IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, LLC, CAPITOL CHRISTIAN MUSIC GROUP, INC., and VIRGIN RECORDS IR HOLDINGS, INC., Plaintiffs, v. REDIGI INC., JOHN OSSENMACHER, and LARRY RUDOLPH a/k/a LAWRENCE S. ROGEL, Defendants.	12-CV-00095 (RJS)

INDIVIDUAL DEFENDANTS' REPLY MEMORANDUM OF LAW REGARDING THE APPLICATION OF RES JUDICATA, COLLATERAL ESTOPPEL, AND LAW OF THE CASE

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Mr. John Ossenmacher and Prof. Larry Rudolph (the "Individual Defendants") submit this reply brief in response to Capitol Records, LLC ("Capitol'); Capitol Christian Music Group, Inc. and Virgin Records IR Holdings, Inc. (collectively, "Plaintiffs") Memorandum of Law Regarding Application of *Res Judicata* to Individual Defendants' Affirmative Defenses, ECF No. 170 (filed Dec. 19, 2014) (hereinafter "Plaintiffs' Response").[1]

I. INTRODUCTION

Plaintiffs' Response attempts to (1) avoid the plain language of binding precedent holding that *res judicata* and collateral estoppel only apply in repetitious suits, and in so doing, fails to discuss the only doctrine that could even potentially be applicable here: law of the case; (2) brush-off the very significant due process issues that would result if Individual Defendants are barred from litigating and obtaining discovery in the manner that Plaintiffs' propose, and (3) improperly seek to convert the parties' present discovery dispute into a "motion to strike." Plaintiffs' arguments ignore well-settled law in favor of their desired version of the law; in essence, Plaintiffs' argument is that this Court should ignore binding Supreme Court and Second Circuit precedent and relieve Capitol from its strategic decision of adding the Individual Defendants to this action on the eve trial on the (misplaced) hope that they would simply acquiesce to their alleged liability. In order to avoid this erroneous course of action, this Court should reject Plaintiffs' arguments in their entirety and allow Individual Defendants to take discovery on their pending defenses. In addition, because Plaintiffs have not filed a motion to strike, their arguments on a number of Individual Defendants' defenses are not properly before the Court, and the Court should therefore disregard this portion of Plaintiffs' Response.

[1] Plaintiffs' Response was filed in response to was filed in response to Individual Defendants' Memorandum of Law Regarding the Application of *Res judicata*, Collateral Estoppel, and Law of the Case, ECF No. 169 (filed Dec. 5, 2014) (hereinafter "Individual Defendants' Memorandum").

II. ARGUMENT

A. The Court Need Not Address the Privity Issue.

Plaintiffs devote significant space in their brief arguing that Individual Defendants are in privity with ReDigi, Inc. ("ReDigi"). Pls.' Resp. at 4-7. But, as Individual Defendants stated in their Memorandum, "The Court need not reach the privity issue because Individual Defendants are only seeking to assert, obtain discovery, and litigate defenses not already decided by the Court." Ind. Defs.' Mem. at 1, n.1. This is not a "tacit concession that [Individual Defendants] are in fact in privity with ReDigi," as Plaintiffs contend, Pls.' Resp. at 5, but rather an attempt to streamline the issues presented to the Court in these briefs. Put simply, this Court's decision should turn on binding Supreme Court and Second Circuit precedent holding that *res judicata* and collateral estoppel only apply in repetitious suits, not the same proceeding, such that the Court need not even reach the privity issue. *See, c.f., Columbia Gas Transmission, LLC v. David N. Martin Revocable Trust*, 833 F. Supp. 2d 552, 560 n.3 (E.D. Va. 2011) (declining to address the additional *res judicata* requirements where the privity element failed).

B. *Res judicata* and Collateral Estoppel Require Repetitious Suits.

In an attempt to avoid the operation of black letter law that *res judicata* and collateral estoppel do not apply in the same suit, Plaintiffs (1) contend that Individual Defendants' argument on this issue "elevat[es] form over substance," Pls.' Resp. at 9, (2) argue that the statements in every single one of the numerous cases Individual Defendants' cite for this well-settled rule are "dicta," Pls.' Resp. at 12, n.5, and (3) ignore the only doctrine that could have any application in this case: law of the case. Plaintiffs' arguments demonstrate their fundamental misunderstanding of each of these doctrines, and in any event, are belied by their own parentheticals, nearly all of which note that the courts only applied *res judicata* or collateral estoppel in cases where there was a "prior" or "subsequent" action. *See* Pls.' Resp. at 3-4; 7.

