

**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)

**MEMORANDUM OF LAW IN SUPPORT OF
INDIVIDUAL DEFENDANTS'
MOTION FOR RECONSIDERATION**

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Pursuant to Rule 6.3 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York and Rules 8, 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, Mr. John Ossenmacher and Prof. Larry Rudolph (the “Individual Defendants”) respectfully submit this memorandum of law in support of their Motion for Reconsideration (“Motion”) of the Court’s September 2, 2014 Opinion and Order, ECF No. 148 (“Order”), denying the Individual Defendants’ motion to dismiss, with prejudice, Capitol Record LLC’s (“Capitol” or “Plaintiff”) claims for copyright infringement.¹

I. PRELIMINARY STATEMENT

Although Individual Defendants recognize that motions for reconsideration should not be used to re-litigate issues that have already been decided by the Court, *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995), reconsideration is warranted here because the Court did not address several of Individual Defendants’ arguments that, if considered, Individual Defendants believe would lead to dismissal. In particular, because Plaintiff’s Amended Complaint is devoid of facts supporting each of the elements of each of the copyright infringement claims against the Individual Defendants, the Court should dismiss these claims with prejudice as to the Individual Defendants.

II. BACKGROUND

A. The Complaint

Plaintiff filed its initial complaint against just ReDigi on January 6, 2012. Compl., ECF

¹ Individual Defendants are filing their answer to Plaintiff’s Amended Complaint concurrently with the present motion out of an abundance of caution and without waiving any of their rights or the arguments made herein. As the District of Connecticut noted, although it is not clear “whether a motion to reconsider a ruling on a motion to dismiss extends the time for filing an answer until the motion for reconsideration is decided,” *Franco v. Yale Univ.*, No. 3:00 CV 1927(GLG), 2002 WL 63803, at *4, it is clear that filing an answer before a court rules on the present motion does not waive any of the answering parties’ rights. *Doe v. Barrett*, No. 3:01CV519(PCD), 2006 WL 3741825, at *3 (D. Conn. Dec. 19, 2006).

No. 1 (filed Jan. 6, 2012). In August 2013, only after this Court partially granted Plaintiff's motion for partially summary judgment as to Plaintiff's claims against ReDigi, *see* Mem. and Order, ECF No. 109 (filed March 30, 2013), Plaintiff requested leave to amend its complaint, in part to add Mr. Ossenmacher and Prof. Rudolph as defendants. Plaintiff claimed that it "ha[d] established strong grounds for their personal liability," presumably through the discovery record, and questioned ReDigi's ability to pay any monetary judgment. ReDigi responded on August 7, 2013, writing that the Individual Defendants "d[id] not satisfy the legal standard for personal liability" because neither "own[s] a controlling share of ReDigi," neither is "solely in charge of the company – they sit on a board that is comprised of 4 active members," and neither "has been paid a salary or received any other form of remuneration from ReDigi." The Court held a conference on these letters on August 9, 2013 and granted Plaintiff leave to amend to add the Individual Defendants to the action.

B. The Amended Complaint

Plaintiff filed its Amended Complaint on August 30, 2013. Am. Compl., ECF No. 118 (filed Aug. 30, 2013). The Amended Complaint contains just four paragraphs with allegations specific to the Individual Defendants:

- Paragraph 6: "Upon information and belief, Defendant John Ossenmacher ('Ossenmacher') is an individual residing in Cambridge, MA. Mr. Ossenmacher is the Chief Executive Officer and a founding owner of ReDigi"
- Paragraph 7: "Upon information and belief, Defendant Larry Rudolph a/k/a Lawrence Rogel ('Rudolph') is an individual residing in Cambridge, MA. Mr. Rudolph is the Chief Technology Officer and a founding owner of ReDigi."
- Paragraph 33: "ReDigi's website also boasted that after a file was 'verified' for eligibility, ReDigi ensured that the original user would not 'willfully use/possess any copies of the sold item,' presumably by deleting the original source file from the user's computer and synchronized devices. But even ReDigi's founder and CEO, *Ossenmacher*, **has acknowledged publicly that there is no way to ensure absolutely that users are not retaining copies of the files they upload to ReDigi's service**, perhaps on other devices or media that ReDigi's software cannot reach.

Regardless, even if the source file is effectively deleted from a user's computer, an infringing copy of that file must be uploaded and downloaded – copied – for the ReDigi 1.0 service to function.”

- **Paragraph 37:** “*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.”

Am. Compl. ¶¶ 6, 7, 33, 37 (emphasis added). Paragraphs 6 and 7 have no bearing on any of the claims as they merely address the Individual Defendants' alleged job titles and residencies.

