UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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ARISTA RECORDS et al.,

Plaintiffs, 08-cv-765 (GTS)(RFT)

-against-

KIMBERLY FRAWLEY,

Defendant.

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS COMPLAINT

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Defendant's attorneys, Law Offices of Richard A. Altman, submits this reply memorandum of law in response to plaintiffs' opposition papers, and in further support of this motion to dismiss this action, based upon insufficient service of process and the running of the statute of limitations.

POINT I

THE CPLR APPLIES TO THE SERVICE OF PROCESS HERE, AND SINCE IT WAS NOT FOLLOWED, THE COURT LACKS PERSONAL JURISDICTION.

Plaintiffs' principal argument for upholding service of process is that that college students can be served at their parents' homes, that Ms. Frawley received her mail and registered her car there, and thus that they have complied with CPLR 308(4). Plaintiffs have apparently failed to read Ms. Frawley's declaration. She says, "I graduated from the State University of New York in Albany on May 18, 2009" (¶ 3 at 1), that in May 2009 "I decided to move to Michigan permanently" (*id.*) and that at the time the papers were served, in July 2010, more than one year later, she had moved into an apartment in Ohio, and she submitted a copy of the lease.

Thus, she was not a college student at the time, even though she was taking summer classes and working. Her place of abode and workplace was Ohio, plaintiffs were required to serve her there, and she had no obligation to inform them of her whereabouts. Plaintiffs' search records prove nothing except that she *at one time* lived with her mother, and that her driver's license was still registered in New York, facts which are not disputed. They certainly do not refute anything in her or her mother's declarations which could create an issue of fact requiring a hearing or depositions, particularly because the process server's affidavit does not contradict them.

Citing a host of federal cases regarding the residences of persons in "our highly mobile and affluent society," thereby suggesting that Ms. Frawley might be some sort of international business

person with multiple residences, like Adnan Kashoggi,[1] plaintiffs argue that Ms. Frawley had more than one place of abode, and that she could be served at her mother's house. But the papers were not served pursuant to F.R.Civ.P. 4(e)(2); they were served pursuant to New York CPLR 308(4), as an alternate method of state-law service permitted by Rule 4(e)(1), and plaintiffs acknowledge that. Thus federal cases interpreting Rule 4(e)(2)–which are the only cases plaintiffs cite–have no application here.

Rule 4(e)(2) requires only that one copy of the papers be left with a person of suitable age and discretion at the defendant's "dwelling or usual place of abode." It does not require, as does CPLR 308(4), an additional mailing of another copy in an envelope marked "personal and confidential" to defendant's last known residence, as was done here. Even if Rule 4(e)(2) were applicable, Ms. Frawley had signed a lease for an apartment in Ohio before service of process. Thus her mother's address could not be her "dwelling or usual place of abode."

In support of this motion, we cited cases arising solely under the CPLR. In particular, *Tokio Marine v. Canter*, 2009 U.S. Dist. LEXIS 70347 at *24-30 (S.D.N.Y. Aug.11, 2009) cites a host of prior New York state and federal cases interpreting the "nail and mail" provision of the CPLR, all of which lead to the same conclusion: the place of "nailing" must be the "actual place of business, dwelling place or usual place of abode" of the defendant.

By contrast, plaintiffs' cases are distinguishable because (1) they all arise under Rule 4(e)(2), plaintiffs citing no case interpreting the "nail and mail" provisions; (2) the facts in their cases involved defendants who maintained connections with the addresses at which they were served (such as keeping clothing there, paying rent there, returning from trips there and affirmatively representing to others that

[1] *Nat'l Dev. Co. v. Triad Holding Corp.*, 930 F.2d. 253 (2d Cir.1991)(Pl. Mem. at 7).

they lived there)[2], or in-hand service,[3] or full-time college students away from home temporarily[4] or service on a corporation where substituted service was not attempted, as it was here,[5] or a prisoner proceeding *pro se.*[6] None of these cases is on point.

