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28IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RHAPSODY INTERNATIONAL INC.,

No. C 13-05489 CRB

Plaintiff,

**ORDER DENYING DEFENDANTS'  
THIRD MOTION TO DISMISS**

v.

RYAN LESTER &amp; NAPSTER.FM, LLC,

Defendants.  

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Defendant Ryan Lester filed his first Motion to Dismiss or, in the Alternative, to Transfer, on December 31, 2013. See generally dkt. 7. On January 24, 2014, Plaintiff filed its First Amended Complaint (“FAC”), which added Napster.fm, LLC as a defendant. See generally dkt. 23. Defendant Napster.fm, LLC filed its first Motion to Dismiss or, in the Alternative, to Transfer, on February 20, 2014. See generally dkt. 37. On February 24, 2014, the Court denied both Defendants’ Motions. See Order (dkt. 40). On March 24, 2014, Defendants filed an answer to Plaintiff’s FAC. See Answer (dkt. 44). Now before the Court is Defendants’ Third Motion to Dismiss for untimely filing of the FAC. See generally dkt. 48.

The Court finds this matter suitable for resolution without oral argument pursuant to Civil Local Rule 7-1(b), and VACATES the hearing currently set for Friday, May 2, 2014. The Court DENIES Defendants’ Third Motion to Dismiss.

1 Defendants argue that the Court should dismiss Plaintiff’s FAC because it is untimely  
2 under Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure, which states that a party may  
3 amend a pleading within twenty-one days of service of a Rule 12(b) motion as a matter of  
4 course. See Fed. R. Civ. P. 15(a)(1)(B). Defendant Lester filed his first motion to dismiss  
5 under Rule 12(b) on December 31, 2014. Plaintiff filed its FAC on January 24, 2014,  
6 twenty-four days after service of Defendant Lester’s Rule 12(b) motion. Plaintiff argues that  
7 it filed the FAC in a timely manner or, in the alternative, that Defendants suffered no  
8 prejudice or undue delay. The Court agrees with Plaintiff.


9 Rule 6(d) of the Federal Rules of Civil Procedure allows for an additional three days  
10 for service of process so long as such service is made under Rule 5(b)(2)(C), (D), (E), or (F).  
11 See Fed. R. Civ. P. 6(d). Rule 5(b)(2)(D) provides for service “by electronic means if the  
12 person consented in writing.” Fed. R. Civ. P. 5(b)(2)(D). In this District, all cases, except  
13 sealed cases, are designated for participation in the Court’s Electronic Case Filing (“ECF”)  
14 system, and each attorney of record is obligated to become an ECF user for access to the  
15 system before e-filing a document in an existing case in the District. See N.D. Cal. Civ. R.  
16 5-1(b) & (c). Defense counsel registered for ECF in order to serve Plaintiff, thus Defendants  
17 have consented to service by electronic means. Therefore, Rule 6(d) allowed Plaintiff an  
18 additional three days, for a total of twenty-four days from Defendant Lester’s service of his  
19 Rule 12(b) motion, to serve the FAC. Accordingly, Plaintiff timely filed the FAC on January  
20 24, 2014.

21 Further, even if Rule 6(d) did not apply, and the proper procedure would have been  
22 for Plaintiff to seek leave to amend, Rule 15 provides that the Court “should freely give leave  
23 when justice so requires.” Fed. R. Civ. P. 15(a)(2). Defendants do not argue that they  
24 suffered any prejudice, and Plaintiff filed the FAC only three days after the 21-day period to  
25 amend a pleading as a matter of course under Rule 15(a)(1)(B). The parties have continued  
26 to litigate the case since Plaintiff filed its FAC, and, as Defendants did not raise any  
27 timeliness objections in their answer or previous briefs, the Court finds that it is preferable to  
28 proceed on the merits. As “the underlying purpose of Rule 15 [is] to facilitate decision on

1 the merits, rather than on the pleadings or technicalities,” the Court declines to dismiss  
2 Plaintiff’s FAC on this basis. See Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en  
3 banc) (internal quotation marks and alterations omitted). For the foregoing reasons, the  
4 Court DENIES Defendants’ Third Motion to Dismiss.

5 **IT IS SO ORDERED.**

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7 Dated: April 21, 2014

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CHARLES R. BREYER  
UNITED STATES DISTRICT JUDGE