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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC,	:	12 CV 00095 (RJS)
	:	
Plaintiff,	:	
	:	
-against-	:	
	:	
REDIGI INC., JOHN OSSENMACHER and	:	
LARRY RUDOLPH a/k/a LAWRENCE S.	:	
ROGEL,	:	
	:	
Defendants.	:	
-----	X	

**MEMORANDUM OF LAW IN OPPOSITION
TO INDIVIDUAL DEFENDANTS' MOTION TO
DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

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Plaintiff Capitol Records, LLC (“Capitol”) submits this Memorandum of Law in opposition to the motion by individual defendants John Ossenmacher (“Ossenmacher”) and Larry Rudolph (“Rudolph”) (collectively, the “Individual Defendants”) to dismiss Capitol’s First Amended Complaint (“FAC”).

PRELIMINARY STATEMENT

Ossenmacher and Rudolph are the founders, owners, and moving force behind defendant ReDigi Inc. (“ReDigi”), whose service this Court has held to be infringing. They conceived of its technology, implemented and control its operations in all respects, and personally participate in and supervise all of its activities adjudicated to be infringing. These facts – alleged in the FAC and proven beyond dispute by their own testimony – render them jointly and severally liable for copyright infringement with ReDigi under clear Second Circuit precedent.

Rather than confront these facts and this law, Ossenmacher and Rudolph indulge in two fictions in pursuing the instant motion to dismiss. First, they recast themselves as newcomers to this lawsuit, allegedly without notice of the basis for the claims against them and unable to decipher from “conclusory” allegations what aspects of their conduct are at issue. Never mind that both individuals have submitted numerous declarations setting out their pivotal role in creating and operating a service the Court has already found infringing; that they are the only two witnesses – much less officers, owners, or employees – the startup ReDigi identified in its initial disclosures; that their deposition testimony was the primary evidence upon which this Court found infringement; and that the Court expressly held that ReDigi’s “founders” and “officers” built an infringing service that they should have known would infringe. Never mind that it was and is precisely these individuals who have argued so vociferously that what their brainchild technology and company do should be lawful under an “updated” view of copyright

law. Somehow, as individuals who control every aspect of ReDigi's service, they feign ignorance about what they might have done wrong. But both the specific allegations of the FAC, as well as the entire history of this case and numerous documents of which this Court may take judicial notice, make more than abundantly clear why Ossenmacher and Rudolph are liable jointly and severally with the startup company they created.

In service of the same fallacy, the Individual Defendants base their motion on a handful of irrelevant cases about the liabilities of multiple cruise lines or a corporate parent's responsibility for the infringements of its subsidiary. They never even so much as acknowledge the decades of well-settled precedent in the Second Circuit (and indeed in every other jurisdiction) that corporate officers who participate in, exercise control over, or benefit from the infringing activity of a corporation are jointly and severally liable with that corporation. Indeed, multiple cases in this jurisdiction set out the relevant factors governing officers' joint and several liability for copyright infringement, such as their creation of an infringing service, daily control over the operations of the corporation, and supervision of infringing activity. The FAC alleges precisely these kinds of activities – which are also substantiated by the Individual Defendants' own testimony – that make them jointly and severally liable for ReDigi's acts already found infringing.

Defendants' motion is, in short, a complete smokescreen, predicated on the false notion that Ossenmacher and Rudolph are somehow strangers to the infringing service they created, operate, manage and control in every respect. Both as a matter of Capitol's amply specific pleading and the reality of where this case now sits, the motion to dismiss just delays the necessary consideration of their liability, and should be denied.

PROCEDURAL HISTORY

Capitol filed its original complaint against ReDigi on January 11, 2012, followed shortly thereafter by its motion for a preliminary injunction. In defending against that motion, both Ossenmacher and Rudolph submitted lengthy declarations describing the ReDigi service they personally invented and manage. As set forth below, on this motion, the Court may take judicial notice of such documents that have been made of record in the case. Ossenmacher noted that he was “Chief Executive Officer and a founder of ReDigi,” and explained that “what we do is provide ... a used digital music marketplace” for music files. See Docket No. 10 ¶¶ 1-2 (emphasis added). He then summarized the “technology behind our sale process” and “our verification technology,” and noted that “we anticipate that our business model will expand to include” files beyond those obtained from iTunes. Id. ¶¶ 3-4 (emphasis added). Finally, he noted that ReDigi was a “startup company” that would be devastated by an injunction, but that it kept detailed records of all transactions, so that Capitol would be able to obtain financial relief in the event Capitol prevailed. Id. ¶¶ 10-12.