The service provisions of F.R.Civ.P. 4(e)(2) may be "liberally construed," *Grammenos v. Lemos*, 457 F.2d 1067 at 1070 (2d Cir.1972), but the service provisions of CPLR 308(4) are not. *Gurevitch v. Goodman*, 269 AD2d 355, 355, 702 N.Y.S.2d 634 (2d Dept.2000)("It is well settled that service pursuant to CPLR 308 (4) may only be used in those instances where service under CPLR 308(1) and (2) cannot be made with 'due diligence.' The due diligence requirement of CPLR 308 (4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received."). See the extensive discussion and citations in *Tokio Marine, supra.*

Finally, the fact that defendant had notice of this action is irrelevant. *See Gerena v. Korb*, 617 F.3d 197, 202 (2d Cir.2010), *citing Macchia v. Russo*, 67 N.Y.2d 592, 594, 496 N.E.2d 680, 505 N.Y.S.2d 591 (1986)("In a challenge to service of process, the fact that a defendant has received prompt notice of the action is of no moment. Notice by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court.") (citations omitted).

Accordingly, service of process was defective, the Court lacks personal jurisdiction over the defendant, and the action must be dismissed.

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[2] *Nat'l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253, 257; *Jaffe and Asher v. Van Brunt*, 158 F.R.D. 278; *Capitol Life Ins. Co. v. Rosen*, 69 F.R.D. 83, 88.

[3] *Ali v. Mid-Atlantic Servs., Inc.*, 233 F.R.D. 32, 36.

[4] *Hubbard v. Brinton*, 26 F.R.D. 564, 565; *Carillo v. Hagerty*, 2006 U.S.Dist. LEXIS 52377

[5] *Grammenos v. Lemos*, 475 F.2d 1067, 1070.

[6] *St. John Rennalls v. County of Westchester*, 159 F.R.D. 418, 420.

POINT II

PLAINTIFFS ARE NOT ENTITLED TO AN EXTENSION OF TIME.

Plaintiffs ask for an extension of time pursuant to Rule 4(m) to cure the bad service, and argue that the Court has discretion to grant it, with or without good cause. But there is no good cause here, and even without it, there is no reason to grant one. They did not move for the extension within 120 days, and only requested it in response to this motion. Those are sufficient reasons to deny it, *Harper v. City of New York*, 2010 U.S. Dist. LEXIS 122184 (E.D.N.Y. Nov. 17, 2010)("After considering the equities, I see no reason to do so where the need for the extension results entirely from counsel's neglect and the request for it came only after the time for service expired, in response to a motion to dismiss.").

As to good cause, plaintiffs fare no better. First, plaintiffs' process server was told that the defendant did not live at the address, thus placing plaintiffs on notice and imposing further obligations, and yet they insisted upon using substituted "nail and mail" service.[7] Even more significant–indeed dispositive– is that defendant's counsel had offered to accept service in order to avoid further delay and harassment, but plaintiffs rejected the offer. When he told plaintiffs' counsel immediately afterward that service was bad, she asked if the offer were still good (*see* Altman decl. in support, ¶ 4 at 1-2):

> Shortly after the Second Circuit decision upholding the subpoena, I sent emails on May 13 and 14, 2010 to Mr. Steven Cole, plaintiffs' counsel, offering to disclose Ms. Frawley's identity and accept service on her behalf...I received no response until June 7, when Ms. Eve Burton, an attorney on behalf of plaintiffs, rejected my offer and stated their intention to commence the action and serve Ms. Frawley...On August 9,

[7] "It is trial counsel's responsibility to monitor the activity of the process server and to take reasonable steps to assure that a defendant is timely served." *McKibben v. Credit Lyonnais*, 1999 U.S. Dist. LEXIS 12310 at *11 (S.D.N.Y. Aug. 9, 1999).

> I received another email from Ms. Burton, indicating her belief that service of process on July 20 was correct, but at the same time asking me if I would accept service.

Plaintiffs' opposition papers do not say anything about this generous offer. Having ignored what Ms. Frawley's mother told them, sending the process server back the next day (thus assuming she was lying), and having rejected counsel's offer, they cannot be heard to claim that they acted with due diligence, and they are not entitled to any judicial sympathy.

