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 SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION FOR RECONSIDERATION

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Mr. John Ossenmacher and Prof. Larry Rudolph (the "Individual Defendants") respectfully submit this reply memorandum of law in further support of their motion for reconsideration of this Court's September 2, 2014 Opinion and Order, ECF No. 148 ("Order").

I. PRELIMINARY STATEMENT

In response to the Memorandum of Law in Support of Individual Defendants' Motion for Reconsideration, ECF No. 150 (filed Sept. 16, 2014) (hereinafter "Memorandum"), Plaintiff, Capitol Records, LLC ("Plaintiff" or "Capitol") has submitted an opposition brief that largely (and sometimes altogether) ignores the arguments made in the Memorandum. Pl.'s Mem. in Opp. to Individual Defs.' Mot. for Reconsideration, ECF No. 153 (filed Sept. 30, 2014) (hereinafter "Opposition"). To the extent Plaintiff's Opposition actually addresses the Individual Defendants' arguments, it ignores the well-settled law the Individual Defendants cited in the Memorandum (and overlooked by this Court) in favor of Plaintiff's desired version of what the law should be. As explained in further detail below, Individual Defendants' Motion should be granted and this case should be dismissed against them with prejudice.

II. ARGUMENT

A. Motions for Reconsideration are Appropriate in Cases Such as This.

As previously discussed, reconsideration of this Court's Order is appropriate for two distinct reasons: (1) controlling case law mandates a different result, and (2) the likelihood of reversal on appeal. Plaintiff's Opposition only addresses the former, and in so doing, concedes the latter. This alone is sufficient to warrant reconsideration.

1. Overlooked Controlling Case Law Warrants Reconsideration.

As Plaintiff acknowledges, reconsideration is appropriate where '"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." Opp. at 2 (quoting

Schrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995)); *see also* Mem. at 4 (quoting the same). Individual Defendants previously referenced binding precedent requiring this Court to determine whether Plaintiff had pled sufficient facts establishing ***each element of each claim*** against the Individual Defendants, Mem. at 4-6, and argued that because Plaintiff had failed to do so for each of its claims, dismissal of each claim was warranted. Mem. at 6-17. That is, Individual Defendants set forth an appropriate basis for reconsideration.

Rather than attempting to refute the holdings of the cases cited by Individual Defendants, however, Plaintiff's Opposition takes the same position it took in its motion to dismiss briefing: because Your Honor found ReDigi liable for copyright infringement, it must necessarily find the Individual Defendants liable regardless of how thin the allegations against them may be and regardless of whether those allegation actually plead the necessary elements of each claim against Individual Defendants. *See* Opp. at 4; Mem. of Law in Opp. to Individual Defs.' Mot. to Dismiss First Am. Compl. 10, ECF No. 133 (filed Oct. 4, 2013) (hereinafter "Original Opposition"). This is not the law under Supreme Court and Second Circuit precedent, and because the Court previously accepted Plaintiff's incorrect position,[1] reconsideration is appropriate. *See, e.g.*, *Brown v. City of Oneonta, N.Y.*, 858 F. Supp. 340, 345 (N.D.N.Y. 1994) (reconsidering the prior denial of a motion to dismiss a section 1981 claim and finding that reconsideration and dismissal was appropriate because plaintiffs had failed to plead a factual basis for a requisite element of their claim).

2. The Likelihood of Reversal Warrants Reconsideration.

Reconsideration is also appropriate for a second reason: the likely reversal of this Court's order. *See Ng v. HSBC Mortgage Corp.*, 07-CV-5434 RRM VVP, 2014 WL 4699648, at *3

[1] *See* Order at 5 ("At 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").

(E.D.N.Y. Sept. 22, 2014) (holding that reconsideration is appropriate where "there is a strong likelihood that the district court's decision would ultimately be reversed on appeal."). As argued in the Memorandum (and never refuted, let alone discussed, in Plaintiff's Opposition),[2] Individual Defendants submit that this Court could not have reached the conclusion it did without inappropriately relying on its summary judgment order (and the corresponding record) pertaining to ReDigi; this alone warrants reconsideration. Mem. at 17-18.

