Exhibit 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CAPITOL RECORDS, LLC,

Plaintiff,

v. 12 Civ. 95 (RJS)

REDIGI, INC.; JOHN OSSENMACHER; and LARRY RUDOLPH, also known as Lawrence S. Rogel,

Defendants.

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New York, N.Y.
December 2, 2013
6:10 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

COWAN LIEBOWITZ & LATMAN
Attorneys for Plaintiff
BY: RICHARD S. MANDEL
JONATHAN Z. KING

ADELMAN MATZ
Attorneys for Defendant Redigi, Inc.
BY: GARY P. ADELMAN
SARAH M. MATZ

HAUSFELD, LLP
Attorneys for Defendants John Ossenmacher and Larry Rudolph
BY: JAMES J. PIZZIRUSSO

defenses and also are seeking discovery that is above and beyond what was the subject up until the first summary judgment motion. So that sort of prompts me to say, is this worth it. The plaintiffs have wanted to amend had they known we were going to go down this road.

Mr. Mandel.

MR. MANDEL: Yes. We do want to amend and we think we have valid claims against the individuals. But unfortunately what we think has happened is, new counsel has come into the case and is using it as an opportunity to try and just invent anything under the sun that they can unearth defenses out of, many of which I think have already been ruled upon.

THE COURT: Some of which have been ruled upon. Fair use is one I ruled upon.

MR. MANDEL: The first sale doctrine.

THE COURT: First sale doctrine. Those are the two principal ones, right?

MR. MANDEL: Correct.

THE COURT: There are some additional defenses that plaintiffs argue Redigi could have raised earlier and did not and that the individual defendants should be foreclosed from bringing those. And you cite cases from the Second Circuit and elsewhere, principally the Second Circuit, In Re Teltronics and Kreager.

I think the posture in those cases was a little

different in that there was already was a judgment in those cases as opposed to here where we don't have a final judgment. We are doing discovery now on damages. And the thought was we could do that pretty quickly and then tee this whole thing up for the circuit sooner rather than later.

I think those cases are different. I think that the reasoning might apply, but those are cases which involve collateral estoppel where there has been a judgment. So that's my reason for suggesting that probably had I started from scratch and known this is where we are going, I would have denied the motion to amend. You could have then filed against the individual defendants, and we would have then gone forward on two tracks. But I think the track against Redigi would be almost done by now as opposed to us being kind of mired in discovery disputes and motions practice.

MR. MANDEL: No. I understand. But I do think, your Honor, that there is law that has applied collateral estoppel to partial summary judgments. And I believe even if you look beyond, even if you assume that these defenses are eligible to be asserted, on the factual record that exists already, it seems very plain that there is actually no possible basis for any of them in terms of just what's already been found.

In terms of the DMCA defense, I think there is a reason Redigi asserted that in the answer. We moved in our partial summary judgment motion, actually addressed it in our

moving papers. They didn't even see fit to address it in response. That's how little they thought of that defense.

THE COURT: The fact that one defendant thinks little of a defense and another thinks better of it is not dispositive. I think if it's a frivolous motion, then I guess there are repercussions that flow from that. At this point I am not sure I'm prepared to say that.

And there is a motion to dismiss now that's pending. And I am not supposed to be delving into the record with respect to the motions to dismiss. You are talking about a record with respect to Redigi which has already passed stage 1 of motions for summary motion. There is a contemplation of additional summary judgment on the remaining issues, including damages. But we are kind of moving on a different tract at this point.

MR. MANDEL: I guess so. I guess what confusing me is the factual record really is the same. These individuals, the only question that's really left in terms of their individual liability is whether they participated in this conduct that's been found to be infringing.

THE COURT: That's what I thought the use was going to be for purposes of the amended complaint against the individuals and that's certainly what was represented to me. And I can quote from the transcript if necessary.

The only defense that could potentially be available

documents. He has to prove the copyright. He has to prove that they own the copyright. We have never conceded that as to the individual tracks.

And during discovery there was also conversations between Ms. Matz and Mr. King, which I'd like her to express, if you would, your Honor.

THE COURT: Look, I don't know that I'm going to need to sort of peel this onion, because I don't think there is a satisfactory way to do it.

So, what I'm prepared to do is stay all discovery now, rule on the motion to dismiss -- which I will do very shortly -- and then once I have done that, then we will have an answer, we will have defenses that are asserted, and then you can make your motion for summary judgment against the individual defendants, arguing at least in part that they are precluded from certain defenses, and we can I guess coordinate whatever additional discovery is necessary to wrap this up. And then I guess we would have additional summary judgment motions on damages.

That's what you are contemplating, right, Mr. Mandel?

MR. MANDEL: We are only contemplating summary judgment motion on the individual defendants' liability.

THE COURT: So, damages would be at trial?

MR. MANDEL: Well, we are going to move for summary judgment on the innocent infringement defense that would open

up a lower category of damages.

THE COURT: So, anyway, I think all of that happens after I rule on the motion to dismiss.

So, to the extent you want to do informal discovery between now and then, you can. If Mr. Adelman is of the view that discover is closed, and he is not so accepting or asking for anything more, then he can take that position. But I am very likely to reopen discovery for a limited time for the purpose of wrapping this up, so we can get to the finish line.

So, I think to the extent there has been confusion and that there has been misunderstandings -- I'm not accusing anybody of anything -- I'm just saying that certainly at the time we had our conference in August, I anticipated a very different way this would unfold.

So, I think it's not fair to Mr. Pizzirusso to be asserting defenses until he knows what he's shooting at, so I think I have to rule on that motion. But discovery I'm going to hold off.

You see the way this wind is blowing, right, Mr. Pizzirusso? You're a smart guy.

MR. PIZZIRUSSO: I do. That was going to be my next question, which was: I hear the court is inclined perhaps probably to deny the motion to seek an answer. And if that's going to happen, we might be more inclined, my clients, to go ahead with some informal discovery if that appears to be the

way the wind is blowing.

THE COURT: Nobody is precluded from informal discovery, but I'm certainly stopping the requirement of reciprocal discovery at this point.

Discovery is stopped unless you folks can agree. But once I rule, and assuming this thing is back on a litigation track, then I will almost certainly reopen discovery for a limited range of issues. What those are exactly, I'm not sure yet, and I think that will turn on what the pleadings, what the answer says.

So, I'm not sure that's satisfactory to everybody, but I think it's the best we can do at this hour. So,anything else I have overlooked, or anything else you think I should at least keep in my brain?

MR. ADELMAN: Only that we also have a letter for summary judgment as well.

THE COURT: Right. Well, there certainly was talk about summary judgment, and I think we should hold off on summary judgment until we have concluded all discovery.

MR. ADELMAN: I agree.

THE COURT: So, no prejudice to your motion, but I think we should --

MR. ADELMAN: No. I was just making sure that it was in the mix. But I think your plan is a good one.

THE COURT: And you don't always think that.

Exhibit 6

HAUSFELD LLP

202.540.7200 ph
202.540.7201 fax

1700 K Street, NW
Suite 650
Washington, DC 20006

Seth R. Gassman
sgassman@hausfeldllp.com

October 9, 2013

VIA U.S. MAIL

Mr. Richard Stephen Mandel
Mr. Jonathan Zachary King
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the America's
New York, NY 10036
(212) 790-9291
Email: rsm@cll.com

RE: *Capitol Records, LLC V. Redigi Inc., John Ossenmacher, and Larry Rudolph, a/k/a Lawrence S. Rogel*, Case No. 12-CV-00095 (RJS) (S.D.N.Y.)

Dear Richard and Jonathan,

I have enclosed copies of Mr. Ossenmacher and Professor Rudolph's (a) Initial Disclosures, (b) First Set of Interrogatories, and (c) First Set of Requests for Production of Documents and Things in the above-captioned matter. Please note that due to the Court's tight discovery timeline, we ask that you answer these interrogatories and requests within 20 days.

In addition, it is our understanding that you have entered into a stipulation with ReDigi for service by electronic means. We would be interested in entering into a similar stipulation with you. If you are amenable to this, we will circulate a draft stipulation later this week or early next for your review.

Sincerely,

Seth R. Gassman

Enclosures

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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)

DEFENDANTS JOHN OSSENMACHER AND LARRY RUDOLPH'S
INITIAL DISCLOSURES

PLEASE TAKE NOTICE THAT, pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure and Local Rule 26.3, Defendants John Ossenmacher and Larry Rudolph ("Individual Defendants") hereby makes the following initial disclosures to Plaintiff Capitol Records, LLC.

INTRODUCTORY COMMENT

Individual Defendants hereby make the following initial disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1). Individual Defendants make these disclosures based upon information available to them pursuant to the investigation that Individual Defendants have been able to conduct to date. Individual Defendants have not yet completed formal discovery in this matter. These disclosures reflect Individual Defendants' current understanding, belief and knowledge. By making these disclosures, Individual Defendants do not represent that they are identifying or producing every witness they may use in support of their allegations.

Individual Defendants reserve the right to supplement or correct these disclosures upon continuing investigation and discovery in accordance with Federal Rule of Civil Procedure 26(e).

While Individual Defendants and their counsel have investigated sources of information immediately available to them, Individual Defendants and their counsel have not yet had sufficient opportunity to interview all persons who have, or may have, knowledge of the facts relevant to this lawsuit or reviewed all documents which refer or relate to such facts. As discovery in this lawsuit continues, additional information, persons and documents may become known to Individual Defendants and their counsel. This Initial Disclosure, therefore, is without prejudice to Individual Defendants' right to amend their response or to offer further or different evidence, documents or information that may come to their attention after these disclosures. In addition, it is possible some individuals listed herein may not in fact possess significant information regarding the issues involved in this litigation or may only have knowledge which is duplicative of knowledge possessed by others.

Individual Defendants submit these Initial Disclosures without waiver of any applicable privilege or protection and reserves the right to object to the admissibility at trial of any information contained in or derived from these Initial Disclosures. Individual Defendants further reserve the right to rely upon the individuals identified in these Initial Disclosures for subjects other than those identified herein in response to any disclosure, evidence or testimony proffered by Plaintiff. All of the disclosures set forth below are made subject to the objections, reservations, and qualifications set forth above.

INITIAL DISCLOSURES

Rule 26(a)(1)(A)(i):

Provide the name, and if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

Rule 26(a)(1)(A)(i) Disclosure:

The following are persons likely to have discoverable information that may support Individual Defendants' defenses:

Name	Contact Information	Subjects
Larry Rudolph	Mr. Rudolph may only be contacted through his counsel of record in this matter: HAUSFELD LLP 1700 K Street, NW Suite 650 Washington, DC 2006 (202) 540-7200	ReDigi software; ReDigi website; registration process; upload, download and storage processes; eligibility and verification of files; linking and streaming of 30-second clips; linking and display of artwork; locker storage; sale process, transfer of ownership.
John Ossenmacher	Mr. Ossenmacher may only be contacted through his counsel of record in this matter: HAUSFELD LLP 1700 K Street, NW Suite 650 Washington, DC 2006 (202) 540-7200	Business model; marketing; terms of service; ReDigi software; ReDigi website; registration process; upload, download and storage processes; eligibility and verification of files; linking and streaming of 30-second clips; linking and display of artwork; locker storage; sale process, transfer of ownership; DMCA designated agent.
Pat Shah	VP, Digital Business Development EMI Music North America 150 5th Avenue #7 New York, NY 10011 (212) 786-8000	Plaintiff's business relationship with ReDigi, including proposals to work with ReDigi; Plaintiff's encouragement of the ReDigi platform prior to its launch; Plaintiff's potential licensing of copyrights to ReDigi; Plaintiff's efforts to misrepresent and conceal the true nature of its relationship with ReDigi and the Individual Defendants; Plaintiff's efforts to misrepresent and conceal the true nature of its relationship with recording artists and producers with respect to the exploitation of copyrighted works; and other conduct of Plaintiff to be uncovered

		through the discovery process.
Alasdair McMullan	SVP, Head of Litigation EMI Music North America 150 5th Avenue #7 New York, NY 10011 (212) 786-8000	Plaintiff's views on the legality of the ReDigi platform prior to ReDigi's launch; Plaintiff's business relationship with ReDigi, including proposals to work with ReDigi; Plaintiff's encouragement of the ReDigi platform prior to its launch; Plaintiff's potential licensing of copyrights to ReDigi, including the negotiation thereof; Plaintiff's efforts to misrepresent and conceal the true nature of its relationship with ReDigi and the Individual Defendants; Plaintiff's efforts to misrepresent and conceal the true nature of its relationship with recording artists and producers with respect to the exploitation of copyrighted works; and other conduct of Plaintiff to be uncovered through the discovery process.
Mark Piibe	EVP, Global Business Development and Digital Strategy Sony Music 550 Madison Ave New York, NY 10022	Plaintiff's business relationship with ReDigi, including proposals to work with ReDigi; Plaintiff's encouragement of the ReDigi platform prior to its launch; Plaintiff's potential licensing of copyrights to ReDigi; Plaintiff's efforts to misrepresent and conceal the true nature of its relationship with ReDigi and the Individual Defendants; Plaintiff's efforts to misrepresent and conceal the true nature of its relationship with recording artists and producers with respect to the exploitation of copyrighted works; and other conduct of Plaintiff to be uncovered through the discovery process.
Christopher Horton	VP, Advanced Technology Universal Music Group 2220 Colorado Avenue Santa Monica, California 90401	Plaintiff's business relationship with ReDigi, including proposals to work with ReDigi; Plaintiff's encouragement of the ReDigi platform prior to its launch; Plaintiff's potential licensing of copyrights to ReDigi; Plaintiff's efforts to

		misrepresent and conceal the true nature of its relationship with ReDigi and the Individual Defendants; Plaintiff's efforts to misrepresent and conceal the true nature of its relationship with recording artists and producers with respect to the exploitation of copyrighted works; and other conduct of Plaintiff to be uncovered through the discovery process.
Steven Marks	Chief, Digital Business & General Counsel Recording Industry Association of America 1025 F. St., NW 10th Floor Washington, D.C. 20004 (202) 775-0101	The record industry's view of the ReDigi platform prior to and after its launch; Plaintiff and other record labels' efforts to shut down ReDigi after its launch; and he record industry's payment of mechanical royalties to recording artists and producers for the exploitation of copyrighted works.
Current and former employees, executives, agents, and corporate representatives of Plaintiff and its subsidiaries and parent companies that have yet to be identified	EMI Music North America 150 5th Avenue #7 New York, NY 10011 (212) 786-8000	Plaintiff's business relationship with ReDigi, including proposals to work with ReDigi; Plaintiff's encouragement of the ReDigi platform prior to its launch; Plaintiff's potential licensing of copyrights to ReDigi; Plaintiff's efforts to misrepresent and conceal the true nature of its relationship with ReDigi and the Individual Defendants; Plaintiff's efforts to misrepresent and conceal the true nature of its relationship with recording artists and producers with respect to the exploitation of copyrighted works; and other conduct of Plaintiff to be uncovered through the discovery process.

