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 Caesars Entertainment Corp.,
 9 Corner Investment Co., LLC,
 Harrah’s Imperial Palace Corp., and
 10 Harrah’s Las Vegas, Inc.

11 **UNITED STATES DISTRICT COURT**
 12 **DISTRICT OF NEVADA**

13 SLEP-TONE ENTERTAINMENT
 14 CORPORATION,

15 Plaintiff,

16 v.

17 ELLIS ISLAND CASINO &
 BREWERY *et al.*,

18 Defendants.
 19

Case No.: 2:12-cv-00239-KJD-RJJ

**MOTION TO DISMISS BY DEFENDANTS
 CAESARS ENTERTAINMENT CORP.,
 CORNER INVESTMENT CO., LLC,
 HARRAH’S IMPERIAL PALACE CORP.,
 AND HARRAH’S LAS VEGAS, INC.**

20 Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Caesars
 21 Entertainment Corp. (“Caesars”), Corner Investment Co., LLC d/b/a Bill’s Gamblin’ Hall &
 22 Saloon (“Bill’s”), Harrah’s Imperial Palace Corp. d/b/a Imperial Palace Hotel & Casino (“Imperial
 23 Palace”), and Harrah’s Las Vegas, Inc. (improperly named “Harrah’s Las Vegas”) (“Harrah’s”) (collectively, the “Caesars Defendants”) hereby move the Court to dismiss Plaintiff Slep-Tone
 24 Entertainment Corporation’s (“Slep-Tone’s”) Complaint for failure to state a claim upon which
 25 relief can be granted.
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1 **PRELIMINARY STATEMENT**

2 Slep-Tone is engaged in a nationwide litigation campaign. It has filed more than fifty (50)
3 cookie-cutter lawsuits, including this one, which it filed against 99 defendants, apparently to avoid
4 paying multiple filing fees. Slep-Tone manufactures and distributes compact discs (“CDs”)
5 containing music to popular songs along with data that displays the song lyrics on a video screen
6 when the tracks are played. According to Slep-Tone, karaoke jockeys (or “KJs”) have unlawfully
7 copied the CDs and are using the copied music to perform karaoke shows and, in the course of
8 doing so, are displaying Slep-Tone’s SOUND CHOICE trademark without Slep-Tone’s consent.

9 However, rather than filing *copyright infringement* actions against the KJs who allegedly
10 copied its CDs, Slep-Tone is filing *trademark infringement* suits against innocent property owners,
11 such as the Caesars Defendants, who hired independent contractors to perform karaoke shows at
12 their properties. These lawsuits, including this one, are based solely upon the display of the
13 SOUND CHOICE trademark on video screens during karaoke shows.

14 Slep-Tone has become the Righthaven of trademarks.¹ Slep-Tone has filed numerous
15 lawsuits, apparently with little or no pre-filing investigation and no warning. Slep-Tone filed suits
16 against a large number of defendants without differentiating between the KJs who allegedly
17 copied Slep-Tone’s CDs and the innocent property owners (including the Caesars Defendants)
18 who had no knowledge of the alleged infringement, no ability to control the music (or the source
19 of the music) used by independent contractor KJs, and who have otherwise done nothing to
20 deserve the burden and bear the cost of defending against a no-warning lawsuit. In true
21 Righthaven fashion, Slep-Tone filed its lawsuits *en masse* for the purpose of coercing settlements
22 rather than protecting legitimate intellectual property rights. Slep-Tone is obviously banking on
23 the fact that it would be far less expensive for each defendant to settle the case than to fight Slep-
24 Tone. This is perhaps best evidenced by the fact that none of Slep-Tone’s lawsuits have
25 proceeded to trial and few have proceeded past the initial pleading stage.

26 This case should be dismissed because Slep-Tone has failed to state a claim upon which

27
28 ¹ Righthaven LLC is the entity that filed more than 275 copyright infringement actions against defendants who copied all or part of newspaper articles on their websites without permission. Righthaven’s business model was to extract settlement payments from each defendant using the threat of liability for statutory damages and attorneys’ fees.

1 relief can be granted. Slep-Tone's empty, conclusory allegations and its failure to sufficiently
2 differentiate between the defendants does not meet even the liberal notice pleading standards
3 under *Iqbal* and *Twombly*. The Complaint's conclusory statements fail to establish a plausible
4 case of direct, contributory, or vicarious trademark infringement or unfair competition. In
5 addition, the Complaint fails to allege facts showing that the Caesars Defendants have used the
6 SOUND CHOICE mark as a trademark. The Complaint is also barred by the doctrine of
7 nominative fair use. The Complaint should also be dismissed because there can be no consumer
8 confusion as a matter of law because the consumers who are allegedly confused (viewers and
9 participants of karaoke shows) are not the consumers of Slep-Tone's CDs. Finally, the Complaint
10 is barred based on the *Dastar* doctrine.

11 **STATEMENT OF ALLEGED FACTS**

12 Plaintiff Slep-Tone is the manufacturer and distributor of karaoke accompaniment tracks
13 sold under the name "Sound Choice." (Compl. ¶ 47.) Slep-Tone owns federal trademark
14 registrations for the SOUND CHOICE word mark and the SOUND CHOICE design mark (the
15 "SOUND CHOICE Marks"). (*Id.* ¶¶ 95-96.) The SOUND CHOICE Marks are registered in
16 International Class 9 for use on "pre-recorded magnetic audio cassette tapes and compact discs
17 containing musical compositions and compact discs containing video related to musical
18 compositions." See <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=74561912> (listing use
19 of SOUND CHOICE on "pre-recorded magnetic audio cassette tapes and compact discs
20 containing musical compositions and compact discs containing video related to musical
21 compositions"); <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=74627124> (listing use of
22 SOUND CHOICE on "pre-recorded magnetic audio cassette tapes and compact discs containing
23 musical compositions and compact discs containing video related to musical compositions.")

