Exhibit 1

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August 2, 2013

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

Hon. Richard J. Sullivan, U.S.D.J.
United States Courthouse
Southern District of New York
500 Pearl Street
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") and write in accordance with ¶¶ 4 and 6 of the Joint Amended Case Management Plan (the "CMP," Docket No. 111) and Rule 2.A of the Court's Individual Practices regarding Capitol's proposed motion to amend its complaint. Capitol wishes to amend its complaint to: (1) supplement the list of its copyrighted recordings that have been infringed; (2) join the principals of defendant ReDigi, Inc. ("ReDigi") as additional defendants; and (3) eliminate portions of its complaint no longer necessary to resolution of this dispute. Capitol's proposed First Amended Complaint is attached. Pursuant to Paragraph 6 of the CMP, we understand that the August 9, 2013 post-discovery conference will also serve as a pre-motion conference to address this proposed motion.

Paragraph 4 of the CMP provides that Capitol may move to join parties or amend pleadings "with leave of the Court, in accordance with Fed. R. Civ. P. 15(a)(2)." Rule 15(a)(2), in turn, provides that the Court "should freely give leave when justice so requires." As this Court has held, leave will be "liberally granted," except in cases of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment." See, e.g., Bush v. Horn, 2009 WL362513 (S.D.N.Y. Feb. 13, 2009) (citations omitted). None of the listed exceptions apply to Capitol's meritorious and narrow amendments, which are the first it has sought in this case. These amendments are necessary to conform Capitol's claims to evidence adduced during damages discovery, require no further discovery, and will not delay the case schedule.

Capitol first proposes to supplement the list of its sound recordings infringed via ReDigi's 1.0 service. The list attached to the original complaint identifies recordings known to have been infringed at the time of Capitol's initial pleading. Discovery has revealed that since that time, ReDigi users have offered for sale or sold many additional Capitol recordings. Capitol

thus proposes to amend its complaint to account for the full universe of recordings at issue from ReDigi's inception until it discontinued ReDigi 1.0 following the Court's summary judgment ruling. The parties expressly anticipated such an amendment in their joint submission to the Court: "Because of the dynamic nature of the ReDigi website at issue in this case, the parties contemplate that the list of plaintiff's recordings allegedly infringed will have to be supplemented prior to a final adjudication in the case based on information obtained through discovery." CMP ¶4.

While supplementing the list of works at issue should thus be non-controversial in principle, Capitol anticipates one area of dispute based on discussions with opposing counsel. Capitol contends that each track that a user either offered for sale or actually sold is actionable, while ReDigi insists that only those actually sold constitute infringement. ReDigi's narrowing interpretation does not comport with the Court's conclusion on summary judgment that ReDigi violates the reproduction right when users upload recordings from their home computers to ReDigi's cloud server, absent some affirmative defense. Under the Court's logic, ReDigi can enjoy no fair use defense for such reproductions where the very purpose of such uploads was to offer those tracks for sale to other ReDigi users. Capitol should be permitted to assert all such tracks in its amended complaint, and will be prepared to discuss this issue further to the extent necessary at the pre-motion conference.

Capitol's second proposed amendment seeks to join ReDigi's two founders, John Ossenmacher and Larry Rudolph, as defendants. Discovery has confirmed that both are personally liable as a legal matter and that, contrary to its earlier protestations, ReDigi itself has insufficient funds to satisfy even a modest damage award in this case. Thus, as the parties move to the remedy phase of this case, Capitol seeks to join these individuals as jointly and severally responsible for Capitol's damages. The relevant facts and legal authorities are as follows.

In defending against Capitol's motion for a preliminary injunction, ReDigi argued vociferously that money damages would be available to remedy any infringement. See Declaration of John Ossenmacher (Docket No. 15) ¶10 ("Even if plaintiff were right that ReDigi's used music marketplace business somehow infringes its copyrights, this infringement would be fully compensable in damages. ReDigi keeps detailed records of all of the purchase and sale transactions ..."); Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction (Docket No. 14) at 2 ("It is evident that this is about nothing but money for the Plaintiff, and that if they were to win on the merits an award of statutory damages would more than make them whole"). However, during recent depositions addressed to damages and remedies, ReDigi acknowledged that it is operating at a huge loss, has extremely limited funds in its accounts, and has no concrete promise of any future capital infusion. That financial status makes it highly unlikely that ReDigi will be able to pay statutory damages for each of the many hundreds of recordings at issue.