Paragraph 33 also does not support the claims at issue in this case as, even assuming it is true, it does not tend to prove a necessary element of any of Plaintiff's claims. Paragraph 37 is the only paragraph where Plaintiff makes any attempt to allege that Individual Defendants “participated in, and supervised and directed” certain undescribed “infringing acts.”

C. The Motion to Dismiss Order

In determining that the Complaint adequately pled each of the infringement claims against the Individual Defendants, this Court held that “[a]t least for the purposes of this motion, there is no need to separately plead the elements of the infringing activities as to the Individual Defendants: their liability is predicated on their direction of and supervision over ReDigi's infringing activity.” Order at 5. The Court reasoned that there was no need for Capitol to “separately plead each theory of liability as to the Individual Defendants” because “a corporate officer is personally liable for the corporation's infringement if he had the ability to supervise the activity and a financial interest in it, or if he personally engaged in the infringing activity.” Order at 5 (citing *Arista Records LLC v. Lime Grp.*, 784 F. Supp. 2d 398, 437 (S.D.N.Y. 2011)). Thus, according to the Court, because the Amended Complaint pled that “ReDigi engaged in various infringing activities and that these activities were undertaken at the behest of or with the

approval of the Individual Defendants, who were co-owners of ReDigi” it sufficiently stated the primary and secondary infringement claims² against the Individual Defendants. *Id.*³

III. ARGUMENT

A. Standard of Review

A court should grant a motion for reconsideration when “the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” *Shrader*, 70 F.3d at 257 (citing *Schonberger v. Serchuk*, 742 F. Supp. 108, 119 (S.D.N.Y. 1990); *Adams v. United States*, 686 F. Supp. 417, 418 (S.D.N.Y. 1988)). Simply put, “[t]he purpose of a motion for reconsideration . . . is to draw a court’s attention to its prior missteps, whatever they may have been.” *Small v. Nobel Biocare USA, LLC*, Nos. 05-3225, 06-683, 2012 WL 952396, at *2 n.5 (S.D.N.Y. Mar. 21, 2012).

B. The Amended Complaint Fails to Plead Facts Supporting Requisite Elements of Each Claim.

1. A Complaint Must Allege a Factual Basis Supporting Each Element of Each Claim.

Under *Twombly* pleading standards, a plaintiff is required to “plead adequate factual content *supporting each element of the claim . . .*” *Paige v. New York City Police Dep’t*, 10-

² The term “secondary” copyright infringement refers to liability “for infringement committed by another.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (“*Grokster III*”) (quoting *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 434 (1984)).

³ In reaching its conclusion, the Court relied on two *summary judgment* cases cited extensively in Plaintiff’s brief: *Arista Records LLC v. Lime Group*, 784 F. Supp. 2d 398 (S.D.N.Y. 2011) and *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124 (S.D.N.Y. 2009). As discussed herein, these cases are inapposite inasmuch as they contain factual findings not alleged in the Amended Complaint.

CV-3773 (SLT) (LB), 2012 WL 1118012, at *4 (E.D.N.Y. Mar. 30, 2012) (emphasis added).⁴

And, as this Court acknowledged, “a pleading that only offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” Order at 2 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); see also *Iqbal*, 556 U.S. at 678-79 (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”). Thus, “where a complaint lacks ‘any description of acts that could lead to the conclusion of direct copyright [] infringement, or allegations of authorization or participation that would indicate vicarious liability or contributory infringement,’ claims sounding in those theories must be dismissed.” *Warren v. John Wiley & Sons, Inc.*, 952 F. Supp. 2d 610, 619 (S.D.N.Y. 2013) (quoting *Carell v. Shubert Org.*, 104 F. Supp. 2d 236, 271 (S.D.N.Y. 2000)).⁵

Despite extensive discovery into ReDigi’s operations prior to adding the Individual

⁴ See also *Home & Nature Inc. v. Sherman Specialty Co.*, 322 F. Supp. 2d 260, 266 (E.D.N.Y. 2004) (examining whether the plaintiff had pled sufficient factual detail to support each element of a copyright infringement claim); *Wilson v. Birnberg*, 667 F.3d 591, 595 (5th Cir. 2012) (holding that a plaintiff must allege facts supporting a cause of action in order to state a cognizable claim); *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1202 (10th Cir. 2011) (same); *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008) (holding that a plaintiff must at least “allege sufficient facts to state the elements” of the claim); see *c.f.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (“[W]e begin by taking note of the elements a plaintiff must plead to state a claim . . .”).