Plaintiffs' argument that *res judicata* and collateral estoppel are "flexible" concepts that can "logically" be applied "with equal force to differing stages in a single lawsuit" is misplaced. While it is true that court's give these doctrines some flexibility in some unique circumstances not applicable here,[2] it appears that this flexibility is afforded, if at all, when the courts are ***denying*** application of the doctrines so as to give the party opposing their application his day in court. *See, e.g., Whitman v. Mastrodonato*, 11 A.D.3d 796, 797, 783 N.Y.S.2d 112, 114 (3rd Dep't 2004) (declining to employ *res judicata* to dismiss claims);[3] *Jones v. U.S. Dep't of Hous. & Urban Dev.*, No. 11 CV 0846, 2012 WL 1940845, at *3 (E.D.N.Y. May 29, 2012) (same); *Sloth v. Constellation Brands, Inc.*, No. 11-CV-6041T, 2013 WL 6628270, at *2 (W.D.N.Y. Dec. 16, 2013) (same, as to collateral estoppel). Plaintiffs are attempting to do the opposite here: they are attempting to deny Individual Defendants their day in court.[4]

In any event, under binding Supreme Court and Second Circuit precedent, these doctrines are inapplicable in the same action. *See* Ind. Defs.' Mem. at 11-18; *Arizona v. California*, 460 U.S. 605, 619 (1983) ("It is clear that *res judicata* and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment.") *decision supplemented*, 466 U.S. 144 (1984); *Goodheart Clothing Co. v. Laura Goodman Enters., Inc.*, 962 F.2d 268, 274 (2d Cir. 1992) (noting that where "the question posed is whether the same

[2] For instance, courts appear to afford more flexibility to *res judicata* and *collateral estoppel* where the prior proceeding was administrative in nature. *See Sierra Club v. Alexander*, 484 F. Supp. 455, 464 (N.D.N.Y. 1980) *aff'd*, 633 F.2d 206 (2d Cir. 1980).

[3] The parties agree that New York and Second Circuit law on claim and issue preclusion are substantially the same. Pls.' Resp. at 10, n.4; Individual Defs.' Mem. at 11, n.16.

[4] Plaintiffs' judicial economy argument, Pls. Resp. at 10-12, is misguided. The Supreme Court has stated that "like *res judicata*, the law of the case doctrine 'promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues."' *Piazza v. Aponte Roque*, 909 F.2d 35, 38 (1st Cir. 1990) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1987)). Because the law of the case doctrine is animated by the same judicial economy considerations and is the only doctrine that would apply in the same proceeding, Ind. Defs.' Mem. at 18, Plaintiffs' policy argument fails to counsel in favor of application of *res judicata* or collateral estoppel rather than law of the case.

court that issued a [prior order] should revisit the issue . . . at a subsequent stage in the same litigation" that "to the extent that any form of preclusion might be considered . . . it would not be a rule of *res judicata* or collateral estoppel, but rather the somewhat more flexible law-of-the-case doctrine . . . ."). Indeed, Plaintiffs' "flexibility" case, *Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co.*, involved issues raised in a prior action. 600 F.3d 190, 197 (2d Cir. 2010) (discussing "whether . . . claims . . . that were not raised in [the plaintiff's] initial action are barred by the doctrine of *res judicata*. . . .").

Plaintiffs' argument that "Individual Defendant's 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," Pls.' Resp. at 12 (emphasis in original), is simply incorrect. Individual Defendants cited *Holzsager v. Valley Hosp.*, 482 F. Supp. 629 (S.D.N.Y. 1979), in which the court refused to apply both of these doctrines because the prior determination had occurred in the same proceeding. Ind. Defs.' Mem. at 14. There, the court specifically addressed the argument that reconsideration of a prior determination was "barred by the doctrines of *res judicata* and collateral estoppel" and held that because the prior order occurred in "the same action" that "neither *res judicata* nor collateral estoppel ha[d] any application . . . ." 482 F. Supp. at 632-33. The court then stated that the only doctrine that would apply was law of the case, which applies "in subsequent proceedings in the same case." *Id*. at 633.[5] Other cases are in accord.[6]

[5] Plaintiffs incorrectly contend that this holding (and the language Individual Defendants' quoted from four other cases regarding the non-application of these doctrines in the same proceeding) is "dicta." Pls. Resp. at 12, n.5. As the above discussion makes plain, *Holzsager*'s language on these doctrines was an essential part of the holding and not dicta, and Plaintiffs' dicta contention as to the other cases is similarly misplaced. *See, e.g.*, *In re Hyman*, 335 B.R. 32, 37 n.3 (S.D.N.Y. 2005) (specifically rejecting the argument that *res judicata* applied in the same proceeding) *aff'd on other grounds*, 502 F.3d 61 (2d Cir. 2007). Indeed, the Sixth Circuit quoted the Second Circuit's pronouncement of the law in *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir. 1999) that the Individual Defendants quoted in their opening brief in affirming the a