24 Entertainers who provide karaoke services in bars, restaurants, and other venues are known
25 as karaoke jockeys ("KJs"), karaoke hosts, or karaoke operators. (*Id.* ¶ 63.) The services provided
26 by KJs typically include providing the karaoke music and equipment for playback, entertaining the
27 assembled crowd for warm-up purposes, and organizing the karaoke show by controlling access to
28 the stage, setting the order of performance and operating the karaoke equipment. (*Id.*) A KJ will

1 typically maintain a catalog of songs available for performance in order to aid participants in
2 selecting a song to sing. (*Id.* ¶ 64.) Slep-Tone alleges that “[m]any KJs, such as *some* of the
3 present Defendants, obtain, copy, share, distribute and/or sell media-shifted copies of the
4 accompaniment tracks via pre-loaded hard drives, USB drives, CD-R’s, or the Internet.” (*Id.* ¶
5 66.) (Emphasis added.) “Media shifting” occurs when KJs copy the accompaniment tracks from
6 CDs to computer hard drives or other media. (*Id.* ¶ 67.) “Format shifting” occurs when compact
7 disc files are converted from one format to another, such as from CD+G to MP3G. (*Id.* ¶ 68.)

8 Slep-Tone alleges, in conclusory fashion, that “[e]ach of the Defendants has used media-
9 shifted and/or format-shifted karaoke accompaniment tracks marked with the [sic] Slep-Tone’s
10 registered trademarks for commercial purposes. (*Id.* ¶ 74.) Slep-Tone further alleges that “venues
11 such as those operated by the Defendants can enjoy significant savings by turning a blind eye to
12 the actions of the illegitimate KJs they hire.” (*Id.* ¶ 93.) Slep-Tone alleges that “[t]hese venues
13 benefit from piracy because unfair competition from pirate KJs pressures legitimate KJs to accept
14 lower compensation from the venues to obtain new business or retain old business. By decreasing
15 the fixed cost of entertainment, the Defendants’ operations become more profitable.” (*Id.* ¶ 94.)

16 With respect to Caesars, Bill’s, Imperial Palace, and Harrah’s, Slep-Tone alleges that they
17 operate a karaoke system to produce a karaoke show at their eating and drinking establishments in
18 which counterfeit copies of Slep-Tone’s accompaniment tracks were observed being used. (*Id.* ¶¶
19 120, 123, 228.) Slep-Tone further alleges that Bill’s and Imperial Palace have advertised or
20 otherwise indicated that they are in possession of a library containing more than 200,000 tracks
21 stored on their karaoke systems, and that Caesars, Bill’s, Imperial Palace, and Harrah’s have
22 repeatedly displayed the SOUND CHOICE Marks without right or license. (*Id.* ¶¶ 121-122, 124-
23 125, 229.)

24 **LEGAL STANDARD**

25 When ruling on a Rule 12(b)(6) motion, the Court must accept all well-pleaded allegations
26 of material fact as true and construe them in a light most favorable to the non-moving party. *See*
27 *Wyler Summit P’ship v. Turner Broad Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). However, the
28 Court is not required to accept as true allegations that are merely conclusory. *Sprewell v. Golden*

1 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A complaint must plead “enough facts to state
 2 a claim to relief that is plausible on its face.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017,
 3 1022 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955,
 4 1964, 167 L. Ed. 2d 929 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)
 5 (stating that “a claim has facial plausibility when the plaintiff pleads factual content that allows the
 6 court to draw the reasonable inference that the defendant is liable for the misconduct alleged”).
 7 Although detailed factual allegations are not required for a complaint to pass muster under Rule
 8 12(b)(6), the factual allegations “must be enough to raise a right to relief above the speculative
 9 level” *Twombly*, 550 U.S. at 555. The pleading must convince the court that the facts
 10 provide more than “a suspicion [of] a legally cognizable right of action.” *Id.* Thus, “[w]here a
 11 complaint pleads facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the
 12 line between possibility and plausibility of entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. at
 13 557). Courts considering a motion to dismiss should “begin by identifying pleadings that,
 14 because they are no more than conclusions, are not entitled to the assumption of truth[;] [w]hile
 15 legal conclusions can provide the framework of a complaint, they must be supported by factual
 16 allegations.” *Iqbal*, 129 S. Ct. at 1940.

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A PLAUSIBLE CLAIM FOR TRADEMARK INFRINGEMENT AND SHOULD BE DISMISSED.

A. The Complaint Fails To Plausibly Allege Claims For Direct, Contributory, Or Vicarious Trademark Infringement Under *Iqbal* and *Twombly*.

1. The Complaint Fails to Plausibly Allege Direct Trademark Infringement.

22 Slep-Tone’s conclusory allegations fail to plausibly allege use of the SOUND CHOICE mark
 23 in commerce, fail to differentiate among each of the 99 defendants in this case, and fail to plausibly
 24 allege a likelihood of confusion as a matter of law.

a. The Complaint Fails to Plausibly Allege Use In Commerce.