It is plaintiffs' burden to demonstrate good cause for their failure to serve within the 120 days of Rule 4(m), *AIG Managed Market Neutral Fund v. Askin Capital Management, L.P.*, 197 F.R.D. 104, 108 (S.D.N.Y.2000). But "delay in service resulting from the mere inadvertence, neglect, or mistake of a litigant's attorney does not constitute good cause." *Id.* This is especially so when plaintiffs are represented by sophisticated counsel, as they are here. *Id.* Under the circumstances, they have not demonstrated good cause, and they are not entitled to a traverse hearing, to discovery, or to an extension of time.

Even absent good cause, a district court may, but need not, grant an extension. *Zapata v. City of New York*, 502 F.3d 192, 196-97 (2d Cir.2007), *cert.den.* 552 U.S. 1243 (2008). In *Zapata*, the Second Circuit refused to permit a Rule 4(m) extension, holding that, while the extension is discretionary, a plaintiff must still present colorable reasons for neglecting to serve timely. But plaintiffs do not do so. They argue that they have acted diligently, and that they "believed, in good faith and based on substantial objective proof, that service was proper under NY CPLR § 308" (Pl. Mem at 9-10). Yet they ignore that they were promptly informed that service was insufficient, and that they had rejected counsel's offer to accept service. Thus they cannot be acting in good faith.

The granting of an extension absent good cause is committed to the discretion of the district court. "When determining whether an extension is appropriate in the absence of good cause, a court

considers such factors as: (1) whether the statute of limitations would bar the refiled action; (2) whether the defendant has attempted to conceal the defect in service; (3) whether the defendant had actual notice of the claims asserted in the complaint; and (4) whether the defendant would be prejudiced by the granting of plaintiff's relief from the provision." *Sims v. Wegmans Food Mkts.*, 674 F. Supp.2d 429 (W.D.N.Y.2009). In *Sims*, the District Court denied the extension, despite that the statute of limitations had run, and even though the defendant had moved promptly to dismiss, and thus had notice of the claims. The plaintiff there "was well aware of the claimed defect in service and had ample time and opportunity to cure it, but chose not to do so." 674 F.Supp.2d at 434-35.

This is exactly what the plaintiffs here did. Willfully ignoring what they had been told, failing to attempt another service, or requesting an extension before the expiration of the 120-day period, they chose to rest upon what they done. But they were wrong, and they, not Ms. Frawley, should bear the consequences. The extension should be denied. "[W]hile expiration of the statute of limitations is a factor that may counsel toward granting an extension of time to serve, it does not automatically do so." *Forte v. Lutheran Augustana Extended Care & Rehab. Ctr.*, 2009 U.S. Dist. LEXIS 114939 (E.D.N.Y.Dec. 8, 2009). *See also Conway v. Am. Red Cross*, 2010 U.S. Dist. LEXIS 120512 (E.D.N.Y. Nov. 15, 2010); *Escobar v. City of New York*, 2009 U.S. Dist. LEXIS 125203 (E.D.N.Y. Oct. 23, 2009); *Abreu v. City of New York*, 657 F. Supp.2d 357 (E.D.N.Y.2009); *Cobbs v. Clements*, 2009 U.S. Dist. LEXIS 84444 (D.Vt. Sept. 14, 2009); *PH Int'l Trading Corp. v. Nordstrom, Inc.*, 2009 U.S. Dist. LEXIS 27110 (S.D.N.Y. Mar. 31, 2009). In fact, discretionary extensions absent good cause are far more frequently denied than granted, even where the statute of limitations has expired.

Plaintiffs argue that there is no prejudice to the defendant in being compelled to defend, despite the running of the statute of limitations, and that the prejudice to them in being unable to proceed is

far greater. Yet, as the Second Circuit said in *Zapata*, *supra*, "in the absence of good cause, no weighing of the prejudices between the two parties can ignore that the situation is the result of the plaintiff's neglect." 502 F.3d at 199. And as for prejudice, any prejudice caused by the RIAA's inability to bring one of its thousands of file-sharing cases is far outweighed by the burden that having to defend this case would impose upon defendant, indeed that it has already imposed.

