IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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PRELIMINARY STATEMENT

In an attempt to overcome the failings of the First Amended Complaint ("Complaint") that Mr. Ossenmacher and Prof. Rudolph (the "Individual Defendants") identified in their Memorandum of Law in support of their Motion to Dismiss (hereinafter "Motion" or MTD"), ECF No. 127, Plaintiff Capitol Records, LLC ("Plaintiff") improperly seeks to interject purported evidence into its opposition brief that, if anything, is most notable for its complete absence from the Complaint itself. *See* Mem. of Law in Opp. to Individual Defs.' Mot. to Dismiss Pl.'s First Am. Compl. 5, ECF No. 133 (hereinafter "Opposition" or "Pl.'s Opp.") (*i.e.*, the summary judgment record). Plaintiff's inappropriate attempt to have the Court overcome these missing allegations by examining the summary judgment record (instead of the Complaint) is all but a concession that the Complaint is devoid of the specific allegations necessary to state a claim against the Individual Defendants. As the Second Circuit has explained, a "plaintiff should not so easily be allowed to escape the consequences of its own failure." *Cortec Indust., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991).

When stripped of this improper "evidence," the reality of Plaintiff's Complaint becomes obvious: it contains only two conclusory allegations that make any reference to the Individual Defendants. Am. Compl. ¶ 33; 37. As explained in the Individual Defendants' Motion, such cursory allegations are insufficient to satisfy *Twombly/Iqbal*. Further, even if this Court considers Plaintiff's un-pled allegations (which, as explained below, it should not), Plaintiff still fails to point the Court to the specific facts needed to state each claim it is attempting to pursue against the Individual Defendants. Therefore, dismissal of the Complaint would still be appropriate.

Nor should Plaintiff be allowed to amend its failed pleading for a second time. Plaintiff already had the opportunity to state its allegations against the Individual Defendants with

particularity and either could not or chose not to do so in a legally sufficient manner. Plaintiff's contention that it will be prejudiced by ReDigi's supposed inability to pay if not permitted to replead is without foundation. This Court should not give Capital another opportunity to do what it could have tried to do months ago and which has already delayed the ultimate resolution of the legal and factual issues in this case. If Plaintiff truly had the facts available to assert viable claims against the Individual Defendants, it should have done so at its first opportunity, and as explained in the Individual Defendants' Motion, the onus of Plaintiff's pleading failure falls on the Plaintiff and not on the Individual Defendants or this Court.

ARGUMENT

A. The First Amended Complaint Fails to State Claims Against the Individual Defendants and Should be Dismissed.

1. Plaintiff's Opposition Inappropriately Attempts to Transform the Individual Defendants' Motion to Dismiss into a Motion for Partial Summary Judgment.

Instead of reviewing the Complaint and the allegations as pled, Plaintiff argues that this Court should instead consider the vast summary judgment record – including the Court's Order, the documents filed in connection with the cross-motions, and the declarations previously filed by the Individual Defendants. Pl.'s Opp. at 3-10. This material is not properly before the Court on the instant motion. And even if these materials did support Plaintiff's allegations (which Individual Defendants dispute), one has to wonder why Plaintiff ultimately failed to include them in its Complaint. The Individual Defendants are unable to respond to (and seek dismissal of) allegations that are not actually made against them, but instead, only referred to generically in the record, and they should not be forced to defend against Plaintiff's vague and amorphous assertions that the bases for its claims lie somewhere in the vast record before the Court.

In order to make use of documents outside the four corners of the complaint in opposing a motion to dismiss, a "plaintiff's *reliance* on the terms and effect of a document in drafting the

complaint is . . . necessary . . . ; mere notice or possession is not enough." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (emphasis in original) (citing *Cortec*, 949 F.2d at 47-48). Plaintiff here does contend that it "relied" on any of these newly cited documents in drafting its Complaint – nor could it. As the Individual Defendants explained in their opening Motion, the Complaint is a near-complete facsimile of the original complaint written prior to the existence of the very materials on which Plaintiff would now have to contend that it relied. *See* MTD at 11. Plaintiff's lack of any specific reliance in drafting the Complaint on the outside documents it now seeks to have this Court consider is fatal to its argument. Nearly the entire Complaint, save the two conclusory and wholly insufficient paragraphs referenced above, is cut and pasted from the initial complaint except that "Defendant" was changed to "Defendants."