26 Slep-Tone’s Complaint fails to state a claim for direct trademark infringement because it does
 27 not sufficiently allege that any one of the Caesars Defendants has used the SOUND CHOICE Marks
 28 in commerce. To state a claim for trademark infringement under the Lanham Act, the plaintiff must

1 allege facts demonstrating: (1) ownership of a valid trademark and (2) likelihood of confusion from
 2 the defendant's use of the mark. *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354 (9th Cir.
 3 1985). In addition, trademark infringement and unfair competition claims "are subject to a
 4 commercial use requirement." *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005);
 5 *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 307 (9th Cir.1992) (holding that
 6 infringement laws "simply do not apply" to a "non-trademark use of a mark"). "The inclusion of
 7 [this] requirement[] in the Lanham Act serves the Act's purpose: 'to secure the owner of the mark the
 8 goodwill of his business and to protect the ability of consumers to distinguish among competing
 9 producers.'" *Bosley*, 403 F.3d at 676 (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774,
 10 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992)). As Professor McCarthy notes:

11 Perhaps the reason that it is argued that a non-trademark use of another's mark is not
 12 an infringement is that a non-trademark use is highly unlikely to cause actionable
 13 confusion. To be an infringement, there must be a likelihood of confusion over
 14 source, sponsorship, affiliation or approval. This happens when the potential buyer
 15 is confronted with two similar designations, both of which are used as marks. That
 16 is, the viewer is confronted with two similar designations which in context tell the
 viewer that they identify and distinguish a single source. Because defendant is an
 imitative free rider, each of the contesting designations is used to identify, not a
 single source, but two different sources. This causes confusion and deception in the
 viewer's mind. This is trademark infringement.

17 4 J. Thomas McCarthy, *McCarthy On Trademarks and Unfair Competition* § 23:11.50 (4th ed. 2008).

18 Slep-Tone has failed to allege that the Caesars Defendants used the SOUND CHOICE mark
 19 in commerce. Slep-Tone makes general allegations that karaoke is a "commercial enterprise." For
 20 example, Slep-Tone alleges that "[f]or KJs, karaoke is a commercial enterprise" and that "[k]araoke
 21 entertainment is provided as part of, and/or in conjunction with, the commercial enterprise of those
 22 persons and entities named herein who own and/or operate eating and drinking establishment(s)." (Compl. ¶¶ 55-56.) Then, Slep-Tone makes general but conclusory allegations against all defendants.
 23 Slep-Tone alleges that "[e]ach of the Defendants has used media-shifted and/or format-shifted
 24 karaoke accompaniment tracks marked with the SLEP-TONE's registered trademarks for commercial
 25 purposes." (Compl. ¶ 74.) Slep-Tone further alleges that "[t]he Defendants' use of the Sound Choice
 26 Marks was in commerce within the meaning of the Trademark Act of 1946 as amended." (Compl. ¶
 27 239.)
 28

1 Slep-Tone's allegations regarding commercial use are conclusory and, therefore, cannot be
2 accepted as true. In *Enea Embedded Tech., Inc. v. Eneas Corp.*, No. 08-CV-1595-PHX-GMS, 2009
3 WL 648891, at *4-7 (D. Ariz. Mar. 11, 2009), the court held that conclusory allegations of
4 commercial use are insufficient to state a claim for trademark infringement. Moreover, as the
5 Supreme Court held in *Iqbal*: "A pleading that offers 'labels and conclusions' or 'a formulaic
6 recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders
7 'naked assertion[s]' devoid of 'further factual enhancement.'" See *Iqbal*, 129 S. Ct. at 1949 (internal
8 citation omitted); see also *Sprewell*, 266 F.3d at 988 ("The court need not, however, accept as true
9 allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court
10 required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or
11 unreasonable inferences.") (internal citations omitted).

12 More problematically, the Complaint improperly aggregates the actions of each of the 99
13 individual defendants in this case -- collectively referring to the actions of all 99 as the actions of the
14 "Defendants." This is clearly improper. See, e.g., *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th
15 Cir. 2001) ("The complaint is replete with allegations that 'the defendants' engaged in certain
16 conduct, making no distinction among the fourteen defendants charged, though geographic and
17 temporal realities make plain that all of the defendants could not have participated in every act
18 complained of."); *Myers v. Winn Law Group*, No. 2:11-cv-02372 JAM KJN PS, 2011 WL 4954215,
19 at *2 (E.D. Cal. Oct. 18, 2011) ("All of plaintiff's allegations are targeted at the four named
20 defendants *collectively*, such that it is impossible to tell which defendant took which alleged
21 actions ... Because plaintiff does not make any factual allegations as to particular defendants, he
22 cannot proceed unless he cures these deficiencies in an amended complaint."); *Corazon v. Aurora*
23 *Loan Services, LLC*, No. 11-00542 SC, 2011 WL 1740099, at *4 (N.D. Cal. May 5, 2011)
24 ("Undifferentiated pleading against multiple defendants is improper."); *In re Sagent Tech., Inc.*, 278
25 F. Supp. 2d 1079, 1094 (N.D. Cal. 2003) ("[T]he complaint fails to state a claim because plaintiffs do
26 not indicate which individual defendant or defendants were responsible for which alleged wrongful
27 act."); *Gauvin v. Trombatore*, 682 F. Supp. 1067, 1071 (N.D. Cal. 1988) (lumping together multiple
28 defendants in one broad allegation fails to satisfy notice requirement of Federal Rule of Civil

1 Procedure 8(a)(2)).

2 Worse yet, the Complaint does not distinguish between defendants who have provided
3 karaoke services as KJs and defendants who merely hired KJs to put on karaoke shows at their
4 properties. It contains no specific factual allegation that any one of the Caesars Defendants has
5 acted as a KJ who provides karaoke services in exchange for money in interstate commerce.
6 Rather, the Complaint generally alleges that: “Karaoke entertainment is provided as part of, and/or
7 in conjunction with, the commercial enterprise of those persons and entities named herein who
8 own and/or operate eating and drinking establishment(s).” (Compl. ¶ 56.) Thus, the Complaint
9 fails to allege that any one of the Caesars Defendants has received money for providing karaoke
10 services. Nor does the Complaint contain any specific factual allegation that any one of the Caesars
11 Defendants has received money from a third-party KJ’s performance of karaoke services on any one
12 of the Caesars Defendants’ properties. Because the Complaint fails to allege specific facts showing
13 that any one of the Caesars Defendants has used the SOUND CHOICE Marks in interstate commerce,
14 it fails to state a claim upon which relief may be granted and must be dismissed.