This Court's apparent reliance on the summary judgment record of a co-defendant during a motion to dismiss warrants reversal of this Court's Order, as "[v]acatur 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." *Friedl v. City of New York*, 210 F.3d 79, 83-84 (2d Cir. 2000) (internal citations and quotations omitted) (alternations in original) (emphasis added). Indeed, the mere fact that the Court "assume[d] the parties' familiarity with the facts . . . as set forth in the Court's summary judgment Order," and did not affirmatively disclaim any reliance on the summary judgment record (despite the propriety of such being briefed by the parties) is likely sufficient to warrant reversal. *Compare Green v. McLaughlin*, 480 F. App'x 44, 49 (2d Cir. 2012) (affirming the dismissal of a complaint where "the district court clearly chose to exclude the additional material attached to the defendants' motion to dismiss") (emphasis added); *Singh v. Wells*, 445 F. App'x 373, 376 (2d Cir. 2011) (noting that the district court "expressly stated that it would not consider" materials beyond the pleadings in

[2] As discussed herein, Plaintiff, for the first time, distances itself from the summary judgment order and record, relying almost exclusively on allegations in the Amended Complaint, many of which Plaintiff did not cite or rely on in its Original Opposition. This demonstrates Plaintiff's tacit agreement that its Original Opposition combined with the Court's Order creates an appearance that the Court likely (and inappropriately) relied on the summary judgment order and record in denying Individual Defendants' motion to dismiss.

rendering its motion to dismiss decision).[3]

B. Plaintiff Misstates The Standards for Adequately Pleading Officer/Director Liability in Copyright Actions.

Plaintiff contends that the "import" of three summary judgment cases[4] is that all it needs to plead in order to survive a motion to dismiss are "sufficient facts" showing that the Individual Defendants "personally participated in or had the ability to supervise and an interest in ReDigi's infringing activity. . ." because having to plead each element to each claim "would of course render completely superfluous the established theory of joint and several liability" and because "[n]o case supports such an absurd result." Opp. at 4. But Plaintiff's bold assertion and use of colorful language cannot change the myriad cases, including Supreme Court cases, rejecting this position.[5]

Supreme Court precedent requires a plaintiff to plead a factual basis for ***each element of each claim***. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)*; Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009); *see also Paige v. New York City Police Dep't*, 10- CV-3773 (SLT) (LB), 2012 WL 1118012, at *4 (E.D.N.Y. Mar. 30, 2012) (noting that a plaintiff is required to "plead adequate factual content supporting each element of the claim . . ."). This black-letter law is not abandoned in copyright cases or where the plaintiff is relying on a joint and several liability

[3] Because Plaintiff did not take issue with Individual Defendants' second basis for reconsideration (thereby conceding its appropriateness), the remainder of this brief will focus on the Individual Defendants' first basis for reconsideration.

[4] Two of these cases – *Lime Group* and *Usenet* – have been previously distinguished on a number of grounds. Mem. at 16-17. Plaintiff does not address these distinctions or otherwise attempt to explain why this Court should give any weight to these opinions. Instead, Plaintiff merely restates the holdings in those cases, which were supported by fully-developed factual records not present here. *See, e.g.*, Opp. at 3-4. The third case, *Broadcast Music, Inc. v. Haibo, Inc.*, 10-CV-240S, 2012 WL 843424 (W.D.N.Y. Mar. 12, 2012), is similarly distinguishable.