Even if Plaintiff, contrary to temporal logic, relied on these unreferenced materials in drafting its Complaint, the Court could only consider them in evaluating a motion to dismiss in three narrow exceptions to the general rule that extraneous materials should not be considered on a motion to dismiss: (1) where the document is integral to the complaint;[1] (2) where the document is incorporated by reference; or (3) where judicial notice may be taken of the document. Plaintiff contends only that the judicial notice exception applies.[2] *See* Pl. Opp. at 8. It

[1] Plaintiff does not contend that the integral exception applies here. While "a document 'upon which [the complaint] *solely* relies and which is *integral to the complaint*' may be considered by the court in ruling on such a motion," *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (quoting *Cortec*, 949 F.2d at 47) (emphasis in original), materials are only "integral" where the complaint "is replete with references to" those materials and "requests judicial interpretation of their terms." *Chambers*, 282 F.3d at 153 n.4. The Complaint does not meet this high standard.

[2] Plaintiff also states, without citation to a single authority, that Paragraph 37 of the Complaint incorporates "the Court's detailed descriptions and analysis of the ReDigi service in its summary judgment opinion." Pl.'s Opp. at 7. But "[t]o be incorporated by reference, the [c]omplaint must make a clear, definite and substantial reference to the documents." *Thomas v. Westchester Cnty. Health Care Corp.*, 232 F. Supp. 2d 273, 275 (S.D.N.Y. 2002). In practice, this means that the complaint must identify the specific material that it seeks to incorporate and make repeated and

does not, nor do any of the other exceptions apply.

In general, a court can 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." *Smart v. Goord*, 441 F. Supp. 2d 631, 637 (S.D.N.Y. 2006) (citing *Calcutti v. SBU, Inc.*, 224 F. Supp. 2d 691, 696 (S.D.N.Y. 2002)). If the court takes judicial notice, however, it only does so "in order 'to determine what statements [they] contained' – but '*again not for the truth of the matters asserted.*'" *Roth*, 489 F.3d at 510 (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)) (emphasis in original); *see also Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998). Thus, for example, the Second Circuit has reversed district courts that consider "extraneous documents . . . to provide the reasoned basis for [their] conclusion . . . ." *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006).

The judicial notice exception does not apply here, and even if it did, this Court could not properly consider the documents to strengthen the insufficient allegations of the Complaint as Plaintiff suggests.[3] This is not the prototypical situation where a *defendant* asks a court to take

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frequent quotations to that material. *Id.*; *see also Goldman v. Belden*, 754 F.2d 1059, 1066 (2d Cir. 1985). The Complaint here fails to do so.

[3] Plaintiff's cases arguing that judicial notice is appropriate are inapposite. The court in *Sun Micro Medical Technologies Corp. v. Passport Health Communications, Inc.*, No. 06 Civ. 2083, 2007 WL 2230082 (S.D.N.Y. July 31, 2007), for example, only considered the allegations contained within the four corners of the complaint when reaching its conclusion. *Channer v. Loan Care Service Center*, No. 3:11cv135, 2011 WL 5238878 (D. Conn. Nov. 1, 2011), involved materials that were actually attached to the *defendants'* briefing. The court in *Tokio Marine v. Canter*, No. 07 Civ. 5599, 2009 WL 2461048 (S.D.N.Y. Aug. 11, 2009), took judicial notice of a stipulation filed in a state court proceeding involving the same parties or their privies only in order to determine whether the plaintiff's federal lawsuit was barred by *res judicata*. And in *Spence v. Senkowski*, No. 91-CV-955, 1997 WL 394667 (N.D.N.Y. July 3, 1997), the *defendants* attached an affidavit previously filed by the plaintiff in the same case in *support* of their motion