⁵ See *Pegasus Imaging Corp. v. Northrop Grumman Corp.*, No. 8:07-CV-1937-T-27 (EAJ), 2008 WL 5099691, at *2 (M.D. Fla. Nov. 25, 2008) (relying on Southern District of New York precedent and dismissing vicarious and contributory copyright infringement claims because the complaint’s allegations that the individual defendants’ “knowledge regarding, its right and ability to supervise, its material contribution to and its receipt of direct financial benefit as a result of, the infringing conduct of both [direct infringers]” were “vague and conclusory”) (internal quotations omitted); *Jacobs v. Carnival Corp.*, No. 06 Civ. 0606 (DAB), 2009 WL 856637, at *5-6 (S.D.N.Y. Mar. 25, 2009) (finding that the plaintiff’s allegations that “all of the remaining defendants have publicly performed and presented significant portions, and/or all, of Grease and/or other famous and enormously popular Broadway, off Broadway, other plays and other works and said remaining defendants . . . planned, prepared, authorized, developed, performed and/or presented such performances and presentations” were insufficient under *Twombly*) (internal quotations omitted); *TechnoMarine SA v. Jacob Time, Inc.*, No. 12 Civ. 0790(KBF), 2012 WL 2497276, at *6 (S.D.N.Y. June 22, 2012) (concluding that “the bare assertion that [defendant] has been selling piratical copies of the watches without offering any factual support for that claim” was insufficient) (internal quotations omitted).

Defendants to the action (including taking depositions of Individual Defendants), the Amended Complaint makes a single, conclusory allegation specifically against the Individual Defendants. And even if this paragraph were sufficient to sustain the direct infringement claims (a point which Individual Defendants dispute, as discussed below), this paragraph cannot be sufficient under *Twombly* as to the secondary infringement claims because neither this allegation (nor any other factual allegation in the entire Amended Complaint) sets forth facts supporting required elements of these claims. This falls far below the standard contemplated by the Supreme Court. *See Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”). Consequently, and as described in greater detail below, reconsideration of the Court’s Order is appropriate and Defendants’ motion to dismiss should be granted.

2. The Inducement of Copyright Infringement Claim.

a. The inducement claim fails as a matter of law.

The Court failed to address controlling authority in this Circuit that inducement to infringe is not a distinct cause of action; instead, inducement to infringe is really a theory for contributory infringement. *See Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Plaintiff’s only response to Individual Defendants’ argument on this point, buried in a footnote, is that the Court need not decide whether a separate claim exists at this stage of the proceedings. Mem. of Law in Opp. to Ind. Defs.’ Mot. to Dismiss Pl.’s First Am. Compl. 19 n.5, ECF No. 133 (filed Oct. 4, 2013) (hereinafter “Opposition” or “Opp.”).⁶

⁶ Plaintiff has therefore waived any argument that this claim exists in this Circuit and dismissal is warranted. *See In re MF Global Holdings Ltd. Inv. Litig.*, No. 11 CIV. 7866 (VM), 2014 WL 667481, at *21 (S.D.N.Y. Feb. 11, 2014) (dismissing a cause of action where defendants alleged that the claim as not recognized under controlling law and the plaintiff’s opposition papers failed to refute – and therefore waived – this argument); *see also See In re UBS AG Sec. Litig.*, No. 07 CIV. 11225 RJS, 2012 WL 4471265, at *11 (S.D.N.Y. Sept. 28, 2012) (citing *Gortat v. Capala Bros., Inc.*, No. 07 Civ. 3629(JLG), 2010 WL 1423018, at *11

The Court's failure to determine this legal issue at the motion to dismiss stage is counter to the Federal Rules of Civil Procedure and controlling case law. *See* Fed. R. Civ. P. 8(a)(2) (stating that a complaint must show "that the pleader is entitled to relief"); *c.f.*, *Hudson v. Imagine Entm't Corp.*, 128 F. App'x 178, 179 (2d Cir. 2005) (holding that the district court did not err by dismissing a claim that did not exist). As this Court acknowledged, although a court must accept factual allegations as true, "that tenet 'is inapplicable to legal conclusion.'" Order at 2 (quoting *Iqbal*, 556 U.S. at 678). But that is precisely what this Court did by permitting this claim to survive without discussion: it accepted Plaintiff's *legal* argument that this claim exists as true. In so doing, the Court has impermissibly given Capitol the right to assert (and potentially seek discovery on) a non-existent claim. The Court should reconsider its upholding of the inducement to infringe claim on this grounds alone.

b. The inducement claim is insufficiently pled.

