

# EXHIBIT D

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
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CAPITOL RECORDS, LLC, et al.,  
Plaintiffs,

v. 12 CV 95 (RJS)

REDIGI, INC., et al.,  
Defendants.

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New York, N.Y.  
November 7, 2014  
4:50 p.m.

Before:

HON. RICHARD J. SULLIVAN,  
District Judge

APPEARANCES

COWAN, LIEBOWITZ & LATMAN, P.C.  
Attorneys for Plaintiffs  
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1 and collateral estoppel applies here, and we think we can reach  
2 that issue without ever having to get to the privity issue.

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

19 MR. GIDDINGS: Absolutely, your Honor.

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

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

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

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

5           MR. GIDDINGS: Okay.

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

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

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

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

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

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

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

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

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

20 MR. GIDDINGS: Right.

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

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

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

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

9 MR. GIDDINGS: Correct, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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