UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, LLC, CAPITOL CHRISTIAN MUSIC GROUP, INC. and VIRGIN RECORDS IR HOLDINGS, INC.,	:	12 Civ. 0095 (RJS)
Plaintiffs,	:	
-against-	:	
REDIGI INC., JOHN OSSENMACHER and LARRY RUDOLPH a/k/a LAWRENCE S. ROGEL,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW REGARDING APPLICATION OF RES JUDICATA TO INDIVIDUAL DEFENDANTS' AFFIRMATIVE DEFENSES

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PRELIMINARY STATEMENT

Plaintiffs Capitol Records, LLC, Capitol Christian Music Group, Inc., and Virgin Records IR Holdings, Inc. (collectively, "Capitol") submit this memorandum of law in opposition to the memorandum of law submitted by defendants John Ossenmacher and Larry Rudolph (collectively, "Individual Defendants") regarding the application of res judicata to their proposed affirmative defenses.

From the moment they were named in the caption, the Individual Defendants have sought in every way imaginable to derail and delay these proceedings. They filed an ill-conceived motion to dismiss that did not so much as acknowledge the settled standards for their joint and several liability; they moved to reconsider their inevitable loss on that motion by mischaracterizing both the Court's decision and the basic elements of copyright liability; they served a blizzard of pointless discovery requests ranging from audit reports for music publishing royalties to generalized demands for all of Capitol's digital "policies" and contracts relating thereto. This latest brief stems from the same modus operandi; the Individual Defendants want to pursue a laundry list of affirmative defenses that were either abandoned by or affirmatively decided against ReDigi, Inc. ("ReDigi"), the small, closely-held corporation the Individual Defendants founded, control and have led through each step of this litigation. Principles of res judicata and collateral estoppel preclude them from doing so, as does the substantively baseless nature of the defenses themselves.

First, as privies to ReDigi, the Individual Defendants are bound by both the losses and litigation strategies of the corporate entity. To the extent ReDigi failed to pursue or abandoned defenses such as unclean hands or laches, the Individual Defendants are precluded from reviving them by res judicata. Likewise, where ReDigi actually litigated and lost other defenses, such as

fair use or first sale, the Individual Defendants are barred from their assertion by the related doctrines of collateral estoppel and law of the case.

The Individual Defendants' only counter argument to this settled law is the mistaken notion that res judicata and collateral estoppel cannot apply to determinations within the same lawsuit. Not only has the Second Circuit ruled otherwise by applying res judicata within the same action, but logic would draw no such artificial distinction. Given the purposes of these doctrines to ensure repose of disputes and avoid piecemeal litigation, the Individual Defendants are predictably unable to identify a single logical reason why their one case/two case distinction serves any purpose other than elevating form over substance.

To make matters worse, the defenses the Individual Defendants seek to revive are on their face objectively baseless. As set forth below, the Individual Defendants' theories of unclean hands, laches, DMCA immunity and the "essential step" doctrine are not even colorable and should be stricken. ReDigi understandably did not pursue them, because they have no prayer of success. To similar effect is the Individual Defendants' implication that they might desire to assert fair use and first sale defenses already decided against ReDigi; those defenses are of course indistinguishable when applied to them as individuals and thus likewise have no place in this case. Thus, beyond the preclusive effect of earlier proceedings in this case, the affirmative defenses at issue represent just another delay tactic, designed to push off trial and mire the parties in unnecessary motion practice and discovery.

ARGUMENT

THE DEFENSES ASSERTED BY THE INDIVIDUAL DEFENDANTS ARE BARRED BY COLLATERAL ESTOPPEL, RES JUDICATA AND/OR LAW OF THE CASE

Because the Individual Defendants are in privity with the corporate defendant ReDigi, they are barred by collateral estoppel from relitigating issues the Court has already decided, such as fair use or first sale. See, e.g., Moran v. City of New Rochelle, 346 F. Supp. 2d 507, 515 (S.D.N.Y. 2004) (sole shareholders of corporation barred from contesting certain issues under collateral estoppel based on prior action commenced by corporation). Moreover, separate and apart from collateral estoppel, the law of the case doctrine also prevents the Individual Defendants from asserting the very same defenses the Court deemed legally deficient. See, e.g., Zdanok v. The Glidden Co., 327 F.2d 944, 953 (2d Cir. 1964) ("Since the doctrine of the law of the case is addressed to the court's 'good sense,' we see no reason why it should be peremptorily excluded because of the presence of new parties ..."); Aid for Women v. Foulston, 2005 U.S. Dist. LEXIS 8420, at *18 n.5 (D. Kan. May 6, 2005) (applying court's prior evidentiary determination to newly added defendant under law of the case doctrine); EEOC v. First Nat'l Bank of Memphis, 1977 WL 70 (W.D. Tenn. Sept. 29, 1977) (holding "any conclusions of law drawn by this Court are now the law of the case and will control" against newly added parent corporation).