POINT III

KRUPSKI DID NOT OVERRULE CASES HOLDING THAT REPLACING A DOE DEFENDANT WITH THE TRUE NAME DOES NOT RELATE BACK.

Plaintiffs cite the recent U.S. Supreme Court case of *Krupski v. Costa Crociere S.A.*, ___U.S.___, 130 S.Ct. 2485 (2010) for the proposition that an amended complaint which substitutes the true name of a Doe defendant relates back to the date of the original complaint. The case does not so hold. Cases in this (and many other) circuits after *Krupski* continue to draw a distinction between cases involving mistakes and cases with Doe defendants. *Krupski* did not overrule the line of Second Circuit cases cited in our main memorandum (at 8-9) with respect to the latter cases, beginning with *Barrow v. Wethersfield Police Dept.*, 66 F.3d 466 (2d Cir.1995). For example, in *Dominguez v. City of New York*, 2010 U.S.Dist. LEXIS 88818 (E.D.N.Y. Aug. 27, 2010), a motion to amend a complaint to add the names of police officers after plaintiff learned their identities, the Court examined *Krupski* and squarely held that it did not overrule those cases:

> Because Second Circuit precedent is applicable to this case, the question before me is whether *Krupski* overturned or limited *Barrow* and its progeny. I find that at least on the facts present here, it did not. *Krupski* merely picks up where *Barrow* left off. *Barrow* asked whether a mistake has been committed; *Krupski* assumes the presence of a mistake and asks whether it is covered by Rule 15(c)(1)(C)(ii). Therefore, *Barrow*'s holding that a lack of knowledge is not a mistake is still intact.
>
> This is the conclusion reached by at least two courts in the Sixth Circuit -- which applies the same rule as *Barrow*-- in the wake of *Krupski*...Therefore, Dominguez'

> claims against the newly named police officers do not relate back to his original complaint, they would not be timely, and his amendment to the complaint would be futile. Accordingly, plaintiff's motion to amend the complaint is denied
> *Id.* at *6-7 (citations and footnote omitted).

To the exact same effect are *Vargas v. Ciarletta*, 2010 U.S. Dist. LEXIS 117515 (S.D.N.Y. Nov. 4, 2010) and *Small v. City of New York*, 2010 U.S. Dist. LEXIS 84110 (S.D.N.Y. Aug. 16, 2010). Thus post-*Krupski* cases in this Circuit continue to distinguish between mistakes in the names of parties, and replacing Doe defendants with the true name, which is *not* a mistake within the meaning of Rule 15(c).

Plaintiffs' citation of *Baez v. JetBlue Airways*, 2010 U.S.Dist. LEXIS 109895 (E.D.N.Y. Oct. 15, 2010) is not on point. In *Baez*, the plaintiff knew exactly who she intended to sue, but only her first name. This is exactly the mistake or omission covered by *Krupski*. Similarly, in *Bishop v. Best Buy, Co.*, 2010 U.S. Dist. LEXIS 110631 (S.D.N.Y. Oct.13, 2010), the plaintiffs knew the identities and positions of the persons they intended to sue, but not their names. Neither of these is our case; the basis of the RIAA's strategy is that they do not know the identities of their defendants at all.

Prior to *Krupski*, almost all of the other Circuit Courts reached the same conclusion as the Second, *i.e.*, replacing a Doe defendant with the true name is *not* a mistake which relates back, and that if the statute of limitations has run, the amendment is time-barred.[8] If the Supreme Court had intended to overrule this almost uniform line of Doe cases in *Krupski*, it would surely have said so.