judicial notice of an extraneous document in order to *support* its motion to dismiss. *See, e.g., In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423 (S.D.N.Y. 2011); *Mosdos Chofetz Chaim, Inc. v. Vill. of Wesley Hills*, 815 F. Supp. 2d 679 (S.D.N.Y. 2011). Instead, Plaintiff (the author and master of its own Complaint) makes the extraordinary and unprecedented request for this Court to take judicial notice of materials it never relied upon or referenced in order to *save* its own Complaint from dismissal – materials that it could have (and should have, if able) cited and quoted so that Mr. Ossenmacher and Prof. Rudolph could truly understand the nature of the claims asserted against them. Plaintiff's novel "hide the ball" approach is improper and it has not cited a *single* case where a plaintiff was permitted or even sought to do what it is attempting to do here. Moreover, Plaintiff essentially concedes that the statements made in these extraneous documents would need to be taken as true. *See* Pl.s' Opp. at 4-5; 12-15; 17-19.[4] But this is improper, and Plaintiff cannot preserve its inadequate Complaint by asking this Court to take judicial notice of materials for their supposed truth.

2. Plaintiff Must Do More Than Simply Plead that the Individual Defendants "Participated, Controlled, or Benefited" From The Corporation's Infringement.

Despite conceding that *Twombly* applies in copyright infringement actions, Pl.'s Opp. at 9, Plaintiff claims that it *only* needs to allege that ReDigi's directors "personally participated in, exercised control over, or benefited from" the corporation's infringement, and that its Complaint meets this low standard. Pl.'s Opp. at 10-15. But this is wrong, as such a conclusory allegation is

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to dismiss. Plaintiff has not cited a *single* case supporting its argument that judicial notice of extraneous documents can be taken in *opposition* to a motion to dismiss.

[4] For instance, Plaintiff states, "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." Pl.'s Opp. at 12. For the reasons set out above, the content of these statements cannot be considered for their truth but only, if at all, for the fact that Mr. Ossenmacher and Prof. Rudolph submitted declarations. These submissions cannot provide support for Capital's insufficient Complaint.

precisely the type of threadbare recital of a claim's elements that *Twombly* held to be insufficient. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It is unsurprising then, that Plaintiff relies on just two easily distinguishable motion to dismiss cases.[5] And Plaintiff's primary summary judgment cases, *Lime Group* and *Usenet*, are wholly distinguishable as they involved specific findings of fact that Plaintiff has failed to allege in its own Complaint.[6]

In comparison, Mr. Ossenmacher and Prof. Rudolph have provided this court with three factually similar cases that Plaintiff fails to adequately distinguish. *See* MTD at 7-9. The futility of Plaintiff's adequate pleading argument forces it to come back to the summary judgment record in its concluding remarks of this section (Pl.'s Opp. at 15), which, for the reasons stated above, may not be considered at this juncture. Consequently, Plaintiff's second argument also fails.

3. Collective-Style Pleading Cannot Save Plaintiff's First Amended Complaint.

Plaintiff's third argument is that it can rely on collective-style pleading, and that it is

[5] Plaintiff only relies on two motion to dismiss cases in this section of its Opposition: *Michael Aram, Inc. v. Laurey*, No. 05 Civ. 8380, 2006 WL 510527 (S.D.N.Y. Mar. 1, 2006) and *Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280 (E.D.N.Y. 2002). *Michael Aram* is easily distinguishable inasmuch as it relied on the Second Circuit's *Twombly* standard (later overturned by the Supreme Court) in concluding that the complaint was sufficient. 2006 WL 510527, at *3. Similarly, *Wings* turned on a pre-*Twombly* interpretation of Rule 8 notice pleading that is no longer tenable. 218 F. Supp. 2d at 284 (relying on *Conley v. Gibson*, 355 U.S. 41, 47 (1957), which was explicitly overruled in *Twombly* to find pleading sufficient). In addition, the individual defendant in *Wings* was alleged to be the 100% shareholder of the corporate defendant and had financially benefited from the copyrighting activity. No such financial interest benefit allegation is present here, MTD at 13, and Plaintiff does not credibly argue to the contrary.

