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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 CAPITOL RECORDS, LLC, et al.,

4 Plaintiffs,

5 v.

12 CV 95 (RJS)

6 REDIGI, INC., et al.,
7

Defendants.
8

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9 New York, N.Y.
10 November 7, 2014
11 4:50 p.m.
Before:

12 HON. RICHARD J. SULLIVAN,
13 District Judge

14 APPEARANCES

15 COWAN, LIEBOWITZ & LATMAN, P.C.

16 Attorneys for Plaintiffs

17 BY: RICHARD S. MANDEL

JONATHAN Z. KING

18 HAUSFELD LLP

19 Attorneys for Defendant Ossenmacher

BY: NATHANIEL C. GIDDINGS

20 ADELMAN MATZ P.C.

21 Attorneys for Defendant Redigi Inc.

BY: GARY P. ADELMAN

SARAH M. MATZ

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1 (Case called)

2 THE COURT: With respect to this case, I guess we have
3 a dispute that stems back to what we talked about some time
4 ago, which is whether or not the individual defendants are sort
5 of locked into the positions taken by the corporate defendants
6 up through the time of the summary judgment ruling.

7 So far so good?

8 I think that is the basic issue. So there is a legal
9 dispute clearly as to whether or not the Second Circuit's
10 decision in Teltronics, which is factually a little different
11 because that's a case where there was a case, a ruling, and
12 then a subsequent case involving the individual principals and
13 shareholders of the corporate defendant that was found liable
14 in the first case, but I think the principle would apply
15 equally to both. There is a legal dispute as to whether or not
16 Teltronics is relevant to this situation. I'm not sure if
17 there is a factual dispute as to whether or not the individual
18 defendants, in fact, controlled the corporate defendant and
19 directed the litigation up through the time of the summary
20 judgment ruling. Maybe we should start there.

21 Is there a dispute about whether or not -- not you,
22 Mr. Mandel.

23 MR. MANDEL: I didn't think so.

24 THE COURT: Is there a dispute about that?

25 MR. GIDDINGS: Yes, your Honor. It is something that

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1 we would like discovery on.

2 THE COURT: What sort of discovery do you need to
3 determine whether or not your clients were running the
4 litigation?

5 MR. GIDDINGS: Let me rephrase, your Honor.

6 It is something that we think can be developed further
7 and potentially challenged in this litigation. If Capitol
8 would like to develop an argument based on facts --

9 THE COURT: Basically, the easiest way to do this is I
10 throw your clients on the stand and we ask them questions about
11 what involvement they had with respect to the litigation when
12 it was just the corporate defendant and who else is involved in
13 running the corporate defendant and running the litigation. I
14 don't want privileged information, but I think that would be
15 relevant to determine whether or not these are people who are
16 responsible for the corporate defendant's litigation strategies
17 and, therefore, arguably liable to stick with those decisions,
18 those prior decisions.

19 Is there really a dispute about this?

20 MR. GIDDINGS: Your Honor, it is something that we
21 didn't focus on in the letters before you. It is something we
22 would like to explore further, and we would be happy to brief
23 it to your Honor.

24 What we think the issue really is today before the
25 Court, as you correctly identified, was whether res judicata

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1 and collateral estoppel applies here, and we think we can reach
2 that issue without ever having to get to the privity issue.

3 THE COURT: That may be. If I rule on the legal issue
4 in your favor, then I guess you're right. I think I'm likely
5 to rule the other way on this. The letters that I received
6 from the parties somewhat cursorily lay out the positions. I'm
7 not criticizing. You had a limited amount of space. I think,
8 basically, your argument is that the Teltronics case and other
9 cases that have been discussed in this context were sort of in
10 a procedurally different posture and, therefore, are wholly
11 inapplicable. I think I would concede, I don't think
12 Mr. Mandel has any choice but to concede that there is a
13 procedural difference between where those cases were and where
14 this case is. But his point is -- and I think I'm inclined to
15 agree -- that's a distinction that doesn't make any difference
16 for purposes of the legal analysis. I think I'm likely to
17 agree with that. If you want to have a chance to develop this
18 more fully, I guess I would give you a chance to do that.