[5] None of the nine cases cited in a footnote are contrary to Individual Defendants' position. Four are summary judgment orders (one of which is *Usenet*), two relate to damage awards, one is a default judgment opinion, and two are pre-*Twombly* motion to dismiss opinions that were distinguished previously. *See* Reply Mem. of Law in Further Supp. of Ind. Defs.' Mot. to Dismiss Pl.s' First Am. Compl. 6 n.5, ECF No. 136 (filed Oct. 18, 2013).

theory.[6] For instance, in *Buttnugget Publ'g v. Radio Lake Placid, Inc.*, the court examined, in detail, the factual allegations contained in a copyright infringement complaint against both the corporation and its officers and found that "[r]egarding the issue of joint and several liability, plaintiffs ha[d] ***sufficiently pled the necessary elements***." 807 F. Supp. 2d 100, 107-08 (N.D.N.Y. 2011) (emphasis added). Numerous other copyright infringement cases have also critically examined the factual allegations pled against officers in copyright infringement actions in order to ensure the complaint adequately pled each of the requisite elements of each claim against those individuals. *See, e.g., Too, Inc. v. Kohl's Dep't Stores, Inc.*, 213 F.R.D. 138, 141-42 (S.D.N.Y. 2003); *Granite Music Corp. v. Ctr. St. Smoke House, Inc.*, 786 F. Supp. 2d 716, 728 (W.D.N.Y. 2011); *NCR Corp. v. Korala Assocs., Ltd.*, 512 F.3d 807, 816 (6th Cir. 2008).[7] In short, Plaintiff's Opposition misstates the applicable pleading standard and because this Court adopted this position in its Order, reconsideration and dismissal are therefore appropriate.

C. The Amended Complaint Fails to Plead Requisite Elements of Each of its Claims Against the Individual Defendants.

Assuming this Court grants Individual Defendants' Motion, it will be necessary to determine whether the Amended Complaint adequately pleads each element of each remaining claim against the Individual Defendants. Plaintiff strains to argue that it has adequately pled a sufficient factual basis for each element of each claim, frequently pointing this Court to

[6] Plaintiff appears to be confusing the application of joint and several liability in copyright infringement actions. In particular, joint and several liability refers to liability for statutory damages for infringement, not to liability for the underlying infringement claim. *See* 6 Patry on Copyright § 22:196; *see also* Charles S. Wright, *Actual Versus Legal Control: Reading Vicarious Liability for Copyright Infringement into the Digital Millennium Copyright Act of 1998*, 75 Wash. L. Rev. 1005, 1010 (2000) ("[A] finding of direct infringement can reverberate widely and draw all associated actors into the scope of secondary liability.").

[7] Further support for this proposition can be found in claims brought under Section 20(a) of the Exchange Act, which imposes joint and several liability for "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter." 15 U.S.C.A. § 78t(a). *See generally In re Jiangbo Pharm., Inc., Sec. Litig.*, 884 F. Supp. 2d 1243, 1256 (S.D. Fla. 2012) ("To state a Section 20(a) claim, [p]laintiffs must allege three elements . . . .").

allegations in the Amended Complaint never referenced in its Original Opposition (which inappropriately relied on the summary judgment order and record). But Plaintiff's newly discovered allegations cannot save its claims against the Individual Defendants.

1. The Inducement to Infringe Claim.

As noted in the Memorandum, an inducement to infringe claim,[8] to the extent it even exists in this Circuit,[9] "premises liability on purposeful, culpable expression and conduct. . . ." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005) ("*Grokster III*"). In order to adequately plead this level of culpability, the complaint should 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).

Plaintiff does not dispute the applicability of above elements, and instead, unsuccessfully attempts to argue that it has adequately pled these elements. In particular, Plaintiff, for the first time,[10] points this Court to the only paragraph that has any bearing on the Individual Defendants' alleged liability (¶ 37), two wholly conclusory allegations, one of which is not even in the factual allegation section of the Amended Complaint (¶¶ 29, 45), and three paragraphs that Plaintiff

[8] Plaintiff argues, for the first time in any brief, that inducement to infringe is a recognized cause of action in this Circuit. Opp. at 5-6. Plaintiff's argument comes too late to save this claim, and reconsideration and dismissal are therefore 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); *see also 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). Indeed, Plaintiff does not even attempt to address the Individual Defendants' waiver argument in its opposition, which arguably concedes the waiver. *See, c.f., Outsource Servs. Mgmt., LLC v. Ginsburg*, Civ. No. 08-5897 DWF FLN, 2010 WL 5088190, at *12 (D. Minn. Dec. 7, 2010) (finding defenses waived where the defendant did not argue that there were not waived).