Even if this Court determines on reconsideration that an inducement to infringe claim exists in this Circuit, the Amended Complaint still fails to state a claim for inducement to infringe against the Individual Defendants and reconsideration of the Court's Order is appropriate.

While Individual Defendants believe *Gershwin* is good law, at least one court in this Circuit has entertained this claim. In considering the inducement claim, that court held that "a plaintiff must show that the defendant (1) engaged in purposeful conduct that encouraged copyright infringement, with (2) the intent to encourage such infringement." *Lime Grp.*, 784 F.

(E.D.N.Y. Apr. 9, 2010); *First Capital Asset Mgmt., Inc. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 392-393 n.116 (S.D.N.Y.2002)), *aff'd sub nom. City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014).

Supp. 2d at 425 (citing cases).⁷ As the Supreme Court explained in *Grokster III*, such a claim would have a high bar:

[M]ere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. ***The inducement rule, instead, premises liability on purposeful, culpable expression and conduct***, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise.

Grokster III, 545 U.S. at 937 (emphasis added).

From this language, to the extent a claim exists, the Ninth Circuit concluded that “the improper object must be plain and must be affirmatively communicated through words or actions. . . .” *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1034 (9th Cir. 2013) *cert. dismissed*, 134 S. Ct. 624 (2013). Thus, Courts have looked to several facts, which if alleged, would help an inducement claim survive a motion to dismiss. For instance, the complaint could allege “facts such as [the defendant’s] use of advertisements or his making of statements urging others to infringe.” *Flava Works, Inc. v. Clavio*, No. 11 C 05100, 2012 WL 2459146, at *4 (N.D. Ill. June 27, 2012) (citing *Grokster III*, 545 U.S. at 923-24).

The Amended Complaint does not allege **any** facts supporting the argument that the Individual Defendants intended to encourage infringement, and the Court did not conclude that the Amended Complaint did so. As stated previously, the Amended Complaint conclusorily alleges that the Individual Defendants participated, supervised, directed, conceived of, and were the ultimate decision makers, Am. Compl. ¶ 37, but it is completely devoid of any allegations

⁷ In that *Lime Group*, the court noted that “[i]n *Grokster [III]*, the Supreme Court confirmed that inducement of copyright infringement constitutes a distinct cause of action.” *Lime Group*, 784 F. Supp. 2d at 424. However, *Lime Group* did not discuss *Gershwin*, and *Grokster III* did not overrule *Gershwin* or otherwise hold that Second Circuit law on the non-availability of an inducement claim was incorrect.

regarding the Individual Defendants' supposed intent to encourage others to infringe. Indeed, if anything, the Amended Complaint makes allegations showing the exact opposite: the Individual Defendants intended to *prevent* copyright infringement. *See, e.g.*, Am. Compl. ¶ 33 (“ReDigi ensured that the original user would not ‘willfully use/possess any copies of the sold item,’ presumably by deleting the original source file from the user’s computer and synchronized devices.”). Because the only arguably particularized allegation regarding the Individual Defendants’ intent shows an attempt to prevent users from violating copyrights, Plaintiff’s inducement to infringe claim (if it exists at all) must fail. As the Court did not analyze the sufficiency of the pleadings as to this claim, reconsideration is appropriate.

3. The Contributory Copyright Infringement Claim.

The Amended Complaint also fails to plead factual support for each of the elements of the contributory infringement claim, and therefore, reconsideration is appropriate as to this claim, as well. In order to state a claim for contributory infringement, the plaintiff must plead “(1) actual knowledge of direct infringement, (2) the ability to police the infringing conduct and (3) derivation of substantial benefit from the actions of the primary infringers.” *Matthew Bender & Co. v. W. Publ’g Co.*, 158 F.3d 693, 710 (2d Cir. 1998) (citing *Gershwin Publ’g*, 443 F.2d at 1163). This is the “acknowledged standard” for contributory liability. *Polygram Int’l Publ’g, Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1333 (D. Mass. 1994). The Amended Complaint fails to plead facts to establish each of the elements of a contributory infringement claim.

a. Knowledge is not adequately pled.

