



MEMO ENDORSED

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By E-mail (sullivanysdchambers@nysd.uscourts.gov)

Hon. Richard J. Sullivan, U.S.D.J.
40 Foley Square
New York, NY 10007

Re: Capitol Records, LLC v. ReDigi Inc., 12 cv. 0095 (RJS)

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Dear Judge Sullivan:

We represent Capitol Records, LLC (“Capitol”) in the above-referenced action and write jointly with counsel for ReDigi Inc. (“ReDigi”) and individual defendants John Ossenmacher and Larry Rudolph (collectively, “IDs”). The Court’s September 2, 2014 Opinion and Order denying IDs’ motion to dismiss (Docket No. 148) directs the parties to submit a joint letter advising the Court of “the need for additional discovery and whether the parties contemplate post-discovery motions for summary judgment as to the Individual Defendants.”

As the Court will recall, shortly after IDs moved to dismiss, there were a number of significant discovery disputes the parties presented to the Court by way of letter filed by ECF. See Capitol letters dated 10/25/13 and 11/6/13; ID letters dated 11/6/13 and 11/7/13. Those disputes related primarily to the scope of discovery IDs were seeking and various affirmative defenses and counterclaims IDs announced they were likely to pursue (as an answer had not yet been filed) and for which they believed discovery was necessary. Capitol argued that the scope of the discovery was disproportionate to any remaining issues in the case and in service of defenses or counterclaims that were either collaterally estopped, barred by res judicata, or otherwise without legal basis; IDs countered that the discovery was appropriate in scope, was well founded, and that neither res judicata, collateral estoppel, nor law of the case barred any of their defenses.

Shortly after those letters were exchanged and consistent with Paragraph 7 of the Second Amended Joint Case Management Plan and Scheduling Order, ECF No. 129 (Aug. 25, 2013), the parties filed a series of pre-summary judgment motion letters in connection with their anticipated summary judgment motions. See Capitol letters dated 11/12/13 and 11/15/13; ReDigi 11/12/13 letter; ID’s 11/12/13 and 11/15/13 letters. Those letters touched on many of the same issues raised in the discovery disputes, particularly insofar as they related to the availability and/or basis for IDs proposed anticipated defenses and/or counterclaims. Capitol stated that it would seek summary judgment on ID’s substantive liability and affirmative defenses, IDs stated that they would move for summary judgment if they were required to do so, but that additional

discovery was necessary to properly assert their defenses and to oppose any summary judgment motion filed by Capitol, and ReDigi's anticipated motion sought to exclude certain allegedly infringed works as a matter of law on the grounds that (i) Capitol failed to produce evidence that it is the owner of the copyrights in and to many of the copyrights; (ii) works that were offered for sale by customers through the ReDigi marketplace, but not sold were not infringed as a matter of law; and (iii) limiting potential damages based on Capitol's failure to mitigate and other factors. It was ReDigi's position that damages discovery was closed.

On December 2, 2013, all counsel appeared for a conference where the Court queried the parties on IDs' motion to dismiss, the various pending discovery disputes, and issues relating to the application of collateral estoppel and res judicata to the proposed affirmative defenses. Capitol further stated that it may seek to amend its complaint to add various subsidiaries or affiliates as plaintiffs to account, among other things, for corporate changes following Capitol's acquisition by the owners of Universal Music Group in 2013. See Tr. (Docket No. 146) at 20-21, 25.

The Court ultimately took IDs' motion to dismiss under advisement and stayed fact discovery, so that the various pending disputes could be resolved, if necessary, after the motion was decided. Since that time, Capitol has informally and voluntarily supplemented its production of contracts that it asserts proves its ownership of various recordings it alleges were infringed. Defendants have asserted their rights to contest the timeliness of this production. This is the only "informal" discovery that has taken place during the stay.

Following the Court's September 2, 2014 Decision and Order, the IDs filed a motion seeking reconsideration of this Court's motion to dismiss order on September 16. In an abundance of caution and because Capitol would not stipulate that no Answer was required, IDs also filed an Answer and affirmative defenses without prejudice to their assertion that the Amended Complaint is inadequate and should have been dismissed.

In conferring on the present state of the case, IDs have stated that should they remain in the case, they intend to pursue the same discovery and affirmative defenses they previously sought. Accordingly, the various issues regarding the scope of that discovery and propriety of those defenses are unresolved. In addition, Capitol plans to seek leave to file a motion to amend its complaint to add additional affiliated parties as plaintiffs. Defendants will oppose this request. The parties' respective positions are not addressed in this letter and will be addressed in letters submitted to 2.A of the Court's individual practices. However if such amendment is allowed, it is Defendants' position, that additional discovery would be needed, and Plaintiff disagrees. The parties reserve their rights to address those issues at the appropriate time.

IDs contend that the discovery issues can be narrowed now but that any necessary discovery should take place after the Court rules on IDs' motion for reconsideration, while Capitol believes that the parties should move forward with any such discovery without the need to await such ruling. Despite this, IDs are willing to work with Capitol during the pendency of the motion for reconsideration to narrow discovery disputes in an effort to avoid further delay.

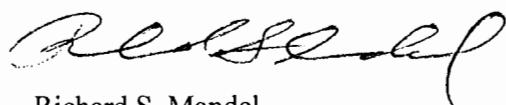
To deal with issues most efficiently, the parties do not seek a ruling on the discovery disputes right now. Rather, they propose that they make a good faith effort to resolve as many of those issues by agreement and then report back to the Court by October 22, 2014, regarding any disputes that remain (subject to this Court's ruling on ID's Motion for Reconsideration). The parties' collective view is that they may be able to narrow the issues previously presented to the Court and conduct any discovery that is necessary and not in dispute (e.g., certain of IDs' interrogatories, document requests and deposition notices).

After all discovery disputes are resolved and liability discovery completed, the parties can then each file their respective summary judgment motions. IDs state that they will also need sufficient time to be allowed for them to review documents and material necessary to assert their defenses before the filing of summary judgment motions. IDs believe this to be the case because, to the extent they remain in the case, IDs have a good-faith basis for obtaining discovery and asserting numerous defenses, including those that were not asserted by ReDigi but which weigh on their individual liability (e.g., DMCA safe harbor, fair use, laches, unclean hands, equitable estoppel, abuse of copyright, etc.).

The parties acknowledge that, given the differences in their views, they may not be able to resolve all discovery and related disputes. However, we collectively believe that we will be in a better position to present a narrowed set of issues to the Court if we first devote our efforts to resolving as many by agreement as possible.

We thank the Court for its attention to the foregoing.

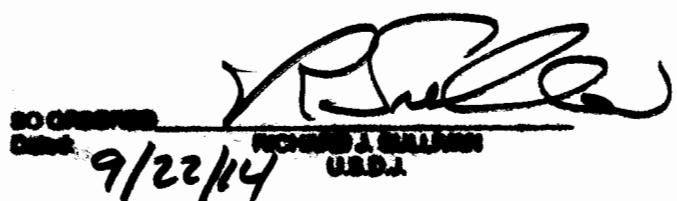
Respectfully,



Richard S. Mandel

cc: James Pizzirusso, Esq. (via email)
Gary Adelman, Esq. (via email)
Nathaniel Giddings, Esq. (via email)
Sarah Matz, Esq. (via email)
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The parties shall submit an updated joint letter detailing the status of any remaining discovery disputes by October 22, 2014.


9/22/14 U.S.D.J.