15
16 *b. The Complaint Fails To Allege Facts Establishing
A Likelihood Of Confusion.*

17 Slep-Tone has alleged likelihood of confusion among viewers and participants in karaoke
18 shows, not confusion among its customers -- KJs who purchase CDs.

19 If the Court determines as a matter of law from the pleadings that confusion is unlikely, the
20 complaint should be dismissed. *See Murray v. Cable Nat’l Broadcasting Co.*, 86 F.3d 858, 860
21 (9th Cir. 1996) (citing *Toho Co. Ltd. v. Sears Roebuck & Co.*, 645 F.2d 788, 790-91 (9th Cir.
22 1981)). A likelihood of confusion exists when a consumer viewing a service mark is likely to
23 purchase the services under a mistaken belief that the services are, or are associated with, the
24 services of another provider. *Murray*, 86 F.3d at 861 (citing *Rodeo Collection, Ltd. v. West
25 Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987)). The confusion must “be probable, not simply a
26 possibility.” *Id.*

27 It is well established that the relevant confusion is confusion among the trademark owner’s
28 customers in the trademark owner’s channels of trade. In the case of *In re The W.W. Henry*

1 *Company, L.P.*, 82 U.S.P.Q.2d 1213 (T.T.A.B. 2007), the United State Trademark Trial and
2 Appeal Board found that there was no likelihood of confusion between the mark PATCH ‘N GO
3 for chemical filler marketed and sold to plastic manufacturers for the repair of plastic and the
4 trademark applicant’s PATCH & GO mark for a drywall and cement patch compound marketed
5 and sold to do-it-yourselfers in hardware stores. *Id.* The Board found that confusion was unlikely
6 because the two products would be sold “to different classes of purchasers through different
7 channels of trade.” *Id.* Likewise, the Federal Circuit found no likelihood of confusion where the
8 plaintiff sold “E.D.S.” computer services while the defendant sold “EDS” power supplies and
9 battery chargers. *Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713
10 (Fed. Cir. 1992). Even though there was some overlap in the markets at issue, the Federal Circuit
11 viewed this as a case of sales occurring in separate channels of trade. *Id.* Even though both parties
12 sold products to the medical industry, the plaintiff sold its “E.D.S.” data processing services to
13 medical insurers while the defendant sold its “EDS” batteries and power supplies to makers of
14 medical equipment such as bedside alert systems and crib monitors. *Id.*

15 Here, as in these cases, there can be no likelihood of confusion as a matter of law. The
16 Complaint alleges that viewers and participants in karaoke shows will be confused by the
17 Defendants’ use of the SOUND CHOICE Marks. (Compl. ¶ 241 (“The Defendants’ use of the
18 Sound Choice Marks is likely to cause confusion, or to cause mistake, or to deceive the
19 Defendants’ customers and patrons into believing that the Defendants’ services are being provided
20 with the authorization of the Plaintiff and that the Defendants music libraries contain bona fide
21 Sound Choice accompaniment tracks.”) (emphasis added).

22 *The viewers and participants in karaoke shows are not Slep-Tone’s customers.* Slep-Tone
23 sells its CDs to KJs. (Compl. ¶ 49) (“As karaoke grew in popularity, Sound Choice became the
24 brand that nearly every karaoke fan wanted to sing and that nearly every karaoke jockey (—KJ)
25 wanted in his or her library.”) (emphasis added); ¶ 52 (“Whereas in the past a KJ would buy
26 multiple copies of an original disk if he or she desired to operate multiple systems, now they
27 simply —clone their songs for multiple commercial systems or even their entire karaoke song
28 libraries to start a new operation.”); ¶ 65 (“Legitimate KJs purchase equipment and purchase or

1 license compact disks containing accompaniment tracks and charge for the above-mentioned
 2 karaoke services.”) (emphasis added). The Complaint does not allege that Slep-Tone is in the
 3 business of providing karaoke services or that the defendants are in the business of selling karaoke
 4 accompaniment tracks to KJs. Accordingly, there is no likelihood of confusion as a matter of law
 5 because the persons allegedly confused -- viewers of and participants in karaoke shows -- are not
 6 the same class of persons who purchase Slep-Tone’s karaoke accompaniment tracks for use in
 7 connection with the provision of karaoke services.

8 2. The Complaint Fails to Plausibly Allege Contributory Infringement.

9 To the extent Slep-Tone seeks to hold the Caesars Defendants liable for contributory
 10 trademark infringement or unfair competition, the Complaint’s allegations fail to state an
 11 actionable claim. To be liable for contributory trademark infringement, a defendant must have: (1)
 12 “intentionally induced” the primary infringer to infringe, or (2) continued to supply an infringing
 13 product to an infringer with knowledge that the infringer is mislabeling the particular product
 14 supplied. *Perfect 10, Inc. v. Visa Int’l Service Ass’n*, 494 F.3d 788, 807 (9th Cir. 2007) (quoting
 15 *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982)).