The Individual Defendants are likewise barred by res judicata from litigating defenses that ReDigi could have asserted but chose not to, such as unclean hands or laches, or defenses that ReDigi originally asserted but later abandoned, such as the "essential step" and DMCA defenses. See, e.g., Marine Midland Bank v. Slyman, 995 F.2d 362, 365-66 (2d Cir. 1993) (principals of corporation barred by res judicata from asserting affirmative defenses that could have been raised by corporation in prior action since principals in privity with corporation)

(applying Ohio law); In re: Teltronics Servs., Inc., 762 F.2d 185, 190-91 (2d Cir. 1985) (founder and president of corporation barred by res judicata from appealing grant of summary judgment since he was in privity with corporation that had commenced prior action); Kreager v. Gen. Elec. Co., 497 F.2d 468, 471-72 (2d Cir. 1974) (president and sole stockholder of corporation barred by res judicata based on prior action commenced by corporation).

The Individual Defendants do not dispute that they are in privity with ReDigi and the undisputed evidence makes clear that they are. Instead, the Individual Defendants resort to hyper-technical arguments that run counter to the basic policies underlying the res judicata doctrine and the flexible manner in which it is applied. Alternatively, Individual Defendants contrive a constitutional argument that seeks somehow to create a due process right to assert frivolous defenses already rightfully discarded by the corporation they own and operate. Because the Individual Defendants' positions are without merit, the Court should strike the various affirmative defenses barred by collateral estoppel and/or res judicata and preclude the open-ended discovery Individual Defendants seek in service of such misguided defenses.

I. The Individual Defendants are in Privity with ReDigi and May Thus Be Precluded From Asserting Affirmative Defenses Actually Litigated or that Could Have Been Litigated by ReDigi

The Individual Defendants claim that the Court need not reach the privity issue, because they only seek to assert defenses not already decided by the Court. See IDs Brief at 1 n.1.[1] That

[1]The Individual Defendants are actually inconsistent and unclear in this regard. Notwithstanding repeated statements that they are only pursuing defenses that have not already been decided by the Court, they also argue at length that collateral estoppel, relevant only to claims already decided, is inapplicable. See IDs' Brief at 14-18. They also use hedging language that suggests the possibility that all asserted defenses may remain viable. See IDs' Brief at 18 ("[C]ollateral estoppel does not operate to bar Individual Defendants from asserting and seeking discovery at all, but particularly as to defenses which the Court has not actually decided."). To the extent the Individual Defendants intend to pursue defenses the Court has already decided against ReDigi, those defenses are foreclosed by collateral estoppel and law of the case. See p. 3 supra, pp. 7-12, 14-15 infra.

observation is a non-sequitur, insofar as privity bears on both issue preclusion/collateral estoppel and res judicata, which bars defenses that could have been litigated previously even if they were not actually asserted or decided. See Brown v. Felsen, 442 U.S. 127, 131 (1979) ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding"); Tonken v. Loving & Weintraub Inc., 22 F. Supp. 2d 86, 90 (S.D.N.Y. 1998) (res judicata bars party from raising a defense that could properly have been asserted previously). Res judicata bars not only a party but those in privity with that party from defenses the party chose not to pursue earlier. See Marine Midland, 995 F.2d at 365-66; In re: Teltronics, 762 F.2d at 190-91; Kreager, 497 F.2d at 471-72. Individual Defendants' opaque argument that privity does not apply to defenses ReDigi chose not to pursue can thus only be understood as a tacit concession that they are in fact in privity with ReDigi.

In any case, the undisputed evidence confirms that the Individual Defendants are in privity with ReDigi. In Teltronics, the Court found that a founder, president and 20% owner of Teltronics was in privity with that entity, based on his "continuous and active 'non-party' participation and his apparent day-to-day leadership role in the prior litigation." 762 F.2d at 190-91. Among other things, the Court noted that the individual submitted an affidavit and was the corporation's sole witness at a hearing on Teltronics' motion for a preliminary injunction. Id. Similarly, in Kreager, the Court found that the president owner of the corporation "participated in and effectively controlled the first action," where he "was present in court throughout the trial, attended conferences in chambers and was the corporation's principal witness." 497 F.2d at 472. Accordingly, he was bound by the judgment against the corporation. Id. See also Moran, 346 F.

Supp. 2d at 515 (privity found where shareholders "undoubtedly controlled both [the] company and the litigation at issue").