19 MR. GIDDINGS: Absolutely, your Honor.

20 THE COURT: I wouldn't bet the house on changing my
21 view on that, just because I think there is not a ton of case
22 law, and I think there is only so many ways to slice this.

23 MR. GIDDINGS: Absolutely, your Honor. Just to
24 clarify, Teltronics was a res judicata case, not a collateral
25 estoppel case.

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1 Are you inclined to say that res judicata would apply
2 here?

3 THE COURT: I'm inclined to say that the principles
4 articulated in Teltronics would apply here, as well --

5 MR. GIDDINGS: Okay.

6 THE COURT: -- if, in fact, it is true and undisputed
7 that the individual defendants were running this defense for
8 the corporate client, the corporate defendant, and knew full
9 well what they were doing when they decided to not challenge
10 certain things, stipulate to certain things, not assert certain
11 defenses. It would seem to me that the rationale in Teltronics
12 is equally applicable here. I can't think of a reason that it
13 wouldn't be applied here.

14 MR. GIDDINGS: Your Honor, Teltronics laid out a
15 four-part test for res judicata. It laid out four factors, and
16 that was: First, the final judgment on the merits; second,
17 that judgment must be by a court of competent jurisdiction;
18 third, the same party for privity; and fourth, the same cause
19 of action.

20 Now, I think we can let two and three go for right
21 now. Really, what the question is, your Honor, is whether or
22 not there has been a final judgment in the merits. I think it
23 is pretty well accepted that res judicata, that means it has to
24 be in a prior proceeding, a prior action, right?

25 What we have here is the same action, so that

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1 res judicata would not apply. For instance, in Marine Midland
2 Bank, the Court said, quote, defenses that could have been
3 raised by a corporation in a prior action were barred by
4 res judicata.

5 THE COURT: That's what it said. It didn't say in a
6 situation like this one that the individual defendants could
7 then raise everything anew, right?

8 I see the language you're seizing upon, but I don't
9 think that was the holding of the case; right?

10 MR. GIDDINGS: I would have to go back and look at
11 that. It is something we would be happy to brief in greater
12 detail, your Honor.

13 THE COURT: I will give you a chance to brief it. I
14 think, clearly, the language of Teltronics, at pages 190 and
15 191, principally those pages, would seem to have equal force
16 here as to what went on. If there is a factual dispute as to
17 whether or not the individual defendants really were running
18 the litigation, well, then I guess we would have to nail that
19 down.

20 MR. GIDDINGS: Right.

21 THE COURT: I think that would be easily done by
22 putting them on the stand in front of me and then I could
23 assess and make a finding.

24 MR. GIDDINGS: Your Honor, Teltronics also said,
25 quote, res judicata applies to repetitious suits involving the

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1 same cause of action. Right? Again, we don't have repetitious
2 suits here.

3 THE COURT: So your view is that had the suit that I
4 granted summary judgment on, if that went to final judgment and
5 then they filed a separate action against your clients, then of
6 course they would be stuck with what they did here; but because
7 it was an amended complaint with the same docket number, that
8 makes all the difference in the world?

9 MR. GIDDINGS: Correct, your Honor.

10 THE COURT: Okay. I think that is the kind of
11 formalism that I don't find persuasive. I think I will give
12 you a chance to brief it, certainly, but it doesn't strike me
13 as that persuasive. Certainly, there are cases in which
14 partial summary judgments are entitled to conclusive effect.

15 MR. GIDDINGS: Your Honor, to be clear about the
16 partial summary judgment point, the cases that Capitol cites,
17 those are all partial summary judgment orders from a prior
18 proceeding, a different action, right. Hudson involved an
19 order from a district court judge in another district.

20 THE COURT: I get all that, but your view is that the
21 entire issue turns on whether or not there was an amended
22 complaint or whether there was a new complaint with a different
23 docket number.

24 MR. GIDDINGS: Correct. That's what the cases say,
25 your Honor.

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1 THE COURT: But they don't say that. They don't
2 address this issue squarely and say that you have to bring a
3 new case; that in a situation in which there's an amended
4 complaint, bringing the same cause of action against two new
5 defendants, that the result is totally different. I haven't
6 found a case that says that. Are you aware of one?