Rudolph was equally personal in describing his role in creating and managing ReDigi. He testified that he is “Chief Technical Officer and a founder of ReDigi,” described the ReDigi system he invented in scrupulous detail, and noted proudly, “We have applied for a patent for our technology.” See Docket No. 11 ¶¶ 1-2 (emphasis added). The attached abstract of the patent listed both him and Ossenmacher as inventors. See Docket No. 11-2. He thereafter described the “basic process used by our technology” and the various things that “we” and “our software” do to process what are now adjudicated to be infringing transactions. Id. ¶¶ 19-20, 25. The repeated uses of “we” and “our” are not accidental slips of the tongue of corporate representatives, but rather frank descriptions of how these two individuals personally conceived,

implemented and manage the business model, technology and web-based service known as ReDigi.

After discovery was completed, the parties cross-moved for summary judgment on July 20, 2012. Ossenmacher and Rudolph again submitted declarations reflecting their personal participation in developing and managing ReDigi. Ossenmacher argued, “We have done significant research and have built a system whereby the rights of copyright holders are protect [sic] to a far greater extent than they ever have been in the past ... We have built a solid, well thought-out, detailed, service that balances the needs of copyright holders and consumers alike.” See Docket No. 81 ¶ 7 (emphasis added). From a technical standpoint, Rudolph unveiled ReDigi’s newly conceived “migration” theory of file transfer and explained, “because of the proprietary nature of ReDigi’s system, we do not explain all of our technical processes to users. Moreover we have tried to make our user interface easy to understand by our users.” See Docket No. 92 ¶26 (emphasis added). Again, the “we” references were not merely a matter of form, since it was indeed Ossenmacher and Rudolph who did the researching, building and marketing they described.¹

The Court’s Order granting Capitol’s motion for summary judgment relied principally on Ossenmacher’s and Rudolph’s deposition testimony in finding ReDigi liable for direct, contributory and vicarious copyright infringement. Indeed, both Capitol’s and ReDigi’s Rule 56.1 Statements (Docket Nos. 50 and 56) are essentially catalogs of the Individual Defendants’ testimony, which provided the primary evidence establishing ReDigi’s infringement. The Court,

¹ To this extent, the Individual Defendants’ argument that only ReDigi itself can have “users” makes a pointless distinction. It was of course these Individual Defendants who solicited, cultivated, and interacted with those users, and who encouraged them to use the system Ossenmacher and Rudolph had designed.

moreover, expressly noted their primary role and knowledge with respect to developing and managing the infringing service.

In assessing whether ReDigi's contribution to infringement is "so great that it warrants holding" ReDigi liable as a direct infringer, the Court held:

On the record before it, the Court concludes that, if such a case could ever occur, it has occurred with ReDigi. ReDigi's founders built a service where only copyrighted work could be sold ... The fact that ReDigi's founders programmed their software to choose copyrighted content satisfies the volitional conduct requirement and renders ReDigi's case indistinguishable from those where human review of content gave rise to direct liability.

Docket No. 109 (the "Summary Judgment Order") at 14 (emphasis added). Elsewhere, in assessing the knowledge element of contributory copyright infringement, the Court reasoned:

Finally, ReDigi's officers claim to have "researched copyright law [and] consulted with attorneys" concerning their service, and also to have met with record companies "to get input, get marketing support[,] and enter into deals with the labels." (RD Rep. 56.1 2 ¶ 5, 5 ¶ 20.) By educating themselves, the officers presumably understood the likelihood that use of ReDigi's service would result in infringement.

Id. at 15. The Court's specific identification of the Individual Defendants reflects the reality of the evidence in this case: Ossenmacher and Rudolph are not merely corporate spokesmen, but the sole creators, designers, and decision makers for the infringing ReDigi service, and the persons who knew or should have known that what they were doing was unlawful. See id.

After the Court's ruling on ReDigi's liability, the parties engaged in damages and remedies discovery. At the conclusion of that period, on August 2, 2013, Capitol submitted a pre-motion letter seeking to amend its complaint to add Ossenmacher and Rudolph individually, setting out the law and facts establishing why they are jointly and severally liable with ReDigi, and attaching the proposed First Amended Complaint. On August 7, 2013, ReDigi responded with its arguments why the Individual Defendants should not be added. At the August 9, 2013 pre-motion conference, the Court allowed the amendment and stated:

And then the last bit is with respect to amending to name two new defendants, individual defendants. And so let's think about this. I do think that my opinion referenced these individuals in some cases explicitly. So I think that there's reason to believe that these guys could be added, and there could be liability against them.

Docket No. 116 at 3.

On August 30, 2013, Capitol filed the FAC (Docket No. 118), which supplemented the list of recordings infringed and joined Ossenmacher and Rudolph as defendants. Among other things, the FAC alleges that Ossenmacher is “the Chief Executive Officer and a founding owner of ReDigi,” and that Rudolph is “the Chief Technology Officer and a founding owner of ReDigi.” FAC ¶¶ 6-7. Having identified Ossenmacher and Rudolph as founding “owners” of ReDigi, the FAC then alleges that “Defendants own and operate the ReDigi website and service located at www.redigi.com.” *Id.* ¶ 19. The allegation is not an undifferentiated grouping of disparate players, because the context makes clear that Ossenmacher and Rudolph themselves are owners and operators of the service they develop and market through the ReDigi website.