The Individual Defendants are situated similarly here. Indeed, counsel for ReDigi conceded to the Court last year that the Individual Defendants directed and controlled the litigation on behalf of ReDigi:

> THE COURT: And who gives you direction as to how the corporate defendant should be pursuing this case? Don't tell me the substance of communications, but the individual who ---
>
> MR. ADELMAN: Primarily, we talked to John Ossenmacher and Larry Rudolph.

Mandel Decl. Ex. C at 9. That answer is hardly surprising, as they were the only individuals identified in ReDigi's initial disclosures, the only witnesses who submitted declarations in opposition to Capitol's preliminary injunction motion, and the principal witnesses who submitted declarations at the summary judgment stage as well.[2] Mandel Decl. ¶ 2 and Ex. A. They founded ReDigi, together own a majority interest in the company and jointly make most of the company's decisions. Mandel Decl. Ex. B (Rudolph Dep. at 19; Ossenmacher Dep. at 295-96, 339-40). They were present at every deposition in the case as well as the preliminary injunction, summary judgment and mediation hearings in the case. Mandel Decl. ¶ 2. They jointly decided to continue with the service after being sued by Capitol. Mandel Decl. Ex. B (Rudolph Dep. at 397-98). These facts are more than sufficient under the cases cited above to support a finding of privity. Surely, if there were anyone else that could be said to control the litigation on ReDigi's behalf, ReDigi's lawyer would have identified them in response to the Court's questioning and the Individual Defendants would have identified them on this motion. The record leaves no

[2]The other summary judgment declarants relied on by ReDigi were programming personnel who worked under the supervision of Larry Rudolph.

room for doubt that the Individual Defendants are in privity with ReDigi, and accordingly both collateral estoppel and res judicata may properly be applied against them.

II. The Individual Defendants' Technical Arguments as to the Alleged Unavailability of Collateral Estoppel and Res Judicata Are Without Merit

Unable to offer any logical rationale why collateral estoppel or res judicata should not apply here, the Individual Defendants instead insist that the doctrines are inapplicable in the context of a partial summary judgment decision reached in the same litigation. The case law squarely rejects such a narrow interpretation of these doctrines. As the Court has already suggested at two prior conferences, there is no persuasive reason for adopting the overly formalistic approach advocated by the Individual Defendants. See Mandel Decl. Ex. C at 13-14, Ex. D at 4-9.

A. Collateral Estoppel and Res Judicata May Be Applied Based on a Partial Summary Judgment Ruling

Contrary to the Individual Defendants' assertion, the Court's grant of partial summary judgment in this case is sufficiently final to support application of both collateral estoppel and res judicata. See, e.g., U.S. Dep't of Justice v. Hudson, 2007 U.S. Dist. LEXIS 62749, at *14 (N.D.N.Y. 2007) ("federal courts have expanded application of collateral estoppel . . . to decisions including partial summary judgment"); Pantoja v. Scott, 2001 WL 1313358 (S.D.N.Y. Oct. 26, 2001) (grant of partial summary judgment deemed final for purposes of applying res judicata and collateral estoppel against newly asserted claims in subsequent suit); L-Tec Elecs. Corp. v. Cougar Elec. Org., 1998 WL 960302 (E.D.N.Y. Dec. 14, 1998) (applying res judicata in same action to bar amended complaint based on earlier grant of summary judgment that did not fully adjudicate all issues as to all parties), aff'd, 198 F.3d 85 (2d Cir. 1999); United States v. McGann, 951 F. Supp. 372, 380-82 (E.D.N.Y. 1997) (earlier partial summary judgment ruling barred later cause of action under doctrine of res judicata); Harris Trust & Sav. Bank v. John

Hancock Mut. Life Ins. Co., 722 F. Supp. 998, 1007-09 (S.D.N.Y. 1989) (applying collateral estoppel based on partial summary judgment ruling), aff'd in part and reversed in part on other grounds, 970 F.2d 1138 (2d Cir. 1992); Creed Taylor, Inc. v. CBS, Inc., 718 F. Supp. 1171, 1177 (S.D.N.Y. 1989) (same).

The fact that the Court's partial summary judgment ruling is non-appealable or interlocutory in nature (IDs' Brief at 16) is irrelevant. "The requirement of finality for purposes of res judicata does not necessarily mean a final judgment in an action." Pantoja, 2001 WL 1313358 (quoting Henessy v. Cement & Concrete Worker's Union Local 17A, 963 F. Supp. 334, 338-39 & n.1 (S.D.N.Y. 1997)). "Finality" in the context of collateral estoppel or res judicata does not require a final judgment that is appealable under 28 U.S.C. § 1291, but rather "may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961). See also L-Tec Elecs. Corp., 1998 WL 960302 ("the law of judgments does not use the word 'final' in relation to conclusiveness, as 28 U.S.C. § 1291 does, to mean only a judgment which ends the litigation and leaves nothing for the court to do but execute the judgment") (quotations omitted); McGann, 951 F. Supp. at 382 ("'final' in the res judicata or collateral estoppel sense is not synonymous with 'final' in the sense of the prerequisite for appellate jurisdiction" given differing policies applicable in each context).

