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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ALFRED BANKS,	)	Civil No. 10cv1886 AJB (CAB)
	)	
Plaintiff,	)	ORDER GRANTING MOTION TO
v.	)	QUASH; DISMISSING PLAINTIFF’S
	)	COMPLAINT AS TO DEFENDANT
ACS EDUCATION CORP., et al.,	)	JEFFERSON CAPITAL SYSTEMS, LLC;
	)	AND DENYING MOTION FOR LEAVE
Defendants.	)	TO FILE SECOND AMENDED
	)	COMPLAINT
	)	
_____	)	[Doc. No. 168 and 175]

The Defendant, Jefferson Capital Systems, LLC (hereinafter “Jefferson Capital”) filed a motion to quash pursuant to Federal Rules of Civil Procedure Rule 12(b)(4) and 12(b)(5). The Plaintiff filed an opposition, Doc. No. 173, and the Defendant filed a Reply, Doc. No. 171. The hearing on Defendant’s motion, set for July 15, 2011 at 1:30 p.m. before Judge Battaglia, is hereby vacated as this motion is appropriate for submission on the papers without oral argument pursuant to Civil Local Rule 7.1.d.1. For the reasons set forth below, the Defendant’s motion to quash is hereby GRANTED and the Plaintiff’s claims as to Jefferson Capital set forth in the First Amended Complaint, Doc. No. 88, are hereby DISMISSED WITHOUT PREJUDICE and with LEAVE TO AMEND.

**Background**

On September 10, 2010, the Plaintiff filed a Complaint alleging violations of his civil rights. [Doc. No. 1]. On February 15, 2011, Plaintiff filed his First Amended Complaint (“FAC”) alleging violations of the Fair Credit Reporting Act as well as a RICO claim. [Doc. No. 88]. On March 2, 2011,

1 the Court ordered Plaintiff to effectuate proper service on any defendant not previously served within 60  
2 days [Doc. No. 100]. On May 24, 2011, the Court issued an Order to Show Cause to the Plaintiff to  
3 appear on June 7, 2011 before Judge Battaglia and show cause as to why the Court should not dismiss  
4 his case against any Defendant not properly served in accordance with Rule 4 of the Federal Rules of  
5 Civil Procedure and the Court's March 2, 2011 Order. At the hearing, the Plaintiff failed to demonstrate  
6 that he had effectuated proper service with regard to several Defendants and the Court dismissed those  
7 Defendants without prejudice for want of prosecution. [Doc. No. 167].

### 8 Discussion

9 In the instant motion, Jefferson Capital moves to quash pursuant to Federal Rules of Civil  
10 Procedure Rule 12(b)(4) and 12(b)(5) on the grounds that Plaintiff's service of process is defective  
11 because: 1) the Plaintiff never served Defendant with the Summons and Complaint in this matter (either  
12 with respect to the original complaint, or the First Amended Complaint); and 2) the Plaintiff has not  
13 filed a proof of service as to this Defendant. While the Plaintiff contends that he has had conversations  
14 with Defendant regarding Defendant's need for additional time to respond to the FAC and the possible  
15 settlement of this case, the Plaintiff has not demonstrated that he has in fact properly served this  
16 Defendant and has failed to file proof of service.

17 As the Court explained to the Plaintiff at the hearing on the Order to Show Cause, this Court  
18 cannot exercise jurisdiction over a defendant without proper service of process pursuant to Rule 4. The  
19 Defendant has now challenged Plaintiff's service of process on two grounds, the first attacking the form  
20 of the proof of service and the second challenging the manner in which service was attempted. (Fed. R.  
21 Civ. P. 12(b)(4) and 12(b)(5). Once service is challenged, the Plaintiff bears the burden of establishing  
22 that service was valid under FRCP 4.<sup>1</sup> *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir.2004) (citing  
23 *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir.1986)). If the Plaintiff is  
24 unable to satisfy his burden, the Court has discretion to either dismiss the action or retain the action and  
25 quash the service of process. *See Stevens v. Sec. Pac. Nat'l Bank*, 538 F.2d 1387, 1389 (9th Cir.1976).

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27 <sup>1</sup> Rule 4(e)(1) provides that unless federal law provides otherwise, an individual may serve  
28 another in the United States by following the state law for serving a summons in an action brought  
in courts of general jurisdiction in the state where the district court is located or where service is  
made. In this case, defendant Jefferson is located in St. Cloud, Minnesota.

1 From the record and moving papers, its appears uncontested that the Plaintiff mailed the  
2 complaint to Defendant, but did not include the required notice or acknowledgment of service. *See*  
3 Declaration of Claressa Duberry Declaration, ¶ 2. The complaint was sent to Jefferson by mail, but did  
4 not include the required notice or acknowledgment of service. Duberry Declaration, ¶ 2. While regular  
5 first class mail would be sufficient service under Minnesota law,<sup>2</sup> and by proxy, under Federal Rule of  
6 Civil Procedure 4(h)(1)(A) if the Defendant is provided two copies of a notice and acknowledgment and  
7 sends an acknowledgment of service to Plaintiff within twenty days, this did not occur. As such, the  
8 Plaintiff's attempted service is insufficient as a matter of law, and the service of the summons must be  
9 quashed. Based upon the foregoing and in light of this Court's March 2, 2011 Order, the Plaintiff's  
10 claims as to Defendant Jefferson Capital are hereby DISMISSED WITHOUT PREJUDICE AND WITH  
11 LEAVE TO AMEND.

12 Since the Plaintiff has now been warned twice by this Court regarding his failure to properly  
13 serve Defendants, the Plaintiff shall have 30 days from the date of this Order to file and serve a Second  
14 Amended Complaint. The Plaintiff is warned that any further failure to comply with Rule 4 and  
15 effectuate proper service on any of the Defendants previously dismissed on these grounds will result in

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25 <sup>2</sup> Minnesota Rules of Civil Procedure 4.05 Service by Mail provides as follows:

26 In any action service may be made by mailing a copy of the summons and of the  
27 complaint (by first-class mail, postage prepaid) to the person to be served,  
28 together with two copies of a notice and acknowledgment conforming  
substantially to Form 22 and a return envelope, postage prepaid, addressed to the  
sender. If acknowledgment of service under this rule is not received by the sender  
within the time defendant is required by these rules to serve an answer, service  
shall be ineffectual.

1 the Plaintiff's claims against these Defendants being DISMISSED WITH PREJUDICE without further  
2 motion by Defendants. In light of the foregoing the Plaintiff's motion for leave to file Second Amended  
3 Complaint, [Doc. No. 175], is DENIED.

4 IT IS SO ORDERED.

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6 DATED: July 13, 2011

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9 Hon. Anthony J. Battaglia  
10 U.S. District Judge  
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