[9] Individual Defendants stand on their arguments as to the non-availability of this claim.

[10] Plaintiff did not address what paragraphs in its Amended Complaint it thought applied to its inducement claim in its Original Opposition

suggest, nonsensically, refer to the Individual Defendants' "users" (¶¶ 26, 32, 36). Opp. at 6.[11] These allegations are insufficient under *Twombly* inasmuch as there is not a single, particularized allegation regarding the Individual Defendants' supposed intent to encourage others to infringe, and the only allegation in the Amended Complaint regarding intent demonstrates that the Individual Defendants actually intended to ***prevent*** copyright infringement. Am. Compl. ¶ 33.[12] Thus, Plaintiff's inducement claim is insufficiently pled and must be dismissed.

2. The Contributory Infringement Claim.

Plaintiff is correct that one is liable for contributory infringement when he, "with ***knowledge of the infringing activity***, induces, causes or materially contributes to the infringing conduct of another . . . ." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir.1971) (emphasis added).[13] Rather than addressing the arguments made in the Memorandum or pointing the Court to allegations made in the Amended Complaint that Capitol believes support these two elements, however, Plaintiff simply points the Court to its Original Opposition. Opp. at 7. But the Original Opposition only cites two paragraphs (¶¶ 36, 37) that Plaintiff inappropriately contended were "bolstered by the Court's [summary judgment] ruling." Orig. Opp. at 12. Neither of these paragraphs, however, says anything about the Individual Defendants' supposed ***knowledge*** of the infringing conduct. Moreover, the only allegation

[11] How the Individual Defendants can have any "users" remains unclear and further demonstrates the failures of Plaintiff's group pleading strategy.

[12] Plaintiff's Opposition avoids this paragraph altogether and does not attempt to explain why it does not undercut its inducement claim against the Individual Defendants.

[13] In their Memorandum, Individual Defendants inadvertently cited to the dissent in *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693 (2d Cir. 1998) for the proposition that there were three elements to the contributory infringement claim and then cited to additional cases for each of the first two elements enunciated in that case: knowledge and "policing." Mem. at 9-11. Individual Defendants equated the "policing" element to the material contribution element. Mem. at 11. Thus, while Individual Defendants' agree that their discussion on the third element (substantial benefit) does not apply to the contributory infringement claim, their discussion on the first two elements remains on point.

remotely touching on their so-called knowledge provides that the Individual Defendants believed the ReDigi system was ***designed to prevent its users from infringing***. *See* Am. Compl. ¶ 33. This is the antithesis of knowledge of infringing activity. Further, as set out in greater detail in the Memorandum, Plaintiff's allegations as to the Individual Defendants' supposed material contribution are insufficient under *Twomly*.[14]

3. The Vicarious Liability Claim.

In order to state a claim for vicarious liability, the plaintiff must adequately plead that the defendant has both supervisory power and an "obvious and direct" financial interest. Mem. at 12-14. In an attempt to argue that the Amended Complaint adequately pleads these elements, Plaintiff stands on its arguments in its Original Opposition, Opp. at 8, which only pointed to three paragraphs (¶¶ 6-7, 37) and argued that being an individual owner of a closely held business is "typically" sufficient to impose vicarious liability. Orig. Opp. at 17-18. This is incorrect. *See 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. . . ."). And Plaintiff's wholly conclusory allegations in paragraph 37 do not save this claim. *See J & J Sports Prods., Inc. v. Daley*, No. 06–CV–0238, 2007 WL 7135707, at *3 (E.D.N.Y. Feb. 15, 2007) ("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 . . . ."). In short, Plaintiff's half-hearted attempt to save its vicarious

[14] As to the material contribution requirement, Individual Defendants stand on their argument in the Memorandum, Mem. at 11, and note, in addition, that the only paragraph Plaintiff cited in its Original Opposition (¶ 36) is wholly conclusory as to this element.

liability claim falls short, and this claim should be dismissed with prejudice on reconsideration.

