October 24, 2014

VIA ELECTRONIC MAIL AND ECF
Hon. Richard J. Sullivan (sullivannysdchambers@nysd.uscourts.gov)

Re: *Capitol Records, LLC v. ReDigi Inc., et al* (12 Civ. 0095) (RJS)

Capitol Records, LLC v. ReDigi Inc. Doc. 157

Hon. Judge Sullivan:

We represent defendants in this action. Pursuant to 2.A of Your Honor's Individual Practices, we write this joint letter to oppose Plaintiff's October 21, 2014, letter seeking leave to amend its complaint to add Capitol Christian Music Group, Inc, and Virgin Records IR Holdings, Inc., as plaintiffs.[1] "[A] motion to amend should be denied if there is an 'apparent or declared reason—such as undue delay, bad faith or dilatory motive." *Dluhos v. Floating & Abandoned Vessel, Known as New York*, 162 F.3d 63, 69 (2d Cir. 1998). The rule that amendments should be freely given "must be balanced against the requirement under Rule 16(b) that the Court's scheduling order shall not be modified except upon a showing of good cause." *Velez v. Burge*, 483 F. App'x 626, 628 (2d Cir. 2012) (affirming denial of request for leave to amend where plaintiff delayed 18 months after deadline to amend to seek to add defendant). "[A] party seeking to amend should bring its motion 'as soon as the necessity for altering the pleading becomes apparent'" to avoid alleged delay. *Azkour v. Haouzi*, 11 CIV. 5780 RJS KNF, 2012 WL 3667439 (S.D.N.Y. Aug. 27, 2012). Prejudice may exist when the amendment would: "(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; [or] (ii) significantly delay the resolution of the dispute." *Monahan v. New York City Dep't of Corrections,* 214 F.3d 275, 284 (2d Cir. 2000).

Based upon the timeline of events, it is beyond clear that the alleged need to add the proposed plaintiffs based on the claim that those entities own copyrights that were infringed by the ReDigi system, has been apparent, or should have been apparent with reasonable diligence, since June 2012 --over two years. Here, Capitol has failed to offer a satisfactory explanation as to why it delayed, or make any specific showing of diligence that would excuse such a long delay, in seeking this amendment. Additionally, Capitol's request is more than a technical amendment. Rather, Capitol's motive appears to be to correct the fact that it did not pay attention to whether it actually owned the works at issue for over two years until ReDigi sought summary judgment to dismiss the tracks that Plaintiff had failed to produce proof of ownership for. Capitol's strategy is clear: it is trying to obtain damages on works that it never owned.

On March 5, 2012, during phase one of discovery, ReDigi requested documents evidencing or concerning Plaintiff's ownership in works allegedly infringed by ReDigi, as well as certificates of copyright registration for each allegedly infringed copyrighted recording. *See* 3/5/14 Requests 18-19. Additionally, pursuant to Capitol's discovery requests, on June 7, 2012, ReDigi served Plaintiff with three charts, which represented tracks sold, tracks stored in the cloud, and tracks offered for sale. *See* REDIGI0000458-553-CONFIDENTIAL. These lists were compiled by searching

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[1] Individual Defendants join ReDigi in opposing Capitol's attempt to amend for the reasons outlined herein but reserve all of their rights to seek discovery as to their affirmative defenses and potential counterclaims. *See* October 22, 2014 Joint Letter. Individual Defendants' need for discovery on their affirmative defenses, of which they have had none, stands in stark contrast to Capitol's request for leave to amend, which relies on information provided to them more than two years ago.

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ReDigi's system for tracks where the metadata contained label names provided by Capitol. In providing the aforementioned disclosures, ReDigi specifically stated that its disclosures were not an admission that Plaintiff owned copyrights in the disclosed tracks. At least 36 of the tracks disclosed on June 7, 2012 were tracks that Plaintiff now alleges are owned by the two proposed plaintiffs.

Following initial discovery both parties moved for summary judgment on the issue of whether ReDigi's system directly and secondarily infringed Capitol's reproduction and distribution rights. ReDigi did not concede that Capitol had sufficiently proved ownership of all of the tracks in the then current Complaint. By Order dated March 30, 2013, which found for Capitol on the issue of whether the ReDigi system infringed, the Court requested that the parties submit a joint letter by April 12, 2013 concerning the next contemplated steps in the case. In that letter, the parties identified that Capitol would seek updates of the charts previously provided by ReDigi. The parties also confirmed that they were discussing and would confer "regarding confirming Capitol's ownership of registered copyrights in all such tracks." *See* April 12, 2013 joint letter to Court.