7 MR. GIDDINGS: I am not, but I'm not aware of a case
8 where res judicata and collateral estoppel have been applied in
9 the same proceeding, to preclude that defendant from raising
10 those defenses. Right? Capitol hasn't pointed to one in their
11 letter, either. Again, maybe something better suited for
12 further briefing and further explanation, but Capitol has not
13 pointed to a single case in which this has been done before.

14 THE COURT: This is the language from Teltronics: "In
15 light of the individual defendant's continuous and active
16 non-party participation and his apparent day-to-day leadership
17 role in the prior litigation, we hold that he was in privity
18 with Teltronics and is bound by the result in Teltronics'
19 litigation arising from this cause of action."

20 So you're hanging your hat on the fact that prior
21 litigation was at issue in that case.

22 MR. GIDDINGS: Correct, your Honor. Actually,
23 Teltronics, my reading of the case, is there are three or four
24 different subsequent actions prior to the Second Circuit
25 decision. It depends on how you count them. Three or four is

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1 a fair assessment at the very beginning of the opinion.

2 THE COURT: The other quote at page 191: "If a
3 stockholder, officer, or director of a corporation controls an
4 action brought on its behalf in furtherance of his own
5 interests, he is bound by the result of that action."

6 I think the issues are pretty clear. If there is
7 additional authority, I would love to see it. I haven't found
8 any.

9 How long do you think you need to brief it?

10 MR. GIDDINGS: To submit a brief on it?

11 THE COURT: A fuller brief than what you have given
12 me.

13 MR. GIDDINGS: From our perspective, we probably need
14 until the first or second week in December, your Honor.
15 Thanksgiving is coming up, and I am going to be out of the
16 country for a different matter for eight days, six to eight
17 days.

18 THE COURT: Let me hear what Mr. Mandel has to say on
19 scheduling and anything else. You want to submit a brief, I
20 guess, in response, right?

21 MR. MANDEL: I suppose so, if your Honor wants
22 briefing.

23 THE COURT: I'm going to give them an opportunity to
24 brief it more fully than a three-page letter.

25 MR. MANDEL: That's fine. Obviously, we would like

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2 the opportunity to respond if they're going to submit a brief.

3 THE COURT: Mr. Giddings, by December 5th.

4 MR. GIDDINGS: I think that is fair, your Honor.

5 Thank you.

6 THE COURT: How long do you need, Mr. Mandel?

7 MR. MANDEL: Two weeks.

8 THE COURT: Two weeks. That is what I was thinking.

9 So December 19th. All right.

10 MR. GIDDINGS: Your Honor, to be clear, are we going
11 to be permitted a reply?

12 THE COURT: I'm not sure that I need a reply,
13 candidly. We have sort of teed this up twice already now in
14 letters and with oral argument back in December, so I would
15 love to get it wrapped up. If you want to make a reply, you
can make a reply by the 23rd. Okay.

16 MR. GIDDINGS: I don't know if one is going to be
17 necessary, your Honor.

18 THE COURT: I assume it will be short. I assume
19 you're not going to find anything in their opposition that you
20 haven't already seen. So the 23rd, it gives you five days to
21 do it. Is that okay?

22 MR. GIDDINGS: That sounds great, your Honor. Thank
23 you.

24 THE COURT: All right. Let's do that.

25 In the meantime, what else can we or should we be

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1 doing?

2 Damages discovery is something I certainly
3 contemplated. We could put that on hold pending resolution of
4 the motions to dismiss and motions for reconsideration of the
5 order denying the motions to dismiss.

6 So, Mr. Mandel, from your perspective, what do we need
7 to do with respect to damages?

8 MR. MANDEL: I think we've talked to Mr. Giddings. We
9 don't need any more discovery from Capitol's perspective.
10 Mr. Giddings had talked about, perhaps, until the end of
11 February, for them to complete the discovery that they feel
12 they need.

13 THE COURT: The discovery they feel they need meaning
14 requests of you?

15 MR. MANDEL: Yes. Discovery that the individual
16 defendants are seeking of Capitol to defend the case. We're
17 agreeable to that.