Plaintiff's reliance on an unpublished Eastern District of New York case that has not been cited by a single court does not compel a different result. While Plaintiffs are correct that the court there applied *res judicata* to preclude arguments in the same action, *L-Tec Elecs. Corp. v. Cougar Elec. Org., Inc.*, No. 97 CV 4303, 1998 WL 960302, at *2 (E.D.N.Y. Dec. 14, 1998) *aff'd*, 198 F.3d 85 (2d Cir. 1999), the parties did not argue in either the district or appellate court, as Individual Defendants do here, that the doctrine was inapplicable for failure of a separate action. Regardless, the parties and the court in *L-Tec* appear to have confused law of the case and *res judicata*. *See* Law of the Case, 18B Fed. Prac. & Proc. Juris. § 4478 (2d ed.) ("There are, to be sure, occasions on which courts absent-mindedly refer to *res judicata* to support law-of-the-case conclusions.") (citing cases).[7] The same doctrinal confusion is present in Plaintiff's collateral estoppel case. *See Cont'l Airlines, Inc. v. Am. Airlines, Inc.*, 824 F. Supp. 689, 709, n.53 (S.D. Tex. 1993) (discussing the defendants' reliance on *Scripps Clinic & Research Found. v. Genentech, Inc.*, 678 F. Supp. 1429 (N.D. Cal. 1988) for the application of collateral estoppel and stating that "[i]n the Court's opinion, [d]efendants may have confused collateral estoppel

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lower court's conclusion that this doctrine did not apply in the same proceeding: '"*Res judicata* does not speak to direct attacks in the same case, but rather has application in subsequent actions." *Waste Mgmt. of Ohio, Inc. v. City of Dayton*, 169 F. App'x 976, 984 (6th Cir. 2006); *see also* Individual Defs.' Mem. at 12.

[6] *See, e.g. Carter v. Adirondack Park Agency*, 203 A.D.2d 788, 789, 610 N.Y.S.2d 408, 409 (3rd Dep't 1994) (concluding, on appeal, that the lower court's "determination following reconsideration was not barred by *res judicata*" because, in part, "the two determinations arose in the same proceeding . . . ."); *Wisell v. Indo-Med Commodities, Inc.*, 74 A.D.3d 1059, 1060, 903 N.Y.S.2d 116, 117 (2nd Dep't 2010) ("[I]n the instant case, we are not dealing with findings in a prior action; we are dealing with the same action. Accordingly, the affirmative defenses of collateral estoppel and *res judicata* are inapplicable to the instant dispute, and the Supreme Court properly denied the defendants' motion to dismiss the complaint as barred by the doctrines of collateral estoppel and *res judicata*."); *see also Tap Holdings, LLC v. Orix Fin. Corp.*, 109 A.D.3d 167, 177, 970 N.Y.S.2d 178, 185 (1st Dep't 2013) (rejecting virtually the same argument that Plaintiffs make here).

[77] *See also In re AmeriServe Food Distrib., Inc.*, 315 B.R. 24, 36 (Bankr. D. Del. 2004) (finding that the parties had confused *res judicata* and law of the case and finding that law of the case – not *res judicata* - applied because the prior determination was made in the same proceeding).

with the doctrine of 'law of the case.'").[8]

In sum, under binding Supreme Court and Second Circuit precedent, Plaintiffs' argument that neither *res judicata* nor collateral estoppel requires a prior proceeding is incorrect and confuses these doctrines with law of the case.[9] As such, Individual Defendants are only precluded from litigating and seeking discovery, if at all, by the law of the case doctrine, which would only preclude discovery and litigation as to those issues actually decided by the Court in the partial summary judgment order: fair use and first sale. Ind. Defs.' Mem. at 18-19.

C. The Partial Summary Judgment Order Should Not Be Afforded Collateral Estoppel or *Res judicata* Affect.

Plaintiffs also argue that the partial summary judgment order should be given preclusive effect. Pls. Resp. at 7-9. As Individual Defendants pointed out in their Memorandum, "partial summary judgment orders in and of themselves are ***not*** final judgments for collateral estoppel purposes. Rater, there must be a prior adjudication of an issue ***in another action*** . . . ." Ind. Defs.' Mem. at 15 (emphasis in original) (citation and internal quotation omitted). This rule is consistent with the above discussion, and Plaintiffs' case parentheticals, nearly all of which note that the partial summary judgment order was issued in a prior suit, confirm this conclusion. Pls. Resp. at 7-8.[10] Because there is no prior action, the partial summary judgment order should not be afforded preclusive affect.