Rule 26(a)(1)(A)(ii):

Provide a copy – or description by category and location – of all documents, electronically stored information, and tangible things that disclosing party has in its possession, custody or control it may use to supports its claims or defenses, unless the use would be solely for impeachment.

Rule 26(a)(1)(A)(ii) Disclosure:

Individual Defendants hereby disclose the following categories of documents:

Category	Description	Location[1]
Software Code	Certain aspects and functions of the software code created and/or used by ReDigi that constitutes the ReDigi products and services identified in Plaintiff's Amended Complaint.	ReDigi Offices and/or on remote computer systems used by vendors who provide certain outsourced Information Technology related services to ReDigi.
ReDigi.com Website	All or portions of the ReDigi website, including those pages that describe, display or reflect the functionality of the ReDigi products and/or services, as well as any usage, privacy and other policies therein.	ReDigi Offices and/or on remote computer systems used by vendors who provide certain outsourced Information Technology related services to ReDigi.
Transactional Database	Excerpts from the database(s) and related systems, if any, that record individual transactions on the ReDigi products and services identified in Plaintiff's Amended Complaint.	ReDigi Offices and/or on remote computer systems used by vendors who provide certain outsourced Information Technology related services to ReDigi.
Electronic Mail	Electronic Mail sent and/or received by ReDigi employees or related individuals.	ReDigi Offices and/or on remote computer systems used by vendors who provide certain outsourced Information Technology related services to ReDigi.
Other Electronically Stored Information	Any other common electronically stored information, such as word documents, excel documents,	ReDigi Offices and/or on remote computer systems used by vendors who provide certain outsourced Information Technology related services to ReDigi.

[1] To the extent not already collected by the ReDigi Defendant, Individual Defendants are in the process of collecting and preserving certain categories and types of information.

	charts, workflows and other such documents.	

Rule 26(a)(1)(A)(iii):

Provide the computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material unless privilege or protected from disclosure on which each computation is based, including materials bearing the nature and extent of injuries suffered.

Rule 26(a)(1)(A)(iii) Disclosure:

Not Applicable to the Individual Defendants.

Rule 26(a)(1)(A)(iv):

Provide for inspection and copying as under Rule 34 any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Rule 26(a)(1)(A)(iv) Disclosure:

None.

DATED: October 9, 2013

Seth R. Gassman

Seth R. Gassman (SG-8116)
James J. Pizzirusso (*pro hac vice* pending)
Nathaniel C. Giddings (*pro hac vice* pending)
HAUSFELD LLP
1700 K Street, N.W., Suite 650
Washington, D.C. 20006

Counsel for John Ossenmacher & Larry Rudolph

PROOF OF SERVICE

CAPITOL RECORDS, LLC V. REDIGI INC., JOHN OSSENMACHER, AND LARRY RUDOLPH, A/K/A LAWRENCE S. ROGEL

Case No. 12-CV-00095 (RJS)

DISTRICT OF COLUMBIA

I am employed in the DISTRICT OF COLUMBIA. My business address is 1700 K Street, NW Suite 650, Washington, DC 20006. I am over the age of eighteen years and am not a party to the within action;

On October 9, 2013, I served the following document(s) entitled **DEFENDANTS JOHN OSSENMACHER AND LARRY RUDOLPH'S INITIAL DISCLOSURES** on ALL INTERESTED PARTIES in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED LIST

BY MAIL: By placing a true copy thereof in a sealed envelope addressed as above, and placing it for and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings and other matters for mailing with the United States Postal Service. The correspondence, pleadings and other matters are deposited with the United States Postal Service with postage thereon fully prepaid in Washington, DC, on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 9, 2013 in Washington, D.C.

Dated: October 9, 2013

Seth R. Gassman

Seth R. Gassman (SG-8116)

SERVICE LIST

CAPITOL RECORDS, LLC V. REDIGI INC., JOHN OSSENMACHER, AND LARRY RUDOLPH, A/K/A LAWRENCE S. ROGEL

Case No. 12-CV-00095 (RJS)

Richard Stephen Mandel
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Attorney of Record for Defendant, ReDigi Inc.

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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)

DEFENDANTS JOHN OSSENMACHER AND LARRY RUDOLPH'S FIRST SET OF INTERROGATORIES TO PLAINTIFF CAPITOL RECORDS, LLC

PROPOUNDING PARTIES:	DEFENDANTS JOHN OSSENMACHER AND LARRY RUDOLPH
RESPONDING PARTY:	PLAINTIFF CAPITOL RECORDS, LLC
SET NO.:	ONE

Pursuant to Federal Rule of Civil Procedure 33, DEFENDANTS JOHN OSSENMACHER AND LARRY RUDOLPH hereby requests that PLAINTIFF CAPITOL RECORDS, LLC answer the following interrogatories within twenty (20) days of service, and afterwards supplement such interrogatory answers as may be necessary to comply with the requirements of Rule 26(e) of the Federal Rules of Civil Procedure.

DEFINITIONS

The following definitions apply to these interrogatories:

1. "YOU," "YOUR" means Plaintiff CAPITOL RECORDS, LLC, its parent corporations, subsidiaries and affiliates, including but not limited to Universal Music Group

Recordings, Inc. and Capitol Music Group, and each of their employees, agents, representatives, attorneys or any person acting or purported to act on behalf of the responding Defendant.

2. INDIVIDUAL DEFENDANTS means Defendants John Ossenmacher and Larry Rudolph a/k/a Lawrence S. Rogel.

3. COMMUNICATIONS means any disclosure, transfer, or exchange of information or opinion, however made, including but not limited to through email, letter, instant messaging and text messaging. COMMUNICATIONS shall include DOCUMENTS and ESI.

4. REDIGI means the online marketplace for pre-owned digital music that is a Defendant in this matter and its employees, officers, and directors other than the INDIVIDUAL DEFENDANTS.

5. SOFTWARE ARCHITECTURE means the structure or structures of a computer system that comprise software components, the externally visible properties of those components, and the relationships between them.

6. DIGITAL CONTENT PROVIDERS means any entity, other than REDIGI, that sells or distributes to end-users digital versions, whether in whole or in part, of music recordings that end-users download or stream over the Internet to or on their computers or other electronic devices (*e.g.*, cell phones).

7. DIGITAL EXPLOITATION means the process by which DIGITAL CONTENT PROVIDERS sell or distribute digital versions, whether whole or in part, of music recordings to end-users.

8. RECORDING ARTISTS means any individual or performing group that recorded master recordings for YOU.

9. PRODUCERS means any individual or performing group that produced master recordings for YOU.

10. COMPENSATION means remuneration, whether in money or in kind.

11. RECORD LABEL means any brand and/or trademark associated with the marketing of music recordings or music videos other than CAPITOL RECORDS, LLC and

including but not limited to Warner Music Group, EMI, Sony, BMG, Universal Music Group, and Polygram.

12. ALLEGEDLY COPYRIGHTED SONGS means the 512 songs listed in Exhibit A to YOUR Amended Complaint in this litigation.

13. PRE-1972 SONGS means the 55 songs listed in Exhibit B to YOUR Amended Complaint in this litigation.

14. PRESS means any news dissemination service and their agents and employees, including but not limited to established news services (*i.e.*, CNN, Fox, MSNBC), websites, RSS feeds, podcasts and blogs.

15. "PERSON" and "PERSONS" shall include both the singular and plural, and shall mean and refer to any natural human being, firm, proprietorship, partnership, corporation, joint venture, shareholder, investors, members, limited liability company, limited liability partnership, general partnership, limited partnership, trust, loan – out company, government agent or government body, association, employers, employees, agents, partners, officers, directors, representatives, affiliates and all other forms of organization or entity or other group or combination of the foregoing acting as one.

16. POLICY means any official standard(s), procedure(s), or protocol(s), whether written or not.

17. ROYALTY STATEMENT means statements of royalties, regardless of type, that YOU provide to RECORDING ARTISTS and PRODUCERS.

18. AUDIT means an examination, review, or inspection of ROYALTY STATEMENT(S) whether initiated at the request of RECORDING ARTISTS or PRODUCERS or as a result of an internal compliance process. "Including" is used to illustrate a Request for particular types of DOCUMENTS requested, and shall not be construed as limiting the Request in any way.

1. "Or" should be construed to require the broadest possible response, and should be read as "and/or."

INTERROGATORIES

INTERROGATORY NO. 1:

IDENTIFY each current or former employee of CAPITOL RECORDS LLC who had any interaction with REDIGI and/or the INDIVIDUAL DEFENDANTS, and IDENTIFY the date, time, and location of each COMMUNICATION any such individual had with REDIGI and/or the INDIVIDUAL DEFENDANTS.

INTERROGATORY NO. 2:

For each ALLEGEDLY COPYRIGHTED SONG and each PRE-1972 SONG, IDENTIFY the date, time, and location of each act that you allege results in the INDIVIDUAL DEFENDANTS' liability in this action, along with an explanation for why and how each act infringed on each ALLEGEDLY COPYRIGHTED SONG and each PRE-1972 SONG.

INTERROGATORY NO. 3:

For each COMMUNICATION identified in response to Interrogatory Number 1, IDENTIFY any action YOU took as a result of or related to each COMMUNICATION.

INTERROGATORY NO. 4:

For all ALLEGEDLY COPYRIGHTED SONGS and PRE-1972 SONGS, IDENTIFY each prior copyright infringement claim, as well as the outcome of that claim (*i.e.*, whether YOU were successful, and if so, the amount of COMPENSATION that you were able to obtain to compensate for the alleged infringement), that YOU have pursued against alleged infringers other than REDIGI or the INDIVIDUAL DEFENDANTS.

INTERROGATORY NO. 5:

For each ALLEGEDLY COPYRIGHTED SONG and PRE-1972 SONG, IDENTIFY the contractual language in each RECORDING ARTIST or PRODUCER contract that YOU contend

provides YOU an interest in the copyright to each of these songs. If no such language exists, IDENTIFY the language, provision, statute or other means that YOU contend provides YOU an interest in the copyright of each song.

INTERROGATORY NO. 6:

For each affirmative defense identified below, state all facts that YOU contend render each inapplicable, as to the INDIVIDUAL DEFENDANTS, in this litigation:

a. The fair use doctrine;

b. The estoppel doctrine;

c. The waiver doctrine;

d. The unclean hands doctrine;

e. The first-sale doctrine as codified in 17 U.S.C. § 109;

f. The substantial-non-infringing use doctrine;

g. The essential steps defense;

h. Each of the safe harbor provisions of the DMCA, 17 U.S.C. § 512; and

i. The common law doctrine of exhaustion.

INTERROGATORY NO. 7:

State all facts that YOU contend demonstrate that the INDIVIDUAL DEFENDANTS did not act with innocent intent, as that terms has been defined by the courts interpreting 17 U.S.C. § 504(c)(2), of the ALLEGEDLY COPYRIGHTED SONGS and PRE-1972 SONGS.

INTERROGATORY NO. 8:

State all facts that YOU contend entitle YOU to statutory damages against, and/or attorneys' fees from, the INDIVIDUAL DEFENDANTS.

INTERROGATORY NO. 9:

State all facts that YOU contend demonstrate that the INDIVIDUAL DEFENDANTS made "distributions," as that term is used in 17 U.S.C. § 106(3), of the ALLEGEDLY COPYRIGHTED SONG and PRE-1972 SONG.

INTERROGATORY NO. 10:

State all facts that YOU contend demonstrate that the INDIVIDUAL DEFENDANTS intentionally induced or encouraged direct infringement of each ALLEGEDLY COPYRIGHTED SONG and PRE-1972 SONG.

INTERROGATORY NO. 11:

State all facts that YOU contend demonstrate YOUR mitigation of damages with respect to REDIGI or the INDIVIDUAL DEFENDANTS' alleged infringement of the ALLEGEDLY COPYRIGHTED SONGS and PRE-1972 SONGS.

INTERROGATORY NO. 12:

State all facts that YOU contend demonstrate that a statutory damage award in this action would not be wholly disproportionate to the YOUR actual harm such that statutory damages would be punitive and unconstitutional.

INTERROGATORY NO. 13:

IDENTIFY the contractual language in each of YOUR AGREEMENTS with DIGITAL CONTENT PROVIDERS that YOU contend prohibits the re-sale of the ALLEGEDLY COPYRIGHTED SONGS and PRE-1972 SONGS.

INTERROGATORY NO. 14:

IDENTIFY the characteristics or attributes of REDIGI's SOFTWARE ARCHITECTURE and the INDIVIDUAL DEFENDANTS' role in developing each of those characteristics or attributes that YOU contend gives rise to the INDIVIDUAL DEFENDANTS'

liability in this action.

INTERROGATORY NO. 15:

For each ALLEGEDLY COPYRIGHTED SONG , state all facts that YOU contend demonstrate that each song was validly copyrighted.

INTERROGATORY NO. 16:

For each PRE-1972 SONG, state all facts that YOU contend demonstrate that the copyright interest in each song has not reverted to the RECORDING ARTIST or PRODUCER.

INTERROGATORY NO. 17:

State all facts that YOU contend demonstrate that REDIGI is not sufficiently capitalized to pay a monetary judgment against it in this action.

INTERROGATORY NO. 18:

IDENTIFY the amount of net revenue that YOU contend REDIGI makes off of each resale of a musical recording, along with the total amount of net revenue YOU contend that REDIGI has made of the resale of the ALLEGEDLY COPYRIGHTED SONGS and PRE-1972 SONGS.

INTERROGATORY NO. 19:

State all facts that YOU contend demonstrate that the INDIVIDUAL DEFENDANTS have made money from REDIGI's resale of the ALLEGEDLY COPYRIGHTED SONGS and PRE-1972 SONGS, and IDENTIFY the total amount of money YOU contend the INDIVIDUAL DEFENDANTS have made from REDIGI's resale of the ALLEGEDLY COPYRIGHTED SONGS and PRE-1972 SONGS, including through any COMPENSATION that YOU contend the INDIVIDUAL DEFENDANTS have received from REDIGI.

INTERROGATORY NO. 20:

Outside of the acts IDENTIFIED in response to Interrogatory Number 2, IDENTIFY each act taken by the INDIVIDUAL DEFENDANTS that YOU contend gives rise to their liability in this action.

INTERROGATORY NO. 21:

For each ALLEGEDLY COPYRIGHTED SONG and PRE-1972 SONG, IDENTIFY the total mechanical royalties that have paid to the RECORDING ARTISTS or PRODUCERS with the original copyright interest in each song that arise from the DIGITAL EXPLOITATION of each song.

INTERROGATORY NO. 22:

IDENTIFY each RECORDING ARTIST or PRODUCER that has contested the amount of mechanical royalties that have been paid to them for the exploitation of the ALLEGEDLY COPYRIGHTED SONGS and PRE-1972 SONGS, whether through an AUDIT or not, along with the result of that contest (*i.e.*, whether more mechanical royalties were found to be owed to the RECORDING ARTIST or PRODUCER and whether such mechanical royalties were paid).