18 The one thing I would point out, we think these
19 defendants are barred by res judicata and collateral estoppel,
20 but even apart from that, I think just in the context of the
21 discovery disputes that we briefed in the letters, even if you
22 assume that somehow these defenses could stand, I think the
23 discovery requests are still way out of bounds and not
24 connected to anything that's really reasonable. I think these
25 defenses, to be frank, they're very slim. They could

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1 probably --

2 THE COURT: You're alleging that they infringed on
3 your copyrights, what you own?

4 MR. MANDEL: Correct.

5 THE COURT: You've attached to your complaint a couple
6 of lists of copyrighted material.

7 MR. MANDEL: Correct.

8 THE COURT: If we were starting from scratch and they
9 said, I don't think you really own those copyrights --

10 MR. MANDEL: I'm not contesting their entitlement to
11 discovery on ownership.

12 THE COURT: What are you talking about?

13 MR. MANDEL: I'm talking about the few issues that we
14 briefed in the letters, which are really primarily geared to
15 their so-called defenses, and they relate to things that are
16 very far afield.

17 THE COURT: What are you talking about?

18 MR. MANDEL: Every copyright case that Capitol has
19 brought for any of these recordings, we have to tell them what
20 they are; what the result was; if there was a settlement, how
21 much it was for. It's crazy. I mean, it has no bearing on any
22 issue that is left to be decided. They're asking for all of
23 our digital exploitation for all of these recordings, so
24 basically all of our contracts.

25 At this point in the case, where we are, I don't know

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2 what that has to do with any issue that's left. We produced in
3 discovery and they have our contract with Apple, which is
4 really the primary relationship that is significant; but at
5 this point, for us to start producing all our licenses, all of
6 our contracts for digital exploitation, everything relating to
7 our policies of digital exploitation, it is a complete fishing
8 expedition. If they want to challenge ownership and ask
9 questions about it and get us to prove that we own it, fine, I
10 understand that. But these other topics are so far afield, and
11 they try to justify them without even explaining they're
12 supposedly related to their unclean hands defense, which they
13 have never articulated what unclean hands defense could
14 possibly exist here, or copyright misuse. I don't know what
15 those defenses are. I don't think they're entitled to assert
16 them as a matter of res judicata or collateral estoppel, but
17 even if they could, they're totally without any factual or
legal foundation at this point.

18 THE COURT: I'm inclined to agree. I guess I would be
19 curious to know what they are, but it may be that the legal
20 ruling dispenses the need even to do that.

21 Mr. Giddings, do you want to say something?

22 MR. GIDDINGS: Yes, your Honor.

23 Regarding Mr. Mandel's comment about the end of
24 February, I think your ruling, depending on what it does at the
25 briefing, has an impact on that. That will obviously push the

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2 discovery or have a very real impact on what discovery the
3 individual defendants are able to seek in this action. So I
think it may be premature.

4 THE COURT: Maybe. Why do you think you need to know
5 about all the infringement cases they have settled with other
6 people?

7 MR. GIDDINGS: Your Honor, my point was that if we are
8 precluded, in your view, by res judicata or collateral estoppel
9 from asserting any defense as to our liability or certain
10 defenses as to the individual defendant's liability, then I
11 believe the discovery period that we could negotiate with
12 Capitol Records would be much shorter.

13 THE COURT: I agree with that. I guess I'm asking,
14 even if I said you can assert defenses that the corporate
15 defendant waived or didn't make, what would be the rationale
16 for getting discovering on every infringement action they've
17 had with third parties?

18 MR. GIDDINGS: Your Honor, our client believes that it
19 is pertinent to the way in which --

20 THE COURT: If your client believes it is pertinent is
21 of no moment to me. What is the articulable basis for its
22 relevance?

23 MR. GIDDINGS: About prior actions, your Honor?

24 THE COURT: Yes.

25 MR. GIDDINGS: It goes as to how Capitol has enforced

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1 its copyrights as to other start-ups, as to other users, which
2 goes, we think, into the damage calculation or the damage --
3 "computation" is not the correct word -- but the equation, if
4 you will.