The remainder of the complaint sets out in detail how the ReDigi service – already identified as founded and operated by Ossenmacher and Rudolph – functions. *See id.* ¶¶ 20-36. The various references to “Defendants” collectively allege actions that were clearly, in context, taken by Ossenmacher and Rudolph as the founders and sole operators of ReDigi. For example, paragraph 28 alleges, “in making and encouraging these various unauthorized reproductions and distributions, Defendants hoped to build a large user-base and corresponding profits”; paragraph 29 alleges, “Defendants' business model was designed to build a customer base and earn profits by infringing and encouraging ReDigi users to infringe copyrighted sound recordings”; and paragraph 30 alleges, “Defendants have sought to excuse their activities legally in various public statements, but none justify their infringing conduct.” The hopes, pursuit of a business model, and public statements alleged are those, of course, of the Individual Defendants promoting the

ReDigi technology and service they created. There would have been no logical or syntactical reason to separate out the acts of each, where ReDigi clearly functions through the two individuals who run it.

Having thus described in detail acts already found to be infringing, the FAC then emphasizes Ossenmacher's and Rudolph's central role in those acts:

Defendants Ossenmacher and Rudolph personally participated in, and supervised and directed, the infringing acts described above. Indeed, they personally conceived of the infringing business model and technology at issue in this case, were the ultimate decision makers concerning the development and implementation of such infringing activity and directed and approved all key aspects of ReDigi's activities found by this Court to infringe Capitol's copyrights. They were the moving force behind those infringing acts.

FAC ¶ 37 (emphasis added). By referencing the allegations “described above” and the activities “found by this Court” to infringe, this paragraph incorporates by reference the detailed allegations of the ReDigi service that precede paragraph 37, as well as the Court's detailed descriptions and analysis of the ReDigi service in its summary judgment opinion. In other words, the context makes clear that Ossenmacher and Rudolph are alleged to have “personally conceived” of, participated in, and directed and approved the precise litany of activities alleged by Capitol and found by the Court to infringe.

ARGUMENT

I. The Standards and Materials Available For Review On A Motion To Dismiss

“On a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must accept all well-pleaded allegations contained in the complaint as true and draw all reasonable inferences in the plaintiffs' favor.” Goodman v. City of New York, 2011 WL 4469513 (S.D.N.Y. Sept. 26, 2011) (quoting ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007)). Plaintiff's claims need only have facial plausibility, which requires that Plaintiff plead factual content “that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). See also Mahoney v. Sony Music Entm’t, 2013 WL 491526 (S.D.N.Y. Feb. 11, 2013) (“Even after Twombly and Iqbal, the Court’s role in deciding a motion to dismiss ‘is merely to assess the legal feasibility of the complaint’”) (citation omitted). Accordingly, “a court should not dismiss a complaint for failure to state a claim if the factual allegations sufficiently ‘raise a right to relief above the speculative level.’” Healthcare Fin. Group, Inc. v. Bank Leumi USA, 669 F. Supp. 2d 344, 347 (S.D.N.Y. 2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

“Determining the facial plausibility of a complaint is a context-specific task that requires this Court to draw on its judicial experience and common sense.” Tokio Marine v. Canter, 2009 WL 2461048 (S.D.N.Y. Aug. 11, 2009) (emphasis added) (internal quotations and citation omitted). Moreover, contrary to the Individual Defendants’ insistence that the Court is limited to “the facts as asserted within the four corners of the complaint and any attached documents,” see Defs’ Br. at 6, the Court can take judicial notice of additional materials germane to the instant motion. “When ruling on a motion to dismiss, the Court may take judicial notice of records and reports of administrative bodies, items in the record of the case, matters of general public record, and copies of documents attached to the complaint.” Sun Micro Med. Techs. Corp. v. Passport Health Commc’ns, Inc., 2007 WL 2230082 (S.D.N.Y. July 31, 2007) (emphasis added). See also, e.g., Channer v. Loan Care Serv. Ctr., 2011 WL 5238878 at n.1 (D. Conn. Nov. 1, 2011) (“a court may ‘take judicial notice of certain public records, such as the content of prior court decisions, even when those public records have not been referenced by the Complaint’”); Tokio Marine, 2009 WL 2461048 (“The Court may properly ‘rely on matters of public record in deciding a motion to dismiss under Rule 12(b)(6), including the public record of prior judicial decisions’”); Spence v. Senkowski, 1996 U.S. Dist. LEXIS 21171, at *3 (N.D.N.Y. July 30,

1996) (considering an affidavit previously filed by the non-moving party on a motion to dismiss because it “already [had] been filed and considered by the court”). Thus, in determining whether Capitol has pled a facially plausible claim of personal liability against the Individual Defendants, the Court can take notice of the Summary Judgment Order, the documents filed in connection with the summary judgment motions, and the declarations previously filed by the Individual Defendants.