[6] *See, e.g., Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398, 438 (S.D.N.Y. 2011) ("The evidence establishes that [the individual defendant] . . . benefited from many of the activities that gave rise to [the corporate defendant's] liability. . . . This evidence, taken together, also establishes that the [individual defendant] knew about the infringement being committed through [the corporate defendant's service]."); *Arista Records LLC v.Usenet.com, Inc.*, 633 F. Supp. 2d 124, 158 (S.D.N.Y. 2009) ("[One corporate defendant] has never had employees; rather, its business is carried out by [the other corporate defendant's] employees, all of whom (besides [the individual defendant]) were terminated by August 2008. [The individual defendant] is the director and sole shareholder of both companies, and he and other employees of [one corporate defendant] have expressly admitted his ubiquitous role in the companies' activities.").

"abundantly clear" that its allegations against "Defendants" encompass ReDigi and the Individual Defendants. Pl.'s Opp. at 15-16. As with Plaintiff's other arguments, this section of its Opposition relies on one distinguishable summary judgment holding (*Usenet*). Plaintiff is unable to cite a single motion to dismiss case that supports its position. Because the *Usenet* court made specific findings of fact on the evidentiary record at summary judgment, 633 F. Supp. 2d at 158, and no such evidentiary record (at least as to the Individual Defendants) exists here, the case is inapposite. The collective pleading cases cited in the Individual Defendants' Motion – all of which held that this form of pleading was inappropriate *at this stage of the case* – bear far more resemblance to the present case than Plaintiff's sole summary judgment decision. This Court should similarly conclude that Plaintiff's collective pleading is inappropriate.[7]

4. The Complaint Fails to Adequately Plead the Elements of Each Claim Allegedly Brought Against the Individual Defendants

Plaintiff's final argument is that "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," and that the complaint adequately states a claim for each of its asserted claims against them. *Id*. at 16-19. By its own terms, this section of Plaintiff's Opposition also turns on the Court first taking inappropriate judicial notice of its summary judgment order and then using its opinion, for the truth of the matters asserted therein, to make certain findings against Mr. Ossenmacher and Prof. Rudolph as if such assertions had been fully pled in the Complaint. Pl.'s Opp. at 16-17. Because the Court cannot use the summary judgment order for

[7] Plaintiff's attempt to incorporate the paragraphs preceding its single allegation against both Individual Defendants, Pl.'s Opp. at 7, fails for this reason as well. *See United States v. Int'l Longshoremen's Ass'n*, 518 F. Supp. 2d 422, 463 n. 75 (E.D.N.Y. 2007) ("[T]he practice of simply incorporating factual allegations en masse . . . against numerous defendants has been held to violate Rule 8(a)(2) even where the factual allegations at issue were incorporated from an earlier portion of the complaint rather than from an external document.") (citing *Discon Inc. v. NYNEX Corp.*, No. 90-CV-546A, 1992 WL 193683, at *16 (W.D.N.Y. June 23, 1992); *Koch v. Hickman*, No. CV F 06-171 AWI SMS P, 2007 WL 586695, at *2 (E.D. Cal. Feb. 22, 2007)).

this purpose and because Plaintiff does not seriously contend that its allegations, absent the summary judgment order, satisfy *Twombly*,[8] Plaintiff's last argument fails.

Even if the Court considers the summary judgment record, however, Plaintiff has still failed to state tenable claims against the Individual Defendants. For instance, Plaintiff can point to no documents showing the Individual Defendants' supposed financial interest in the infringing acts, and instead asks the Court to imply such benefit based on three summary judgment cases. Pl.'s Opp. at 18 (citing cases). Similarly, Plaintiff directs the Court to no documents supporting an assertion that the Individual Defendants had actual knowledge that ReDigi allegedly infringed on Plaintiff's copyrights, and instead only quote a portion of the summary judgment order stating that the Individual Defendants "*presumably* understood the likelihood" of infringement. Pl.'s Opp. at 18 (emphasis added). This statement is hardly the same as a finding (or even allegation) of actual knowledge. Finally, Plaintiff cannot allege that Mr. Ossenmacher and Prof. Rudolph acted with scienter, regardless of whether they inappropriately rely on the summary judgment record. Consequently, Plaintiff's Complaint fails to satisfy *Twombly* even if the Court considers this inappropriate summary judgment evidence and dismissal is warranted.