As a substantive legal matter, Ossenmacher and Rudolph clearly satisfy the standards for personal liability insofar as they "participate in, exercise control over or benefit from an infringement." Arista Records LLC v. Lime Group LLC, 784 F.Supp.2d 398, 439 (S.D.N.Y.

2011) (citations omitted); Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 158 (S.D.N.Y. 2009). ReDigi's founders conceived of the ReDigi "used marketplace" and its methodology. Mr. Rudolph was the architect of the infringing software. Mr. Ossenmacher operates the business day-to-day, with final say over all strategic, marketing, financial, personnel, and operational decisions. They jointly own a majority interest in the company, which is essentially comprised of the two of them and a handful of programmers under their direction. As this Court held, "ReDigi's founders built a service where only copyrighted work could be sold" and "programmed their software to choose copyrighted content." See Summary Judgment Memorandum and Order (Docket No. 109) at 14. This control over every aspect of the business renders them personally liable. See, e.g., Lime Group, 784 F. Supp. 2d at 438-39 (CEO who "conceived of" infringing technology and was "ultimate decisionmaker" on strategic and business planning personally liable for infringement); 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).

Moreover, adding ReDigi's founders as parties imposes no delay or prejudice. Capitol seeks no additional discovery or other extensions, and has established strong grounds for their personal liability. If Capitol were unable to include them now, it would need to file a separate action against them personally to preserve its ability to obtain meaningful financial redress. While the parties were focused on obtaining a quick resolution of the underlying liability issues last year, now that the case has moved on to remedies, ReDigi's founders should be added as parties so that Capitol has the remedial resources ReDigi promised last year.

Finally, in the interests of efficiency, Capitol also seeks to eliminate aspects of its complaint no longer germane to this dispute. Since Capitol has now elected to seek statutory damages for infringement of its federally copyrighted works, it eliminates claims for other species of damages (such as profits or actual damages) for federal copyright infringement. Capitol's claims for violation of the performance and display rights are also effectively mooted by the Court's summary judgment ruling. Since those claims relate to the same recordings as to which Capitol has already established violations of the reproduction and distribution right, proof of infringement of these additional rights is no longer necessary for Capitol to seek statutory damages for each of those recordings. Capitol, accordingly, elects not to pursue those claims. We assume ReDigi will gladly accept such narrowing amendments.

Respectfully,

Richard S. Mandel

cc: Gary Adelman, Esq.

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DSL

Davis Shapiro & Lewit, LLP

New York | Beverly Hills

August 7, 2013

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

Re: *Capitol Records, LLC v. ReDigi Inc.* (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 in response to Plaintiff Capitol Records, LLC's ("Capitol") letter dated August 2, 2013 regarding Capitol's request to: (i) amend its Complaint to supplement the list of copyrighted recordings that have been allegedly infringed; and (ii) join the principals of ReDigi as defendants in the within action.[1]

It is ReDigi's position that Capitol should not be given leave to amend its Complaint to include tracks that were merely offered for sale through the ReDigi marketplace. Capitol's contention that tracks merely "made available" are infringements was already addressed by this Court in the March 30, 2013 Memorandum and Order, when the Court noted that "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. *See also London-Sire Records, Inc.*, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (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). This Court has already declined to decide that making a work available is an infringement. As such, tracks that were merely offered for sale through the ReDigi marketplace, but never sold, cannot be considered as "infringements"[2] for the purposes of calculating statutory damages at trial in this action.

Capitol is now claiming that these tracks that were merely "made available" should be added to the damages calculation by arguing that the Court "conclu[ded] on summary judgment that ReDigi violates the reproduction right when users upload recordings from their home computers to ReDigi's cloud server absent some affirmative defense." *See* 8/2/13 Cap. Let. at 2. Although the Court found that a reproduction occurred during the upload process, the decision is clear that an **infringement only occurs through sale**. Contrary to Capitol's mis-paraphrasing of the Courts

[1] Capitol has also stated its intent to eliminate the portions of its complaint that relate to the alleged infringement of its display and performance rights. ReDigi has no objection to this.