On May 2, 2013, following discussions by the parties and in anticipation of submitting a proposed scheduling order, Plaintiff's counsel sent an email confirming Plaintiff's understanding about an agreement reached by the parties during a previous telephone call, including that "[o]nce we have updated charts, Capitol will assemble registrations and ownership information." *See* 5/2/13 J. King email. Following that, the parties submitted a proposed Amended Case Management Plan and Scheduling Order, which was So Ordered on May 6, 2013 [DE 111] (the "Scheduling Order"). The scheduling order did contemplate that the "list of plaintiff's" recordings allegedly infringed might need to be supplemented based on information obtained through discovery, but it did not contemplate the addition of any parties, only that the names of tracks *owned by Plaintiff* may need to be supplemented. Additionally, the Scheduling Order stated that "[n]o additional parties may be joined . . . except with the opposing party's written consent or leave of the Court." The Scheduling Order further provided for all remaining discovery to be completed by August 2, 2013.

Thereafter, the ReDigi and Capitol proceeded with damages discovery. On June 13, 2014, ReDigi produced updated track lists for tracks that were sold and/or offered for sale through ReDigi 1.0. Contrary to Plaintiff's contention that the fact that the list was compiled using names of various Capitol labels/affiliates, including Virgin, reflected the parties' "understanding that the focus was on identifying any recordings falling within the Capitol family of companies, without regard to the specific entity or label name involved" this was not ReDigi's understanding. In producing the updated charts, ReDigi searched for label names that Capitol requested (just as it had in the initial discovery phase) so as to avoid unnecessary motion practice. In providing these charts ReDigi expressly stated that the charts were not an "admission of any kind that Capitol owns the copyright to these sound recordings." *See* 6/13/13 Email from S. Matz. ReDigi further stated that "[w]e will await proof of ownership and then we can further discuss that issue." *See id.* Any implication that ReDigi knew that Capitol would seek to add plaintiffs is simply unfounded. Additionally, as Plaintiff's May 2, 2014 email and ReDigi's counsels' June 13, 2013 emails make clear, contrary to Plaintiff's current assertion, ReDigi *did seek discovery regarding Capitol's ownership* of the allegedly infringed works as this was a disputed issue.

On August 2, 2013, discovery closed. On November 12, 2013, ReDigi submitted a request for a pre-motion conference in anticipation of making a motion for summary judgment in connection with Capitol's Amended Complaint, *inter alia*, on the grounds that Capitol had not produced evidence that it owned many of the copyrights that its Amended Complaint claimed were infringed.

ReDigi identified that Capitol had failed to produce copyright registrations for a number of the works, had failed to produce evidence of any transfer of ownership for some registrations that were not owned by Capitol and had failed to produce evidence that it was the owner of many of the pre-1972 works that it claimed it owned. Realizing it was not going to be able to prove ownership of many of the allegedly infringed works, suddenly, months after the close of damages discovery, Capitol started producing documents to try to fix the issues raised by the defendants. On or about December 2, 2013, the Court held a pre-motion conference to discuss all of the parties' anticipated motions. At the conference the parties discussed the ownership issues in connection with ReDigi's anticipated motion. ReDigi identified the issues with Capitol's production and noted its position that Capitol had always been aware that ownership was its burden, that it failed to produce documents to evidence ownership of all of the works it alleged to be infringed, and ReDigi's position was that it was now precluded.

On September 2, 2014, the Court issued an order on the Individual Defendants' motion to dismiss. On September 16, 2014, Capitol made defendants aware that it intended to seek leave to amend its complaint, yet did not request permission to do so until October 21, 2014, the day before the parties were supposed to report to the Court concerning remaining discovery issues.

The delay in seeking leave to amend here is not excusable. Plaintiff has either known, or should have known, about the alleged need for the instant amendment since June 2012, before the summary judgment filings, before damages discovery closed, before its prior request to amend, before ReDigi submitted its pre-motion conference letter seeking leave to move for summary judgment on these issues – but waited until now to request leave to actually amend from the Court. Plaintiff's request fails to show good cause or diligence that would explain its delay. Capitol has completely ignored the fact that the charts produced in June 2012, identified at least 36 tracks that Capitol now contends are allegedly owned by the two proposed plaintiffs. Capitol has offered no excuse as to why it could not identify the proposed plaintiffs' that purportedly own these tracks earlier. Capitol states that one of the companies changed its name in August 2013, but it offers no explanation as to why between June 2012 and August 2013, prior to the name change, this issue was not identified or why the company that did not change its name was not identified. Capitol has tried to explain the delay by stating that identifying the recordings was a "difficult process" and that it had to review "numerous records," such as contracts and corporate documents. But this explanation falls far short of satisfactory for a delay of more than two years.

Defendants will be prejudiced by the amendment as it will have to expend additional resources deposing the new plaintiffs and taking discovery on the chain of title issues. Plaintiff had ample opportunity to identify this issue and address it in a timely fashion. As a result of its failure to do so, and as this request is clearly for the purpose of increasing its damage award, Plaintiff's request for leave to amend should be denied. We appreciate the Court's time and consideration.

Respectfully submitted,

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Cc: Counsel of Record