B. <u>The First Amended Complaint Should be Dismissed with Prejudice.</u>

In its Opposition, Plaintiff reveals its *sole* motivation for adding the Individual Defendants to the complaint: ReDigi's supposed inability "to cover the substantial liability it faces for its infringing conduct." Pl.'s Opp. at 21. This is a legally insufficient reason to allow Plaintiff yet another opportunity to amend the Complaint this late in the litigation, and consequently, dismissal with prejudice is warranted.

[8] *See* Pl.'s Opp. at 17-19 (citing the Court's summary judgment order for each of the claims it is apparently pursuing against Mr. Ossenmacher and Prof. Rudolph); *Id*. at 19 (citing the same pre-*Twombly* motion to dismiss cases in support of this argument that are easily distinguishable for the reasons set out in note 5, *infra*).

In *Cartier, Inc. v. Four Star Jewelry Creations, Inc.*, No. 01 Civ. 11295, 2004 WL 169746 (S.D.N.Y. Jan. 28, 2004), the plaintiffs sought to amend their complaint for a second time – two years after the initial complaint was filed, and after discovery had been completed – in order "to add the Presidents and Vice Presidents of the three corporate defendants on the theory that a corporate officer is individually liable for the torts the officer commits." Plaintiffs there specifically noted that they were concerned about the corporate defendant's ability and willingness to pay any monetary award. *Id*. at **2-3. Judge Motley denied plaintiffs another opportunity to amend their complaint, concluding that this lapse in time constituted undue delay:

> The factual possibility that a corporate defendant will not be able to satisfy a money judgment attends every litigation. Further, the theory for relief against the proposed defendants that plaintiffs advocate for was known to them at the time they filed their initial and first amended complaints. Given that the facts and the theory were known to the plaintiffs previously, and they do not offer a foundation to explain their sudden preoccupation with defendants' seeming inability or unwillingness to pay, the court is not persuaded that the plaintiffs have provided a satisfactory and valid reason for their delay.

Id. at *3 (citing cases). Judge Motley found that the corporate defendants' reliance on the plaintiffs' theory for two years coupled with the above established that the defendants would be unduly prejudiced if it allowed plaintiffs to add the individual defendants to their second amended complaint. *Id*. at *4.

This case is on all fours with *Cartier*. Just as in *Cartier*, the Plaintiff here sought to add corporate officers to the action nearly two years after the initial complaint was filed and after discovery is all-but complete. Here, despite knowing that Mr. Ossenmacher and Prof. Rudolph were directors of ReDigi at least since February 15, 2012 (when ReDigi served its initial disclosures on Plaintiff), Plaintiff only sought to add Mr. Ossenmacher and Prof. Rudolph as defendants on August 9, 2013 – 541 days later – well after it had succeeded on its summary judgment motion against ReDigi. As in *Cartier*, the Plaintiff here sought leave to amend to add

the Individual Defendants because, allegedly, "ReDigi itself has insufficient funds to satisfy even a modest damage award in this case." Finally, like in *Cartier*, the facts underlying the Individual Defendants' alleged liability were known well before Plaintiff sought to add them to the action.

While the Court previously granted Plaintiff the opportunity it requested to add Mr. Ossenmacher and Prof. Rudolph as defendants in this matter, Plaintiff's pleading was wholly deficient, and this Court should not allow Plaintiff yet another opportunity to further delay this case. Moreover, another amendment would be futile because, as discussed above, Plaintiff has pointed to nothing in the summary judgment record (even if it was allowed another opportunity to actually plead it into the Complaint) that could plausibly allege that Individual Defendants' were personally liable for any of ReDigi's actions.

Plaintiff's decision not to seek to add Mr. Ossenmacher and Prof. Rudolph as parties until after it had won its motion for partial summary judgment and after discovery was all but over (and then, only in a conclusory and unsupported pleading) constitutes inexcusable and undue delay and is highly prejudicial. This Court should conclude, as did the court in the *Cartier*, that Plaintiff knew of the facts and theories with respect to the Individual Defendants much earlier in this action or that such a repleading would be futile. Leave to replead should be denied.

CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request the Court grant their motion in its entirety and dismiss the Amended Complaint, as against them, with prejudice.

Dated: October 18, 2013

/s/ Seth R. Gassman

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