[2] ReDigi does not concede that any other instance is an infringement that warrants damages.

decision the Court found that "absent the existence of an affirmative defense the **sale** of digital music files on ReDigi's website infringes Capitol's exclusive right of reproduction." *See* 3/30/13 Order at 7 (emphasis added). Buttressing this conclusion, when discussing the applicability of fair use the Court noted it was only uploading to and downloading form the Cloud locker "*incident to sale*" that fell outside of the ambit of fair use. *Id* at 10. The Court's Order did not find that uploads to the cloud that were never actually sold were infringements. In fact the Order specifically declined to make this finding, and instead found that it was the **sale** on ReDigi's website that infringed the exclusive right of reproduction. As the Court has already decided that mere uploads that were offered for sale and never sold are not infringements, it would be futile and a waste of resources for Capitol to be allowed to supplement their Complaint to add these tracks now.

Next, Capitol's request to add John Ossenmacher and Larry Rudolph as defendants in the instant action should be denied, as neither the spirit nor the letter of the law support allowing Capitol to implead Mr. Ossenmacher and Mr. Rudolph at this stage. *First*, contrary to Capitol's statement, Mr. Rudolph and Mr. Ossenmacher do not satisfy the legal standard for personal liability. Individually, neither Mr. Ossenmacher nor Mr. Rudolph own a controlling share of ReDigi. Moreover, although Mr. Ossenmacher and Mr. Rudolph exercise some decision making power, they are not solely in charge of the company—they sit on a board that is comprised of 4 active members. Lastly, neither individual has been paid a salary or received any other form of remuneration from ReDigi, and as such haven not benefitted from the allegedly infringing activity.

The facts here are wholly unlike the cases cited by Capitol and other cases where imposition of liability on individuals may have been appropriate. *C.f. Arista Records LLC v. Lime Grp. LLC,* 784 F. Supp. 2d 398, 438 (S.D.N.Y. 2011) (imposing individual liability on CEO who knew about infringement being committed through LimeWire, actively marketed LimeWire to Napster users, operated multiple companies as one, and owned majority share of LimeWire); *Arista Records LLC v. Usenet.com, Inc.,* 633 F. Supp. 2d 124, 158 (S.D.N.Y. 2009) (individual defendant Reynolds was moving force behind entire business of both corporate defendants, was the sole employee of company who carried out business of defendant companies, director and sole shareholder of both companies and encouraged employees to take steps that were found to intend to foster infringement); *Microsoft Corp. v. Tech. Enterprises, LLC*, 805 F. Supp. 2d 1330, 1333 (S.D. Fla. 2011) (individual defendant was moving force behind his company's infringement, owned 99 percent of company and was the its only employee); *Stumm v. Drive Entm't, Inc.*, 00 CIV. 4676, 2002 WL 5589 (S.D.N.Y. Jan. 2, 2002) (individual liability was appropriate for CEO who was the only employee receiving a salary). The contrast between the above cases and the facts here is stark. Unlike these cases, neither Mr. Ossenmacher nor Mr. Rudolph have received financial benefit, are not the only persons in control of the company, and do not own a controlling interest of ReDigi. Additionally, unlike the file sharing cases cited to by Capitol, here ReDigi's entire purpose was to provide a lawful service. Although the Court has found that parts of the original ReDigi 1.0 technology were infringing, this was a case of first impression and cannot, under any stretch of the imagination be compared to situations where the individuals in the cases cited by Capitol intentionally provided a known infringing service for their own personal financial gain. As such there is no reason to implead Mr. Ossenmacher and Mr. Rudolph.

Second, and also contrary to Capitol's representations, ReDigi could satisfy a modest damage award in this matter. Although Capitol would like to pretend there are "many hundreds" of tracks at issue—there are not.[3] In reality the number of tracks at issue in this litigation is very

[3] Capitol's statement that there are "many hundreds" of works at issue is an exaggeration based upon Capitol's attempt to include the 134 tracks downloaded by their own investigator and the tracks that were offered for sale through the

limited--well under one hundred. In light of the limited number of works at issue, ReDigi could absolutely satisfy a modest[4] damage award. Capitol is not in a position of not being able to obtain meaningful financial redress. Capitol's request to add Mr. Ossenmacher and Mr. Rudolph as defendants in this action is legally without merit and seems motivated by an intention to harass and exert pressure and stress on ReDigi's officers. As such Capitol's request should be denied.