While the Individual Defendants cite cases for the uncontroversial point that Twombly applies to copyright infringement cases,² courts both before and after Twombly have denied motions to dismiss claims of personal liability for copyright infringement where, as here, Plaintiff has alleged sufficient facts to support a claim that individual defendants have personally participated in the corporation’s infringing acts. See Graham Hanson Design LLC v. 511 9th LLC, 2011 WL 744801 (S.D.N.Y. Feb. 24, 2011) (denying motion to dismiss where complaint alleged that individual defendant “was directly involved in the misappropriation of [Plaintiff’s] intellectual property,” “exploited the Website, the Promotional Materials, and the Logo for commercial gain without securing the rights to use the materials,” and “has aided and assisted in the unauthorized exploitation of the Website”); Michael Aram, Inc. v. Laurey, 2006 WL 510527 (S.D.N.Y. Mar. 1, 2006) (complaint sufficiently stated claim by alleging that individual

² The copyright pleading cases cited by the Individual Defendants do not support dismissal of the FAC. For example, in Fleurimond v. New York University, 722 F. Supp.2d 352 (E.D.N.Y. 2010), the Court actually denied a motion to dismiss where plaintiff alleged she was the “sole creator” of the work, despite evidence that the copyright was owned by defendant as a work made for hire. In those instances where a motion to dismiss was granted, the plaintiff was unable to allege clearly required elements of a successful copyright infringement case. See, e.g., Ochre LLC v. Rockwell Architecture, Planning & Design, P.C., 2013 WL 3606123 (2d Cir. July 16, 2013) (failure to plead separable elements that would render useful article lighting fixtures copyrightable); Muniz v. Morillo, 2008 WL 4219073 (S.D.N.Y. Sept. 10, 2008) (plaintiff did not own registration); Kelly v. L.L. Cool J., 145 F.R.D. 32 (S.D.N.Y. 1992) (holding infringing acts sufficiently pled, but dismissing based on failure to allege ownership and registration).

defendant “engaged Ever Mutual to manufacture the infringing products” and “knowingly participated in the infringing activity”); Capitol Records, Inc. v. Wings Digital Corp., 218 F. Supp. 2d 280, 285 (E.D.N.Y. 2002) (complaint sufficiently stated a claim for personal liability against individual defendant who was president and shareholder of the corporate defendant). Cf. Carson Optical, Inc. v. Electro-Optix, Inc., 2012 WL 6720784 (E.D.N.Y. Dec. 21, 2012) (granting motion to amend where pleading “identifies [the individual defendant] as the corporate officer and/or owner of defendant . . . [and] also contends that [the individual defendant] ‘is the mastermind behind the infringing activities described herein, and is responsible for directing the manufacture, distribution, offer for sale and sale of the infringing goods’”). As described in detail below, the FAC here states a facially plausible claim against the Individual Defendants under the governing standards.

II. The FAC Pleads Precisely the Kinds of Specific Facts that Warrant Holding The Individual Defendants Jointly And Severally Liable With ReDigi

The most serious legal flaw of the Individual Defendants’ motion is its wholesale failure to address the well-developed Second Circuit law governing their joint and several liability for ReDigi’s copyright infringement. The rules, reiterated frequently by courts here and elsewhere, are summarized as follows:

It is well established that [a]ll persons and corporations who participate in, exercise control over or benefit from an infringement are jointly and severally liable as copyright infringers. [A]n individual, including a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, or who personally participates in that activity is personally liable for infringement. These principles apply equally to claims of direct infringement and claims based on secondary liability.

Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 398, 437 (S.D.N.Y. 2011) (citations and quotations omitted). See also Sygma Photo News, Inc. v. High Society Magazine, 778 F.2d 89, 92 (2d Cir. 1985) (“All persons and corporations who participate in, exercise control over, or benefit from the infringement are jointly and severally liable as copyright infringers”); Broadcast

Music, Inc. v. Haibo, Inc., 2012 WL 843424 (W.D.N.Y. Mar. 12, 2012); EMI Entertainment World, Inc. v. Karen Records, Inc., 806 F. Supp. 2d 697, 709 (S.D.N.Y. 2011); Centrifugal Force, Inc. v. Softnet Communications, Inc., 2011 WL 744732 (S.D.N.Y. March 1, 2011); Yash Raj Films (USA), Inc. v. Adda Rong, Inc., 2010 WL 1270013 (E.D.N.Y. March 12, 2010); BMG Music v. Roma's Record Corp., 2009 U.S. Dist. LEXIS 87588, at *8 (E.D.N.Y. August 19, 2009); Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 158-59 (S.D.N.Y. 2009); Musical Prods., Inc. v. Roma's Record Corp., 2007 WL 750319, at *1 (E.D.N.Y. Mar. 5, 2007); Michael Aram, 2006 WL 510527, at *2; Wings, 218 F. Supp. 2d at 85.