ALLEGEDLY COPYRIGHTED SONGS

DATED: October 9, 2013

Seth R. Gassman

Seth R. Gassman (SG-8116)
James J. Pizzirusso (*pro hac vice* pending)
Nathaniel C. Giddings (*pro hac vice* pending)
HAUSFELD LLP
1700 K Street, N.W., Suite 650
Washington, D.C. 20006

Counsel for John Ossenmacher & Larry Rudolph

PROOF OF SERVICE

CAPITOL RECORDS, LLC V. REDIGI INC., JOHN OSSENMACHER, AND LARRY RUDOLPH, A/K/A LAWRENCE S. ROGEL

Case No. 12-CV-00095 (RJS)

DISTRICT OF COLUMBIA

I am employed in the DISTRICT OF COLUMBIA. My business address is 1700 K Street, NW Suite 650, Washington, DC 20006. I am over the age of eighteen years and am not a party to the within action;

On October 9, 2013, I served the following document(s) entitled **DEFENDANTS JOHN OSSENMACHER AND LARRY RUDOLPH'S FIRST SET OF INTERROGATORIES TO PLAINTIFF CAPITOL RECORDS, LLC** on ALL INTERESTED PARTIES in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED LIST

BY MAIL: By placing a true copy thereof in a sealed envelope addressed as above, and placing it for and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings and other matters for mailing with the United States Postal Service. The correspondence, pleadings and other matters are deposited with the United States Postal Service with postage thereon fully prepaid in Washington, DC, on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 9, 2013 in Washington, D.C.

Dated: October 9, 2013

Seth R. Gassman

Seth R. Gassman (SG-8116)

SERVICE LIST

CAPITOL RECORDS, LLC V. REDIGI INC., JOHN OSSENMACHER, AND LARRY RUDOLPH, A/K/A LAWRENCE S. ROGEL

Case No. 12-CV-00095 (RJS)

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Attorney of Record for Defendant, ReDigi Inc.

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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)

DEFENDANTS JOHN OSSENMACHER AND LARRY RUDOLPH'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS TO PLAINTIFF CAPITOL RECORDS, LLC

PROPOUNDING PARTIES:	DEFENDANTS JOHN OSSENMACHER AND LARRY RUDOLPH
RESPONDING PARTY:	PLAINTIFF CAPITOL RECORDS, LLC
SET NO.:	ONE

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, DEFENDANTS JOHN OSSENMACHER AND LARRY RUDOLPH hereby requests that PLAINTIFF CAPITOL RECORDS, LLC respond to the following Request for Production of Documents and Things ("Requests") and produce the DOCUMENTS and things described herein, at the location agreed upon by counsel, within twenty (20) days of service.

DEFINITIONS

The following definitions apply to these Requests:

1. "DOCUMENT[S]" has the same full meaning as construed by Federal Rule of Civil Procedure 34 and includes without limitation the original (or identical duplicate when the

original is not available) and all non-identical copies (whether non-identical because of notes made on copies or attached comments, annotations, marks, transmission notation, or highlighting of any kind) and drafts of all writing, whether handwritten, typed, printed or otherwise produced, and includes, without limitation, letters, correspondence, memoranda, legal pleadings, notes, reports, agreements, calendars, diaries, travel or expense records, summaries, records, messages or logs of telephone calls, conversations or interviews, telegrams, mailgrams, facsimile transmissions (including cover sheets and confirmations), electronically stored information (see definition number two below), minutes or records of meeting, compilations, notebooks, laboratory notebooks, work papers, books, pamphlets, brochures, circulars, manuals, instructions, sales, advertising or promotional literature or materials, ledgers, graphs, charts, blue prints, drawings, sketches, photographs, film and sound reproductions, tape recordings, or any other tangible materials on which there is any recording or writing of any sort. The term also includes the file, folder tabs, and/or containers and labels appended to, or associated with, any physical storage device associated with each original and/or copy of all DOCUMENTS requested herein.

2. "ELECTRONICALLY STORED INFORMATION" ("ESI") has the same full meaning as construed by Federal Rule of Civil Procedure 26 and 34 and includes, without limitation, the following:

a. activity listings of electronic mail receipts and/or transmittals;

b. output resulting from the use of any software program, including without limitation word processing DOCUMENTS, spreadsheets, database files, charts, graphs and outlines, electronic mail, instant messaging programs; bulletin board programs, operating systems, source code, PRF files, PRC files, batch files,

ASCII files, and all miscellaneous media on which they reside and regardless of whether such electronic data exist in an active file, deleted file, or file fragment;

c. any and all items stored on computer memories, hard disks, floppy disks, CD-ROM, magnetic tape, microfiche, or on any other vehicle for digital data storage and/or transmittal, including without limitation a personal digital assistant, e.g., Palm Pilot, Blackberry, Treo or other device.

3. "YOU," "YOUR" means Plaintiff CAPITOL RECORDS, LLC, its parent corporations, subsidiaries and affiliates, including but not limited to Universal Music Group Recordings, Inc. and Capitol Music Group, and each of their employees, agents, representatives, attorneys or any person acting or purported to act on behalf of the responding Defendant.

4. INDIVIDUAL DEFENDANTS means Defendants John Ossenmacher and Larry Rudolph a/k/a Lawrence S. Rogel.

5. COMMUNICATIONS means any disclosure, transfer, or exchange of information or opinion, however made, including but not limited to through email, letter, instant messaging and text messaging. COMMUNICATIONS shall include DOCUMENTS and ESI.

6. REDIGI means the online marketplace for pre-owned digital music that is a Defendant in this matter and its employees, officers, and directors other than the INDIVIDUAL DEFENDANTS.

7. SOFTWARE ARCHITECTURE means the structure or structures of a computer system that comprise software components, the externally visible properties of those components, and the relationships between them.

8. DIGITAL CONTENT PROVIDERS means any entity, other than REDIGI, that sells or distributes to end-users digital versions, whether in whole or in part, of music recordings that end-users download or stream over the Internet to or on their computers or other electronic devices (*e.g.*, cell phones).

9. DIGITAL EXPLOITATION means the process by which DIGITAL CONTENT

PROVIDERS sell or distribute digital versions, whether whole or in part, of music recordings to end-users.

10. RECORDING ARTISTS means any individual or performing group that recorded master recordings for YOU.

11. PRODUCERS means any individual or performing group that produced master recordings for YOU.

12. COMPENSATION means remuneration, whether in money or in kind.

13. RECORD LABEL means any brand and/or trademark associated with the marketing of music recordings or music videos other than CAPITOL RECORDS, LLC and including but not limited to Warner Music Group, EMI, Sony, BMG, Universal Music Group, and Polygram.

14. ALLEGEDLY COPYRIGHTED SONGS means the 512 songs listed in Exhibit A to YOUR Amended Complaint in this litigation.

15. PRE-1972 SONGS means the 55 songs listed in Exhibit B to YOUR Amended Complaint in this litigation.

16. PRESS means any news dissemination service and their agents and employees, including but not limited to established news services (*i.e.*, CNN, Fox, MSNBC), websites, RSS feeds, podcasts and blogs.

17. "PERSON" and "PERSONS" shall include both the singular and plural, and shall mean and refer to any natural human being, firm, proprietorship, partnership, corporation, joint venture, shareholder, investors, members, limited liability company, limited liability partnership, general partnership, limited partnership, trust, loan – out company, government agent or government body, association, employers, employees, agents, partners, officers, directors, representatives, affiliates and all other forms of organization or entity or other group or combination of the foregoing acting as one.

18. POLICY means any official standard(s), procedure(s), or protocol(s), whether written or not.

19. ROYALTY STATEMENT means statements of royalties, regardless of type, that YOU provide to RECORDING ARTISTS and PRODUCERS.

20. AUDIT means an examination, review, or inspection of ROYALTY STATEMENT(S) whether initiated at the request of RECORDING ARTISTS or PRODUCERS or as a result of an internal compliance process.

21. "Including" is used to illustrate a Request for particular types of DOCUMENTS requested, and shall not be construed as limiting the Request in any way.

22. "Or" should be construed to require the broadest possible response, and should be read as "and/or."

INSTRUCTIONS

Pursuant to Rule 26(e) of the Federal Rules of Civil Procedure, these DOCUMENT requests shall be deemed to be continuing in nature so that if Defendants, their directors, officers, employees, agents, representatives or any person acting on behalf of Defendants, subsequently discover or obtain possession, custody or control of any DOCUMENT previously requested or required to be produced, Defendants shall promptly make such DOCUMENT available.

1. In producing DOCUMENTS and ESI, you are to furnish all DOCUMENTS or ESI in your possession, custody or control, regardless of the physical location of the DOCUMENTS or whether such DOCUMENTS or materials are possessed directly by you or your directors, officers, agents, employees, representatives, subsidiaries, managing agents, affiliates, investigators, or by your attorneys or their agents, employees, representatives or investigators.

2. In producing DOCUMENTS and ESI, you are requested to produce the original of each DOCUMENT or item of ESI requested, together with all non-identical copies and drafts of such DOCUMENT. If the original of any DOCUMENT or item of ESI cannot be located, a

copy shall be produced in lieu thereof, and shall be legible and, for a DOCUMENT, bound or stapled in the same manner as the original.

3. Documents or ESI not otherwise responsive to these Requests shall be produced if such DOCUMENTS or ESI mention, discuss, refer to, or explain the DOCUMENTS that are called for by these Requests, or if such DOCUMENTS are attached to DOCUMENTS called for by these Document Requests and constitute routing slips, transmittal memoranda, letters, cover sheets, comments, evaluations or similar materials.

4. All DOCUMENTS and ESI shall be produced in the same order as they are kept or maintained by you in the ordinary course of your business. ESI shall be produced in native format. If any DOCUMENTS or items of ESI have been removed from the files in which they were found for purposes of producing them in response to these requests, indicate for each DOCUMENT the file(s) from which the DOCUMENT(s) was (were) originally located.

5. All DOCUMENTS shall be produced in the file folder, envelope or other container in which the DOCUMENTS are kept or maintained by you. If for any reason the container cannot be produced, produce copies of all labels or other identifying marks.

6. Documents and ESI shall be produced in such fashion as to identify the department, branch or office in whose possession they were located and, where applicable, the natural person in whose possession they were found and the business address of each DOCUMENT's custodian(s).

7. Documents attached to each other should not be separated, including, but not limited to, e-mail attachments.

8. If a DOCUMENT or item of ESI once existed and has subsequently been lost, destroyed, or is otherwise missing, please provide sufficient information to identify the

DOCUMENT and state the details concerning its loss.

9. All DOCUMENTS produced in paper form should be numbered sequentially, with a unique number on each page, and with a prefix identifying the party producing the DOCUMENT.

10. If you claim the attorney-client privilege or any other privilege or work product protection for any DOCUMENT, provide a detailed privilege log that contains at least the following information for each DOCUMENT that you have withheld:

a. state the date of the DOCUMENT or item of ESI;

b. identify each and every author of the DOCUMENT or item of ESI;

c. identify each and every person who prepared or participated in the preparation of the DOCUMENT or item of ESI;

d. identify each and every person who received the DOCUMENT or item of ESI;

e. identify each and every person from whom the DOCUMENT or item of ESI was received;

f. provide a general description of the subject matter;

g. state the present location of the DOCUMENT or item of ESI and all copies thereof;

h. identify each and every person having custody or control of the DOCUMENT or item of ESI and all copies thereof;

i. identify the numbered request(s) to which the DOCUMENT or item of ESI is responsive; and

j. provide sufficient information concerning the DOCUMENT or item of

ESI and the circumstances thereof to explain the claim of privilege or protection and to permit the adjudication of the propriety of the claim.

11. If you assert privilege with respect to part of a responsive DOCUMENT or item of ESI, redact the privileged portion and indicate clearly on the DOCUMENT where the material was redacted. Produce the redacted DOCUMENT or item of ESI even if you believe that the non-redacted portion is not responsive. Identify the redacted portions on the privilege log in the same manner as withheld DOCUMENTS. Non-responsiveness of a portion of a DOCUMENT or item of ESI is not a sufficient basis for redaction.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

All COMMUNICATIONS that refer or relate to REDIGI between YOU and:

a. REDIGI;

b. YOUR Parent Companies;

c. YOUR Subsidiaries;

d. DIGITAL CONTENT PROVIDERS;

e. Other RECORD LABELS;

f. RECORDING ARTISTS;

g. PRODUCERS; and

h. The PRESS.

REQUEST FOR PRODUCTION NO. 2:

All COMMUNICATIONS that refer or relate to the exploitation of the ALLEGEDLY COPYRIGHTED SONGS or PRE-1972 SONGS between YOU and:

a. REDIGI;

b. YOUR Parent Companies;

c. YOUR Subsidiaries;

d. DIGITAL CONTENT PROVIDERS;

e. Other RECORD LABELS;

f. RECORDING ARTISTS; and

g. PRODUCERS.

REQUEST FOR PRODUCTION NO. 3:

All COMMUNICATIONS that refer or relate to reversion rights on the PRE-1972 SONGS and:

a. REDIGI;

b. YOUR Parent Companies;

c. YOUR Subsidiaries;

d. DIGITAL CONTENT PROVIDERS;

e. Other RECORD LABELS;

f. RECORDING ARTISTS; and

g. PRODUCERS.

REQUEST FOR PRODUCTION NO. 4:

ALL COMMUNICATIONS that refer or relate to YOUR alleged rights in the ALLEGEDLY COPYRIGHTED SONGS or PRE-1972 SONGS between YOU and ---

a. REDIGI;

b. YOUR Parent Companies;

c. YOUR Subsidiaries;

d. DIGITAL CONTENT PROVIDERS;

e. Other RECORD LABELS;

f. RECORDING ARTISTS; and

g. PRODUCERS.

REQUEST FOR PRODUCTION NO. 5:

ALL of YOUR internal COMMUNICATIONS that refer or relate to REDIGI.

REQUEST FOR PRODUCTION NO. 6:

All contracts or agreements, including drafts thereof, between YOU and any third party that refer or relate to the DIGITAL EXPLOITATION of the PRE-1972 SONGS or the ALLEGEDLY COPYRIGHTED SONGS.

REQUEST FOR PRODUCTION NO. 7:

All contracts or agreements, including drafts thereof, between YOU and any DIGITAL CONTENT PROVIDER that refer or relate to the payment of mechanical royalties to RECORDING ARTISTS or PRODUCERS for the DIGITAL EXPLOITATION of the PRE-1972 SONGS or the ALLEGEDLY COPYRIGHTED SONGS.

REQUEST FOR PRODUCTION NO. 8:

All contracts or agreements, including drafts thereof, between YOU and any third party that refer or relate to the payment of mechanical royalties to RECORDING ARTISTS or PRODUCERS for the DIGITAL EXPLOITATION of the PRE-1972 SONGS or the ALLEGEDLY COPYRIGHTED SONGS.

REQUEST FOR PRODUCTION NO. 9:

All contracts or agreements, including drafts thereof, between YOU and RECORDING ARTISTS or PRODUCERS that refer or relate to the PRE-1972 SONGS or the ALLEGEDLY COPYRIGHTED SONGS.