4. The Direct Infringement Claim.

Plaintiff unsuccessfully attempts to save its direct infringement claim not by arguing that it has pled each of the required elements of a direct infringement claim against the Individual Defendants, addressing any of Individual Defendants' cases supporting dismissal of this claim,[15] or incorporating its Original Opposition, but rather by claiming that "the principles of joint and several liability apply equally to direct and secondary liability" and because ReDigi has already been found liable for direct infringement, that the claim against the Individual Defendants must be permitted. Opp. at 8.

But alleging joint and several liability is not alone sufficient under *Twombly*, *see* Part II-B, *supra*, and in any event, Plaintiff's argument is based on an erroneous conception of joint and several liability. In particular, joint and several liability, as it relates to officers accused of leading a company that infringes a copyright, refers to their secondary liability for the acts of the direct infringer, not for their liability for the direct infringement itself. *See Crystal Semiconductor Corp. v. TriTech Microelectronics Int'l, Inc.*, 246 F.3d 1336, 1361 (Fed. Cir. 2001) ("A party that induces or contributes to infringement is jointly and severally liable ***with the direct infringer*** for all general damages.") (citing *Hewlett–Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990)) (emphasis added). That is, the officers are jointly and severally liable with the direct infringer for the damages caused by the direct infringement as a result of their secondary infringement and not because of their own direct infringement. *See generally Gershwin Publ'g Corp.*, 443 F.2d at 1162 (differentiating between direct and secondary infringement claims); *see e.g., Luft v. Crown Publishers, Inc.*, 772 F. Supp. 1378,

[15] Plaintiff falsely asserts that Individual Defendants "cite no case supporting [their] proposition." Opp. at 8. In fact, Individual Defendants cited and/or discussed no fewer than five cases supporting their position, including *Lime Group*. Mem. at 14-16.

1379 (S.D.N.Y. 1991) (discussing an officers joint and several liability based on a theory of vicarious liability). Plaintiff points this Court to no case in which an officer that himself did not directly infringe a copyright was held liable for direct infringement as opposed to being held jointly and severally liable for damages caused by another's direct infringement. Because the issue with this direct claim is whether it has been adequately stated against the Individual Defendants (and not whether they are liable for damages for another's direct infringement), this claim should be dismissed upon reconsideration.

D. Plaintiff Waived Any Right to Replead.

Individual Defendants asserted that dismissal with prejudice was appropriate on reconsideration of this Court's Order, Mem. at 18-19, and Plaintiff did not dispute (or even address) this point in its Opposition. Even if leave to amend were appropriate (it is not), Plaintiff's decision not to dispute Individual Defendants' dismissal with prejudice argument unambiguously demonstrates Plaintiff's intent to stand on its Amended Complaint and waives any argument that leave to amend should be granted. *See Kajoshaj v. New York City Dep't of Educ.*, 543 F. App'x 11, 17 (2d Cir. 2013); *Klatch-Maynard v. ENT Surgical Assocs. Hazleton Health & Wellness Ctr.*, 404 F. App'x 581, 584 (3d Cir. 2010).

III. CONCLUSION

For the foregoing reasons, reconsideration is warranted, and on reconsideration, this Court should dismiss each of Plaintiff's claims against the Individual Defendants with prejudice.

Dated: October 6, 2014

/s/ Seth R. Gassman

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