Based on these cases, the sole issue on this motion is whether Capitol has alleged a facially plausible claim that Ossenmacher and Rudolph personally participated in, exercised control over, or benefited from ReDigi's infringement. The FAC, in fact, does much more. The FAC alleges that Ossenmacher and Rudolph are the "founding owners" of ReDigi, and collectively along with the corporate defendant "own and operate" the service (§§ 6-7, 19); it describes in great detail how ReDigi works and the various sequence of events and activities that the Court has already found to infringe (§§ 20-36); and finally it alleges that Ossenmacher and Rudolph participate in and control all of the infringing steps just described (§ 37).

More particularly, paragraph 37 emphasizes that Ossenmacher and Rudolph "personally conceived of" the business model and technology the Court has already found infringing; that they made all decisions regarding developing and implementing the infringing workings of ReDigi; that they "personally participated in, and supervised and directed" the infringing conduct "described above" in the FAC; and that they "directed and approved" all those infringing acts and were in fact the "moving force" behind them. These allegations thus catalog with ample specificity why Ossenmacher and Rudolph are liable for having conceived, implemented, and

operated an infringing service. They are essentially charged with participating in and controlling every aspect of ReDigi's business found to infringe, so nothing more need be said to state a plausible claim.

Moreover, these allegations do not sit in a vacuum, but in a context that leaves no doubt about their meaning and that requires no further amplification to render the claim plausible. See Muniz v. Morillo, 2008 WL 4219073 (S.D.N.Y. Sept. 10, 2008) (“complaint must satisfy a “flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible”) (emphasis added) (quoting Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)). Paragraph 37 cross-references not only the many other allegations of the FAC, but the Court's Summary Judgment Order, which describes the ReDigi service in detail and specifically notes that ReDigi's “founders” and “officers” built and programmed a service they knew or should have known infringes. See Tokio Marine, 2009 WL 2461048 (Court may rely on prior judicial opinions in deciding Rule 12(b)(6) motion). The FAC is further bolstered by Ossenmacher's and Rudolph's multiple declarations attesting to their very personal roles in inventing, implementing, managing and operating the service and each of its component elements found to infringe. See Spence, 1996 U.S. Dist. LEXIS 21171, at *3 (considering an previously filed affidavit on motion to dismiss). And of course, these allegations all arise in a context where the very activities they are alleged to have directed and participated in have already been adjudicated to infringe. In these circumstances, Ossenmacher and Rudolph cannot seriously argue that Capitol has not alleged “a right to relief above the speculative level.” See Twombly, 550 U.S. at 555.

Many Courts in this Circuit and elsewhere have held individual corporate officers jointly and severally liable with their corporations in functionally identical circumstances. For example,

in Lime Group, the Court granted summary judgment finding corporate defendant's CEO personally liable for his company's infringing file-sharing business. The Court noted that the CEO was the company's "ultimate decisionmaker" whose approval was required for "any major strategic and design decisions"; that he "conceived of" the infringing technology and "directed and approved many aspects of" its "design and development"; and that he was "heavily involved in developing" the company's business plan and determining its "public relations and advertising efforts." 784 F. Supp. 2d at 438.

Similarly, in the Usenet case, the Court granted summary judgment finding the director and sole shareholder of two companies personally liable for online music infringement. In assessing whether the director had personally participated in the infringement, the Court reasoned that he "was the moving force behind the entire business of both corporate Defendants." It further noted that he set the companies' "overall strategic vision," and "was personally and intimately involved in many of the activities that form[ed] the basis of Defendants' copyright liability." 633 F. Supp. 2d at 158.

Capitol alleges effectively identical facts against Ossenmacher and Rudolph. The FAC alleges that they personally conceived of ReDigi's business plan and technology, have final say and direction and control over all its activities deemed to be infringing, and are the "moving force" behind the infringement. The FAC thus does more than merely intone elements of the claims, but alleges precisely the kind of specific facts of participation and control that support holding corporate officers jointly and several liable for the infringements of their corporation. See EMI Entertainment, 806 F. Supp. 2d at 709-11 (50% owners who had financial and personnel control over record company held jointly and severally liable for company's infringement); Blue Nile, Inc. v. Ideal Diamond Solutions, Inc., 2011 WL 3360664 (W.D. Wash.