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[8] Plaintiffs' New York state court case is readily distinguishable inasmuch as the plaintiff sought to file an amended complaint "12 years after entry of judgment dismissing the case" against the defendants. *Feigen v. Advance Capital Mgmt. Corp.*, 146 A.D.2d 556, 557-58, 536 N.Y.S.2d 786 (1st Dep't 1989).

[9] Plaintiffs' confusion is further demonstrated by the fact that but for a few stray citations intermittently placed within their collateral estoppel and *res judicata* arguments, Plaintiffs do not discuss law of the case. Pls. Resp. at 2; 12, n.5.

[10] Plaintiffs omit the prior adjudication language in several case parentheticals, but these cases involved partial summary judgment orders in prior actions as well or have already been noted as such by Individual Defendants. *See United States v. McGann*, 951 F. Supp. 372, 379 (E.D.N.Y. 1997); Ind. Defs.' Mem. at 16, 17 n.24.

D. The Plaintiffs' Argument Raises Serious Due Process Concerns.

Plaintiffs next argue that Individual Defendants' due process argument "is [n]ot [e]ven [c]olorable" because the Individual Defendants have not actually been adjudicated as liable "yet." Pls. Resp. at 13-14. But Plaintiffs cannot hide from their dubious sand-bagging strategy and past positions in this case that, in their mind, the Individual Defendants' liability is already a foregone conclusion. *See, e.g.*, Pizzirusso Decl., Ex. 2 at 4:17-19 (Mr. Mandel: "I think legally, in terms of infringement being established, I don't think there's going to be any question under the [partial summary judgment] opinion."); Ex. 9 ("IDs are jointly liable with ReDigi as a matter of law."). Because the Individual Defendants were (inappropriately) added to this action after ReDigi's liability had already been determined, Ind. Defs. Mem. at 21, 21 n.29, if the Court accepts Plaintiffs' argument,[11] the Individual Defendants will have been denied the opportunity to mount their defense, let alone one aided by discovery. This is the same concern that animated the Supreme Court's decision to overturn the lower courts in *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 463 (2000).[12] In order to avoid these due process concerns, this Court should either reject Plaintiffs' arguments and allow Individual Defendants to take discovery.

E. The Discovery Requests at Issue are Appropriate.

Plaintiffs contend that the discovery requests at issue in the present motion – Requests for Production 10, 17, & 18 and Interrogatory 17 – are "well beyond the scope of anything reasonably required to defend the case." Pls. Resp. at 19-21. Not only do Plaintiffs' arguments

[11] Contrary to Plaintiffs' assertion, Pls. Resp. at 13, Individual Defendants should be permitted to raise defenses as to ReDigi's liability since they are only liable, if at all, through ReDigi's liability.

[12] *See also, c.f., La Framboise Well Drilling, Inc. v. R.J. Dooley & Assocs., Inc.*, No. 05CIV.956, 2007 WL 430285, at *5 (S.D.N.Y. Feb. 7, 2007) (rejecting plaintiff's attempt to obtain summary judgment against a corporate officer where the corporate officer was not a defendant in the action because "[d]ue process requires that a corporate officer or principal shareholder be given an opportunity to contest his personal liability for a judgment previously rendered against the corporation") (citing *Nelson,* 529 U.S. at 463, 471).

on these discovery requests fail to acknowledge the standard for what is discoverable − "[A]ny matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case," *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) − but their arguments also largely fail to address Individual Defendants' arguments as to the relevance of the information sought. Plaintiffs' arguments must therefore fail.

Regarding the requests for production, Individual Defendants asserted that these requests go to "the amount of actual damages suffered by Capitol," and that '"it is well-settled that the amount of action damages is one factor that courts take into account when setting statutory damages.'" Ind. Defs.' Mem. at 23 (quoting *Arista Records LLC v. Lime Grp.*, No. 06 CV 5936, 2010 WL 4720338, at *4 (S.D.N.Y. Nov. 19, 2010) (citing authorities)). Thus, for purposes of these discovery requests, it is largely immaterial that "Plaintiffs do not even claim that they have been harmed with respect to any such potential market." Pls.' Resp. at 20. Individual Defendants are seeking relevant material that they intend to rely on to reduce the amount of any potential statutory damages award. This meets the Supreme Court's broad definition of relevance.