We appreciate the Court's time and consideration in this matter, and should the Court need any further information, we are available at the Court's convenience.

Respectfully submitted,

DAVIS SHAPIRO & LEWIT LLP

Gary Adelman, Esq.

Cc: Jonathan Z. King, Esq.
Richard Mandel, Esq.

ReDigi marketplace but never sold. As set forth above, the Court has already declined to find that the latter of the two constitutes infringement. As to the tracks downloaded by Capitol itself, for the reasons set forth in ReDigi's August 2, 2013 letter to the Court, Capitol should not be allowed to include these tracks in any calculation of statutory damages. To do so would reward Capitol for downloading over a hundred tracks, which was far more than was even arguably necessary for investigation purposes. Given the high number of tracks, it appears as if Capitol intentionally downloaded an extremely high number of tracks for the purpose of driving up a damage award and allowing Capitol to include these tracks would only encourage copyright plaintiffs to attempt to artificially inflate potential statutory damages to the point where they become punitive. Such a ruling would serve no legitimate purpose.

[4] "In awarding statutory damages, the courts may consider, among other factors, the expenses saved and the profits earned by the defendant, the revenues lost by the plaintiff, the deterrent effect on the defendant and third parties, the defendant's cooperation in providing evidence concerning the value of the infringing material, and the conduct and attitude of the parties." *See Smith v. NBC Universal*, 06 CIV. 5350, 2008 WL 483604 (S.D.N.Y. Feb. 22, 2008). Here all of these factors point in favor of a minimal statutory damage award. ReDigi has not "profited" from the infringement or saved expenses, it designed a system that it believed to comply with the law and any monies earned from actual customers are so limited at this point it has not been able to recoup any expenses. Plaintiffs have not "lost revenues" either. Immediately after receiving the Court's 3/30/13 Order, ReDigi disabled its 1.0 migration technology, cancelled any offers for sale for any tracks that were uploaded using the 1.0 technology, and replaced all tracks that users had purchased using the 1.0 migration technology, by purchasing those tracks from iTunes and having the replacement tracks delivered directly from iTunes to the ReDigi cloud locker. ReDigi did all of this at its own cost, and as ReDigi purchased these replacement tracks from iTunes, Capitol has already recovered any revenues it could claim to have "lost". There is no lack of evidence concerning the value of tracks sold through ReDigi, and Capitol surely could have pursued actual damages. The conduct of ReDigi and the need for a deterrent, similarly point to a minimal damage award. ReDigi has at all times tried to comply with copyright law in designing its system, has promptly complied with all Court Orders and a large award here would have a chilling effect on the development of new technologies, like ReDigi that are trying to develop lawful services where the law is at best uncertain. Given the facts here, ReDigi believes that the bare minimum of statutory damages would be appropriate and it could certainly satisfy such an award.

Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CAPITOL RECORDS, LLC,

Plaintiff,

v. 12 CV 95(RJS)

REDIGI INC.,

Defendant.

----------x

August 9, 2013

10:11 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

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

DAVIS SHAPIRO & LEWIT LLP
Attorneys for Defendant
BY: GARY ADELMAN
SARAH MATZ

offered for sale, according to defendant.

THE COURT: So I think that's fair game here. If it was the other, I think there's a fair use. There would be a fair use defense. I don't have a rule on that, but I think it will be if we just store it, I don't think that -- reproduction is probably not appropriate in this case. But for what you just said, then I think then I'm inclined to allow it. I think that is fair game, in light of my opinion.

And then the last bit is with respect to amending to name two new defendants, individual defendants. And so let's think about this. I do think that my opinion referenced these individuals in some cases explicitly. So I think that there's reason to believe that these guys could be added, and there could be liability against them. I don't know if there needs to be additional facts developed, though. I mean, if amending to add them is not going to require any additional discovery, then I think I probably will allow it. But if it's going to require additional discovery, then I'm not so sure.

MR. MANDEL: We don't --

THE COURT: You don't think it will?

MR. MANDEL: We don't think so. We think that the evidence we've gotten from the depositions as to their participation, some of which is even referenced in your Honor's summary judgment opinion, is sufficient to establish individual.

