

# EXHIBIT A



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October 25, 2013

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

Hon. Richard J. Sullivan, U.S.D.J.  
40 Foley Square  
New York, NY 10007

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

Dear Judge Sullivan:

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

### Capitol’s Position

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

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

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

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

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

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

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

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

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

### IDs' Position

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

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

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

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

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

IDs’ other requests specifically referenced by Plaintiff are all “reasonably calculated to lead to admissible evidence.” For example:

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

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

- Interrogatory Nos. 14, 19, & 20 go to whether Plaintiff can prove the requisite elements of its derivative copyright claims against the IDs. For instance, Plaintiff must demonstrate that the IDs had a direct financial interest in the allegedly infringing activity and exercised a legally sufficient level of control over those allegedly infringing acts to succeed on some of these claims, and these Interrogatories seek precisely that type of information.
- Interrogatory Nos. 4, 7, 8, 10, 11, 12, 17, 18 go to damages, which given the tight discovery schedule, IDs may properly seek at this point in time.
- Document Request Nos. 1, 2, 5, 6, & 10 and Interrogatory Nos. 1, 3, 6, & 13 go to the estoppel/implied consent, fair use, DMCA, waiver, and first sale affirmative defenses, among others. For instance, some of these Requests and Interrogatories seek information regarding whether Plaintiff encouraged the ReDigi system architecture, which may give rise to a defense for implied consent. Further, some of these Requests and Interrogatories solicit information that may bear on whether there are as many violations as Plaintiff claims inasmuch as Plaintiff may have given its consent or waived its copyright claims up until a certain point in time (and alleged infringement before that date would not be actionable).
- Document Requests Nos. 7-8 & 11-16a and Interrogatory Nos. 21 & 22 go to the unclean hands affirmative defense, among others, inasmuch as Plaintiff may have itself infringed on its recording artists and producers' rights to receive mechanical royalties in the compositions of the allegedly infringed.
- Document Requests Nos. 16b & 17 go to potential counterclaims, including but not limited to tortious interference with business relations, violations of New York and California's deceptive trade practice statutes, and/or violations of federal and state antitrust laws for conspiring with other record labels to corner the digital download market. IDs may properly ask for this category of information at this point in time.
- Document Request Nos. 19 & 20 go to Plaintiff's preservation and production duties under the Federal Rules so that the IDs may best assess whether Plaintiff has produced all requested, non-privileged documents.

Respectfully,

COWAN, LIEBOWITZ & LATMAN, P.C.

HAUSFELD LLP

/s/ Richard S. Mandel

Richard S. Mandel

/s/ James J. Pizzirusso

James J. Pizzirusso

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, LLC,

Plaintiff,

v.

REDIGI INC., JOHN OSSENMACHER, and  
LARRY RUDOLPH a/k/a LAWRENCE S.  
ROGEL,

Defendants.

12-CV-00095 (RJS)

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

PROPOUNDING PARTIES: DEFENDANTS JOHN OSSENMACHER AND LARRY  
RUDOLPH

RESPONDING PARTY: PLAINTIFF CAPITOL RECORDS, LLC

SET NO.: ONE

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

**DEFINITIONS**

The following definitions apply to these Requests:

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

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

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

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



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

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

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

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

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

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

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

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

9. DIGITAL EXPLOITATION means the process by which DIGITAL CONTENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### INSTRUCTIONS

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

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

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

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

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

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

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

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

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

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

DOCUMENT and state the details concerning its loss.

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

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

- a. state the date of the DOCUMENT or item of ESI;
- b. identify each and every author of the DOCUMENT or item of ESI;
- c. identify each and every person who prepared or participated in the preparation of the DOCUMENT or item of ESI;
- d. identify each and every person who received the DOCUMENT or item of ESI;
- e. identify each and every person from whom the DOCUMENT or item of ESI was received;
- f. provide a general description of the subject matter;
- g. state the present location of the DOCUMENT or item of ESI and all copies thereof;
- h. identify each and every person having custody or control of the DOCUMENT or item of ESI and all copies thereof;
- i. identify the numbered request(s) to which the DOCUMENT or item of ESI is responsive; and
- j. provide sufficient information concerning the DOCUMENT or item of

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

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

### **REQUESTS FOR PRODUCTION**

#### **REQUEST FOR PRODUCTION NO. 1:**

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

- a. REDIGI;
- b. YOUR Parent Companies;
- c. YOUR Subsidiaries;
- d. DIGITAL CONTENT PROVIDERS;
- e. Other RECORD LABELS;
- f. RECORDING ARTISTS;
- g. PRODUCERS; and
- h. The PRESS.

#### **REQUEST FOR PRODUCTION NO. 2:**

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

- a. REDIGI;

- b. YOUR Parent Companies;
- c. YOUR Subsidiaries;
- d. DIGITAL CONTENT PROVIDERS;
- e. Other RECORD LABELS;
- f. RECORDING ARTISTS; and
- g. PRODUCERS.