16 Although this formulation technically requires either intentional inducement or continued sale
 17 of an infringing product, the Ninth Circuit has found the rule less restrictive in the situations
 18 involving the provision of services. *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F. 3d
 19 980, 983 (9th Cir. 1999). In *Lockheed*, the Ninth Circuit held that, even though an internet service
 20 provider did not supply a “product” to infringing third parties, the court should “consider the extent of
 21 control exercised by the defendant over the third party’s means of infringement” to determine if
 22 actual or constructive knowledge of the third party’s infringement would give rise to contributory
 23 liability. *Id.* at 984. For liability to attach, there must be “[d]irect control and monitoring of the
 24 instrumentality used by a third party to infringe the plaintiff’s mark.” *Id.* Accordingly, when a
 25 defendant offers a service instead of a product, a plaintiff can base its contributory trademark
 26 infringement claim on the “extent of control” theory or the “intentional inducement” theory. *Id.*

27 a. *The Complaint Does Not Allege Intentional Inducement.*

28 Slep-Tone has failed to plead facts showing that any one of the Caesars Defendants

1 intentionally induced KJs (or any other direct infringer) to infringe Slep-Tone’s SOUND CHOICE
2 Marks. The Complaint alleges that the defendants have “benefitted [sic] from the use and display
3 of unauthorized media-shifted and format-shifted copies of karaoke accompaniment tracks which
4 have been marked falsely with SLEP-TONE’s federally registered trademarks.” (Compl. ¶ 70.)
5 The Complaint alleges that the defendants have “possessed, used, or authorized or benefited from
6 the use and display of unauthorized counterfeit goods bearing the Sound Choice Marks, or has
7 provided, advertised, or authorized or benefited from the provision of services in connection with
8 the Sound Choice Marks.” (Compl. ¶ 230.) And the Complaint alleges that the defendants have
9 “used, or authorized or directly benefited from the use of, a reproduction, counterfeit, or copy of
10 the Sound Choice Marks in connection with the provision of services including karaoke services,
11 by manufacturing or acquiring the reproduction, counterfeit, or copy of the Sound Choice Marks
12 and by displaying the reproduction, counterfeit, or copy of the Sound Choice Marks during the
13 provision of those services.” (Compl. ¶ 238.) None of these conclusory allegations show that any
14 one of the Caesars Defendants induced anybody to do anything.

15 *b. The Complaint Does Not Allege Knowledge of The Infringement Or*
16 *Direct Control Or Monitoring Of the Instrumentalities Of the*
Infringement.

17 The Complaint fails to allege that the Caesars Defendants knew of the infringement or had
18 direct control over or monitoring of the instrumentalities of infringement. Under the extent of control
19 theory, “a plaintiff must prove that the defendant had knowledge and ‘[d]irect control and monitoring
20 of the instrumentality used by the third party to infringe the plaintiff’s mark.” *Louis Vuitton*
21 *Malletier, S.A. v. Akanoc Solutions, Inc.*, 591 F. Supp. 2d 1098, 1111 (N.D. Cal. 2008) (quoting
22 *Lockheed Martin*, 194 F.3d at 984)). Actual knowledge exists where it can be shown by a
23 defendant’s conduct or statements that it actually knew of specific instances of direct infringement.
24 *See A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir.2001). Constructive
25 knowledge exists where it can be shown a defendant should have known of the direct infringement.
26 *Id.* In addition, a defendant’s “willful blindness” to “blatant” and repeated acts of infringement may
27 satisfy the knowledge requirement. *See Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 265
28 (9th Cir. 1996) (approving Seventh Circuit’s use of “willful blindness” to establish knowledge

1 element of contributory infringement test, stating “a swap meet operator can not disregard its
2 vendors’ blatant trademark infringements with impunity.”).

3 In this case, the Complaint fails to allege facts showing that any one of the Caesars
4 Defendants had actual or constructive knowledge of the alleged infringement. There are literally no
5 allegations in the Complaint that any of the Caesars Defendants actually knew that karaoke shows
6 were being performed on any of Caesars Defendants’ properties using counterfeit copies of Slep-
7 Tone’s CDs. The Complaint does not allege that Slep-Tone sent any of the Caesars Defendants a
8 cease and desist letter or otherwise put them on notice. Nor does the Complaint allege facts showing
9 that any of the Caesars Defendants *should have known* of the alleged infringement. The most the
10 Complaint alleges is that KJs who use illegal copies of Slep-Tone’s tracks are able to offer lower
11 priced karaoke services. (Compl. ¶ 89.) And that “[v]enues such as those operated by the
12 Defendants can enjoy significant savings by turning a blind eye to the action of the illegitimate KJs
13 they hire.” (Compl. ¶ 93.) These empty and generalized allegations do not show that any one of the
14 Caesars Defendants were on notice of even a single act of infringement. Nor do these allegations
15 demonstrate “willful blindness.” Willful blindness is defined as a “deliberate failure to investigate
16 suspected wrongdoing.” *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d
17 1143, 1149 (7th Cir. 1992). Here, there are no facts alleged in the Complaint from which the
18 Court can conclude that any one of the Caesars Defendants “deliberately” failed to investigate any
19 suspicion of infringing conduct. Nor are there any facts from which the Court can conclude that
20 any one of the Caesars Defendants suspected wrongdoing in the first place.

21 3. The Complaint Fails to Plausibly Allege Vicarious Infringement.

22 To the extent that Slep-Tone seeks to hold the Caesars Defendants vicariously liable for
23 trademark infringement or unfair competition, the Complaint’s empty allegations fail to state an
24 actionable claim. “Vicarious liability for trademark infringement requires ‘a finding that the
25 defendant and the infringer have an apparent or actual partnership, have authority to bind one
26 another in transactions with third parties or exercise joint ownership or control over the infringing
27 product.’” *Perfect 10, Inc.*, 494 F.3d at 808. Here, Slep-Tone does not allege facts supporting the
28 existence of any apparent or actual partnership between any KJ and any of the Caesars

1 Defendants. The Complaint does not allege facts showing that any KJ and any of the Caesars
2 Defendants have entered into a legal relationship with mutual legal authority to bind the other in
3 transactions with third parties. Nor does the Complaint allege facts showing that any KJ and any
4 one of the Caesars Defendants exercise joint ownership or control over any infringing CD.