As to the knowledge element, the first and only time knowledge appears in the Amended Complaint is under the “Contributory Copyright Infringement” heading. *See* Am. Compl. ¶ 61 (“Defendants had actual and constructive knowledge of their users’ infringing activity and materially contributed to that activity by promoting Defendants’ ability to help users make and

sell unauthorized copies of sound recordings . . .”).⁸ But this allegation is unsupported by any other factual allegation; it is wholly conclusory in nature and therefore falls far below the *Twombly* standard. *See, e.g., Brought to Life Music, Inc. v. MCA Records, Inc.*, No. 02 CIV. 1164 (RWS), 2003 WL 296561, at *2 (S.D.N.Y. Feb. 11, 2003) (finding that allegations that one defendant gave another a copy of a copyrighted song and that the copyright was “infringed with knowledge” were insufficient to state a contributory infringement claim); *Id.* at *3 (citing analogous cases).⁹ Indeed, the Amended Complaint alleges elsewhere that the Individual Defendants lacked knowledge of infringing conduct, *see* Am. Compl. ¶ 33 (“ReDigi ensured that the original user would not ‘willfully use/possess any copies of the sold item,’ presumably by deleting the original source file from the user’s computer and synchronized devices.”), which renders the Amended Complaint inadequate as to the knowledge requirement. *See Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 750 (S.D.N.Y. 2012) (noting, in a copyright infringement action, that “[o]ne who ‘supplies another with instruments by which another commits a tort, must be shown to have knowledge that the other will or can reasonably be expected to commit a tort with the supplied instrument. The test is whether [the] wrongdoing . . . might well have been anticipated by the defendant.’”) (quoting *Display Producers, Inc. v.*

⁸ Again, Plaintiff’s attempt to incorporate the summary judgment order to satisfy the knowledge requirement, Opp. at 4-5, is inappropriate and, to the extent the Court considered this in reaching its conclusions, is grounds for reversal.

⁹ Even before *Twombly* and *Iqbal*, courts faced with contributory infringement claims rejected such conclusory allegations of knowledge. *See Calloway v. Marvel Entm’t Grp.*, No. 82 Civ. 8697 (RWS), 1983 WL 1152, *3 (S.D.N.Y. Dec. 23, 1983) (granting judgment as a matter of law on a contributory infringement claim in favor of a defendant where the complaint “alleged no facts to support [the] conclusory allegation” of knowledge); *see also Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000) (“A ‘properly [pled] copyright infringement claim must allege . . . by what acts during what time the defendant infringed the copyright. . . . Count I fails to allege with specificity any acts by which either defendant directly or contributorily violated plaintiff’s copyright.”) (citation omitted); *Lin v. Universal Card Servs. Corp.*, 238 F. Supp. 2d 1147, 1150 (N.D. Cal. 2002) (“[On motion to dismiss] the Court will not accept wholly conclusory allegations.”).

Shulton, Inc., 525 F. Supp. 631, 633 (S.D.N.Y.1981)) (alterations in original).¹⁰

b. Policing is not adequately pled.

As to the policing requirement (also sometimes phrased as “substantial participation” in or “material contribution” to the infringing conduct), “an allegation that a defendant ‘merely provid[ed] the means to accomplish an infringing activity’ is insufficient to establish a claim for contributory infringement.” *Brought to Life Music*, 2003 WL 296561, at *2 (quoting *Livnat v. Lavi*, No. 96 CIV. 4967 (RWS), 1998 WL 43221, at *3 (S.D.N.Y. Feb. 2, 1998)) (citation omitted by court). That is, “[a] mere allegation that the defendant provided the third party with the opportunity to engage in wrongful conduct would not even be enough to survive a motion to dismiss.” *Quiroga v. Fall River Music, Inc.*, No. 93 CIV. 3914 (RPP), 1998 WL 851574, at *37 (S.D.N.Y. Dec. 7, 1998) (citing *Display Producers*, 525 F.Supp. at 633). This is precisely all the Amended Complaint alleges. *See* Am. Compl. ¶ 61 (“Defendants provided its users with software to facilitate unauthorized copying, and awarded users “coupons” or “credits” towards future purchases every time they uploaded a song for “sale” or succeeded in distributing a track, thus urging and contributing to infringing conduct.”). This wholly conclusory allegation is insufficient to plead the policing element under *Twombly*.

c. Substantial Benefit is not adequately pled.

