was complete regardless. Plaintiff is hereby ORDERED to
21 show cause why this action should not be dismissed without
22 prejudice for failure to timely serve Defendants.⁴

23 **C. Order to Show Cause Re Sanctions**

24 A federal court may impose an appropriate sanction against an
25 attorney for violating Rule 11(b) after giving the attorney "notice

26 _____
27 ⁴ In reaching this conclusion, the Court does not rely on or
28 consider the Request filed by purported "interested party" Flavour
of Italia. If Flavour of Italia wishes to intervene in this case,
it must file a proper motion. Plaintiff's Objection to the Request
is SUSTAINED.

1 and a reasonable opportunity to respond." Fed. R. Civ. P.
2 11(c)(1). Rule 11(b) provides, in pertinent part:

3 By presenting to the court a pleading, written motion, or
4 other paper -- whether by signing, filing, submitting, or
5 later advocating it -- an attorney . . . certifies that
6 to the best of the person's knowledge, information, and
7 belief, formed after an inquiry reasonable under the
8 circumstances . . . the claims, defenses, and other legal
9 contentions are warranted by existing law or by a
10 nonfrivolous argument for extending, modifying, or
11 reversing existing law or for establishing new law[.]

12 Fed. R. Civ. P. 11(b)(2). "Rule 11 imposes a duty on attorneys to
13 certify by their signature that (1) they have read the pleadings or
14 motions they file and (2) the pleading or motion is well-grounded
15 in fact, has a colorable basis in law, and is not filed for an
16 improper purpose." Smith v. Ricks, 31 F.3d 1478, 1488 (9th Cir.
17 1994) (internal quotation marks omitted).

18 Concurrent with the instant Motion, Riley filed an affidavit
19 in which he represented to the Court that Defendants had been "duly
20 served" with process in this action. Riley Aff. ¶ 2. The word
21 "duly" means "properly."⁵ In this context, it represents a
22 judgment about the legal sufficiency of service of process. A
23 judicial determination that process has been "duly served" can have
24 serious consequences for a defendant. This case is exemplary.
25 Riley has already attested in papers filed with this Court that he
26 plans to seek default judgment against Defendants on the basis of
27 their failure to defend despite purportedly having been "duly
28 served." Riley's client seeks damages of at least \$170,000 against
29 them, in addition to other relief, including an award of Riley's
30 fees and costs.

31 _____
32 ⁵ E.g., Black's Law Dictionary (9th ed. 2009) ("In a proper manner;
33 in accordance with legal requirements.").

1 However, for the reasons explained above, it appears that
2 Riley could not have thought "after an inquiry reasonable under the
3 circumstances" that Defendants had been "duly served." The
4 applicable existing law, Rule 4(m), clearly bars service outside of
5 its time limits. The Court doubts that any reasonable inquiry
6 could have left Riley ignorant of the November 15, 2011 deadline
7 for service in this case. The operation of Rule 4 is not
8 mysterious, and this was not a close call; the purported substitute
9 service occurred more than three months after the deadline.
10 Moreover, Riley himself requested this deadline when he moved for
11 an extension of time in papers bearing his electronic signature.

12 If the time limits afforded under Rule 4 and this Court's
13 order extending time proved too constraining, Riley could have
14 asked for more time. Alternatively, he could have, consistent with
15 Rule 11, argued for extension, modification, or reversal of
16 existing law. Riley did neither. He did not come to Court asking
17 for more time in advance of the November 15, 2011 deadline. Nor
18 did he argue afterward that he should have been entitled to more
19 time. Indeed, he could not have done so, because he never
20 acknowledged that service was untimely under existing law. Cf. Fox
21 v. Acadia State Bank, 937 F.2d 1566, 1570 (11th Cir. 1991)
22 (plaintiffs did not make good faith argument to modify or reverse
23 binding appellate opinion because "they did not refer to it at
24 all"). On the contrary, Riley affirmed under oath that Defendants
25 had been "duly served," and argued for entry of default on that
26 basis. Riley also signed two Ex Parte Applications relying on
27 Defendants' purported failure to defend -- a failure which, again,
28 is predicated on their having first been properly served. See Mar.

1 8 EPA at 1 n.1 (citing POS); May 2 EPA at 3-4.

2 The Court is troubled by this course of misrepresentation.⁶
3 Riley's representations to the Court in this case have been
4 consistent with either bad faith or, more charitably, reckless
5 disregard of both their truth and their potential consequences for
6 Defendants. But in our legal system, words have consequences.
7 Rule 11 embodies this principle in literal fashion, by attaching
8 consequences to an attorney's signature. Riley signed the
9 documents in this case, and in doing so he certified their
10 contents. Now he must stand by his words.

11
12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court DENIES Plaintiff's Motion
14 for Entry of Default against Defendants and ORDERS the Clerk not to
15 enter default against them until further order of this Court.

16 The Court ORDERS Plaintiff to show cause why this action
17 should not be dismissed without prejudice for failure to timely
18 serve Defendants.

19 The Court ORDERS Thomas P. Riley, counsel for Plaintiff Joe
20 Hand Productions, Inc., to show cause why he should not be
21 sanctioned for representing to the Court in his May 2, 2012
22 affidavit that Defendants had been "duly served."

23 The Court shall hold a hearing on the two Orders to Show Cause
24 at 10:00 a.m. on Friday, June 8, 2012, in Courtroom 1, United

25 _____
26 ⁶ The Court notes that the timing and contents of Riley's filings
27 appear to be motivated at least in part by Riley's determination to
28 avoid appearing personally before this Court, as was ordered on
April 20, 2012. To the extent filings were made out of such
motivation, they would run afoul of Rule 11's ban on presenting
papers to a federal court for "any improper purpose." Fed. R. Civ.
P. 11(b)(1).

1 States Courthouse, 450 Golden Gate, San Francisco, California.
2 Riley shall appear at the hearing in person. If Plaintiff elects
3 to voluntarily dismiss this action, Riley still must appear for the
4 hearing on sanctions.

5 Riley may submit a brief addressing either or both Orders to
6 Show Cause, though he is not required to do so. Any such brief
7 shall not exceed eight (8) pages in length and shall be filed
8 electronically no later than 3:00 p.m. on Tuesday, June 5, 2012.

9 Plaintiff shall cause a copy of this Order to be served on
10 Defendants and on Flavour of Italia within three (3) days of the
11 date of this Order. Plaintiff then shall file a certificate of
12 service with the Court.

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14 IT IS SO ORDERED.

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16 Dated: May 17, 2012

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UNITED STATES DISTRICT JUDGE

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