REQUEST FOR PRODUCTION NO. 10:

YOUR POLICY or POLICIES, including drafts thereof, that refer or relate to the use of the PRE-1972 SONGS or the ALLEGEDLY COPYRIGHTED SONGS for DIGITAL EXPLOITATION.

REQUEST FOR PRODUCTION NO. 11:

YOUR POLICY or POLICIES, including drafts thereof, that refer or relate to the payment of mechanical royalties to RECORDING ARTISTS and PRODUCERS for the DIGITAL EXPLOITATION of the PRE-1972 SONGS or the ALLEGEDLY COPYRIGHTED SONGS.

REQUEST FOR PRODUCTION NO. 12:

YOUR POLICY or POLICIES, including prior versions and drafts thereof, that refer or relate to the payment of mechanical royalties to RECORDING ARTISTS or PRODUCERS for the non-DIGITAL EXPLOITATION of the PRE-1972 SONGS or the ALLEGEDLY COPYRIGHTED SONGS.

REQUEST FOR PRODUCTION NO. 13:

YOUR POLICY or POLICIES, including prior versions and drafts thereof, that refer or relate to the payment of mechanical royalties to RECORDING ARTISTS or PRODUCERS when the PRE-1972 SONGS or the ALLEGEDLY COPYRIGHTED SONGS are sold or otherwise distributed by REDIGI.

REQUEST FOR PRODUCTION NO. 14:

ROYALTY STATEMENTS generated by YOU for RECORDING ARTISTS or PRODUCERS showing the payment of mechanical royalties from the DIGITAL EXPLOITATION of the PRE-1972 SONGS or the ALLEGEDLY COPYRIGHTED SONGS.

REQUEST FOR PRODUCTION NO. 15:

Royalty Statements generated by YOU for RECORDING ARTISTS and PRODUCERS showing the payment of mechanical royalties for the sale or distribution of the PRE-1972 SONGS or the ALLEGEDLY COPYRIGHTED SONGS by REDIGI.

REQUEST FOR PRODUCTION NO. 16:

All AUDITS YOU have been subject to that refer or relate to the alleged non-payment of mechanical royalties to RECORDING ARTISTS or PRODUCERS for the DIGITAL EXPLOITATION of the PRE-1972 SONGS or the ALLEGEDLY COPYRIGHTED SONGS.

REQUEST FOR PRODUCTION NO. 16:

All of YOUR analyses on the impact REDIGI could have on the amount of money YOU or other RECORD LABELS could make.

REQUEST FOR PRODUCTION NO. 17:

All DOCUMENTS relating to YOUR plans or intentions to develop SOFTWARE ARCHITECTURE for reselling of songs originally purchased from DIGITAL CONTENT PROVIDERS.

REQUEST FOR PRODUCTION NO. 18:

All DOCUMENTS relating to RECORD LABELS' plans or intentions to develop SOFTWARE ARCHITECTURE for reselling of songs originally purchased from DIGITAL CONTENT PROVIDERS.

REQUEST FOR PRODUCTION NO. 19:

All contracts or agreements between YOU and any third party that refer or relate to the storage, maintenance or compilation of ESI.

REQUEST FOR PRODUCTION NO. 20:

All contracts or agreements that YOU contend prohibits or limits YOU from producing DOCUMENTS requested by the INDIVIDUAL DEFENDANTS in this above-entitled litigation.

DATED: October 9, 2013

Seth R. Gassman

Seth R. Gassman (SG-8116)
James J. Pizzirusso (*pro hac vice* pending)
Nathaniel C. Giddings (*pro hac vice* pending)
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Washington, D.C. 20006

Counsel for John Ossenmacher & Larry Rudolph

PROOF OF SERVICE

CAPITOL RECORDS, LLC V. REDIGI INC., JOHN OSSENMACHER, AND LARRY RUDOLPH, A/K/A LAWRENCE S. ROGEL

Case No. 12-CV-00095 (RJS)

DISTRICT OF COLUMBIA

I am employed in the DISTRICT OF COLUMBIA. My business address is 1700 K Street, NW Suite 650, Washington, DC 20006. I am over the age of eighteen years and am not a party to the within action;

On October 9, 2013, I served the following document entitled **DEFENDANTS JOHN OSSENMACHER AND LARRY RUDOLPH'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS TO PLAINTIFF CAPITOL RECORDS, LLC** on ALL INTERESTED PARTIES in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED LIST

BY MAIL: By placing a true copy thereof in a sealed envelope addressed as above, and placing it for and mailing following ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence, pleadings and other matters for mailing with the United States Postal Service. The correspondence, pleadings and other matters are deposited with the United States Postal Service with postage thereon fully prepaid in Washington, DC, on the same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 9, 2013 in Washington, D.C.

Dated: October 9, 2013

Seth R. Gassman

Seth R. Gassman (SG-8116)

SERVICE LIST

CAPITOL RECORDS, LLC V. REDIGI INC., JOHN OSSENMACHER, AND LARRY RUDOLPH, A/K/A LAWRENCE S. ROGEL

Case No. 12-CV-00095 (RJS)

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Attorney of Record for Defendant, ReDigi Inc.

Exhibit 7

COWAN LIEBOWITZ LATMAN

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Richard S. Mandel
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October 14, 2013

Via Email and Mail

Seth R. Gassman, Esq.
Hausfeld LLP
1700 K Street NW, Suite 650
Washington DC 20006

Re: Capitol Records, LLC v. ReDigi Inc., No. 12 Civ. 0095 (RJS)(AJP)

Dear Seth:

We write with reference to the first set of interrogatories and document requests you served by mail and email on October 9, 2013. This letter constitutes our good faith effort to confer with you concerning Capitol's objections to such requests and attempt to resolve any disputes without the need for Court intervention.

As a threshold matter, the discovery requests are untimely. The Court issued an order on September 19, 2013 providing for the amendment of existing discovery deadlines in such a manner as "to allow for the completion of all discovery by November 8, 2012." Docket No. 124 (emphasis added). That deadline was also incorporated into the amended case management plan ordered by the Court on September 25, 2013. Docket No. 129 ¶ 3 ("[a]ll remaining discovery shall be completed by November 8, 2013) (emphasis added). Nevertheless, defendants inexplicably waited twenty days from the Court's initial order before serving discovery requests by mail and email on October 9, 2013. Under Fed. R. Civ. P. 6(d), Capitol's responses to such requests are not due until November 11, 2013, after the close of discovery. By serving discovery requests that did not allow sufficient time for responses to be made before the discovery cutoff, the individual defendants have violated the Court's order and the rules regarding the timing of discovery. Accordingly, Capitol is under no obligation to respond to such requests. See, e.g., Commonwealth Annuity & Life Ins. Co. v. Dalessio, 2009 U.S. Dist. LEXIS 130364, at *6 (N.D. Cal. July 20, 2009) (holding that requests for admission served 30 days before discovery cut-off were untimely because the three days added under Rule 6(d) meant that responses were due after the cut-off); Jones v. Hirschfeld, 2003 U.S. Dist. LEXIS 10370, at *17 n.13 (S.D.N.Y. June 19, 2003) ("the discovery deadline date is the date on which *discovery should be complete*") (emphasis added); Gavenda v. Orleans County, 182 F.R.D. 17, 20 (W.D.N.Y. 1997) (requests for

production served before end of discovery cut-off deemed untimely where responses were due after the cut-off).

In addition, the discovery requests are patently overbroad and burdensome, and demand enormous amounts of irrelevant information about unrelated topics, going well beyond any information that could reasonably be necessary to defend the case. The scope of the requests is completely inconsistent with defendants' promise to the Court that they might require "additional and limited discovery." When Mr. Adelman appeared at the conference before the Court on August 9, 2013, he was unable to think of any additional discovery that would be required if the individual defendants were added to the case. Yet somehow defendants' new requests manage to find virtually unlimited areas that have suddenly become necessary.

Given the current posture of the case, where ReDigi has already been found to be an infringer and its affirmative defenses rejected as a matter of law, the only remaining subjects for adjudication are whether the individual defendants participated in the infringing acts and the amount of statutory damages for which defendants are jointly and severally liable. And yet, the bulk of your clients' requests have virtually nothing to do with those topics.

For example, the individual defendants have served no fewer than eight document requests and two interrogatories (Request Nos. 7-8, 11-16; Interrogatories 21-22) directed at mechanical royalties paid by Capitol, including Capitol's agreements, policies, calculations and disputes regarding such mechanicals. As you are aware, mechanical royalties are payable to songwriters and music publishers for exploitation of musical compositions, whereas this case concerns the different and unrelated copyright interest in sound recordings. Since information relating to mechanical royalties has no conceivable bearing on any issue in this case, these requests are not reasonably calculated to lead to the discovery of admissible evidence in this case. Moreover, compliance with such requests would be incredibly burdensome.

Numerous other requests are hopelessly overbroad or simply irrelevant. Contrary to the "limited" discovery that defendants advised the Court they might need, defendants have engaged in a wholesale fishing expedition that calls for every single communication or agreement (including drafts) related to exploitation of or Capitol's rights in the more than 500 recordings at issue. See Request Nos. 2, 3, 4, 6, 9. With hundreds of world famous recordings at issue, it would be virtually impossible to comply with such a request in any case. Defendants have also asked for documents concerning Capitol's own plans with respect to the potential re-sale of recordings, an issue that is of no potential relevance in the case. See Request Nos. 17-18. Whatever plans Capitol may or may not have with respect to a secondary market has no bearing on whether defendants are permitted to reproduce and distribute Capitol's recordings without its authorization. Other requests ask for general policies or agreements on subjects that are not reasonably calculated to lead to the discovery of admissible evidence. See Request Nos. 10, 19. Defendants cannot seriously justify a request that asks for "policies" relating to exploitation of some of the most famous sound recordings of all time. A request of this nature would seem to embrace Capitol's entire business. Even were Capitol inclined to consider responding to defendants' untimely requests, there is no reasonable basis on which to respond to the requests as

they are currently constituted. Finally, several additional requests – such as Request Nos. 1, 5, and 20 – are simply duplicative of discovery that has already been provided in this case and that has now been in your possession for over a month.

The interrogatories are similarly overbroad and unreasonable, and often redundant of discovery already conducted in this case. Interrogatory No. 2 seeks information that is within ReDigi's own control and was provided on the very charts it compiled in discovery identifying the Capitol recordings at issue. Interrogatory Nos. 1 and 3 concern Capitol's communications with ReDigi that have already been provided in prior discovery. Interrogatory No. 4 unreasonably asks for every copyright infringement claim Capitol has asserted with respect to the hundreds of recordings at issue and the outcome of all such claims. Such information cannot reasonably lead to any admissible evidence in this case.

Interrogatory Nos. 6-10, 14 and 20 ask for recitation of factual information that is readily obtainable simply by reading Capitol's prior briefs in this case and the Court's summary judgment opinion, or that otherwise relates to unplead affirmative defenses that would be without any basis in fact or law here. As noted above, ReDigi's various functions and activities have already been adjudicated to constitute infringement with no valid defense, so all that remains to be litigated as regards liability is whether the individual defendants personally participated in those acts. The individual defendants can challenge their personal participation, but they cannot relitigate, either through discovery or at trial, whether the underlying conduct they are alleged to have participated in infringes or enjoys any of the defenses they somehow believe are still available.

Interrogatory No. 11 relates to a doctrine that has no applicability to a copyright infringement case. Interrogatory No. 12 seeks pure legal arguments. Interrogatory No. 13 is incomprehensible and based on the mistaken assumption that Capitol's right to object to re-sale of its recordings is rooted in contract law rather than copyright law. Interrogatory Nos. 5 and 15 relate to Capitol's ownership interest in the recordings at issue, which rights are proven prima facie by its registrations and/or contracts. To the extent any such documents have not already been produced, we will supplement accordingly. Interrogatory No. 16 references an unspecified "reversion of rights" we cannot decipher. Interrogatory No. 17 relates to financial information ReDigi itself possesses. Interrogatory Nos. 18 and 19 seem to relate to other forms of damages – such as defendants' profits – that Capitol has elected not to pursue. All of the above are also overbroad, vague and/or irrelevant. Again, even were Capitol inclined to look past the untimely nature of these interrogatories, they are wholly unreasonable and utterly inconsistent with the notion of "limited" discovery that might reasonably be sought in this case.

Please let me know when you are available to discuss these issues further in an effort to resolve the disputes without the need for Court intervention.

Sincerely,

Richard S. Mandel

cc: Jonathan Z. King, Esq.
Gary Adelman, Esq.
Nathaniel Giddings, Esq.
James Pizzirusso, Esq.

Exhibit 8

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October 25, 2013

By E-mail (sullivannysdchambers@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)

Dear Judge Sullivan:

We represent plaintiff Capitol Records, LLC ("Capitol") in this action and write jointly with counsel for defendants Ossenmacher and Rudolph ("IDs"), pursuant to Rule 2.G. of Your Honor's Individual Practices, regarding a dispute over IDs' discovery requests. The parties exchanged letters about these disputes on October 14 and 15 and conducted a lengthy telephone conference on October 17, 2013 in which Messrs. Mandel and King participated for Capitol and Messrs. Pizzirusso, Gassman and Giddings participated for IDs.

Capitol's Position

IDs advised the Court in the parties' joint September 16, 2013 letter that "they may seek additional and limited discovery." On September 19, 2013, the Court ordered "the completion of all discovery by November 8, 2013." Docket No. 124 (emphasis added). See also Amended Case Management Plan, Docket No. 129 ¶ 3 ("[a]ll remaining discovery shall be completed by November 8, 2013") (emphasis added). Nevertheless, IDs inexplicably waited twenty days before mailing and emailing their discovery requests, copies of which are attached, at 5:00 p.m. on October 9, 2013. The requests are untimely and also improperly seek massive amounts of irrelevant information well beyond the scope of anything required to defend the case.

Under Fed. R. Civ. P. 6(d), upon service by mail or email under Fed. R. Civ. P. 5(b)(2)(C) or 5(b)(2)(E), three days are added for response.[1] Capitol's responses are thus not due until November 11, 2013, after the close of discovery. Given IDs' failure to abide by the Court's schedule, no response should be required. See, e.g., Commonwealth Annuity & Life Ins. Co. v. Dalessio, 2009 WL 2169868 (N.D. Cal. July 20, 2009) (requests for admission served 30 days before discovery cut-off deemed untimely Rule 6(d)); Jones v. Hirschfeld, 2003 WL 21415323, at n.13 (S.D.N.Y. June 19, 2003) ("the discovery deadline date is the date on which *discovery should be complete*") (emphasis added); Gavenda v. Orleans County, 182 F.R.D. 17, 20 (W.D.N.Y. 1997) (requests for production served before end of discovery cut-off deemed untimely where responses were due after the cut-off).

[1]Capitol never consented in writing to email service by the IDs (as it had with ReDigi's counsel), but even if it had, the rules would still add three days to Capitol's response time.