As to the substantial benefit requirement, Capitol does not allege any facts (conclusory or not) as to the Individual Defendants’ supposed benefit in the infringing conduct. *See* Am. Compl. ¶¶ 59-68. Although Plaintiff does allege that the Individual Defendants “derived direct and substantial financial benefits” under the next claim, Am. Compl. ¶ 72, this allegation is

¹⁰ To the extent Plaintiff attempts to argue that knowledge exists because RIAA allegedly sent the Individual Defendants’ notice of infringement, this has been held to be insufficient evidence of knowledge for a contributory infringement claim. *See Wolk*, 840 F. Supp. 2d at 751 (“The [p]laintiff’s attempt to establish knowledge using the notices the [p]laintiff sent is unavailing . . .”).

insufficient as a matter of law, *see infra*, and in any event, it comes after the contributory infringement claim such that it is not incorporated by reference. *See* Am. Compl. ¶ 59 (incorporating paragraphs 1-58 by reference). Consequently, the Court may not consider these allegations in evaluating the sufficiency of the contributory infringement claim. *See Sidhu v. Mann*, No. 1:10-CV-2311, 2011 WL 900982, at *4 (M.D. Pa. Mar. 14, 2011) (dismissing a claim where allegations were made in “Count II and are not incorporated by reference into Count I”).

Because Capitol’s Amended Complaint fails to plead sufficient facts for each element of its contributory infringement claim against the Individual Defendants, and the Court failed to address Individual Defendants’ arguments on these points, reconsideration of the Court’s Order is appropriate as to this claim, as well.

4. The Vicarious Copyright Infringement Claim.

Vicarious liability requires that the plaintiff plead that the defendant had (1) the right and ability to supervise and (2) an obvious and direct financial interest. *Polygram Int’l Publ’g*, 855 F. Supp. at 1324 (citing *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963)). The Amended Complaint fails to provide sufficient factual allegations as to either of these elements and reconsideration is therefore appropriate.

As to the first element – right and ability to supervise – the Amended Complaint fails to allege the requisite level of control by the Individual Defendants. While the Amended Complaint alleges that the Individual Defendants “supervised” and “directed” the allegedly infringing conduct, Am. Compl. ¶ 37, these allegations are insufficient. As the Southern District of New York stated in *Banff Ltd. v. Limited, Inc.*, 869 F. Supp. 1103, 1109-10 (S.D.N.Y. 1994), “[T]here must be indicia beyond the mere legal relationship showing that the parent is actually involved with the decisions, processes, or personnel directly responsible for the infringing activity. . . . [T]he actual exercise of control cannot be presumed from the mere power to control. . . .” *See*

also Chavez v. United States, 683 F.3d 1102, 1110 (9th Cir. 2012) (holding that a complaint’s allegations that supervisory defendants “personally reviewed and, thus, knowingly ordered, directed, sanctioned or permitted” illegal traffic stops were insufficient as “wholly conclusory”); *Blantz v. California Dept. of Corrections & Rehabilitation, Div. of Correctional Health Care Servs.*, 727 F.3d 917, 927 (9th Cir. 2013) (holding that a complaint’s allegation that a supervisory defendant “directed” others to violate plaintiff’s rights was insufficient as conclusory).

As to the second element – an obvious and direct financial interest – the Amended Complaint is utterly devoid of a single factual allegation supporting the existence of this requirement. The only allegation regarding the Individual Defendants’ supposed financial interest inappropriately relies on group pleading, is conclusory in nature, and occurs without factual development solely under the “Count IV: Vicarious Copyright Infringement” heading. *See* Am. Compl. ¶ 73 (“Defendants derived direct and substantial financial benefits from the infringement of Plaintiff’s copyrighted sound recordings occurring via its 1.0 service. In addition to attracting a user base, Defendants charged a percentage sales commission when unauthorized recordings were sold via the ReDigi site.”). This is nothing more than a conclusory recitation of a claim’s required element, which falls far short of the pleading standard set forth in *Twombly*. *See Mertik Maxitrol GMBH & Co. KG v. Honeywell Techs. Sarl*, No. 10–CV12257, 2011 WL 1454067, at *5 (E.D.Mich. Apr. 13, 2011) (dismissing the plaintiffs’ vicarious liability claim where the “[p]laintiffs assert[ed] no facts in support of this claim, but simply recite[d] the elements of a vicarious liability claim” because “[a]bsent factual support, such conclusory assertions are insufficient to establish a plausible claim of vicarious liability”).¹¹

¹¹ *See also J & J Sports Prods., Inc. v. Daley*, No. 06–CV–0238, 2007 WL 7135707, at *3 (E.D.N.Y. Feb. 15, 2007) (“The facts of this case plainly establish a reasonable basis for liability against [the corporate defendant]: the business had no license to show the Event to its

Because the Amended Complaint fails to plead facts supporting each of the two required elements of the vicarious liability claim, reconsideration of the Court's Order is warranted.