THE COURT: Yes, no question about that. Do you think it's going to need more discovery?

MR. ADELMAN: No, I do not.

THE COURT: Okay. Well, that's -- I mean, I appreciate your candor, then. Then I think I am going to allow it. This will, of course, lead to, I'm assuming, an inevitable second summary judgment motion with respect to the individuals, right?

MR. MANDEL: We could talk about that. I mean, I guess that entitles him to sort of where we'd go from here.

THE COURT: Where are we going from here? Let's put on our practical shoes.

MR. MANDEL: You know, we'd like to get to trial.

THE COURT: Trial on damages?

MR. MANDEL: On damages. So, I mean, we'd be prepared to try the issue of their individual liability without doing a separate summary judgment motion because, I mean, I think legally, in terms of the infringement being established, I don't think there's going to be any question under the opinion. So the only issue is going to be --

THE COURT: You'd be moving basically for a directed verdict after you closed.

MR. MANDEL: I think the only defense that could potentially be available is that somehow they don't have enough personal involvement to be individually liable. And, frankly,

Exhibit 3

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September 16, 2013

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

Hon. Richard J. Sullivan, U.S.D.J.
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

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

Dear Judge Sullivan:

All parties to the above-referenced action submit this joint letter in accordance with the Court's order that the parties advise the Court of the next anticipated steps in this action and the potential length of and preferred timing for trial. As the Court may be aware, individual defendants John Ossenmacher and Larry Rudolph have retained separate counsel, Hausfeld LLP. All counsel, including attorneys from Hausfeld LLP, have met and conferred about the content of this letter, which is submitted on behalf of all parties.

Pursuant to the Court's order, Capitol amended its complaint on August 30, 2013 to name Mr. Rudolph and Mr. Ossenmacher as defendants, and to update the list of recordings at issue in the litigation. See Docket No. 118. Counsel for Mr. Rudolph and Mr. Ossemacher intends to move to dismiss Capitol's amended complaint for failure to state a claim against their clients, pursuant to Fed. R. Civ. P. 12(b)(6). The newly named Defendants do not believe that the Court ruled on the sufficiency of the pleadings in allowing Capitol to file an amended complaint, nor were they or their Counsel before the Court at that time. Since their respective answers are currently due on September 20, 2013, they will submit pre-motion letters by that date, although newly retained Counsel for the individual Defendants may request additional time to familiarize themselves with the significant discovery and pleadings record that already exists in the case prior to filing the Motion to Dismiss. If the individual defendants' Motions are denied and they remain in the case, they may seek additional and limited discovery.

Capitol does not believe there is any basis for the proposed pleading motion since the Court already permitted Capitol to amend in the form attached to its August 2, 2013 pre-motion letter after considering arguments regarding the basis for liability against the individual Defendants. Capitol also believes that no additional discovery should be required since the only additional issues implicated by the addition of the individual Defendants concern matters within their own knowledge concerning their own conduct.

Capitol intends to move for summary judgment regarding the individual defendants' joint and several liability with ReDigi for copyright infringement; the individual Defendants may cross-move as to various issues. Similarly, ReDigi will likely seek to file summary judgment as to some damages issues. To the extent the individual defendants remain in the case at trial, they will demand a jury trial.

Since Capitol has already addressed the legal issues relating to individual liability in its letter submissions to the Court on July 2 and 7, 2013 in connection with Capitol's motion to amend, Capitol would be prepared to file its motion for summary judgment promptly at the Court's direction without the need for additional pre-motion letters. If that is acceptable to the Court, Capitol proposes to file its motion for summary judgment by October 11, 2013, with opposition papers due November 8, 2013 and reply papers due by November 18, 2013. Of course, if the Court believes that pre-motion letters are necessary, Capitol would be prepared to submit such a letter promptly.

The Defendants oppose any efforts to brief the contemplated cross-motions for summary judgment until after the amended pleadings are fully resolved by the Court. As indicated above, the newly named individual defendants may also seek additional discovery relevant to the various summary judgment motions. Defendants believe it would be premature, inefficient, and a waste of judicial resources to brief summary judgment motions until such issues are resolved. The Defendants are prepared to abide by the Court's Local Rules with respect to any additional motions and believe that pre-motion letters should be filed.