To make matters worse, the belated requests demand enormous amounts of irrelevant information far beyond IDs' promise of "limited" discovery. Given the current case posture, where ReDigi has already found liable for infringement, the only remaining subjects for adjudication are whether the IDs are jointly and severally liable for participating in ReDigi's infringing acts (see Capitol's Memorandum in Opposition to Motion to Dismiss, Docket No. 133, at 10-15) and the statutory damages for which all defendants are jointly and severally liable. Yet the bulk of IDs' untimely requests have virtually nothing to do with these topics.

IDs have served eight document requests and two interrogatories (Requests 7-8, 11-16; Interrogatories 21-22) directed at mechanical royalties paid by Capitol for more than 500 recordings, including Capitol's agreements, policies, calculations and disputes regarding such mechanicals. This case concerning sound recordings has nothing to do with mechanical royalties, payable to songwriters and music publishers who own a different copyright in musical compositions. Counsel for IDs contend that the record industry's supposedly "unfair" practices concerning payment of mechanicals to third parties may unearth an "unclean hands" defense. However, any such alleged conduct caused no harm to IDs, is extraneous to whether Capitol's sound recordings have been infringed, and thus could not possibly support unclean hands, available in extremely limited circumstances where the conduct relates directly to the subject matter of the suit. See, e.g., Bentley v. Tibbals, 223 F. 247, 252 (2d Cir. 1915); Price v. Fox Entm't Group, Inc., 2007 WL 241387 (S.D.N.Y. Jan. 26, 2007); Coleman v. ESPN, Inc., 764 F. Supp. 290, 296 (S.D.N.Y. 1991); Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130, 146 n.12 (S.D.N.Y. 1990).

IDs further seek every single communication, agreement or policy relating to "exploitation" or "use" of more than 500 recordings, see Requests 2, 6, 10, and documents concerning Capitol's own plans for "reselling" digital recordings. See Request Nos. 17-18. Capitol's authorized exploitation of its own recordings has no bearing on whether the IDs participated in ReDigi's infringing acts, and collecting such information for hundreds of world famous recordings would be an insuperable burden. See SJ Opinion (Docket No. 109) at 11 ("Of course, Capitol, as copyright owner, does not forfeit its right to claim copyright infringement merely because it permits certain uses of its works.").

Interrogatory 4 asks about every copyright infringement claim Capitol has asserted with respect to the hundreds of recordings at issue. It would be extremely burdensome to compile such information, none of which leads to admissible evidence. Interrogatories 2, 6, 8, 9, 10, 14, and 20 improperly seek broad discovery into the underlying infringement already resolved by this Court, including what acts infringed Capitol's copyrights, the fair use and first sale defenses, whether Capitol's recordings have been "distributed" under the Copyright Act, secondary liability, and the aspects of ReDigi's "software architecture" alleged to infringe. Because they are in privity with Redigi, IDs are barred by collateral estoppel and the law of the case doctrine from relitigating issues already determined. See, e.g., In re: Teltronics Servs., Inc., 762 F.2d 185, 190-91 (2d Cir. 1985); Kreager v. Gen. Elec. Co., 497 F.2d 468, 472 (2d Cir. 1974); Moran v. City of New Rochelle, 346 F. Supp. 2d 507, 515 (S.D.N.Y. 2004). Contrary to IDs'

assertions, preclusive effect may be given to the Court's grant of partial summary judgment. See, e.g., U.S. Dept. of Justice v. Hudson, 2007 U.S. Dist. LEXIS 62749 (S.D.N.Y. 2007) ("federal courts have expanded application of collateral estoppel . . . to decisions including partial summary judgment"); Creed Taylor, Inc. v. CBS, Inc., 718 F.Supp. 1171, 1177 (S.D.N.Y. 1989) (granting preclusive effect to partial summary judgment); Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co., 722 F. Supp. 998, 1007-09 (S.D.N.Y. 1989) (same), aff'd in part and reversed in part on other grounds, 970 F.2d 1138 (2d Cir. 1992). Capitol need not recapitulate the copious evidence briefed and determined on summary judgment, where the only issue to be litigated is whether IDs participated in the acts already determined to be infringing.

Interrogatory 11 relates to "mitigation of damages," a theory with no application to statutory damages in a copyright infringement case. Interrogatory 12 seeks pure legal arguments. Interrogatory 13 is incomprehensible and based on the mistaken assumption that Capitol's right to object to re-sale of its recordings is rooted in contract law rather than copyright law. Interrogatory 16 references an unspecified "reversion of rights" IDs cannot explain. Interrogatories 18 and 19 relate to other forms of damages – such as IDs' profits – that Capitol has elected not to pursue. All of the above are also overbroad, vague and/or irrelevant. Given the unreasonable nature of IDs' untimely requests and to offer any meaningful compromise in their scope, the Court should issue a protective order relieving Capitol of the burden of response.

IDs' Position

Plaintiff claims that the IDs' discovery requests are untimely is without merit and reflects a desire to avoid the consequences of adding the IDs to this action near the end of the case. Discovery requests served within thirty days of the discovery deadline *are* timely. See, e.g., Watkins v. Chang & Son Enter., 2008 WL 4682332 (E.D.N.Y. Oct. 21, 2008); Thomas v. Pacificorp, 324 F.3d 1176, 1179 (10th Cir. 2003). The cases Plaintiff cites do not hold otherwise. Commonwealth Annuity addressed requests for admission (which are not at issue here) and turned on the interpretation of a California local rule. 2009 WL 2169868, at *2. In Gavenda, the discovery requests were served just **two days prior to the close of discovery**, had "minimal, if any, relevance to the instant action," and included requests aimed at "defendants who had been dismissed from the action." 182 F.R.D. at 20. If the Court determines that IDs' discovery requests are untimely, however, IDs respectfully request that the Court extend the discovery schedule to provide sufficient time to complete the discovery necessary to assert their individual defenses. This is precisely the outcome in Plaintiff's own case, Jones. Faced with arguably untimely discovery requests, the court reopened discovery "to allow both parties to develop the record further." 2003 WL 21415323, at *4.

As IDs' Motion to Dismiss is pending and IDs have not yet filed an answer in this case, it is not yet clear what defenses or counter claims they will assert. Nevertheless, good cause for an extension exists because IDs were added to this action at the end of the case, and their new counsel have not even received, let alone reviewed, Capitol's voluminous production. Moreover, this is not the type of case where the party seeking an extension has had ample opportunity to

complete discovery but has chosen not to diligently pursue its options. And, if Plaintiff (as claimed in the September 16th letter), plans on filing a summary judgment motion "promptly," extending discovery under F.R.C.P. 56(f) is also appropriate. See PSG Poker, LLC v. DeRosa-Grund, 2007 WL 1837135, at *6 (S.D.N.Y. June 26, 2007).

Plaintiff also claims that discovery as to certain affirmative defenses is improper because IDs are "collaterally estopped" from relitigating certain findings the Court made against ReDigi in its summary judgment order because IDs are "in privity with ReDigi." Most defenses upon which IDs have sought discovery were not at issue in the Court's summary judgment order (e.g., the fair use doctrine, estoppel, waiver, unclean hands, *etc.*), and therefore, collateral estoppel cannot apply. See Yoon v. Fordham Univ. Faculty & Admin. Ret. Plan, 263 F.3d 196, 202 n.7 (2d Cir. 2001) (citation omitted). Further, collateral estoppel does not apply to partial summary judgment where there has not been a "valid final judgment," Ball v. A.O. Smith Corp., 451 F.3d 66, 69 (2d Cir. 2006); Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F.2d 1265 (5th Cir. 1986). Regardless, "collateral estoppel do[es] not speak to direct attacks in the same case, but rather [applies only] in subsequent actions." Algonquin Power Income Fund v. Christine Falls of N.Y., Inc., 362 Fed. Appx. 151, 154 (2d Cir. 2010) (internal quotation omitted). For this reason, each of Plaintiff's cases (Hudson, Creed, and Harris Trust), which involved issues raised in prior litigations, are inapposite. Even if collateral estoppel could apply, however, "privity under such a theory depends on a finding that the person against whom collateral estoppel is applied actively participated in the previous litigation" and "controlled" the other defendant's trial strategy. Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Phillippe S.E. Schreiber, 327 F.3d 173, 187 (2d Cir. 2003). Plaintiff has provided this Court with no such evidence. Plaintiff's argument also contravenes the purposes of the broad discovery rules, which allow parties to probe facts that can *potentially* lead to admissible evidence. Plaintiff should not be permitted to preempt discovery simply because it thinks it has a legal argument that certain defenses may not apply.

Plaintiff also argues that IDs' discovery requests are unduly burdensome and overbroad. But, the party opposing production must provide sufficient detail and explanation about the nature of the burden in terms of time, money, and procedure which would be required. See Edwards v. Ford Motor Co., 2012 WL 553383, at *3 (S.D. Cal. Feb. 17, 2012). Plaintiff's failure to provide any specificity as to its alleged burden is fatal to this argument. Moreover, Plaintiff seeks potentially millions of dollars in damages from the IDs. IDs have a right to fully develop the evidence to defend themselves as to both liability and damages. Through the meet and confer process, the IDs agreed to narrow certain requests to facilitate the efficient management of this case (and indicated a willingness to continue that process), but Plaintiff refused to answer any questions on the basis that they were untimely.

IDs' other requests specifically referenced by Plaintiff are all "reasonably calculated to lead to admissible evidence." For example:

- Document Request Nos. 3, 4, & 9 and Interrogatory Nos. 2, 9, 15, & 16 go to whether

Plaintiff actually has a copyright infringement claim against the IDs. Plaintiff must prove a valid copyright in each of the songs and the date, time, and location of each alleged violation under which it seeking redress in order to succeed on any of its claims, and these Requests and Interrogatories seek information related to Plaintiff's ability to prove these requisite elements.

- Interrogatory Nos. 14, 19, & 20 go to whether Plaintiff can prove the requisite elements of its derivative copyright claims against the IDs. For instance, Plaintiff must demonstrate that the IDs had a direct financial interest in the allegedly infringing activity and exercised a legally sufficient level of control over those allegedly infringing acts to succeed on some of these claims, and these Interrogatories seek precisely that type of information.

- Interrogatory Nos. 4, 7, 8, 10, 11, 12, 17, 18 go to damages, which given the tight discovery schedule, IDs may properly seek at this point in time.

- Document Request Nos. 1, 2, 5, 6, & 10 and Interrogatory Nos. 1, 3, 6, & 13 go to the estoppel/implied consent, fair use, DMCA, waiver, and first sale affirmative defenses, among others. For instance, some of these Requests and Interrogatories seek information regarding whether Plaintiff encouraged the ReDigi system architecture, which may give rise to a defense for implied consent. Further, some of these Requests and Interrogatories solicit information that may bear on whether there are as many violations as Plaintiff claims inasmuch as Plaintiff may have given its consent or waived its copyright claims up until a certain point in time (and alleged infringement before that date would not be actionable).

- Document Requests Nos. 7-8 & 11-16a and Interrogatory Nos. 21 & 22 go to the unclean hands affirmative defense, among others, inasmuch as Plaintiff may have itself infringed on its recording artists and producers' rights to receive mechanical royalties in the compositions of the allegedly infringed.

- Document Requests Nos. 16b & 17 go to potential counterclaims, including but not limited to tortuous interference with business relations, violations of New York and California's deceptive trade practice statutes, and/or violations of federal and state antitrust laws for conspiring with other record labels to corner the digital download market. IDs may properly ask for this category of information at this point in time.

- Document Request Nos. 19 & 20 go to Plaintiff's preservation and production duties under the Federal Rules so that the IDs may best assess whether Plaintiff has produced all requested, non-privileged documents.

Respectfully,

COWAN, LIEBOWITZ & LATMAN, P.C.

/s/ Richard S. Mandel
Richard S. Mandel

HAUSFELD LLP

/s/ James J. Pizzirusso
James J. Pizzirusso

Exhibit 9

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November 12, 2013

By E-mail (sullivannysdchambers@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)

Dear Judge Sullivan:

Capitol Records, LLC ("Capitol") submits this pre-motion letter in connection with its proposed motion for summary judgment (1) holding individual defendants John Ossenmacher ("Ossenmacher") and Larry Rudolph ("Rudolph") (collectively, "IDs") jointly and severally liable for copyright infringement with defendant ReDigi Inc. ("ReDigi"), and (2) dismissing affirmative defenses IDs have stated they will pursue. The parties have indicated their agreement to adjourn this letter until the conclusion of discovery, but because the Court has not yet ruled on the various discovery disputes or requested extensions, Capitol submits this letter today to comply with the Second Amended Case Management Plan, Docket No. 129.

The IDs are Jointly and Severally Liable with ReDigi As A Matter of Law

The Court's March 30, 2013 Order (Docket No. 109) found corporate defendant ReDigi liable for direct, vicarious and contributory copyright infringement. Capitol now seeks a ruling that IDs are jointly and severally liable with ReDigi for violating Capitol's rights of reproduction and distribution. The standards for holding corporate officers jointly liable for infringements of corporations are well-settled in the Second Circuit: "It is well established that [a]ll persons and corporations who participate in, exercise control over or benefit from an infringement are jointly and severally liable as copyright infringers." Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 398, 437 (S.D.N.Y. 2011) (citations and quotations omitted). See also Sygma Photo News, Inc. v. High Society Magazine, Inc., 778 F.2d 89, 92 (2d Cir. 1985); EMI Entertainment World, Inc. v. Karen Records, Inc., 806 F. Supp. 2d 697, 709 (S.D.N.Y. 2011); Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 158-59 (S.D.N.Y. 2009). Insofar as ReDigi's infringement has already been determined, the sole remaining issue regarding IDs' liability is whether they meet this standard of "participation" or "supervision."

Ossenmacher and Rudolph serve respectively as ReDigi's Chief Executive and Chief Technology Officer. Rudolph testified at depositions that he and Ossenmacher jointly founded ReDigi; conceived of its used digital music marketplace; developed the company into a for-profit enterprise; implemented incentives for users to "resell" their music files; made all hiring and

firing decisions; and determined to continue with the service after the RIAA asserted a claim of infringement. He and Ossenmacher are the named inventor in the ReDigi patent, and he personally wrote the software by which ReDigi operates. Rudolph testified that he is "in charge of" and has final approval authority over ReDigi's "technical functionality."

In declarations and depositions, Ossenmacher similarly described how he and Rudolph established the "startup" ReDigi and its business model after conducting significant "research" in "building" the service. They collectively own 60% of ReDigi. Ossenmacher personally raised ReDigi's starting capital from investors, who contribute funds but do not play "any" role in the "day-to-day operations of the company," which are determined solely by Ossenmacher and Rudolph. Ossenmacher is responsible for all of ReDigi's marketing and website content and business operations, while Rudolph controls its technical functions, and they jointly make all personnel decisions. Between the two of them, they design, approve, supervise, and control every business and technical function the Court found infringing. As the Court held, "ReDigi's founders built a service where only copyrighted work could be sold," "programmed their software to choose copyrighted content," and "presumably understood the likelihood that use of ReDigi's service would result in infringement." Docket No. 109 at 14-15 (emphasis added).