August 3, 2011) (summary judgment finding officer who “controlled the corporate affairs” of a “small company” that was his “brainchild” personally liable for corporation’s infringement); Centrifugal Force, 2011 WL 744732 (denying CEO’s motion for summary judgment where he was principal owner of small company with 12 employees and had “financial interest in the company and is in a position to supervise and control” its employees); Microsoft Corp. v. Tech. Enters., LLC, 805 F. Supp. 2d 1330, 1333 (S.D. Fla. 2011) (granting summary judgment holding corporate officer personally liable, where he “was the moving force behind his company’s infringement” and “[was] the only person involved in the business decisions”); Michael Aram, 2006 WL 510527 (denying motion to dismiss where complaint alleged that individual “knowingly participated” in infringing activity with corporate defendants); Blum v. Kline, 8 U.S.P.Q.2d 1080, 1082 (S.D.N.Y. 1988) (holding principal officer and owner “responsible for the corporation's daily activities” could be held jointly liable with corporation for infringement); Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 514 (N.D. Ohio 1997) (granting summary judgment holding defendant’s president personally liable, where “[he] has the authority, right and ability to control the content of the [bulletin board service] and its operations”).

Against this copious authority, Ossenmacher and Rudolph feebly cite to cases that do not even address these well-settled standards of joint copyright liability and in any case bear no factual resemblance to the present circumstances. See Technomarine SA v. Jacob Time, Inc., 2012 WL 2497276 (S.D.N.Y. June 22, 2012) (complaint stated only speculative conclusion that allegedly infringing watches “may” be counterfeit, while also acknowledging they may be authentic); Jacobs v. Carnival Corp., 2009 WL 856637 (S.D.N.Y. Mar. 25, 2009) (suing multiple cruise lines without alleging sufficient facts concerning what infringing acts certain of the lines

committed and when such acts occurred); Pegasus Imaging Corp. v. Northrop Grumman Corp., 2008 WL 5099691 (M.D. Fla. Nov. 24, 2008) (no factual basis for holding parent corporation liable for acts of its separate subsidiary). The Individual Defendants' personal and active role in the acts already adjudicated to be infringing are amply chronicled in the FAC, their own prior declarations and the Court's summary judgment ruling itself. To pretend at this juncture that they do not know what they are accused of, and that there is no plausible allegation regarding their liability, ignores the entire history of this case culminating in the FAC.

III. Capitol's Collective References to "Defendants" State A Cognizable Claim Against the Individual Defendants and the Corporation They Control

Ossenmacher and Rudolph argue that Capitol's use of the collective term "Defendants" warrants dismissal for "failing to differentiate between the alleged wrongdoing of the Individual Defendants and ReDigi." See Defs' Br. at 9. They claim that such collective references "fail to put each defendant on notice of the claims against them." Id at 10. Of course, "Defendants" plainly means a very narrow universe of Ossenmacher, Rudolph and the small startup company they created and control in all relevant respects. Moreover, the FAC spells out each step of the infringing system and then charges both Individual Defendants with participating in and directing each of those steps, so the conduct of which they are accused is abundantly clear. Insofar as ReDigi the corporation acts primarily through the only two people who run it, Capitol lodges the allegations properly against all three. They act together, which is why they are jointly and severally liable.

Not surprisingly, the one Court that appears to have confronted the issue in the infringement context roundly rejected the same argument Ossenmacher and Rudolph press here. In Usenet, the defendant corporations were liable for operating an online service offering unauthorized downloads of plaintiffs' sound recordings. The Court had the following

observation in response to the corporate director's claim that accusations against all

"Defendants" collectively were insufficient to hold him individually accountable:

As a last-ditch effort to avoid liability, Defendants contend that Plaintiffs have no evidence that Reynolds can be held liable for conduct that has been described only in broad terms referring to the "Defendants" in the collective. This argument cannot withstand scrutiny. It is well settled in this Circuit that "[a]ll persons and corporations who participate in, exercise control over, or benefit from the infringement are jointly and severally liable as copyright infringers." Syigma Photo News, Inc. v. High Society Magazine, Inc., 778 F.2d 89, 92 (2d Cir. 1985) (citing Shapiro, 316 F.2d at 308-09). Here, the evidence bears out that Reynolds was personally responsible for a major share of Defendants' infringing activities; moreover, he was the moving force behind the entire business of both corporate Defendants.

Usenet, 633 F. Supp.2d at 158. Likewise, where Ossenmacher and Rudolph are alleged to be the "moving force" behind a company they own and operate, they too cannot complain when their actions are described jointly with that company.³

IV. The FAC Properly Pleads The Elements of All Claims Asserted Against the Individual Defendants

The Individual Defendants' final argument for dismissal is that the FAC fails to allege the requisite elements for direct and secondary copyright infringement against them individually. This argument again misunderstands the nature of their joint and several liability, predicated on their participation in and control over acts already found to be infringing. Insofar as the Court