With respect to the anticipated length of and preferred dates for trial, the motions described above and certain additional factors make predictions and scheduling difficult to assess. In the Amended Case Management Plan endorsed by the Court on May 6, 2013 (Docket No. 111), Redigi and Capitol jointly estimated a two day bench trial on damages and remedies applicable to ReDigi. Counsel for the two individual defendants have indicated that their clients will seek a jury trial, and the motion practice described above may impact the scope of claims before the jury, if any. The parties believe that they will be in a better position to schedule a trial of an estimated length once the motions described above are resolved.

We thank the Court and are happy to address these matters with Your Honor at any time.

Respectfully,

Richard S. Mandel

cc: Gary Adelman, Esq.
Seth R. Gassman, Esq.
James Pizzirusso, Esq.

Exhibit 4

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October 21, 2014

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

Hon. Richard J. Sullivan, U.S.D.J.
Thurgood Marshall United States Courthouse
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") and write in accordance with ¶ 4 of the Joint Amended Case Management Plan (the "CMP," Docket No. 111) and Rule 2.A of the Court's Individual Practices. Capitol seeks leave to file the attached Second Amended Complaint joining as plaintiffs two of its affiliated companies, Capitol Christian Music Group, Inc. and Virgin Records IR Holdings, Inc., which are the owners of certain of the sound recordings infringed by Defendants. The amendment also removes a small number of recordings and corrects a few typos in the exhibit listing the recordings. As set forth below, this technical amendment is necessitated by the difficulties in identifying the sound recordings at issue and the complex corporate structure of Capitol both before and after its acquisition by the owner of Universal Music Group. Capitol first announced the need for this amendment at the last hearing before the Court. The amendment will require no additional discovery, as the same universe of recordings are involved, the same documents and contracts prove plaintiffs' ownership of the recordings in question, and the same corporate designee for all related plaintiff entities will attest to that ownership in depositions and at trial.

Paragraph 4 of the CMP provides that Capitol may move to join parties or amend pleadings "with leave of the Court, in accordance with Fed. R. Civ. P. 15(a)(2)." Rule 15(a)(2), in turn, provides that the Court "should freely give leave when justice so requires." As this Court has held, leave will be "liberally granted," except in cases of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment." See, e.g., Bush v. Horn, 2009 WL362513 (S.D.N.Y. Feb. 13, 2009) (citations omitted). None of the listed exceptions apply to Capitol's narrow amendment, which functions only to ensure that the proper copyright owners are identified in the case caption, imposes no prejudice on any party, and does not in any way delay or increase the scope of discovery. The need for the amendment stems from the following circumstances.

First, as all parties have acknowledged from the outset, one of the challenges of this dispute has been identifying with precision the Capitol tracks that have been infringed by ReDigi's system. Both the original Case Management Plan (Docket No. 31) and the amended CMP (Docket No. 111) contained the following joint statement: "Because of the dynamic nature of the ReDigi website at issue in this case, the parties contemplate that the list of plaintiff's recordings allegedly infringed will have to be supplemented prior to a final adjudication in the case based on information obtained through discovery." During liability discovery preceding the Court's summary judgment ruling, Capitol expended great effort in narrowing down a preliminary list of infringed recordings then available in ReDigi's system. Capitol's first round of deposition of ReDigi's Chief Technology Officer focused significantly on deciphering a series of charts listing certain of those recordings. At the same time, though Capitol had produced contracts proving its ownership of the recordings then known to have been infringed, ReDigi took virtually no discovery on those documents and conceded Capitol's ownership during summary judgment briefing.

After the Court found for Capitol on summary judgment, the parties resumed the painstaking process of distilling the set of recordings at issue. In June 2013, after writing a software script capable of identifying Capitol recordings, ReDigi produced approximately 120 pages of complex charts dividing long lists of such recordings into five categories (depending upon who uploaded them, offered them for sale, or purchased them), but insisted that some of those recordings were not part of the case, because they were allegedly uploaded using ReDigi "2.0." The parties negotiated further on how best to distill this information down to usable form, and in July 2013, ReDigi produced a follow-up master list and chart of Capitol recordings broken down into multiple categorical columns. Notably, the list was compiled using the names of all of the various Capitol labels/affiliates, including Virgin, reflecting the parties' understanding that the focus was on identifying any recordings falling within the Capitol family of companies, without regard to the specific entity or label name involved. After ReDigi's witness testified at length to explain how the master list worked, Capitol was finally able to assemble a coherent and (Capitol hopes) comprehensive list of the more than 500 recordings at issue. Notably, during this last phase of discovery, which concluded on August 2, 2013, ReDigi sought no discovery or deposition regarding Capitol's ownership of the growing list of recordings infringed.