In the present case, the Court's comprehensive partial summary judgment decision resolved issues that were actively litigated by both sides following extensive briefing and oral argument. The Individual Defendants actively participated in and controlled each stage of the process. Under these circumstances, the Court's ruling easily satisfies the "finality" requirement

for purposes of applying both collateral estoppel and res judicata against the Individual Defendants.

B. The Absence of a Separate Earlier Action Does Not Prevent Application of Collateral Estoppel or Res Judicata

In a quintessential example of elevating form over substance, the Individual Defendants also argue that collateral estoppel and res judicata only apply to a separate, later action. However, while these doctrines most commonly arise in the context of two separate actions, courts have applied res judicata and collateral estoppel to bar relitigation of claims or issues within the same action.

For example, in the L-Tec Elecs. Corp. case cited above, 1998 WL 960302 (E.D.N.Y. Dec. 14, 1998), the District Court granted summary judgment dismissing claims brought against the individual defendants, who had been sued along with their corporate entity, for failure to pay for certain goods delivered by plaintiff. The plaintiff thereafter amended the complaint in the same action, which remained pending against the corporate defendant, asserting four new theories of liability that arose out of the same facts as those alleged in the original complaint. The District Court granted the individual defendants' motion to dismiss, holding that all of the claims were barred by res judicata because they all arose out of the same transactions and occurrences as the original complaint. On appeal, the Second Circuit affirmed the district court's application of res judicata to bar claims in an amended complaint in the same action based on plaintiff's failure to include such claims in the original complaint. 198 F.3d at 87 ("The district court ... properly dismissed plaintiff's second amended complaint as precluded by principles of res judicata").[3] See also Scripps Clinic & Research Foundation v. Genentech, Inc., 678 F. Supp.

[3]Interestingly, the Second Circuit's opinion cites the same general language on which the Individual Defendants are fixated concerning a "prior action." Id. at 87 ("The doctrine of res judicata, or claim preclusion, prevents a plaintiff from relitigating claims that were or could have

1429, 1436-37 (N.D. Cal. 1988) (applying collateral estoppel to bar relitigation of issues previously determined by Court on summary judgment in same action where new party was in privity with defendant); Feigen v. Advance Capital Management Corp., 146 A.D.2d 556, 558-59, 536 N.Y.S.2d 786, 788 (1st Dep't 1989) (plaintiff's filing of amended complaint precluded by res judicata based on earlier ruling issued in same action dismissing original complaint arising out of same transactions).[4]

The Second Circuit has cautioned that res judicata should not be interpreted in an "overly formalistic" manner that "would itself result in an outcome contrary to the purposes promoted by the doctrine of res judicata: judicial efficiency and prevention of piecemeal litigation." Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 600 F.3d 190, 200 (2d Cir. 2010) (affirming lower court's application of res judicata). See also Scripps, 678 F. Supp. at 1436-37 (applying collateral estoppel even if not strictly applicable where considerations underlying that doctrine compel such a result). The flexibility with which courts have applied res judicata and collateral estoppel reflects the overriding importance of the private and public interests these doctrines are designed to vindicate, including preservation of judicial resources, reliance on adjudication, prevention of piecemeal litigation, and ensuring repose.

As the United States Supreme Court has stated, the doctrines of res judicata and collateral estoppel "[have] the dual purpose of protecting litigants from the burden of relitigating an

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been raised in a prior action against the same defendant where that action has reached a final judgment on the merits."). Nevertheless, the Second Circuit had no hesitation in proceeding to affirm the District Court's dismissal of plaintiff's claims on res judicata grounds even though the earlier ruling had been issued in the same action. Clearly, the use of the "prior action" language as part of the general res judicata standard need not be taken in the literal sense that Individual Defendants insist is required.

[4]As the Individual Defendants acknowledge (IDs' Brief at 11 n.16), "there is no discernible difference between federal and New York law concerning res judicata and collateral estoppel." Marvel Characters, Inc. v. Simon, 310 F.3d 280, 286 (2d Cir. 2002).

identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). See also Allen v. McCurry, 449 U.S. 90, 94 (1980) ("res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication"); EDP Med. Computer Sys. v. United States, 480 F.3d 621, 624 (2d Cir. 2007) ("Res judicata 'is a rule of fundamental repose important for both the litigants and for society'") (citation omitted); Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998) ("The related doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) are meant to protect parties from having to relitigate identical claims or issues and to promote judicial economy"). Those purposes logically apply with equal force to differing stages in a single lawsuit as they do to separate actions.