³The "collective pleading" cases on which the Individual Defendants rely bear no resemblance to the present circumstances. See, e.g., Robbins v. Oklahoma, 519 F.3d 1242, 1250 (10th Cir. 2008) (tortious acts of different groups of defendants were "entirely different in character" and therefore inappropriately grouped in a single allegation); In re Ernie Haire Ford, Inc., 459 B.R. 824 (Bankr. M.D. Fla. 2011) (lumping 42 different defendants into various general classes without any allegations explaining what wrongful acts were committed); Pietrangelo v. NUI Corp., 2005 WL 1703200, at *10 (D.N.J. July 18, 2005) (complaint failed even to mention nine of the defendants and lumped all together into general allegations that all defendants breached all of their fiduciary duties); Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc., 170 F.R.D. 361, 375 (S.D.N.Y. 1997) (unclear which corporation is the parent of, or controlled or dominated, the others, rendering it unclear which entity's corporate veil was to be pierced). Unlike the defendants in those cases, Ossenmacher and Rudolph cannot be divorced from either ReDigi or each other. They created, manage, operate, and direct all activities of their company found infringing and set forth in detail in the FAC.

has already held that ReDigi itself infringes, there is no question that the FAC adequately pleads what ReDigi's infringing acts are. Under the law noted above, the only further question is whether Ossenmacher and Rudolph "participate in, exercise control over or benefit from" those same infringing acts. Lime Group, 784 F. Supp. 2d at 437. The FAC pleads specifically that they did. Accordingly, there is no need to set out separately and redundantly that Ossenmacher and Rudolph "personally participated in," "directed," or "supervised" each act described in each paragraph.

Moreover, even viewed from the myopic perspective of their motion, the FAC clearly alleges the elements of each tort against Ossenmacher and Rudolph. It alleges that Capitol owns the list of more than 500 recordings attached as Exhibits A and B (¶¶ 13-14, 17-18); various operations and acts in the ReDigi system violate Capitols' rights of reproduction and distribution (¶¶ 20-23) in those recordings; and Ossenmacher and Rudolph founded and own the company, operate the company, and participate in and control all the aforementioned acts constituting violation of the reproduction and distribution rights (¶¶ 6-7, 19, 37). Those allegations satisfy the elements of direct infringement as specified by the Court. See Summary Judgment Order at 4.⁴

With regard to vicarious infringement, the FAC alleges that Ossenmacher and Rudolph own ReDigi and "supervised and directed" its infringing acts (¶¶ 6-7, 37), thus satisfying the elements also set out by the Court on summary judgment. See Summary Judgment Order at 16

⁴ The cases relied on by the Individual Defendants are not on point. In Carell v. The Shubert Organization, Inc., 104 F. Supp.2d 236 (S.D.N.Y. 2000), the Court found valid copyright claims stated against the defendant that as an owner of the corporate entities had authorized or licensed the uses in question. Id. at 271. The claim only failed against those defendants that were alleged to have done nothing more than receive a "credit" on the infringing work and a copy of a letter threatening the plaintiff with legal action. Id. Plainly, the Individual Defendants here do not stand in any comparable position. Likewise, the Jacobs cruise line case is inapposite as addressed in Point II above.

(vicarious liability requires the right and ability to supervise the infringing activity and a direct financial interest in that activity). Individual owners of closely held corporations are typically deemed to have satisfied the direct financial interest element of vicarious liability. See, e.g., EMI Entertainment, 806 F. Supp. 2d at 711 (“Bienvenido and Isabel were 50% owners of the Karen Defendants and therefore stood to benefit from those companies' infringing activity”); Centrifugal Force, 2011 WL 744732 (as CEO and principle owner, individual defendant “has a financial interest in the company and is in a position to supervise and control” its employees’ activities); Peer Int’l Corp. v. Luna Records, Inc., 887 F. Supp. 560, 565 (S.D.N.Y. 1995) (sole shareholder and director who ran affairs of corporate defendant held vicariously liable).

With regard to contributory infringement, Capitol has likewise sufficiently plead that Ossenmacher and Rudolph had knowledge of the infringing activity and material contributed to that activity. See Summary Judgment Order at 14 (contributory infringement requires that defendant have knowledge of and materially contribute to infringing activity). The FAC alleges, among other things, that “Defendants materially contributed to and induced infringing conduct,” and “knowingly and willfully offered [users] financial incentives for participating in unauthorized reproductions and distributions of Plaintiff s sound recordings.” FAC ¶ 36. It further alleges specifically that Ossenmacher and Rudolph “personally participated in, and supervised and directed” these infringing acts; “personally conceived of” the infringing technology; and “directed and approved” all the acts the Court found to be infringing. Finally, in finding ReDigi liable for contributory infringement, this Court specifically noted that ReDigi’s “officers presumably understood the likelihood that use of ReDigi’s service would result in infringement.” These allegations, bolstered by the Court’s ruling, are more than sufficient to state a claim for contributory infringement against the Individual Defendants. See Centrifugal

Force, 2011 WL 744732 (denying summary judgment where question of fact whether CEO had knowledge of infringement); Michael Aram, 2006 WL 510527 (refusing to dismiss contributory infringement claim against corporation's president alleged to have "knowingly participated" in infringing activity); Wings, 218 F. Supp. 2d at 284-85 (refusing to dismiss contributory infringement claim against 100% owner alleged to be responsible for daily operation of corporate defendant).⁵

V. The Court Should Grant Capitol Leave to Replead if it Grants the Individual Defendants' Motion to Dismiss

For all the reasons set forth above, the Individual Defendants' motion to dismiss is baseless and should be denied. However, in the unlikely event that the Court were to grant the motion, then it should likewise grant Capitol leave to replead.