5 **B. The Complaint Is Barred By The Doctrine Of Nominative Fair Use.**

6 Slep-Tone's claims are also barred by the doctrine of nominative fair use. Nominative fair
7 use refers to a defendant's use of the plaintiff's trademark to describe or identify the plaintiff's
8 product. 3 J. Thomas McCarthy, *McCarthy On Trademarks And Unfair Competition* § 23:11 (4th
9 ed. 2006 & Supp. 2012). "[A] defendant who raises the nominative fair use issue need only show
10 that it uses the mark to refer to the plaintiff's trademarked goods or services. The burden then
11 reverts to the plaintiff to show a likelihood of confusion under the nominative fair use analysis."
12 *Id.* § 23:11. Here, the Defendants allegedly used Slep-Tone's SOUND CHOICE Marks to, at
13 most, identify Slep-Tone's music and lyrics. The Complaint alleges that the Defendants have
14 provided karaoke entertainment in connection with the operation of eating and drinking
15 establishments and that the SOUND CHOICE Marks are displayed when KJs play Slep-Tone's
16 CDs. (Compl. ¶¶ 55, 62.) Slep-Tone further alleges that the music tracks played are copies of
17 Slep-Tone's music. So, when the Defendants play CDs during karaoke shows, the SOUND
18 CHOICE Marks are seen in connection with *Slep-Tone's* actual music and lyrics. Thus, the
19 SOUND CHOICE Marks are used in connection with Slep-Tone's music and lyrics, not those of
20 some other party.

21 The Court may consider the issue of nominative fair use on a motion to dismiss. *See In re*
22 *Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1466-67 (9th Cir. 1993); *1 800*
23 *Get Thin, LLC v. Hiltzik*, No. CV11-00505 ODW (PJWx), 2011 WL 3206486 (C.D. Cal. July 25,
24 2011) (dismissing trademark infringement claim against the Los Angeles Times for using
25 plaintiff's 1 800 GET THIN trademark in seven news articles); *Architectural Mailboxes, LLC v.*
26 *Epoch Design, LLC*, No. 10cv974 DMS (CAB), 2011 WL 1630809 (S.D. Cal. Apr. 28, 2011)
27 (dismissing trademark infringement claim based upon the defendant's use of plaintiff's OASIS
28 trademark on defendant's website where website identified plaintiff as the manufacturer of the

1 “Oasis Jr.” metal mailbox at issue).

2 The Ninth Circuit considers three factors to determine whether nominative fair use has
3 occurred. It considers whether: (1) the product was “readily identifiable” without use of the mark;
4 (2) the defendant used more of the mark than necessary; and (3) whether the defendant falsely
5 suggested he was sponsored or endorsed by the trademark holder.” *Toyota Motor Sales, U.S.A.,*
6 *Inc. v. Tabari*, 610 F.3d 1171, 1175–76 (9th Cir. 2010) (citing *Playboy Enterprises, Inc. v. Welles,*
7 *279 F.3d 796, 801* (9th Cir.2002)). This test “evaluates the likelihood of confusion in nominative
8 use cases.” *Id.* It is designed to address the risk that nominative use of the mark will inspire a
9 mistaken belief on the part of consumers that the speaker is sponsored or endorsed by the
10 trademark holder. *Id.* If the nominative use satisfies the three-factor test, it does not infringe. *Id.*

11 Here, each of the nominative fair use factors are satisfied. First, Slep-Tone admits that it is
12 not the sole provider of karaoke accompaniment tracks in the market. (Compl. ¶ 48 (“Sound
13 Choice is recognized as one of the leading producers of high quality karaoke accompaniment
14 tracks.”); Compl. ¶ 91 (referring to “other manufacturers’ tracks”).) Since Slep-Tone is not the
15 sole provider of karaoke accompaniment tracks, its CDs are not readily identifiable without
16 referring to its SOUND CHOICE Marks.

17 Second, the Defendants have not used more of the mark than necessary. The Complaint
18 alleges only that the Defendants have used the SOUND CHOICE Marks during “playback” of
19 Slep-Tone’s tracks. (Compl. ¶ 62.)

20 Third, with respect to whether “the defendant falsely suggested he was sponsored or
21 endorsed by the trademark holder,” the defendants used Slep-Tone’s mark to, at most, identify
22 Slep-Tone’s music and lyrics, not to falsely associate themselves with Slep-Tone. This element
23 does not require a defendant to have made an affirmative statement that its product or service is
24 not sponsored by the plaintiff. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 811 (9th
25 Cir. 2003). “A defendant’s use is nominative where he or she used plaintiff’s [mark] to describe
26 or identify the plaintiff’s product, even if the defendant’s ultimate goal is to describe or identify
27 his or her own product.” *Id.*, 353 F.3d 792 at 809-810. (Emphasis added.) “Where use of the
28 trade dress or mark is grounded in the defendant’s desire to refer to the plaintiff’s product as a

1 point of reference for defendant's own work, a use is nominative." *Id.* at 810.

2 In this case, Slep-Tone uses its SOUND CHOICE Marks to identify itself as the source of
3 the goods listed in its trademark registrations -- namely its CDs which contain karaoke
4 accompaniment tracks. Slep-Tone does not use its SOUND CHOICE Marks to identify itself as a
5 provider of karaoke services. Indeed, its trademark registrations do not cover karaoke services. In
6 addition, the Complaint alleges nothing more than the display of the SOUND CHOICE Marks
7 during karaoke shows, which are displayed automatically when Slep-Tone's CDs are played. The
8 SOUND CHOICE Marks are being used, if at all, to identify Slep-Tone as the source of its CDs,
9 which contain its karaoke accompaniment tracks. The SOUND CHOICE Marks are not being
10 used to identify the defendants' karaoke services. Accordingly, the Court should dismiss the
11 Complaint because it is barred by the doctrine of nominative fair use. To the extent Slep-Tone
12 complains about confusion as to whether it is the origin of the copyrighted music and lyrics, its
13 claim is barred by the United States Supreme Court's decision in *Dastar*, as set forth more fully
14 below.