In the case at bar, the Court has already expended significant judicial resources shepherding this complex case through discovery and summary judgment and resolving the numerous and intricate substantive claims and defenses actively litigated by the parties. It cannot seriously be disputed that the Individual Defendants, through their corporate entity with whom they are in privity, had a full and fair opportunity to litigate all of the defenses with which they wished to contest Capitol's claims of copyright infringement. Fundamental interests of judicial economy should preclude them from relitigating the very same defenses already adjudicated by the Court or those which ReDigi (under their direction) sensibly rejected as too weak even to pursue.

In contrast, the Individual Defendants' proposed course of action – a wholesale relitigation of otherwise barred defenses – would directly undermine the compelling public policies served by the collateral estoppel and res judicata doctrines. Such an approach would

represent precisely the type of "endless litigation" and "chaos" the doctrines of res judicata and collateral estoppel are designed to avoid. See Smith v. Updegraff, 744 F.2d 1354, 1362 (8th Cir. 1984). The Individual Defendants' concession that they could have been precluded from pursuing these same defenses had Capitol purchased a new index number and filed a separate complaint against them cannot be supported by any reasoned principle or legitimate policy interest.

Not surprisingly, the Individual Defendants fail to cite a single case that refused to apply collateral estoppel or res judicata solely on account of the fact that the Court's determination had occurred in the same action.[5] More important, they do not even attempt to provide any logical reason why imposing a "separate action" requirement comports in any way with the policies and purposes of res judicata and collateral estoppel. Given that the central elements of privity and finality have been satisfied, and that application of collateral estoppel and res judicata would vindicate important public and private interests embodied in those doctrines, the Court should apply the doctrines here to avoid the wasteful and unnecessary litigation the Individual Defendants seem determined to pursue.

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[5]The cases cited by the Individual Defendants do not turn on the fact that the claims or issues were determined in the same action, and accordingly any statements concerning application of res judicata or collateral estoppel in a single action constitute mere dicta. See Yoon v. Fordham Univ. Faculty & Admin. Ret. Plan, 263 F.3d 196, 202 n.7 (2d Cir. 2001) (collateral estoppel did not apply to bar litigation of issue subject to default judgment and thus not actually decided); Rezzonico v. H & R Block, Inc., 182 F.3d 144, 149 (2d Cir. 1999) (deciding whether prior decision constituted law of the case); In re: Hyman, 335 B.R. 32, 37 n.3 (S.D.N.Y. 2005) (decision for which res judicata sought was voluntary dismissal and thus had not decided issues on the merits); Holzsager v. Valley Hosp., 482 F. Supp. 629, 632-33 (S.D.N.Y. 1979) (order holding that federal court lacked subject matter jurisdiction for failure to meet jurisdictional threshold and remanding to state court did not preclude litigation of merits underlying the parties' claims and defenses); Moezinia v. Damaghi, 152 A.D.2d 453, 544 N.Y.S.2d 8, 11 (1st Dep't 1989) (refusing to apply preclusion to order dismissing complaint after assessing sufficiency of allegations de novo and finding that dismissal order had been in error).

III. The Individual Defendants' Assertion of a Due Process Violation is Not Even Colorable

Relying on Nelson v. Adams USA, Inc., 529 U.S. 460 (2000), the Individual Defendants also argue that the application of res judicata and collateral estoppel to their proposed affirmative defenses would constitute a violation of their right to due process. The circumstances of the Nelson case bear not even the remotest resemblance to those of the instant case. In Nelson, a judgment awarding the defendant its attorneys' fees and costs had already been entered when the defendant sought simultaneously to add the president of the plaintiff company as a party to the lawsuit and to amend the judgment to apply to the newly added individual. Id. at 464. Finding that "[the individual defendant] was adjudged liable the very first moment his personal liability was legally at issue," the Supreme Court ruled that there had been a due process violation, because the individual defendant was "[not] given an opportunity to respond and contest his personal liability for the award after he was made a party and before the entry of judgment against him." Id. at 466-468. Notably, the Supreme Court made clear that due process affords a newly added party "only the right to contest on the merits his personal liability"; it does not shield him or her from a finding of liability. Id. at 472.

In the present case, of course, the Court has yet to adjudicate the issue of the Individual Defendants' personal liability. The Individual Defendants will have a full and fair opportunity to contest whether they personally participated in, exercised control over or benefitted from ReDigi's acts of infringement, which is the only relevant question in terms of their liability. See, e.g., Sygma Photo News, Inc. v. High Soc'y Magazine, Inc., 778 F.2d 89, 92 (2d Cir. 1985) ("[a]ll persons and corporations who participate in, exercise control over, or benefit from the infringement are jointly and severally liable as copyright infringers"); Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 398, 437-38 (S.D.N.Y. 2011) ("[A]n individual, including a

corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, or who personally participates in that activity is personally liable for infringement."). Due process requires no more.