5 THE COURT: I guess I would want to see some authority
6 for the proposition that you're entitled to know the settlement
7 terms of every infringement case they have ever settled to
8 assess the damages.

9 MR. GIDDINGS: To be clear, your Honor, we weren't
10 asking for settlement terms. I believe the request asks for a
11 list of all their prior enforcement actions or their copyright
12 actions as to these asserted claims.

13 THE COURT: What would that be relevant to in this
14 case? A list of other enforcement actions that they have
15 brought to protect their copyrights?

16 MR. GIDDINGS: It does also ask for the outcome of the
17 claim.

18 THE COURT: Look, I think I'm not likely to allow
19 that. I think the legal question may resolve it without me
20 having to do this piecemeal, but I do think at some point we
21 may get to the merits of these, and whether this is just
22 designed to inflict pain on the other side or whether it is
23 just a fishing expedition or a desire to delay further the
24 litigation, so I guess I'm not going to resolve that now, but
25 I'm skeptical.

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1 MR. GIDDINGS: Thank you, your Honor.

2 THE COURT: Mr. Adelman, this is the quietest I have
3 ever seen you.

4 MR. ADELMAN: I appreciate that.

5 THE COURT: I said it with a smile.

6 Anything else you want us to cover?

7 MR. ADELMAN: I have lots to say, but not in this
8 case.

9 THE COURT: You have nothing to say today?

10 MR. ADELMAN: No, I don't think we have anything to
11 say other than we are going to participate, obviously, in the
12 discovery process to the extent it goes on, because I think we
13 feel, to the extent that -- may I stand?

14 THE COURT: Sure.

15 MR. ADELMAN: While we continue to object to their
16 providing certain documents after the close of damages
17 discovery in the corporate case proffer, they did disclose
18 almost 4,000 pages, and we would like the opportunity to depose
19 someone from the plaintiffs --

20 THE COURT: With respect to damages?

21 MR. ADELMAN: Yes, with respect to damages.

22 THE COURT: Mr. Mandel, you're not objecting to that?

23 MR. MANDEL: No. I think if, by damages, they mean
24 ownership --

25 MR. ADELMAN: Yeah, I mean in the damages, as part of

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1 the damages phase, yes, as to ownership --

2 MR. MANDEL: We don't have any problem with that.

3 MR. ADELMAN: I just wanted to make sure that was part
4 of whatever you decide here today vis-a-vis discovery.

5 THE COURT: I think we will resolve the legal issue as
6 to what the defendants are going to be able to assert. Once I
7 have done that, then we will decide what discovery remains and
8 what it is going to look like. I don't anticipate it lasting
9 terribly long because I think it is going to be fairly
10 discrete. I didn't understand that fact discovery with respect
11 to damages was done. I mean, my understanding and my intention
12 all along was to have some damages discovery, and then we kind
13 of got waylaid by the individual defendants submitting
14 complaints and the motions to dismiss and reconsider. I'm not
15 faulting anybody, but I think that's what has gone on. So my
16 contemplation was always and remains -- and I think I have the
17 discretion to make this happen -- that we're going to have some
18 damages discovery, but let's first resolve this last legal
19 issue relating to Teltronics and what it means for this case.

20 I will issue a scheduling order for that briefing, and
21 then I think I will likely resolve it very quickly, with or
22 without an opinion. The opinion may follow later, just so that
23 we can get this back on track. Okay.

24 It is an interesting case. It has attracted a lot of
25 attention, with good reason, but I want to get it moving. So

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2 it may be that the Teltronics issue is one where I will rule
3 and then explain later. Okay? All right.

4 Anything else we should cover today?

5 MR. MANDEL: Not from plaintiffs, your Honor.

6 THE COURT: All right.

7 MR. ADELMAN: No, your Honor.

8 MR. GIDDINGS: Not from our perspective, your Honor.

9 THE COURT: Thanks very much.

10 I will issue that short order.

11 I thank the court reporter, as always, for her talent
12 and time.

13 If anybody needs a copy of the transcript, you can
14 take that up with her now.

15 (Adjourned)