5. The Direct Infringement Claims.

In order to survive a motion to dismiss on a statutory copyright infringement claim, a plaintiff must plead "(1) which specific original works are the subject of the copyright claim, (2) that plaintiff owns the copyrights in those works, (3) that the copyrights have been registered in accordance with the statute, and (4) by what acts during what time *the defendant infringed* the copyright." *Blagman v. Apple Inc.*, No. 12 Civ. 5453(ALC), 2013 WL 2181709, at *2 (S.D.N.Y. May 20, 2013) (citing cases) (emphasis added). The elements for common law copyright infringement and statutory copyright infringement are the same. *See Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 563 (2005). Thus, to the extent a plaintiff fails to plead a factual basis for each element of a statutory infringement claim, the plaintiff has also failed to plead a factual basis for the common law infringement claim.

It is simply not the case, as this Court held, that "the ability to supervise" and a "financial interest in" the direct infringement makes an individual personally liable for direct infringement. Order at 5. *See Gershwin*, 443 F.2d at 1161 (distinguishing between direct and secondary infringement claims and noting that "this court recently held that even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to

patrons, and . . . testimony demonstrates that it nevertheless did so. However, [the plaintiff's] attempt to have the individual defendant [] pay damages raises a more difficult issue, because nothing in the record supports a conclusion that [the individual defendant] should be held personally responsible for the actions of [the corporate defendant]. The Complaint sets forth only conclusory allegations based on information and belief to the effect that he is the company's principal, that he supervises and controls its operations, and that he derives financial benefit from the company . . . Such generalized allegations cannot suffice to establish vicarious liability for damages under [even] the copyright infringement standard that [plaintiff] urges me to apply—a standard that requires a showing of the individual defendant's right and ability to supervise the challenged activity coupled with obvious and direct financial interest." (emphasis added).

supervise the infringing activity and also has a direct financial interest in such activities”); *see also Zappa v. Rykodisc, Inc.*, 819 F. Supp. 2d 307, 316 (S.D.N.Y. 2011) (“Here, there is no evidence establishing direct liability, since [plaintiff] cannot point to volitional conduct by [defendant] that caused the distribution. Rather, Apple, not [defendant], distributed these tracks.”).

The Fourth Circuit’s recent decision in *Universal Furniture* is on point. In that case, the lower court found the individual defendant liable for direct and vicarious copyright infringement and the individual defendant appealed. *Universal Furniture Int’l, Inc. v. Frankel*, 538 F. App’x 267, 270 (4th Cir. 2013). In discussing the judgment, the Fourth Circuit agreed with the district court “that the uncontested evidence established at least **vicarious liability** for copyright infringement” and then recited the elements of vicarious liability that this Court attributed to **direct liability**: the right and ability to supervise and an obvious and direct financial interest. *Id.* at 271. The Fourth Circuit did not affirm the direct infringement claim. *Id.*

Similarly, in *Lime Group*, the case the Court relied upon for its holding, the court stated that the ability to supervise and financial interest principles “apply equally to claims of direct infringement and claims based on secondary liability,” but then the court cited a case – *Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280, 284-85 (E.D.N.Y.2002) – in which the court found “that CEO of defendant corporation **could be individually liable for contributory and vicarious infringement** committed by corporation.” *Lime Grp. LLC*, 784 F. Supp. 2d at 438. *Lime Group* therefore does not stand for the proposition that a mere financial interest and ability to supervise subjects a corporate officer to liability for *direct* infringement as this Court concluded, but only for *secondary* infringement.¹²

¹² *Usenet* is similarly distinguishable inasmuch as the plaintiff did not press a direct infringement on reproduction rights against the individual defendants. *Usenet.com, Inc.*, 633 F. Supp. 2d at 129 n.2 (noting that although this claim was in the amended complaint, that the

Reconsideration is appropriate on these claims because the Amended Complaint fails to allege a factual basis supporting “when” and “how” the Individual Defendants’ allegedly directly infringed Plaintiff’s copyrights. Direct infringement, as outlined above, requires that the defendant actually engage in infringing conduct, not that another person whom the defendant “supervises” engages in infringing conduct. There is not a single non-conclusory allegation in the Amended Complaint explaining the Individual Defendants’ acts that Plaintiff’s alleged directly infringed on their copyrights, let alone facts sufficient under *Twombly*. Indeed, to the extent there are direct infringement allegations in the Amended Complaint, they overwhelmingly refer to *ReDigi’s users’* alleged infringement, not the Individual Defendants’ alleged infringement. *See, e.g.*, Am. Compl. ¶¶ 29 (“Defendants’ business model was designed to build a customer base and earn profits by infringing and encouraging ReDigi users to infringe copyrighted sound recordings”); 32 (“ By urging users to upload their content for resale, Defendants encouraged those users to infringe copyrights.”); 36 (“Beyond their own infringing conduct, Defendants materially contributed to and induced infringing conduct by its users.”). This is insufficient to state a claim for direct infringement, and therefore, dismissal is appropriate. *See also Grokster III*, 545 U.S. at 927 (noting a similar distinction between software users’ alleged direct infringement and corporate defendants’ alleged secondary infringement). Therefore, this Court should reconsider its Order as to direct infringement claims.