Moreover, due process certainly does not require the Court to allow the Individual Defendants to litigate meritless, time-wasting defenses[6] that have either already been rejected by the Court or discarded by the company they founded, control, and manage as a litigant. The Individual Defendants controlled ReDigi's defense of Capitol's copyright infringement claims, including decisions as to which defenses to raise and which to waive or otherwise abandon. Under such circumstances, res judicata properly bars defenses that ReDigi chose not to pursue, and the Individual Defendants do not have a constitutional right to revive them, because they are desperate to find some new basis on which to avoid liability or at least delay the day of reckoning when they must answer for their infringing acts.

IV. The Court Should Strike the Affirmative Defenses at Issue and Block the Individual Defendants From Taking Discovery Concerning Such Defenses

A. The Second, Eleventh, Twelfth, Fifteenth and Twenty-First Affirmative Defenses Asserted by the Individual Defendants Should be Stricken Based on Collateral Estoppel and/or Law of the Case Doctrine

The Individual Defendants have asserted five affirmative defenses in their answer based upon principles of fair use and first sale (second, eleventh, twelfth, fifteenth and twenty-first affirmative defenses). Inasmuch as the Individual Defendants now apparently intend to limit their defenses to those not already decided by the Court (see IDs' Brief at 1 n.1, 17, 27), they presumably do not oppose having such defenses stricken from their answer. To the extent there is any uncertainty in their position, see fn. 1 supra, they in any case can identify no grounds for

[6] As discussed below, quite apart from principles of res judicata, there is not even a good faith basis on which to assert the various affirmative defenses the Individual Defendants seek to add to the case. See pp. 15-19 infra.

invoking a fair use or first sale defense different from those already unsuccessfully asserted by ReDigi. Accordingly, the Court should strike the second, eleventh, twelfth, fifteenth and twenty-first affirmative defenses as barred by collateral estoppel and the law of the case and in any case substantively without merit.

B. The Fifth, Sixth, Seventh, Sixteenth, Twentieth, Twenty-Second and Twenty-Third Affirmative Defenses Should Be Stricken Based on Res Judicata and the Absence of any Good Faith Basis for Their Assertion

The fifth, sixth, seventh, sixteenth, twentieth, twenty-second and twenty-third affirmative defenses should all be stricken as barred by res judicata inasmuch as they were waived and/or abandoned by ReDigi. Moreover, separate and apart from res judicata, these affirmative defenses are objectively baseless. The Individual Defendants' transparent effort to delay the proceeding with frivolous defenses and unnecessary discovery will prejudice Plaintiffs and should not be permitted. See Fed. R. Civ. P. 12(f).

1. Unclean Hands (Seventh Affirmative Defense)

Unclean hands "is a limited device, invoked by a court only when a plaintiff otherwise entitled to relief has acted so improperly with respect to the controversy at bar that the public interest in punishing the plaintiff outweighs the need to prevent the defendant's tortious conduct. The defense of unclean hands in copyright actions is recognized only rarely, when the plaintiff's transgression is of serious proportions and relates directly to the subject matter of the infringement action." Price v. Fox Entm't Group, Inc., 2007 WL 241387 (S.D.N.Y. Jan. 26, 2007) (quotations omitted). Simply pleading the words "unclean hands" without anything more, as the Individual Defendants have done in their seventh affirmative defense, is insufficient, and courts will strike the defense in such circumstances. See, e.g., Radiancy, Inc. v. Viatek Consumer Products Group, Inc., 2014 WL 1318374 (S.D.N.Y. April 1, 2014); Cartier Int'l AG v.

Motion In Time, Inc., 2013 WL 1386975 (S.D.N.Y. April 5, 2013); Obabueki v. IBM, 145 F. Supp. 2d 371, 401 (S.D.N.Y. 2001), aff'd, 319 F.3d 87 (2d Cir. 2003).

Nor should the Individual Defendants be granted leave to replead this frivolous defense. The sole purported basis for the defense is that Capitol's paralegal who initially purchased various infringing recordings from the ReDigi website was engaged in the business of a private investigator without license, in purported violation of section 70 of NYGBL. See Pizzirusso Decl. Ex. 9 (Document 168-3) at 72. However, all the paralegal did was purchase recordings from a publicly accessible website in the same manner that any other member of the public was free to do. 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, Individual Defendants suffered no harm or prejudice from being made to answer for acts of infringement, which could be readily observed on their own public website, and Capitol clearly did not commit the kind of improper action that could plausibly serve as a bar to copyright infringement.