**REQUEST FOR PRODUCTION NO. 3:**

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

- a. REDIGI;
- b. YOUR Parent Companies;
- c. YOUR Subsidiaries;
- d. DIGITAL CONTENT PROVIDERS;
- e. Other RECORD LABELS;
- f. RECORDING ARTISTS; and
- g. PRODUCERS.

**REQUEST FOR PRODUCTION NO. 4:**

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

- a. REDIGI;
- b. YOUR Parent Companies;
- c. YOUR Subsidiaries;
- d. DIGITAL CONTENT PROVIDERS;

- e. Other RECORD LABELS;
- f. RECORDING ARTISTS; and
- g. PRODUCERS.

**REQUEST FOR PRODUCTION NO. 5:**

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

**REQUEST FOR PRODUCTION NO. 6:**

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

**REQUEST FOR PRODUCTION NO. 7:**

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

**REQUEST FOR PRODUCTION NO. 8:**

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

**REQUEST FOR PRODUCTION NO. 9:**

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



**REQUEST FOR PRODUCTION NO. 10:**

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

**REQUEST FOR PRODUCTION NO. 11:**

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

**REQUEST FOR PRODUCTION NO. 12:**

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

**REQUEST FOR PRODUCTION NO. 13:**

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

**REQUEST FOR PRODUCTION NO. 14:**

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

**REQUEST FOR PRODUCTION NO. 15:**

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

**REQUEST FOR PRODUCTION NO. 16:**

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

**REQUEST FOR PRODUCTION NO. 16:**

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

**REQUEST FOR PRODUCTION NO. 17:**

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

**REQUEST FOR PRODUCTION NO. 18:**

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

**REQUEST FOR PRODUCTION NO. 19:**

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

**REQUEST FOR PRODUCTION NO. 20:**

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

DATED: October 9, 2013

*Seth R. Gassman*

---

Seth R. Gassman (SG-8116)

James J. Pizzirusso (*pro hac vice* pending)

Nathaniel C. Giddings (*pro hac vice* pending)

HAUSFELD LLP

1700 K Street, N.W., Suite 650

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*Counsel for John Ossenmacher & Larry Rudolph*

**PROOF OF SERVICE**

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

Case No. 12-CV-00095 (RJS)

DISTRICT OF COLUMBIA

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

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

**SEE ATTACHED LIST**

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

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

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

Dated: October 9, 2013

*Seth R. Gassman*

---

Seth R. Gassman (SG-8116)

**SERVICE LIST**

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

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**Richard Stephen Mandel**

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*Attorney of Record for Defendant, ReDigi  
Inc.*

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, LLC,

Plaintiff,

v.

REDIGI INC., JOHN OSSENMACHER, and  
LARRY RUDOLPH a/k/a LAWRENCE S.  
ROGEL,

Defendants.

12-CV-00095 (RJS)

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

PROPOUNDING PARTIES: DEFENDANTS JOHN OSSENMACHER AND LARRY  
RUDOLPH

RESPONDING PARTY: PLAINTIFF CAPITOL RECORDS, LLC

SET NO.: ONE

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

**DEFINITIONS**

The following definitions apply to these interrogatories:

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

## INTERROGATORIES

### INTERROGATORY NO. 1:

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

### INTERROGATORY NO. 2:

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

### INTERROGATORY NO. 3:

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

### INTERROGATORY NO. 4:

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

### INTERROGATORY NO. 5:

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

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

**INTERROGATORY NO. 6:**

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

- a. The fair use doctrine;
- b. The estoppel doctrine;
- c. The waiver doctrine;
- d. The unclean hands doctrine;
- e. The first-sale doctrine as codified in 17 U.S.C. § 109;
- f. The substantial-non-infringing use doctrine;
- g. The essential steps defense;
- h. Each of the safe harbor provisions of the DMCA, 17 U.S.C. § 512; and
- i. The common law doctrine of exhaustion.

**INTERROGATORY NO. 7:**

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

**INTERROGATORY NO. 8:**

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

**INTERROGATORY NO. 9:**

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

**INTERROGATORY NO. 10:**

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

**INTERROGATORY NO. 11:**

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

**INTERROGATORY NO. 12:**

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

**INTERROGATORY NO. 13:**

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

**INTERROGATORY NO. 14:**

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

liability in this action.

**INTERROGATORY NO. 15:**

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

**INTERROGATORY NO. 16:**

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

**INTERROGATORY NO. 17:**

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

**INTERROGATORY NO. 18:**

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

**INTERROGATORY NO. 19:**

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

**INTERROGATORY NO. 20:**

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

**INTERROGATORY NO. 21:**

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

**INTERROGATORY NO. 22:**

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

ALLEGEDLY COPYRIGHTED SONGS

DATED: October 9, 2013

*Seth R. Gassman*

---

Seth R. Gassman (SG-8116)  
James J. Pizzirusso (*pro hac vice* pending)  
Nathaniel C. Giddings (*pro hac vice* pending)  
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*Counsel for John Ossenmacher & Larry Rudolph*

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