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[8] *See Wilson v. U.S.*, 23 F.3d 559, 563 (1st Cir.1994); *Barrow v. Wethersfield Police Dep't.*, 66 F.3d 466, 469 (2d Cir.1995), amended 74 F.3d 1366 (2d Cir.1996); *W. Contracting Corp. v. Bechtel Corp.*, 885 F.2d 1196, 1201 (4th Cir.1989); *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir.1998); *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir.1996); *Worthington v. Wilson*, 8 F.3d 1253, 1256 (7th Cir.1993); *Garrett v. Fleming*, 362 F.3d 692, 696-97 (10th Cir. 2004); *Powers v. Graff*, 148 F.3d 1223, 1226-27 (11th Cir.1998). The Third Circuit is the exception, *see Singletary v. Pennsylvania Dept. of Corr.*, 266 F.3d 186, 201 (3d Cir. 2001), and the post-*Krupski* case of *Jamison v. City of York*, 2010 U.S. Dist. LEXIS 104871 (M.D Pa.Sept. 30, 2010).

The conclusion must therefore be that the distinction between a mistake and a lack of knowledge continues, and that the latter is not covered by Rule 15(c). In addition to the above-cited New York cases, almost all of the post-*Krupski* cases from other District Courts continue to deny motions to amend in Doe cases.[9] Thus *Krupski* does not control, the amendment does not relate back, and the action is time-barred.

POINT IV

PLAINTIFFS ARE NOT ENTITLED TO EQUITABLE TOLLING.

Plaintiffs argue that they are entitled to equitable tolling solely because their subpoena was stayed. It is a substantial burden to show such entitlement, *Boos v. Runyon*, 201 F.3d 178, 185 (2d Cir. 2000), and they have not met it. "Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 549 U.S. 384, 396, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). The cases in this Circuit where it is sought (and almost always denied anyway) usually involve either sympathetic *pro se* plaintiffs, prisoners, habeas petitions, or disability cases, or else active wrongdoing and fraudulent concealment on the part of defendants. Litigating the validity of a subpoena is neither wrong nor fraudulent.

It is the RIAA and their expert counsel which have chosen their strategy in these cases against Doe defendants, and if they want to spend millions of dollars suing college students in order to collect

[9] *See Trigo v. Dir. Tex. Dept. of Crim. Justice*, 2010 U.S. Dist. LEXIS 87056 at *52 (S.D.Tex.Aug. 24, 2010); *Venezia v. 12th & Div. Props., LLC*, 2010 U.S. Dist. LEXIS 80750 (M.D.Tenn.Aug. 6, 2010); *Wilson v. Delta Airlines, Inc.*, 2010 U.S. Dist. LEXIS 72471 (W.D.Tenn. July 19, 2010); *Burdine v. Kaiser*, 2010 U.S. Dist. LEXIS 63122 (N.D.Ohio June 25, 2010)(imputed knowledge of a defendant does not apply to Doe cases).

thousands, that is their right.[10] But it is still their obligation to identify who they intend to sue in a timely fashion. That the only way to do so may be by subpoenas directed toward internet service providers and universities (and there is no proof that it is) does not insulate them from that obligation. The Doe cases are quite plain and unambiguous, and do not contain exceptions for the recording industry, or for difficulties created by the anonymity of the internet. The Second Circuit's stay did not prevent plaintiffs from doing anything else to uncover Doe 3's identity. Furthermore, in the cases involving mistakes in identification, a defendant's knowledge of the claims is a factor in whether amended complaints relate back, *Krupski, supra.* But the Doe cases do not contain such a factor. Therefore, Ms. Frawley's knowledge of this action is irrelevant.

CONCLUSION

The Court lacks personal jurisdiction over the defendant and the statute of limitations has expired. Plaintiffs are not entitled to an extension of time pursuant to Rule 4(m), nor to an equitable tolling of the statute of limitations. This motion should be granted and the amended complaint dismissed with prejudice.

Dated: New York, New York
December 6, 2010

/S/

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[10] See *RIAA piracy fight costs millions, recovers thousands*, http://www.geek.com/articles/news/riaa-piracy-fight-costs-millions-recovers-thousands-20100714/ (accessed December 6, 2010).