C. The Court’s Order Relied On Inapposite Summary Judgment Opinions.

Although the Individual Defendants provided this Court with numerous analogous motion to dismiss cases supporting the above-outlined positions, *see* Mem. of Law in Supp. of

plaintiffs abandoned their direct infringement of reproduction rights claim at argument and in their papers).

Ind. Defs.’ Mot. to Dismiss Pl.’s First Am. Compl. 7-9, ECF No. 127 (filed Sept. 20, 2013), the Court neither discussed nor relied on any one of these cases. Instead, the Court relied solely on two summary judgment cases – cases also relied upon heavily by Capitol – in reaching its conclusion that the infringement claims were adequately alleged: *Lime Group* and *Usenet*. But, in those two cases, facts were presented to the court supporting each of the alleged claims. Those facts are not even alleged here. *See, e.g., Lime Grp.*, 784 F. Supp. 2d at 438 (“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.]”); *Usenet.com, Inc.*, 633 F. Supp. 2d at 158 (“[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.”). Because Capitol did not attempt to allege facts similar to those relied upon by the court in *Lime Group* and *Usenet*, those cases are readily distinguishable, and reconsideration of the Court’s Order is appropriate.

D. Reversal of the Motion to Dismiss Order, As Written, Is Likely Warranted.

Plaintiff asked the Court to rely on the summary judgment record to support requisite elements of each of these secondary infringement claims. *See* Opp. at 4-5; 16-19. But “more specific allegations contained in an opposing brief cannot be used to supplement otherwise conclusory allegations in a complaint.” *Brought to Life Music*, 2003 WL 296561, at *3, and Individual Defendants therefore opposed this effort. *See* Reply Mem. of Law in Further Supp. of Ind. Defs.’ Mot. to Dismiss Pl.s’ First Am. Compl. 2-5, ECF No. 136 (filed Oct. 18, 2013).

Although the Court did not explicitly state that it was relying on the summary judgment record in reaching its conclusion, Individual Defendants respectfully submit that based on the language of the Order, there could be no other basis on which the Court could have reached the conclusion that Plaintiff's claims were adequately stated. This also supports the need for reconsideration. As the Second Circuit explained in *Friedl v. City of New York*:

[W]hen matters outside the pleadings are presented in response to a 12(b)(6) motion, a district court must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material. *This conversion requirement is strictly enforced whenever there is a legitimate possibility that the district court relied on material outside the complaint in ruling on the motion.* Thus, a district court errs when it consider[s] affidavits and exhibits submitted by defendants or relies on factual allegations contained in legal briefs or memoranda, in ruling on a 12(b)(6) motion to dismiss. *Vacatur is required even where the court's ruling simply mak[es] a connection not established by the complaint alone or contains an unexplained reference that raises the possibility that it improperly relied on matters outside the pleading in granting the defendant's Rule 12(b) motion.*

210 F.3d 79, 83-84 (2d Cir. 2000) (internal citations and quotations omitted) (alternations in original) (emphasis added). Individual Defendants therefore respectfully submit that reconsideration of this Court's Order is necessary to avoid reliance on the summary judgment record.

E. The First Amended Complaint Should be Dismissed with Prejudice.

Because the Court denied the Individual Defendant's motion to dismiss, it did not have the opportunity to address whether or not leave to amend was appropriate. On reconsideration, however, Individual Defendants submit that this inquiry will be necessary and that dismissal with prejudice is appropriate. *See Cartier, Inc. v. Four Star Jewelry Creations, Inc.*, No. 01 Civ. 11295, 2004 WL 169746, at *2-3 (S.D.N.Y. Jan. 28, 2004) (denying the plaintiffs an opportunity to replead their complaint to add individual corporate defendants because of concern of the

corporate defendant's ability to pay any judgment against it as unduly prejudicial, reasoning that "[t]he factual possibility that a corporate defendant will not be able to satisfy a money judgment attends every litigation" and "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.").

IV. CONCLUSION

For the foregoing reasons, the Individual Defendants respectfully request the Court reconsider its Order and dismiss Plaintiff's secondary copyright infringement claims with prejudice.

Dated: September 16, 2014

/s/ Seth R. Gassman

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