On August 30, 2013, after verifying which of the identified recordings were listed on its internal computer system as being owned by the Capitol family of companies, Capitol filed its First Amended Complaint (Docket No. 118), which among other things, attached the updated and significantly expanded lists of recordings at issue and named ReDigi's founders as individual defendants. Now in the case, the individual defendants sought extensive discovery on Capitol's contractual ownership of the recordings in question. With a list of recordings now many times the size of the original list, Capitol rapidly assembled and produced ownership documents both before and after the Court stayed discovery while the individual defendants' motion to dismiss was pending. Capitol had assumed, as had the Court, that ReDigi itself was not seeking further discovery on the issue of ownership it had conceded on summary judgment. See Tr. of 12/3/13 Hearing (Docket No. 146) at 29-31 (The Court: "Look, I have to say, to the

extent that Mr. Mandel was wrong in what he assumed, I assumed the same thing. So, I did not anticipate that the document request [about ownership] made a year before my summary judgment ruling was still alive ..."]. Regardless, Capitol acknowledges that the newly named individual defendants may take ownership discovery and as a practical matter sees no reason to prevent ReDigi from participating in that same discovery.

In assembling complete chain-of-title documents for the now lengthy list of recordings, Capitol learned that some of the recordings were owned by the two affiliated companies identified above, one of which changed its name in August 2013 as a result of the acquisition of EMI (Capitol's parent company) by the owner of Universal Music Group. The result is that, while the previously produced copyright registration certificates and contractual documents remain the same, the technical owner of certain of the copyrights in question are affiliates other than the single currently named plaintiff. Capitol accordingly announced at the parties' last hearing before the Court that Capitol would likely need to conform the case caption to include these affiliated entities. See Tr. (Docket No. 146) at 20-21, 25. At that hearing, the Court stayed discovery in the case, but Capitol voluntarily produced substantial additional documents showing ownership of many of the newly added sound recordings, including ones in which the new entities are the copyright owners.

Capitol's requested amendment readily satisfies the liberal standards of Fed. R. Civ. P. 15(a). There can be no issues of bad faith, dilatory motive or futility, when the amendment simply conforms the list of plaintiffs to the universe of recordings at issue. There has been no undue delay, because the amendment results from the difficult process of identifying the universe of recordings at issue and reviewing numerous records concerning chain of title, including many contracts and corporate documents. Capitol could not have proffered the amendment before a list of recordings was finalized. Finally, defendants suffer no prejudice where the same documents and single witness can provide any ownership information defendants elect to investigate during discovery. Indeed, as noted above, until the individual defendants appeared in the case with new counsel, Capitol shared the Court's impression that ownership was even not an issue of contention.

We thank the Court for its attention to the foregoing.

Respectfully,

Richard S. Mandel

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

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October 24, 2014

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

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

Hon. Judge Sullivan:

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

ADELMAN MATZ P.C.

Sarah M. Matz, Esq.

HAUSFELD

James J. Pizzirusso, Esq.

Cc: Counsel of Record

Exhibit 5

From:	Mandel, Richard
To:	"sullivannysdchambers@nysd.uscourts.gov"
Cc:	James J. Pizzirusso; Nathaniel C. Giddings; Gary Adelman (g@adelmanmatz.com); "Sarah Matz"; King, Jonathan
Subject:	Capitol Records, LLC v. ReDigi Inc.
Date:	Tuesday, October 28, 2014 4:19:20 PM
Attachments:	Amended Complaint_ReDigi - Second Amended Complaint_ReDigi.pdf

Dear Judge Sullivan,

As requested today by chambers, attached is a redline showing changes from the Amended Complaint to Capitol's Proposed Second Amended Complaint.

Respectfully,

Richard S. Mandel, Esq.
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