2. Laches (Twenty-Second Affirmative Defense)

IDs' twenty-second affirmative defense alleges that the claim is barred by laches. However, the Supreme Court's recent decision in Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014), makes clear that laches will not bar recovery of damages in a copyright case such as this one that has been filed within the Copyright Act's three year statute of limitations. Id. at 1967. Moreover, where Capitol put ReDigi on notice of its objections within a month of the beta launch of ReDigi's site and brought suit within three months of such launch, there is no plausible basis on which laches could bar injunctive relief, which would be binding on the

Individual Defendants as officers of ReDigi. See Fed. R. Civ. P. 65(d)(2)(B) (officers of parties bound by injunctions).

3. Estoppel, Waiver and Consent (Fifth, Sixth and Twenty-Third Affirmative Defenses)

Given Capitol's prompt action in objecting to the ReDigi service and filing suit against ReDigi as described above, there is also no possible basis on which to assert estoppel, waiver and/or implied consent. Indeed, any purported reliance by the Individual Defendants on Capitol's failure to name them personally in the original complaint would be objectively unreasonable, and Individual Defendants proceeded at all times at their own risk based on their own misguided reading of the law rather than anything Capitol said or did. See, e.g., National Football League v. Coors Brewing Co., 1999 WL 1254122 (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, Mr. Ossenmacher's own deposition testimony that Capitol was either "too busy" to meet with ReDigi or refused to have such a meeting thoroughly refutes any notion that Capitol consented to or otherwise encouraged ReDigi's development of its infringing system. Mandel Decl. Ex. B (Ossenmacher Dep. at 103-110).

4. DMCA (Twentieth Affirmative Defense)

ReDigi originally alleged a DMCA safe harbor defense. See Answer (Docket No. 6) ¶ 62. However, when confronted with Capitol's motion for summary judgment, which included a section explaining the defense's inapplicability (see Capitol Moving SJ Brief (Docket No. 49) at 23), ReDigi did not respond on this point and the Court accordingly treated the defense as abandoned. See Summary Judgment Opinion (Docket No. 109) at n. 4. While ReDigi thought

so little of the defense as to not even bother responding as to its merits, the Individual Defendants now apparently believe that the defense is so critical that foreclosing its assertion amounts to a constitutional violation.

The defense is in any case objectively baseless. Apart from the fact that the Individual Defendants are not themselves qualifying Internet Service Providers ("ISPs"), neither they nor ReDigi has designated an agent to receive infringement notices, as required by 17 U.S.C. § 512(c)(2). Mandel Decl. ¶ 6 and Ex. E. 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. Summary Judgment Opinion (Docket No. 109) at 16-17. Given this finding, the Individual Defendants are in no position to claim a defense based on ReDigi's alleged immunity.

5. Essential Step Doctrine (Sixteenth Affirmative Defense)

ReDigi also abandoned the essential step defense at the summary judgment stage following Capitol's opening brief addressing such defense. See Capitol Moving SJ Brief (Docket No. 49) at 18-20; Summary Judgment Opinion (Docket No. 109) at n.4. That decision was likewise well taken, as on its face, section 117(a) of the Copyright Act does not apply to copying sound recordings for resale. First, sound recordings are not "computer programs": "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101. In addition, the copies made by ReDigi and its users are decidedly not "created as an essential step in the utilization" of the recordings and used "in no other manner." They are used for the express purpose of resale. Section 117 only applies to

copies (or adaptations) made for the computer program owner's own "internal use" and not to those that are distributed, transferred or made accessible to unrelated third parties. See, e.g., Aymes v. Bonelli, 47 F.3d 23, 26 (2d Cir. 1995); Centrifugal Force, Inc. v. Softnet Commc'ns, Inc., 2011 WL 744732 (S.D.N.Y. Mar. 1, 2011); Practiceworks, Inc. v. Prof'l Software Solutions of Ill., Inc., 72 U.S.P.Q.2d 1691, 1696 (D. Md. 2004); Expediters Int'l of Wash., Inc. v. Direct Line Cargo Mgmt. Servs., Inc., 995 F. Supp. 468, 478 (D.N.J. 1998); ISC-Bunker Ramo Corporation v. Altech, Inc., 765 F. Supp. 1310, 1332 (N.D. Ill. 1990); Apple Computer, Inc. v. Formula Int'l, Inc., 594 F. Supp. 617, 621-22 (C.D. Cal. 1984). Accordingly, once again, there is no plausible basis on which to assert the essential step defense codified in section 117(a) of the Copyright Act.