15 **C. The Complaint Is Barred By *Dastar* And Should Be Dismissed.**

16 Trademark law "is concerned with the protection of symbols, elements or devices used to
17 identify a product in the marketplace and to prevent confusion as to its source." *RDF Media Ltd.*
18 *v. Fox Broad. Co.*, 372 F. Supp. 2d 556, 563 (C.D. Cal. 2005) (quoting *EMI Catalogue*
19 *Partnership v. Hill, Holliday, Connors, Cosmopulos, Inc.*, 228 F.3d 56, 63 (2d Cir. 2000)). In
20 contrast, copyright law "protects the artist's right in an abstract design or other creative work." *Id.*
21 Thus, while trademark law protects the distinctive source-identifying function of a particular mark,
22 copyright law protects the expressive content of an author's creative work as a whole. *See*
23 *Whitehead v. CBS/Viacom, Inc.*, 315 F. Supp. 2d 1, 13 (D.D.C. 2004).

24 Here, Slep-Tone impermissibly seeks to redress the unlawful copying and distribution of its
25 music and lyrics -- claims that are properly brought under the copyrights laws -- through a
26 trademark infringement action. Slep-Tone's claims are barred by the United States Supreme
27 Court's decision in *Dastar Corporation v. Twentieth Century Fox Film Corporation*, which holds
28 that the Lanham Act does not protect against confusion as to the identity of the *author* of any idea,

1 concept, or communication (*i.e.*, copyrightable expression). *See Dastar Corp. v. Twentieth*
2 *Century Fox Film Corp.*, 539 U.S. 23, 37, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003).

3 In *Dastar*, Doubleday had published a book entitled “Crusade in Europe” and granted
4 exclusive television rights to Fox, who created a television series based on the book. *See Dastar*,
5 539 U.S. at 25-27. Years went by and Fox allowed its television rights to pass into the public
6 domain. *Id.* It later reacquired them, including the right to distribute the series on video. It
7 sublicensed the right to manufacture and distribute videos of the series to SFM Entertainment and
8 New Line Home Video, Inc. (the “Fox Licensees”). *Id.* However, when the television rights were
9 in the public domain, Dastar acquired the original video tapes to the television series, revised them,
10 and began selling them without any attribution to Fox or the Fox Licensees. *Id.* The Fox
11 Licensees sued Dastar alleging that sales of the new television series constituted “reverse passing
12 off” under the Lanham Act. *Id.* The district court entered a judgment for the Fox Licensees on
13 their Lanham Act claim and the Ninth Circuit affirmed. *Id.* at 28.

14 The United States Supreme Court reversed the Ninth Circuit in a unanimous decision
15 authored by Justice Scalia. The Supreme Court noted that the Lanham Act protects trademark
16 owners against false designations of *origin* made by competitors. Justice Scalia stated: “If ‘origin’
17 refers only to the manufacturer or producer of the physical ‘goods’ that are made available to the
18 public (in this case the videotapes of the new series), Dastar was the origin. If, however, ‘origin’
19 includes the creator of the underlying work that Dastar copied [*i.e.*, the original series], then
20 someone else (perhaps Fox) was the origin of Dastar’s product.” *Id.* at 31. Justice Scalia reasoned
21 that if “origin” means the creator of the underlying copyrightable work then trademark law would
22 conflict with copyright law, which allows for the free copying and distribution of works whose
23 copyrights have passed into the public domain. Justice Scalia stated: “Assuming for the sake of
24 argument that Dastar’s representation of itself as the ‘Producer’ of its videos amounted to a
25 representation that it originated the creative work conveyed by the videos, allowing a cause of
26 action under [the Lanham Act] for that representation would create a species of mutant copyright
27 law that limits the public’s ‘federal right to ‘copy and to use’ expired copyrights.” *Id.* at 34.
28 Thus, the Supreme Court held that the word “origin” in § 43(a) of the Lanham Act (*i.e.*, 15 U.S.C.

1 § 1125(a)) “refers to the producer of the tangible goods that are offered for sale, and not to the
2 author of any idea, concept, or communication embodied in those goods.” *Id.* at 37.

3 Under *Dastar*, Slep-Tone cannot state a Lanham Act claim based on the notion that viewers
4 and participants of karaoke shows are confused as to whether Slep-Tone is the creator of the music
5 and lyrics on the CDs. The Complaint states: “The Defendants’ use of the Sound Choice Marks is
6 likely to cause confusion, or to cause mistake, or to deceive the Defendants’ customers and patrons
7 into believing that . . . the Defendants music libraries contain bona fide Sound Choice
8 accompaniment tracks.” (Compl. ¶ 241.) Accordingly, to the extent Slep-Tone is complaining
9 about confusion occurring in the marketplace as to whether it is the author of its karaoke
10 accompaniment tracks, as opposed to whether it is a source from which karaoke CDs are available
11 for purchase, Slep-Tone fails to state a claim upon which relief can be granted.

12 **II. THE COMPLAINT FAILS TO STATE A CLAIM**
13 **FOR UNFAIR COMPETITION AND SHOULD BE DISMISSED.**

14 Count II of the Complaint purports to allege a cause of action for unfair competition under
15 the Lanham Act. “When trademark and unfair competition claims are based on the same
16 [allegedly] infringing conduct, courts apply the same analysis to both claims.” *Toho Co., Ltd. v.*
17 *William Morrow and Company, Inc.*, 33 F. Supp. 2d 1206, 1210 (C.D. Cal. 1998) (citing *E. & J.*
18 *Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1288 n.2 (9th Cir. 1992)). Count II is based
19 upon the same allegedly infringing conduct as Count I. Accordingly, because Slep-Tone has failed
20 to state a claim for trademark infringement, it has also failed to state a claim for unfair competition
21 and the Complaint should be dismissed.