Pleadings are designed to provide an opposing party with notice of the claims or defenses to be litigated, and "mere technicalities' should not prevent cases from being decided on the merits." Monahan v. New York City Dep't of Corrections, 214 F.3d 275, 283 (2d Cir. 2000). Accordingly, the Second Circuit has emphasized that "the usual practice is to grant leave to amend the complaint.... Although the decision whether to grant leave to amend is within the discretion of the district court, refusal to grant leave must be based on a valid ground. Where the possibility exists that the defect can be cured and there is no prejudice to the defendant, leave to amend at least once should normally be granted as a matter of course." Oliver Schools, Inc. v. Foley, 930 F.2d 248, 253 (2d Cir. 1991) (internal quotations and citations omitted). Accord Simmons v. Abruzzo, 49 F.3d 83, 86-87 (2d Cir. 1995) ("if the court dismisses the complaint for

⁵ The Individual Defendants also argue that there is no separate tort of inducement. As the Court noted in the Summary Judgment Order, "[d]isagreement exists over whether 'inducement of infringement' is a separate theory of liability for copyright infringement or merely a subset of contributory liability." Summary Judgment Order at 16 n.9. Inasmuch as the Court has not yet resolved that issue, there is no basis for dismissing the inducement claim.

failure to comply with Rule 8, it should generally give the plaintiff leave to amend. This is especially true when the complaint states a claim that is on its face nonfrivolous”).

To the extent there are any pleading defects in the FAC – and Capitol strongly contends there are not – they are clearly technical in nature and can easily be remedied. This Court has already ruled as a matter of law that the ReDigi service infringed Capitol’s copyrights, and the Individual Defendants’ personal participation in developing and implementing that service provides a sufficient basis for holding them individually liable for such infringement under the well established law of this Circuit. Thus, if the Court believes that further details are required to state a claim against the Individual Defendants, Capitol should be given an opportunity to provide such details based on the substantial record evidence that exists to support its claims.

The Individual Defendants’ conclusory claims of delay and prejudice are without merit, particularly where Capitol does not seek any additional discovery in order to support the new claims.⁶ See, e.g., State Teachers Retirement Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981) (lower court abused discretion in denying leave to amend where “amendment will not involve a great deal of additional discovery” since the relevant parties had already been deposited); Forbes & Wallace, Inc. v. Chase Manhattan Bank, 79 F.R.D. 563, 567 (S.D.N.Y. 1978) (rejecting claim of undue delay where “[m]uch of the relevant discovery may well have

⁶ The cases on which the Individual Defendants rely all involve situations of egregious delay in which the attempted amendment came after a motion for summary judgment had been filed. See, e.g., Christine Falls Corp. v. Algonquin Power Fund, Inc., 401 F. App’x. 584 (2d Cir. 2010); Krumme v. Westpoint Stevens, Inc., 143 F.3d 71 (2d Cir. 1998); Cresswell v. Sullivan & Cromwell, 922 F.2d 60 (2d Cir. 1990); Kaplan v. Rose, 49 F.3d 1363 (two previous amendments); Henderson v. City of Meriden, 2013 WL 2149706 (D. Conn. May 16, 2013) (two previous amendments); Scott v. City of New York Dep’t of Corr., 2007 WL 4178405 (S.D.N.Y. Nov. 26, 2007); Cartier, Inc. v. Four Star Jewelry Creations, Inc., 2004 WL 169746 (S.D.N.Y. Jan. 28, 2004) (motion made nine days after anticipated trial date that had already been extended eight months); CL-Alexanders Laing & Cruickshank v. Goldfeld, 739 F. Supp. 158 (S.D.N.Y. 1990). No such circumstances are present here.

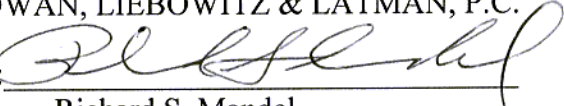
already taken place in this or other actions. Thus, the Court is not persuaded that the prospect of substantial additional pretrial delay calls for denying plaintiffs' motion [to amend]”). Indeed, the only prejudice here would be to Capitol, which was assured at the outset of the case by ReDigi that there would be adequate resources to satisfy any judgment that might be obtained, only to learn during discovery that ReDigi has not been adequately funded to cover the substantial liability it faces for its infringing conduct. Accordingly, if the Court grants the Individual Defendants' motion to dismiss, it should grant Capitol leave to replead under the liberal pleading standard of Fed. R. Civ. P. 15.

CONCLUSION

For all of the foregoing reasons, the Individual Defendants' motion to dismiss should be denied.

Dated: New York, New York
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