Based on these admitted facts, IDs are jointly liable with ReDigi as a matter of law. See EMI Entertainment World, Inc. v. Karen Records, Inc., 806 F. Supp. 2d at 709-11 (summary judgment finding 50% owners who had financial and personnel control over record company jointly liable for company's infringement); Blue Nile, Inc. v. Ideal Diamond Solutions, Inc., 2011 WL 3360664 (W.D. Wash. August 3, 2011) (summary judgment finding officer who "controlled the corporate affairs" of a "small company" that was his "brainchild" personally liable for corporation's infringement); Lime Group, 784 F. Supp. 2d at 438-39 (CEO personally liable where he "conceived of" and "directed" development of infringing technology, was "ultimate decisionmaker" on strategic planning, and "heavily involved" in company's marketing and public relations); Microsoft Corp. v. Tech. Enters., LLC, 805 F. Supp. 2d 1330, 1333 (S.D. Fla. 2011) (corporate officer personally liable where he "was the moving force behind his company's infringement" and "[was] the only person involved in the business decisions"); Usenet.com, 633 F. Supp. 2d at 158-59 (director and sole shareholder responsible for strategic, marketing and technical decisions personally liable); Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 514 (N.D. Ohio 1997) (granting summary judgment holding defendant's president personally liable, where "[he] has the authority, right and ability to control the content of the [bulletin board service] and its operations"). Having stressed their personal roles in creating and implementing ReDigi, IDs are well-past disavowing their personal participation in and control over the very acts this Court found infringing.

Meritless Affirmative Defenses and Counterclaims

IDs have not yet answered, but in the parties' October 24, 2013 letter to the Court, IDs purport to be exploring "estoppel/implied consent, fair use, DMCA, waiver, and first sale affirmative defenses," "the unclean hands affirmative defense," and "counterclaims, including but not limited to tortuous [sic] interference with business relations, violations of New York and

California's deceptive trade practice statutes, and/or violations of federal and state antitrust laws for conspiring with other record labels to corner the digital download market." However boundless IDs' ambitions, these defenses/claims have either already been litigated or were waived, and are in any event baseless. IDs are in privity with ReDigi, and are thus (1) barred by collateral estoppel from relitigating issues the Court has already determined, such as fair use and first sale, see, e.g., In re: Teltronics Servs., Inc., 762 F.2d 185, 190-91 (2d Cir. 1985); Kreager v. Gen. Elec. Co., 497 F.2d 468, 472 (2d Cir. 1974); Moran v. City of New Rochelle, 346 F. Supp. 2d 507, 515 (S.D.N.Y. 2004); and (2) barred by res judicata from asserting defenses or claims ReDigi abandoned on summary judgment (such as the essential step doctrine and DMCA immunity, see Docket No. 109, at 4-5 n.4) or could have but failed to assert, [1] such as unclean hands and estoppel. See, e.g., Marine Midland Bank v. Slyman, 995 F.2d 362, 365-66 (2d Cir. 1993) (res judicata barred principals in privity with corporation from asserting defenses that could have been raised by corporation in prior action) (applying Ohio law).

Even were such defenses available, they lack a good faith basis. IDs enjoy no fair use or first sale defenses independent from ReDigi where they are charged with participating in the selfsame infringing acts. IDs' theory of unclean hands -- that Capitol "infringed on its recording artists and producers' rights to receive mechanical royalties" – cannot support a defense, available only in extremely limited circumstances, that requires that alleged misconduct relate directly to the subject matter of the suit. See, e.g., Bentley v. Tibbals, 223 F. 247, 252 (2d Cir. 1915); Price v. Fox Entm't Group, Inc., 2007 WL 241387 (S.D.N.Y. Jan. 26, 2007); Coleman v. ESPN, Inc., 764 F. Supp. 290, 296 (S.D.N.Y. 1991); Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130, 146 n.12 (S.D.N.Y. 1990). Alleged harms to artists owed mechanical royalties for musical compositions have nothing to do with ReDigi's infringement of Capitol's sound recordings. Likewise, IDs cannot establish the prejudicial delay or reliance elements of estoppel, where Capitol sued ReDigi within three months of its launch, and ReDigi had already received the RIAA's claim letter. See, e.g., National Football League v. Coors Brewing Co., 1999 U.S. App. LEXIS 32547, at *5 (2d Cir. Dec. 15, 1999) (no reliance where defendant foresaw that NFL would defend its mark); Lottie Joplin Thomas Trust v. Crown Publishers, Inc., 456 F. Supp. 531, 535 (S.D.N.Y. 1977) (no reliance where plaintiff promptly asserted rights), aff'd, 592 F.2d 651 (2d Cir. 1978). Finally, IDs have no plausible counterclaims for antitrust "conspiracies," deceptive acts, or tortious interference, where the company they founded and control has already been adjudged an infringer.

Respectfully,

Richard S. Mandel

cc: James Pizzirusso, Esq. (via email)
Gary Adelman, Esq. (via email)

[1] ReDigi's answer to the First Amended Complaint predictably asserts those defenses now, but they are of course inoperative for a defendant which has already been found liable.

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November 15, 2013

VIA E-MAIL (sullivannysdchambers@nysd.uscourts.gov)

Honorable Richard J. Sullivan, U.S.D.J.
United States District Court
Southern District of New York
40 Foley Square
New York, New York 10007

RE: *Capitol Records, LLC v. ReDigi Inc.*, No. 12-cv-00095 (RJS)

Dear Judge Sullivan,

We represent Defendants John Ossenmacher and Larry Rudolph a/k/a Lawrence Rogel ("IDs") in the above-captioned matter and submit this response to Plaintiff Capitol Records, LLC's ("Capitol") pre-motion letter in accordance with Rule 2.A of Your Honor's Individual Practices and Paragraph 7 the Second Amended Joint Case Management Plan and Scheduling Order. ECF No. 129 (Aug. 25, 2013). Capitol argues that summary judgment against the IDs is appropriate as to their liability and planned affirmative defenses because ReDigi Inc.'s ("ReDigi") liability has already been determined and the "sole remaining issue" is whether the IDs participated or supervised ReDigi's allegedly infringing activities. As explained below, this assertion is specious.

As an initial matter, IDs are not "barred" from litigating any of the planned affirmative defenses or counterclaims by collateral estoppel, res judicata, or the law of the case doctrine. Capitol appears to assert that simply being in privity with a corporate defendant is sufficient for these doctrines to apply.[1] This is not correct. First, as explained in the October 25, 2013 joint letter to the Court, collateral estoppel only applies in subsequent actions, not to prior decisions in the same action. *See Algonquin Power Income Fund v. Christine Falls of N.Y., Inc.*, 362 Fed. Appx. 151, 154 (2d Cir. 2010). Capitol fails to address this deficiency in its pre-motion letter, and its continued reliance on this doctrine is disingenuous.[2] Second, res judicata is equally

[1] Regardless, whether the IDs are in the requisite level of privity with ReDigi in order for these doctrines to apply is a question of fact inappropriate for summary judgment. *See Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Phillippe S.E. Schreiber*, 327 F.3d 173, 187 (2d Cir. 2003) (holding that "privity . . . depends on a finding that the person against whom collateral estoppel is applied actively participated in the previous litigation" and "controlled" the other defendant's trial strategy).

[2] The cases Capitol cites for its collateral estoppel argument are as equally inapposite as the collateral estoppel cases cited in the October 25 joint letter. Two of Capitol's cases actually involved res judicata, not collateral estoppel, and in any event, those cases made clear that res

(Continued ...)

inapplicable because, as Capitol admits in its parenthetical to *Marine Midland Bank v. Slyman*, 995 F.2d 362 (2d Cir. 1993), "res judicata bar[s] principals in privity with corporation from asserting defenses that could have been raised by corporation ***in prior action***." (emphasis added); *see also* n. 2, *supra*. Third, putting aside the fact that Capitol cites no cases for its law of the case argument, this doctrine does not apply to parties that were added to the litigation after an issue was decided, such as IDs here. *See In re W.R. Grace & Co.*, 591 F.3d 164, 174 (3d Cir. 2009), *cert. denied*, 131 S. Ct. 200 (2010); *Commercial Union Ins. Co. v. SEPCO Corp.*, 300 F. Supp. 2d 1198, 1201 (N.D. Ala. 2004). Moreover, this doctrine applies *only* when a court actually decides an issue of law. *See Arizona v. California*, 460 U.S. 605, 618 (1983); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 7-8 (2d Cir. 1996). Thus, the doctrine is inapplicable to any defenses and arguments that were never decided by this Court, even if they could have been raised (*e.g.*, DMCA safe harbor, fair use, laches, unclean hands, equitable estoppel, abuse of copyright, etc.). Further, because this doctrine is discretionary in this Circuit, courts have refused to invoke this doctrine where new discovery has been sought or obtained such that "the interests of justice militate against blind application of the law of the case doctrine." *Cargill, Inc. v. Sears Petroleum & Transp. Corp.*, 334 F. Supp. 2d 197, 243 (N.D.N.Y. 2004). Consequently, if IDs remain in this case, they are permitted as a matter of law to litigate each of their anticipated defenses and counterclaims (none having yet been pled given the pending Motion to Dismiss).

Capitol inappropriately conflates ReDigi's liability with the IDs' liability. As stated, IDs are permitted to litigate each of their anticipated defenses and counterclaims regardless of whether or not ReDigi may be able to do so. Thus, IDs cannot, as Capitol claims, be "jointly liable with ReDigi as a matter of law" merely because ReDigi has been found liable; they are entitled to litigate defenses as to both direct and secondary copyright infringement. Further, and by way of example, Capitol contends that because it sued ReDigi "within three months of its launch," that IDs cannot establish prejudicial delay required for their estoppel argument. However, the question is not whether ReDigi would be prejudiced, but whether IDs would be. IDs are undoubtedly prejudiced by Capitol's decision to add them on the eve of trial after discovery is essentially complete; Capitol's delay was inexcusable.

Regardless, even if Capitol's allegations are true (which IDs will dispute) Capitol has still failed to demonstrate why IDs are "jointly liable with ReDigi as a matter of law." For instance, it is simply insufficient for secondary liability that the IDs "presumably understood the likelihood" of infringement. *See Banff Ltd. v. Limited, Inc.*, 869 F.Supp. 1103 (S.D.N.Y. 1994); *Singer v.*

(... Continued)
judicata only applied in repetitious suits, not in the same action. *In re Teltronics Servs., Inc.*, 762 F.2d 185, 190 (2d Cir. 1985)*; Kreager v. Gen. Elec. Co.*, 497 F.2d 468, 472 (2d Cir. 1974). Capitol's third case involved collateral estoppel but it turned on findings from two prior proceedings. *Moran v. City of New Rochelle*, 346 F. Supp. 2d 515 (S.D.N.Y. 2004). Thus, Capitol's cases actually support IDs' position that they are not barred from litigating defenses that ReDigi may be precluded from arguing.

Citibank N.A., No. 91 Civ. 4453 (JFK), 1993 WL 177801 (S.D.N.Y. May 21, 1993). Similarly, simply owning 60% of a company (if true) does not rise to the level of financial interest necessary to hold the IDs liable for secondary infringement. *Compare Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280 (E.D.N.Y. 2002) (involving a 100% shareholder).

Capitol also contends that that IDs' anticipated counterclaims are "baseless." As these claims have not yet been pled, it is difficult to see how Capitol could make such an assertion. Nevertheless, group boycotts and interference with contractual relations are potential claims upon which relief may be sought here. *See Quad Cinema Corp. v. 20 Century Fox Film Corp.*, 76 CIV 4452 (LBS), 1981 WL 2122 (S.D.N.Y. July 21, 1981); *White Plains Coat & Apron Co. v. Cintas Corp.*, 460 F.3d 281, 285 (2d Cir. 2006). In addition, IDs are entitled to discovery on their anticipated counterclaims because Capitol opened the door by adding them to the action. *See Silkroad Associates, Ltd. v. Junior Gallery Grp., Inc.*, 88 CIV. 7082 (CSH), 1991 WL 51103 (S.D.N.Y. Apr. 3, 1991) (stating new defendants are entitled to additional discovery); *Data Digests, Inc. v. Standard & Poor's Corp.*, 57 F.R.D. 42, 45 (S.D.N.Y. 1972) (same).

Alternatively, IDs are entitled to additional discovery under Rule 56(f) to defend against Capitol's summary judgment motion. For the reasons specified in previous letters and also herein, IDs have not been afforded a sufficient opportunity to present facts essential to their defense at this stage of the proceedings and extending discovery under Rule 56(f) is appropriate. *See, cf., Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

In sum, Capitol inappropriately added the IDs to this action on the eve of trial in the hopes that this Court might find the IDs jointly liable under the dubious assertion that ReDigi might not be able to satisfy a judgment. Capitol's pleading utterly failed to satisfy *Twombly* and IDs still do not understand the claims asserted against them. Moreover, IDs discovery efforts have thus far been stymied. As IDs are not even sure that they will remain in this case, and, if so, what the claims pled against them will look like, it has been difficult to determine every possible defense and counterclaim that they might assert. Likewise, given the unsettled nature of the pleadings, it has been difficult to adequately defend against Capitol's proposed motion for summary judgment. IDs have a right to litigate each of their anticipated defenses and counterclaims and to receive discovery on the same. Capitol should not be permitted to handcuff IDs in a misleading attempt to hold them liable. Capitol's anticipated summary judgment motion against IDs is without merit and premature, and therefore, should be denied (even assuming that the IDs remain in this case which they should not).

Sincerely,

James J. Pizzirusso

CC: Gary Adelman, Esq.
Richard S. Mandel, Esq.

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November 12, 2013

VIA E-MAIL (sullivannysdchambers@nysd.uscourts.gov)

Honorable Richard J. Sullivan, U.S.D.J.
United States District Court
Southern District of New York
40 Foley Square
New York, New York 10007

RE: *Capitol Records, LLC v. ReDigi Inc.*, No. 12-cv-00095 (RJS)

Dear Judge Sullivan,

We represent Defendants John Ossenmacher and Larry Rudolph a/k/a Lawrence Rogel ("IDs") in the above-captioned matter and submit this pre-motion letter in accordance with Rule 2.A of Your Honor's Individual Practices and Paragraph 7 the Second Amended Joint Case Management Plan and Scheduling Order. ECF No. 129 (Aug. 25, 2013). As an initial matter, the IDs have sought a discovery extension (generally unopposed by Capitol) in order to complete outstanding discovery. That request, as well IDs' Motion to Dismiss and a discovery dispute, are pending before this Court. Because this Court indicated that all discovery should be completed before summary judgment motions are filed, IDs submit this letter without prejudice to the outstanding issues. Should the IDs remain in this action and should this case proceed on the present schedule (with no additional discovery having yet occurred),[1] IDs intend to move for summary judgment on the liability and damages issues described below. As explained in the November 6 letter to Your Honor, however, IDs have not yet had ample time for discovery, and assuming Capitol files its own motion, they may also seek additional discovery under Rule 56(f).