As to the interrogatory, which "seeks information related to the amount of money that Capitol contends the Individual Defendants have made through ReDigi," Ind. Defs. Mem. at 23, this contention interrogatory is directly relevant to Plaintiffs' vicarious liability claim.[13] While Plaintiffs attempt to rest on cases that they purport "typically deem[]" the corporate officers of closely held corporations vicariously liable, Pls. Resp. at 21, this is insufficient. Plaintiffs have repeatedly contended that they require no additional discovery, and this being the case, under Federal Rule of Civil Procedure 33(c), contention interrogatories are properly used to ask a party to "articulate facts underlying a contention." *Capacchione v. Charlotte-Mecklenburg Sch.*, 182

[13] Individual Defendants inadvertently referred to "contributory infringement" rather than "vicarious infringement" in their Memorandum.

F.R.D. 486, 489 (W.D.N.C. 1998).[14] If the only fact that Plaintiffs can point to is the Individual Defendants' ownership in the company, there is a serious question as to whether this is a viable claim. The Court should compel Plaintiffs' response to this interrogatory so as to clarify whether Plaintiffs possess any other facts that would support this claim.

F. Plaintiffs' "Motion to Strike" Certain Affirmative Defenses Fails.

Though inappropriately framed as a "motion to strike" when the Court invited briefing on the ability of Individual Defendants to obtain the discovery, the bulk of Plaintiffs' Response is essentially a premature motion for summary judgment on certain of Individual Defendants' affirmative defenses. Pls. Resp. at 14-19. *See Horn v. Greenwood Rehab. Ctr., Inc.*, No. 84 CIV. 312, 1984 WL 531, at *1 (S.D.N.Y. June 28, 1984) (discussing a motion to strike affirmative defenses and saying that "[i]f plaintiffs' motion is to prevail against defenses such as these, it must be as a motion for summary judgment, not a motion to dismiss defenses.").[15] Because Plaintiff has neither moved to strike nor for summary judgment − and such motion for summary judgment would be woefully premature given the fact that Individual Defendants have had virtually no discovery as to their asserted defenses − the Court should disregard this portion of Plaintiffs' Response. In addition, under Local Rule 7.1 and Rule 2 of Your Honor's Individual Rules of Practice, Plaintiffs have not filed a letter requesting a pre-motion conference on this supposed "motion to strike," nor have they filed a motion and memorandum in support.

Regardless, Plaintiffs' "motion to strike" fails for substantive reasons, as well. First and foremost, it purports to rely on Plaintiffs' faulty interpretation of *res judicata* and collateral

[14] *See also Lucero v. Valdez*, 240 F.R.D. 591, 594 (D.N.M. 2007) ("Contention interrogatories . . . may ask for the material or principal facts that support a party's contentions, and contention interrogatories that do not encompass every allegation, or a significant number of allegations, made by a party are proper.") (citations omitted)

[15] *See also Huang v. Gruner + Jahr USA Pub.*, No. 99 CIV. 5058, 2000 WL 640660, at *1 (S.D.N.Y. May 17, 2000) (citing *Horn* and doing the same).

estoppel. Second, the "motion" is untimely under the Federal Rules of Civil Procedure, as more than 21 days has elapsed since Individual Defendants answered the Second Amended Complaint. *See* Fed. R. Civ. P. 12(f); Ind. Defs.' Ans. to Second Am. Compl., ECF No. 163 (filed Nov. 12, 2014). Third, motions to strike are disfavored. As the Southern District of New York explained:

> It is clear, that if there are either questions of fact or disputed questions of law, the motion must be denied. For the plaintiff to succeed on this motion, the Court must be convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed. . . . These narrow standards are designed to provide a party the opportunity to *prove* his allegations if there is the possibility that his defense or defenses may succeed after a full hearing on the merits.

Carter-Wallace, Inc. v. Riverton Labs., Inc., 47 F.R.D. 366, 368 (S.D.N.Y. 1969) (footnotes omitted). Because there are still very significant questions of law and fact as to the Individual Defendants' asserted affirmative defenses, Plaintiffs' attempted "motion to strike" is inappropriate, and the Court should disregard it.

III. CONCLUSION

For the reasons explained above, neither *res judicata*, collateral estoppel, nor law of the case (which Plaintiffs failed to adequately address) bar Individual Defendants from raising, seeking discovery, and litigating defenses not already decided by the Court, and the Court should compel Capitol to respond to Requests for Production Nos. 10, 17, & 18 and Interrogatory No. 19. Although Plaintiffs appear to believe that by merely naming the Individual Defendants, they should now be found liable, that is (thankfully) not the law, and Plaintiffs must live with the consequences of their own legal strategy.

Dated: December 23, 2014

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