C. The Discovery Sought is Not Reasonably Calculated to Lead to Admissible Evidence Concerning Any Issues That Remain in the Case

The discovery requests served by the Individual Defendants in this case were so clearly overreaching as to suggest they were intended more to inflict pain and cause delay than discover relevant information. The Court itself expressed such skepticism about the Individual Defendants' motivation at the most recent conference. See Mandel Decl. Ex. D at 15 ("I do think at some point we may get to the merits of these, and whether this is just designed to inflict pain on the other side or whether it is just a fishing expedition or a desire to delay further the litigation, so I guess I'm not going to resolve that now, but I'm skeptical.").

While the Individual Defendants have understandably pared their requests down by eliminating some of the more outlandish requests (such as documents concerning the mechanical royalties paid by Plaintiffs to their artists), they continue to seek irrelevant information and documentation well beyond the scope of anything reasonably required to defend the case. For example, document requests 10, 17 and 18 seek documents concerning Plaintiffs' "policies"

regarding digital exploitation of its recordings and Plaintiffs' and the other record companies' own plans for "reselling" digital recordings. However, Plaintiffs' authorized exploitation of their own recordings has no reasonable bearing on whether the Individual Defendants participated in ReDigi's acts. See Summary Judgment 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").

The Individual Defendants originally claimed that these requests "go to Individual Defendants' copyright misuse and consent defenses, among others, and the appropriate amount of the requested statutory damage award." Pizzirusso Decl. Ex. 12 (Document 168-4 at 36). However, the Individual Defendants do not asset copyright misuse as an affirmative defense and there is no basis for any "consent" defense. See p 17 supra. Moreover, any plans Plaintiffs (or the other record companies, who are not even parties to this case) may have considered with respect to a possible re-sale market would have no impact on the amount of damages in this case, particularly where Plaintiffs do not even claim they have been harmed with respect to any such potential market.

Interrogatory 19, which seeks information concerning the amount of money Plaintiffs allege the Individual Defendants made through ReDigi, is also misguided. Individual Defendants contend this interrogatory "goes directly to whether Capitol can prove a requisite element – substantial benefit – of its contributory infringement claim." IDs' Brief at 24. As a threshold matter, as the Individual Defendants have already acknowledged in connection with their unsuccessful motion for reconsideration of the Court's order denying their motion to

dismiss, "substantial benefit" is not an element of contributory infringement.[7] See IDs' Reply Brief on Motion for Reconsideration (Docket No. 154) at 7 n.13.

To the extent Individual Defendants meant to reference the "financial interest" element of vicarious liability, their position is equally baseless. Individual owners of closely held corporations are typically deemed to have satisfied the direct financial interest element of vicarious liability. See, e.g., Centrifugal Force, Inc. v. Softnet Communications, Inc., 2011 WL 744732 (S.D.N.Y. March 1, 2011) (as CEO and principal owner, individual defendant "has a financial interest in the company and is in a position to supervise and control" its employees' activities); Peer Int'l Corp. v. Luna Records, Inc., 887 F. Supp. 560, 565 (S.D.N.Y. 1995) (sole shareholder and director who ran affairs of corporate defendant held vicariously liable). Moreover, Capitol's response to interrogatory 19 states that "as majority owners of ReDigi, Ossenmacher and Rudolph were in a position to benefit from the commissions earned from resale of Capitol's recordings." See Pizzirusso Decl. Ex. 11. Any further information concerning the specific amount of such benefit is within Individual Defendants' own knowledge and is not a subject on which Plaintiffs have any independent knowledge. Accordingly, no further response should be required from Plaintiffs at this point.

[7] The Individual Defendants apparently are continuing to rely on Judge Sweet's dissenting opinion in Matthew Bender & Co. v. W. Publ'g Co., 158 F.3d 693, 710 (2d Cir. 1998), which relied on a 1994 District of Massachusetts case in importing "derivation of substantial benefit" as an element of contributory infringement. Such an element is not part of the test for contributory infringement as articulated by the Second Circuit and indeed the Supreme Court. See Summary Judgment Opinion (Docket No. 109) at 15 ("[c]ontributory infringement occurs where one . . . with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.") (citations and quotations omitted).

CONCLUSION

For all the foregoing reasons, the Individual Defendants should be barred by principles of res judicata, collateral estoppel and law of the case from pursuing affirmative defenses that were either decided against ReDigi or that ReDigi opted not to pursue. The Court should strike the second, fifth, sixth, seventh, eleventh, twelfth, fifteenth, sixteenth, twentieth, twenty-first, twenty-second and twenty-third affirmative defenses, and permit no further discovery in pursuit of such defenses, including, without limitation, document requests 10, 17 and 18 and interrogatory no. 19.

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Respectfully submitted,

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