After additional discovery, or if required to do so now, IDs will file a motion for summary judgment on their liability for direct and secondary copyright infringement. As to direct infringement, IDs will seek summary judgment on the following affirmative defenses: (1) the safe-harbor provisions of the Digital Millennium Copyright Act of 1998 ("DMCA"), 17

[1] IDs served written discovery on Capitol on October 9, 2013. Although Capitol agreed to produce some documents and answer some interrogatories, it objected to answering all discovery on the grounds that under the mailbox rule, the discovery cut off was three days prior to the due date for its answers. In addition, Capitol has scheduled a 30(b)(6) deposition for December 6, 2013 and has not yet provided dates for the other witnesses IDs sought to depose. IDs have also subpoenaed RIAA, which has indicated it will assert privilege over the documents IDs seek. A log is purportedly forthcoming, and IDs would like to resolve any claims of privilege prior to taking RIAA's deposition. As of today, despite their best efforts, IDs have been unable to obtain any discovery beyond that already produced.

U.S.C. § 512; (2) unclean hands; (3) laches; (4) equitable estoppel/implied consent; and (5) abuse of copyright. First, summary judgment under DMCA is appropriate here, as just like YouTube, ReDigi is a qualified service provider that adopted and reasonably implemented a copyright infringer policy that terminated and/or suspended infringers' accounts and also had standard technical measures that were used to identify and/or protect copyrighted works. *See Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012). Thus, under DMCA, the IDs are immune from suit. *Id.* at 41. Second, summary judgment based on unclean hands is appropriate because Capitol's "paralegal investigator" was not likely a New York-licensed private investigator, as required by New York law. *See* N.Y.G.B.L. § 70. Consequently, Capitol has committed a Class B misdemeanor, and such misdemeanor is an unconscionable act that has injured the IDs. *See Devils Films, Inc. v. Nectar Video*, 29 F. Supp. 2d 174, 175-76 (S.D.N.Y. 1998) (upholding unclean hands defense where the plaintiff was in violation of a federal law related to the distribution of the copyrighted material). Third, summary judgment is appropriate under a theory of laches. Here, Capitol, despite knowing of IDs' roles in ReDigi, did not name them to the suit until the eve of the close of discovery (and for dubious reasons). Capitol's delay was unreasonable as to the IDs, and the IDS were unfairly prejudiced by such delay. *See Lego A/S v. Best-Lock Constr. Toys, Inc.*, 874 F. Supp. 2d 75, 86-95 (D. Conn. 2012). Fourth, summary judgment based on equitable estoppel is warranted. Here, Capitol knew of the IDs allegedly infringing acts but nonetheless encouraged them to develop the allegedly infringing system. IDs so relied on Capitol's encouragement (as Capitol intended) not knowing, until it was too late, that Capitol actually intended to sue ReDigi for infringement. *See id.* (discussing the elements of the equitable estoppel defense). Fifth, summary judgment on liability is appropriate based on Capitol's abuse of its copyrights. Specifically, Capitol, through and in conjunction with RIAA and the other record labels, conspired to abuse their copyrights to exclude ReDigi from the digital music market and tortiously interfered with ReDigi's existing licenses. *See Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990).

With respect to liability for secondary infringement, IDs will seek summary judgment on the grounds that there is no evidence that (1) they intentionally induced or encouraged direct infringement; or (2) they financially benefitted from the alleged infringement. First, IDs did not act with bad faith – the requisite level of culpability – in developing ReDigi, and consequently, summary judgment is appropriate on the inducement of copyright infringement claim. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937 (2005) ("The inducement rule . . . premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise."). Second, and as set out in the IDs' pending Motion to Dismiss, Capitol has not, and cannot, point to any evidence produced in this litigation demonstrating that the IDs had an "obvious and direct financial interest in the exploitation of the copyrighted materials." *Viacom*, 676 F.3d at 36.[2]

[2] Neither the law of the case doctrine nor collateral estoppel prevent IDs from litigating these defenses, as they were not actually decided in the prior proceedings. *See Pescatore v. Pan Am.*

(Continued ...)

In addition, IDs will also file a motion for summary judgment as to damages on the following grounds: (1) Capitol may not recover damages for those songs for which Capitol has failed to produce evidence of a valid contractual arrangement or copyright ownership (of which there are many); (2) IDs acted with innocent intent; (3) Capitol failed to mitigate damages; (4) Capitol may not recover damages on songs that were offered for sale on ReDigi but never "sold;" and (5) an award of statutory damages here would be unconstitutionally punitive. First, IDs will move for summary judgment as to those damages Capitol is claiming on songs for which Capitol has failed to produce evidence of contracts and/or copyright registrations demonstrating a valid copyright interest. *See* 17 U.S.C. § 411(a). Second, IDs will move the court for summary judgment as to their innocent intent in developing and launching ReDigi as IDs had a good-faith belief that ReDigi was a non-infringing platform, such that any statutory damage award should be reduced to $200 per violation. *See* 17 U.S.C. § 504(c)(2). Third, any damage award should be reduced by Capitol's failure to mitigate damages, inasmuch as Capitol's "paralegal investigator" downloaded hundreds of songs more than she needed in order to show the allegedly infringing conduct. *See Interplan Architects, Inc. v. C.L. Thomas, Inc.*, 4:08-CV-03181, 2010 WL 4366990, at *48 (S.D. Tex. Oct. 27, 2010). Fourth, damages may not properly be awarded for those songs that ReDigi only made available for distribution to others but did not actually "sell." *See* 17 U.S.C. § 101; *Elektra Entm't Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 244-45 (S.D.N.Y. 2008). Finally, any damage award in excess of four-times actual damages are a derogation of IDs' due process rights. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *Atl. Recording Corp. v. Brennan*, 534 F. Supp. 2d 278, 282 (D. Conn. 2008) (upholding the viability of this defense); *UMG Recordings, Inc. v. Lindor*, No. CV-05-1095 (DGT), 2006 WL 3335048, at *5 (E.D.N.Y.2006) (same).

Notwithstanding the foregoing, should IDs remain in this action on the current schedule and should Capitol file its own motion for summary judgment, IDs may seek discovery under Federal Rule of Civil Procedure 56(f) to gather additional facts "essential to justify [their] opposition" to Capitol's summary judgment motion. *See Gualandi v. Adams*, 385 F.3d 236, 244-45 (2d Cir. 2004) (citations omitted).

Sincerely,

James J. Pizzirusso

CC: Gary Adelman, Esq.
Richard S. Mandel, Esq.

(... Continued)
World Airways, Inc., 97 F.3d 1, 7-8 (2d Cir. 1996) (law of the case); *Yoon v. Fordham Univ. Faculty & Admin. Ret. Plan*, 263 F.3d 196, 202 n.7 (2d Cir. 2001) (collateral estoppel).

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November 15, 2013

By E-mail (sullivannysdchambers@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)

Dear Judge Sullivan:

Capitol Records, LLC ("Capitol") submits this letter in response to the November 12, 2013 pre-motion letter submitted on behalf of individual defendants John Ossenmacher ("Ossenmacher") and Larry Rudolph ("Rudolph") (collectively, "IDs") regarding IDs' proposed summary judgment motion.

IDs state that they intend to move for summary judgment on five separate affirmative defenses. However, there is not even a good faith basis for asserting any of these defenses under Rule 11, let alone for seeking summary judgment on them. As set forth in Capitol's own pre-motion letter, ReDigi has already waived any DMCA defense by abandoning it at the summary judgment stage. See Docket No. 109, at 4-5 n.4. ReDigi has likewise waived the other defenses by failing to raise them at any time prior to being adjudicated liable as an infringer. Because IDs are in privity with ReDigi, they are barred by the doctrine of res judicata from raising such defenses that could have been previously asserted before the summary judgment ruling. See, e.g., Marine Midland Bank v. Slyman, 995 F.2d 362, 365-66 (2d Cir. 1993) (res judicata barred principals in privity with corporation from asserting defenses that could have been raised by corporation in prior action) (applying Ohio law).

Even were such defenses still available, they could not survive, much less support, summary judgment. Despite consistently protesting that they are not in privity with ReDigi, IDs claim DMCA immunity for themselves based on ReDigi's purported status as a qualifying internet service provider ("ISP"). Apart from the fact that IDs are not themselves ISPs, neither they nor ReDigi has designated an agent to receive infringement notices, as required by 17 U.S.C. § 512(c). DMCA immunity also requires that an ISP "does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity." 17 U.S.C. § 512(c)(1)(B). This Court has already held that ReDigi received a financial benefit directly attributable to the infringing activity and had the right and ability to control such activity, based on its intimate involvement in examining the content sold and supervising the sales process. See Docket No. 109 at 16-17. Given this finding, IDs are in no position to claim a defense based on ReDigi's alleged immunity.

The IDs' unclean hands defense is not even colorable. Capitol's paralegal was not engaged in the business of a private investigator, but simply purchased recordings from a publicly accessible website in the same manner that any other member of the public was free to do. Moreover, even if she were somehow deemed to be covered by section 70 of NYGBL, as a regular employee within Capitol's legal department working exclusively under the supervision of attorneys, she would fall within the exception of NYGBL § 83 and be exempt from the requirement of a license. In any event, IDs suffered no harm or prejudice from being made to answer for acts of infringement, which could readily be observed on their own public website, and Capitol has clearly not committed any kind of "unconscionable act," such as the criminal distribution of pornography that was involved in the Devils Films case cited by IDs.

Laches and estoppel/implied consent are similarly unavailing. IDs were on notice of Capitol's and the other record companies' objections within a month of the beta launch of the ReDigi site, and Capitol brought suit within three months of such launch. Any purported reliance on Capitol's failure to name them personally would be objectively unreasonable, and IDs proceeded at all times at their own risk based on their own misguided reading of the law. See, e.g., National Football League v. Coors Brewing Co., 1999 U.S. App. LEXIS 32547, at *5 (2d Cir. Dec. 15, 1999) (no reliance where defendant foresaw that NFL would defend its mark); Lottie Joplin Thomas Trust v. Crown Publishers, Inc., 456 F. Supp. 531, 535 (S.D.N.Y. 1977) (no reliance where plaintiff promptly asserted rights), aff'd, 592 F.2d 651 (2d Cir. 1978). Moreover, IDs statement that Capitol "encouraged" ReDigi to develop its system is flatly contradicted by Mr. Ossenmacher's testimony that Capitol was either "too busy" to meet with ReDigi or refused to have such a meeting.

The copyright misuse defense likewise has no plausible basis where Capitol has already successfully established its right to prevent ReDigi from engaging in the underlying conduct at issue. ReDigi and the IDs have no right to participate in digital exploitation of Capitol's recordings to the extent they do so in a manner that violates Capitol's copyrights. Moreover, IDs have failed to identify any specific conduct that supports its spurious allegation of a conspiracy.

IDs' contemplated motion with respect to their secondary liability is equally unfounded for the reasons already explored in detail in Capitol's own pre-motion letter of November 12, 2013, as well as Capitol's opposition to the IDs' motion to dismiss. The evidence clearly establishes that IDs encouraged infringement. They developed a business model so as to ensure that only infringing activity could occur on the ReDigi site by limiting eligible files to iTunes tracks. They encouraged users to make unauthorized reproductions and distributions of Capitol's copyrighted recordings by urging users – with coupons, prizes, credits and solicitations – to copy and sell recordings without the requisite permission. And they erroneously advised users on the ReDigi website that the service was legal, despite knowing that there were serious doubts concerning such legality, in an effort to encourage continued infringing activity that would build the site's user base. Moreover, with respect to IDs' financial interest argument, individual owners of closely held corporations are typically deemed to have satisfied the direct financial interest element of vicarious liability. See, e.g., EMI Entertainment World, Inc. v. Karen Records, Inc., 806 F. Supp. 2d 697, 711 (S.D.N.Y. 2011); Centrifugal Force, Inc. v. Softnet

Communications, Inc., 2011 WL 744732 (S.D.N.Y. March 1, 2011); Peer Int'l Corp. v. Luna Records, Inc., 887 F. Supp. 560, 565 (S.D.N.Y. 1995).

Finally, IDs' motion concerning damages is also without merit for the reasons explained in detail in Capitol's response, submitted jointly with this letter, to ReDigi's own pre-motion letter regarding summary judgment. Capitol has provided copyright certificates covering all federally registered recordings on which it has brought suit, and has indicated that it will provide any remaining chain of title/ownership documents not already produced in advance of the 30(b)(6) deposition of Capitol's witness scheduled for December 6, 2013. IDs cannot invoke the innocent intent provision of 17 U.S.C. § 504(c)(2), which is unavailable where IDs had access to published copies of Capitol's recordings bearing copyright notices. See 17 U.S.C. 402(d); BMG Music v. Gonzalez, 430 F.3d 888, 892 (7th Cir. 2005) (under §402(d), defendant who downloaded recordings which were available in CD form with copyright notices not entitled to "innocent" infringer reduction). Even if not statutorily barred, the "innocent infringer" reduction only protects an infringer who "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright." This Court has already stated that it had "little difficulty concluding that ReDigi knew or should have known its service would encourage infringement," while also indicating that its "officers presumably understood the likelihood that use of ReDigi's service would result in infringement." Docket No. 109 at 15. IDs' mitigation and distribution arguments are both predicated on the notion that damages cannot be awarded for recordings that were offered for sale but never sold. However, under the clear reasoning of the Court's summary judgment ruling, the reproduction that necessarily took place in order for such recordings to be offered for sale constitutes an independent violation of Capitol's reproduction right under 17 U.S.C. § 106(1), without regard to whether or not a sale was ever consummated. The Court recognized as much at the August 9, 2013 conference when it permitted Capitol to amend to assert such violations, noting that any recordings offered for sale were "fair game." And IDs' constitutional argument fails to recognize that"[s]tatutory damages under the Copyright Act are designed not only to provide 'reparation for injury,' but also 'to discourage wrongful conduct.'" Sony BMG Music Entertainment v. Tenenbaum, 719 F.3d 67, 71 (1st Cir. 2013) (quoting F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952)) (upholding award of $22,500 per song for total of $675,000 where actual injury estimated to be no more than $450).

For all of the foregoing reasons, there is no basis for granting IDs' proposed summary judgment motion, or even for allowing the assertion of the various inapplicable defenses and arguments they have cobbled together in their submission.

Respectfully,

Richard S. Mandel

cc: James Pizzirusso, Esq. (via email)
Gary Adelman, Esq. (via email)

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November 12, 2013

VIA ELECTRONIC MAIL
Hon. Richard J. Sullivan, U.S.D.J.
sullivannysdchambers@nysd.uscourts.gov

Re: *Capitol Records, LLC v. ReDigi Inc., et al* (12cv0095) (RJS)

Hon. Judge Sullivan:

We represent defendant ReDigi Inc., ("ReDigi") in the above referenced action. We write in accordance with Rule 2.A of Your Honor's Individual Practices to respectfully request a pre-motion conference in anticipation of filing a motion for summary judgment on ReDigi's behalf in connection with certain damages issues as set forth below.

Plaintiff Capitol Records LLC's ("Capitol") First Amended Complaint alleges infringement of 512 allegedly federally registered works and 55 pre-1972 tracks. Capitol bears the burden of proving the elements of its copyright infringement claims. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (To succeed on a claim of copyright infringement, plaintiff must prove two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original)."