22 **III. THE COMPLAINT FAILS TO STATE A CLAIM FOR TRADEMARK**
23 **COUNTERFEITING AND SHOULD BE DISMISSED.**

24 Although Slep-Tone does not expressly denominate a “count” in its Complaint for
25 trademark counterfeiting, its prayer for relief requests that the Court find each of the defendants
26 liable for trademark counterfeiting and seeks enhanced statutory damages under 15 U.S.C. §
27 1117(c) for trademark counterfeiting in the amount of \$2 million per infringed mark. (Compl. at
28 pp. 36-37.)

1 The Complaint, however, fails to state a claim for trademark counterfeiting. To state a
 2 claim for trademark counterfeiting, the plaintiff must allege that: (1) the defendant infringed a
 3 registered trademark in violation of 15 U.S.C. § 1114; and (2) the defendant intentionally used the
 4 mark knowing it was a counterfeit, as the term counterfeit is defined in 15 U.S.C. § 1116. *See*
 5 *Too, Inc. v. TJX Companies, Inc.*, 229 F. Supp. 2d 825, 837 (S.D. Ohio 2002) (citing *Babbit*
 6 *Electronics, Inc. v. Dynascan Corp.*, 38 F.3d 1161, 1180 (11th Cir. 1994)). A “counterfeit mark”
 7 is defined in 15 U.S.C. § 1116 as: “a counterfeit of a mark that is registered on the principal
 8 register in the United States Patent and Trademark Office for such goods or services sold, offered
 9 for sale, or distributed” 15 U.S.C. § 1116(d)(1)(B)(i).

10 Here, the Complaint fails to state a claim for trademark counterfeiting because the SOUND
 11 CHOICE Marks do not meet the statutory definition of a “counterfeit mark.” To meet that
 12 definition, “[s]ection 1116(d) requires that the mark in question be (1) a non-genuine mark
 13 identical to the registered, genuine mark of another, where (2) the genuine mark was registered for
 14 use on the same goods to which the infringer applied the mark.” *Louis Vuitton Malletier, S.A. v.*
 15 *Akanoc Solutions, Inc.*, 658 F.3d 936, 945-46 (9th Cir. 2011) (emphasis added). The SOUND
 16 CHOICE Marks satisfy the first part of the test because they are each a “non-genuine mark” that is
 17 “identical to the registered, genuine mark” of Slep-Tone when used by KJs who have illegally
 18 copied Slep-Tone’s CDs. However, the SOUND CHOICE Marks do not meet the second part of
 19 the test because they do not cover the same goods and services allegedly offered by the
 20 defendants. The Complaint identifies Slep-Tone’s U.S. trademark registrations for the SOUND
 21 CHOICE Marks as United States Trademark Registration Nos. 1,923,448 and 2,000,725. (Compl.
 22 ¶¶ 95-96.) Slep-Tone’s trademark registrations permit use of the SOUND CHOICE Marks on
 23 “pre-recorded magnetic audio cassette tapes and compact discs containing musical compositions
 24 and compact discs containing video related to musical compositions.” *See*
 25 <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=74561912> (listing use of SOUND CHOICE
 26 on “pre-recorded magnetic audio cassette tapes and compact discs containing musical
 27 compositions and compact discs containing video related to musical compositions”);
 28 <http://tarr.uspto.gov/servlet/tarr?regser=serial&entry=74627124> (listing use of SOUND CHOICE

1 on “pre-recorded magnetic audio cassette tapes and compact discs containing musical
2 compositions and compact discs containing video related to musical compositions.”² The
3 defendants are accused of using SOUND CHOICE in connection with karaoke services. (Compl.
4 ¶¶ 233 (“Each of the Defendants is accused of committing acts of infringement, unfair
5 competition, and deceptive and unfair trade practices in substantially the same way, namely,
6 through the use of counterfeit karaoke tracks to perform karaoke-related services.”).)
7 Accordingly, the SOUND CHOICE Marks are not “counterfeit marks” under the circumstances
8 alleged in the Complaint. The Complaint fails to state a claim for trademark counterfeiting
9 because the SOUND CHOICE Marks do not meet the statutory definition of “counterfeit marks”
10 where, as here, the goods and services they cover are different from those allegedly offered by the
11 defendants.

12 CONCLUSION

13 For the foregoing reasons, the Caesars Defendants respectfully request that the Court
14 dismiss the Complaint.

15 Dated this 21st day of March, 2012.

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² The Court may properly consider Slep-Tone’s trademark registrations when ruling on a motion to dismiss because Slep-Tone’s trademark registrations are public records. *See Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (a “court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment, as long as the facts noticed are not subject to reasonable dispute.”); *see also Journal Commun’cs, Inc. v. Sabo*, No. 3:07-00605, 2008 WL 821524, at *1 n.3 (M.D. Tenn. March 26, 2008) (“The Court may properly consider these [trademark] registrations in determining Crye-Leike’s Rule 12(b)(6) motion.”).

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2012, I filed the foregoing document entitled MOTION TO DISMISS BY DEFENDANTS CAESARS ENTERTAINMENT CORP., CORNER INVESTMENT CO., LLC, HARRAH'S IMPERIAL PALACE CORP., AND HARRAH'S LAS VEGAS, INC., with the Clerk of the Court via the Court's CM/ECF system, which sent electronic notice to the following:

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I hereby further certify that on March 21, 2012, I caused paper copies of the same to be served by first-class, United States, mail upon the following non-CM/ECF participants:

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