ReDigi's anticipated motion seeks judgment to exclude certain allegedly infringed works as a matter of law on the grounds that (i) Capitol has failed to produce admissible evidence that it is the owner of a valid copyright of many of the works (both pre and post 1972) that it claims were infringed; (ii) works that were offered for sale by customers through the ReDigi marketplace, but never sold were not "infringed" as a matter of law; and (iii) limiting any potential damages award based on Capitol's failure to mitigate, ReDigi's innocent intent and the fact that statutory damages award here would violate ReDigi's due process rights.

Here Capitol has failed to produce evidence that it is the owner of a valid copyright in a number of the works it alleges were infringed by ReDigi users. First and foremost, Capitol has failed to produce or provide copyright registration certificates to demonstrate that it is the owner of certain of the allegedly copyrighted works that Capitol claims were infringed, and as such these works should be excluded as a matter of law. In addition, Capitol has failed to prove that certain copyrights, which were registered under entities other than Capitol were properly transferred to Capitol. *See e.g. International Media Films, Inc., v. Lucas Entertainment, Inc.*, 703 F.Supp.2d 456, 463 (S.D.N.Y. 2010) (a transferee plaintiff in a copyright infringement action must prove that the copyright was properly transferred to the plaintiff (citing *Kenbrooke Fabrics, Inc. v. Soho Fashions, Inc.*, No. 87 Civ. 5775, 1989 WL 117704, at *1 (S.D.N.Y. Oct. 2, 1989) (dismissing complaint when plaintiff failed to prove transfer of copyright)). Similarly Capitol has failed to produce admissible evidence to support that it is the owner of a valid

copyright in many of the pre-1972 works it claims were infringed, as such Capitol's claim under New York law fails. *See Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 563, 830 N.E.2d 250, 266 (2005) (A copyright infringement cause of action in New York consists of two elements: (1) the existence of a valid copyright; and (2) unauthorized reproduction of the work protected by the copyright). To the extent Capitol has failed to produce proof that it owns a valid copyright in and to certain sound recordings it claims were infringed, these works must be excluded as a matter of law as Capitol has failed to satisfy its burden of proof on the first and most essential element of its claims for copyright infringement.

Similarly ReDigi will seek judgment as a matter of law dismissing those sound recordings that were merely offered for sale (i.e. "made available") through the ReDigi marketplace, but never sold, as ReDigi contends that merely offering a track for sale is not an "infringement" or a "distribution" within the meaning of 17 U.S.C. 106(3). As this Court correctly noted "a number of courts, including one in this district, have cast significant doubt on this 'make available' theory" . . . but "because the Court concludes that actual sales on ReDigi's website infringed Capitol's distribution right, it does not reach this additional theory of liability". *See* 3/30/13 Order at 8, n.6. Cases from this and other circuits have consistently held that there can be no distribution where no sale occurred. *See London-Sire Records, Inc.*, 542 F. Supp. 2d at 169 (defendants cannot be liable for violating the plaintiffs' distribution right unless a "distribution" actually occurred); *Natl Car Rental Sys., Inc., v. Computer Assocs Int'l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993) (stating that infringement of the distribution right requires the actual dissemination of copies or phonorecords); *Elektra Entm't Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 243 (S.D.N.Y. 2008) (the support in the case law for the "make available" theory of liability is quite limited). Under relevant law, it is not a violation of the distribution right to merely make a work available, where no sale or transfer of ownership is consummated and this Court has already declined to decide that making a work available is an infringement. Capitol has repeatedly stated that it is not challenging the legality of uploading works to the cloud for storage and this Court has noted that such an act is likely protected by fair use. *See* 2/6/12 Tr. 21:4-23;8/9/13 Tr. Pp. 2-3. When users were previously able to offer for sale tracks that had been uploaded to the cloud through ReDigi 1.0, to do so required two steps. First, the user would have to download ReDigi's verification software and the track would be migrated to the ReDigi Cloud Locker. There is no dispute that this is not an infringement and is protected by fair use. Then *at a later point in time*, the user could choose to offer an eligible file for sale. As set forth above merely offering a particular track for sale i.e. making it available, is not an infringement, especially here where at any time the user could cancel the offer for sale and leave that track in the cloud for storage purposes. The migration and the offer for sale are two distinct acts that happen at two separate points in time. By claiming that the tracks offered for sale but not sold are "infringements" Capitol is trying to fuse two distinct acts, which are both legal, that happened at two separate points in time, into one and are claiming it is illegal. Each allegation of infringement must be looked at on its own and here there is no evidence to support the contention that the two alleged acts should be combined into one. As such, tracks that were merely offered for sale through the ReDigi marketplace, but never sold, cannot be considered as "infringements" for the purposes of calculating statutory damages at trial in this action.

ReDigi further seeks summary judgment reducing any damages award (i) on the grounds that Capitol failed to mitigate its damages and is not entitled to damages on the 134

tracks that its paralegal investigator Coleen Hall purchased; (ii) ReDigi had innocent intent; and (iii) a damages award in excess of four times the actual damages here would violate ReDigi's due process rights.

Here Capitol should not be entitled to damages on the works downloaded by Capitol's investigator paralegal Ms. Coleen Hall as Capitol has failed to mitigate its damages and as such is not entitled to an award on these tracks. Prior to filing the instant action, Capitol, through one of its employees downloaded approximately 134 musical tracks as part of its "investigation" of the ReDigi system. Now, Capitol intends to seek an award of statutory damages on the musical tracks it had its own paralegal download. It is ReDigi's position that the tracks Capitol itself purchased and downloaded should not be part of any potential damages calculation for statutory damages. To count these works as "infringements" for the purpose of determining a statutory damage award, would reward Capitol for downloading far more works than necessary to (i) determine the functionality of the ReDigi website; or (ii) to gather evidence of alleged infringement. Allowing Capitol to recover a statutory damage award for these works would encourage future copyright plaintiffs' to engage in the infringing activity more than necessary during "investigations", so that they could artificially inflate the potential statutory damage award and would encourage parties not to mitigate their damages. Such a precedent would encourage companies, like Capitol here, to have interns and paralegals download hundreds or even thousands of their own works to drive up a potential damages award, when such activity is completely unnecessary to accomplish the goal of "investigating," what they consider to be a potentially infringing service.

ReDigi will also move on the grounds that any damages award in excess of four-times Capitol's actual damages would a derogation of ReDigi's due process rights. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *Atl. Recording Corp. v. Brennan*, 534 F. Supp. 2d 278, 282 (D. Conn. 2008) (upholding the viability of this defense); *UMG Recordings, Inc. v. Lindor*, No. CV-05-1095 (DGT), 2006 WL 3335048, at *5 (E.D.N.Y.2006) (same). Alternatively, ReDigi will seek a reduction of statutory damages to $200 per work as ReDigi had a good-faith belief that it was a non-infringing platform. *See* 17 U.S.C. § 504(c)(2).

We appreciate the Court's time and consideration in this matter and look forward to discussing these matters at the upcoming conference.

Respectfully submitted,

ADELMAN MATZ P.C.

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November 15, 2013

By E-mail (sullivannysdchambers@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)

Dear Judge Sullivan:

Capitol Records, LLC ("Capitol") submits this letter in response to the November 12, 2013 pre-motion letter submitted by defendant ReDigi Inc. ("ReDigi") in anticipation of ReDigi's proposed summary judgment motion.

ReDigi first argues that Capitol has "failed to produce evidence that it is the owner of a valid copyright in a number of the [infringed] works" in the form of copyright registration certificates. In fact, Capitol not only identified each such registration certificate by number in the First Amended Complaint, but has produced copies of registration certificates for all 512 registered works. Indeed, all but 17 of those certificates were delivered to ReDigi three and a half months ago, with the remaining handful supplemented this week. Moreover, the certificate numbers identified in the First Amended Complaint were easily verifiable from public records on the U.S. Copyright Office website. Pursuant to 17 U.S.C. §410(c), these registration certificates constitute prima facie evidence of ownership of a valid copyright. See, e.g., In Re: Literary Works In Electronic Databases Copyright Litigation, 509 F.3d 116, 131 (2d Cir. 2007) (registration certificate provides "prima facie proof of ownership and validity"). Because of this presumption, a party "seeking to contest ownership must put forward specific evidence that rebuts the presumption of validity which attaches to a duly issued registration." See Complex Systems, Inc. v. Abn Ambro Bank N.V., 2013 WL 5797111 (S.D.N.Y. October 17, 2013) (citing Hamil Am., Inc. v. GFI, 193 F.3d 92, 98 (2d Cir. 1999)). ReDigi, of course, provides no such specific evidence, because none exists, and thus ReDigi cannot meet its own burden of rebutting the presumption of ownership flowing from Capitol's registrations.

ReDigi next asserts that Capitol cannot prove "that certain copyrights, which were registered under entities other than Capitol were properly transferred to Capitol" or that Capitol is the owner "of a valid copyright in many of the pre-1972 works." In fact, Capitol produced in the first wave of discovery hundreds of pages of agreements establishing Capitol as the owner or exclusive licensee of the recordings identified in Capitol's initial complaint. ReDigi took virtually no discovery on those documents and conceded Capitol's ownership on summary

judgment. During the second wave of discovery relating to damages, the parties focused their efforts on the difficult task of identifying additional Capitol recordings that had been offered for sale or sold via ReDigi, requiring the writing of special software, the production of hundreds of pages of charts, and the elimination of some recordings that were not uploaded with the ReDigi 1.0 software. During that entire time, ReDigi sought no discovery or deposition regarding Capitol's ownership of the growing list of infringed works. Since finally identifying all 567 works at issue, Capitol has been assembling the remaining agreements (some of which overlap with previously provided agreements) regarding its chain of title to each recording at issue, and will provide such documents in advance of the individual defendants' 30(b)(6) deposition of Capitol's witness. The net result is that ReDigi already has or will soon have all relevant agreements covering the identified recordings.

ReDigi next rehashes its argument, already rejected by the Court, that recordings "merely offered for sale ... but never sold" should be excluded from the case, because "merely offering a track for sale is not an 'infringement' or a 'distribution' within the meaning of 17 U.S.C. 106(3)." ReDigi unsuccessfully pressed these same arguments in its August 2 and 7, 2013 letters to the Court seeking to exclude this same category of tracks and opposing Capitol's amendment to include them. ReDigi continues to confuse the rights of reproduction and distribution. As Capitol then argued, tracks offered for sale must first be uploaded to the ReDigi cloud. Pursuant to the Court's summary judgment opinion, such uploads fix the recording in a new phonorecord in violation of Capitol's exclusive right of reproduction under 17 U.S.C. §106(1), regardless of whether Capitol's distribution rights have also been violated. Moreover, the Court has already rejected the one affirmative defense (fair use) that ReDigi proffers to immunize such reproduction. The Court's fair use analysis on summary judgment – that ReDigi's purposes are commercial, that its service "transforms" nothing, and that the entire creative work is appropriated in a fashion that devalues the market for legitimate digital distribution – applies regardless of whether a track offered for sale is ultimately sold.

It is for this reason that the Court allowed Capitol to add such recordings to its amended complaint and rejected ReDigi's argument that tracks "offered" for sale are not actionable. As the Court stated, its "whole opinion" was predicated on reproduction, so that songs that were "reproduced into the cloud and then offered for sale" were certainly "fair game" for inclusion in the amended complaint. See August 9, 2013 Tr. (Docket No. 116) at 2-3. Nothing has changed to warrant a different conclusion. ReDigi's subsidiary argument that "uploading works to the cloud for storage" constitutes fair use is a non-sequitur, inasmuch as Capitol seeks damages only for those recordings that were uploaded and then offered for sale. Its speculation that certain tracks might first be uploaded and then offered for sale "at a later point in time" is equally irrelevant. ReDigi has provided no evidence of any such time gap, and in any case, once the track is offered for sale, any fair use justification evaporates.

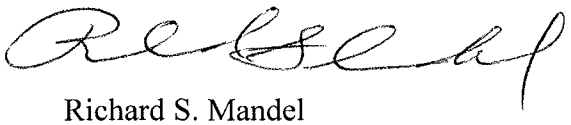
ReDigi rehashes a second failed argument that recordings purchased by Capitol's paralegal to verify that Capitol's tracks were being infringed are also not actionable. ReDigi pressed these same arguments in the above-noted August 2 and 7, 2013 letters to the Court. But again, for anyone to purchase such tracks, they had to have first been uploaded and offered for

sale in violation of Capitol's rights of reproduction, so Capitol's subsequent purchase did nothing to inflate the universe of songs already infringed. Moreover, a long line of cases holds that purchases made by the plaintiff's agent establish infringement and indeed distribution. See, e.g., Arista Records LLC v. Lime Group LLC, 2011 WL 1226277 (S.D.N.Y. March 29, 2011); Warner Bros. Records Inc. v. Walker, 704 F. Supp.2d 460, 467 (W.D. Pa. 2010); Arista Records, LLC v. Usenet.com, Inc., 633 F. Supp.2d 124, 149-150 n. 16 (S.D.N.Y. 2009) (collecting cases); Capitol Records, Inc. v. Thomas, 579 F. Supp.2d 1210, 1216 (D. Minn. 2008).

ReDigi's claim that a damage award in excess of "four times Capitol's actual damages" would be unconstitutional is based on State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003), which expressly declined to adopt any specific ratio for punitive damages. Moreover, the constitutionality of punitive damages is completely irrelevant to the different analysis for statutory damages. See Sony BMG Music Entertainment v. Tenenbaum, 719 F.3d 67, 71 (1st Cir. 2013) (punitive damage analysis not applicable to copyright statutory damages; upholding $675,000 statutory damage award where actual injury estimated at $450). Not surprisingly, the other cases ReDigi cites make no finding that any particular award was unconstitutional, because awards within the statutorily prescribed ranges do not violate due process. See Arista Records LLC v. Usenet.com, Inc., 2010 WL 3629688 (S.D.N.Y. Feb. 2, 2010) (rejecting claim that statutory damage award was unconstitutional where defendant cited "no case where a court has found a statutory damages award within the range prescribed by Congress to be unconstitutional").

Finally, ReDigi cannot seek a damages reduction for "innocent" infringement under 17 U.S.C. § 504(c)(2) for two reasons. First, this reduction is statutorily unavailable to an infringer who had access to phonorecords bearing a proper copyright notice. See 17 U.S.C. 402(d). See also BMG Music v. Gonzalez, 430 F.3d 888, 892 (7th Cir. 2005) (under §402(d), defendant who downloaded recordings which were available in CD form with copyright notices not entitled to "innocent" infringer reduction). Here, Capitol's published CDs bear proper copyright notices, and iTunes downloads contain copyright information in metadata which ReDigi concededly reviews. Second, even were the reduction technically available, the Court has already found that "ReDigi knew or should have known its service would encourage infringement," so ReDigi is ill-situated to protest that it "was not aware and had no reason to believe" that its serviced infringes, as required under 17 U.S.C. § 504(c)(2).

Respectfully,



Richard S. Mandel

cc: James Pizzirusso, Esq. (via email)
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