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7 *and NP Palace LLC*

8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10
11 SLEP-TONE ENTERTAINMENT
CORPORATION,

12 Plaintiffs,

13 v.

14 ELLIS ISLAND CASINO & BREWERY;
15 FAME OPERATING COMPANY, INC.;
HOT SHOTS BAR AND GRILL (a/k/a
16 KELLEY'S PUB); THE PUB, LLC; JOE;
DAN; BIG NAILS, LLC; BEAUTY BAR;
17 CAFÉ MODA; CAFÉ MODA, LLC;
WILLIAM CARNEY; LAS VEGAS DJ
18 SERVICE; JOHNNY VALENTI; E
STRING GRILL & POKER BAR; PCA
19 TRAUTH, LLC; KARAOKE LAS
VEGAS; JACK GREENBACK; BILL'S
20 GAMBLIN' HALL & SALOON;
CORNER INVESTMENT COMPANY,
21 LLC; IMPERIAL PALACE HOTEL &
CASINO; HARRAH'S IMPERIAL
22 PALACE CORPORATION; ROLL 'N'
MOBILE DJ'S AND KARAOKE TOO;
23 KENNY ANGEL; PT'S PLACE;
GOLDEN-PT'S PUB CHEYENNE-
24 NELLIS 5, LLC; PT'S PUB; GOLDEN-
PT'S PUB WEST SAHARA 8, LLC; PT'S
25 GOLD; GOLDEN-PT'S PUB
CENTENNIAL 32, LLC; GOLDEN-PT'S
26 PUB STEWART-NELLIS 2, LLC;
GOLDEN TAVERN GROUP, LLC;
27 STEVE & RAY KARAOKE; STEVE
RAY; LEGENDS CASINO;
28 PUGDAWGS, LLC; STARMAKER

CASE NO.: 2:12-cv-00239-KJD-RJJ

**DEFENDANTS NP BOULDER LLC AND
NP PALACE LLC'S MOTION TO
DISMISS PURSUANT TO RULE 12(b)(6)
AND MOTION TO DISMISS AND/OR
SEVER PURSUANT TO RULES 20 AND 21**

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1 KARAOKA; DEBBIE HARMS;
2 DECATUR RESTAURANT & TAVERN;
3 DDRT, LLC; PUTTERS;
4 LISA/CARRISON LTD.; DJ TARA KING
5 PRODUCTIONS; TARA KING; KIXX
6 BAR; BOULDER STATION CASINO;
7 NP BOULDER, LLC; NPPALACE, LLC;
8 PALACE STATION; DANSING
9 KARAOKE; KIRK; GILLEY'S LAS
10 VEGAS; TREASURE ISLAND;
11 TREASURE ISLAND, LLC; HALF
12 SHELL SEAFOOD AND GAMING;
13 HALF SHELL, LLC; JAMES BELLAMY;
14 MEGA-MUSIC PRODUCTIONS; MR.
15 D'S SPORTS BAR; SPORTS BAR, LLC;
16 RICK DOMINGUEZ; SOUND SELECT;
17 ISLAND GRILL; OFFICE 7 LOUNGE &
18 RESTAURANT, INC.; JAKE'S BAR;
19 DOC, G. & G., INC.; MIKE CORRAL;
20 DAVE CORRAL; SHOWTYME
21 KARAOKE & DJ; CALICO JACK'S
22 SALOON; MIKE R. GORDON; RED
23 LABEL LOUNGE; RED LABEL BAR,
INC.; TERRY CICCI; TERRY-OKE
KARAOKE; KJ'S BAR & GRILL; L.T.
BOND, INC.; TIM MILLER; VISION &
SOUND ENTERTAINMENT;
THUNDERBIRD LOUNGE AND BAR;
ARUBA HOTEL AND SPA;
IRVINGTON PROPERTIES, LLC;
THUNDERBIRD BAR & LOUNGE, LLC;
AUDIO THERAPY DJ; MATTE
McNULTY (a/k/a "DJ Matte"); AUDIO
THERAPY; GSTI HOLDINGS, LLC;
GOLD SPIKE HOTEL & CASINO;
GOLD SPIKE HOLDINGS, LLC; MARDI
GRAS LOUNGE – BEST WESTERN;
THE NEVADIAN, LLC; BEST
WESTERN MARDI GRAS INN; J.P.P.J.
OF NEVADA, INC.; HARRAH'S LAS
VEGAS; CAESAR'S ENTERTAINMENT
CORPORATION; TJ'S ALL-STAR
KARAOKE; JOHN MENNITI; and JOHN
DOES NOS. 1-10 INCLUSIVE,
IDENTITIES UNKNOWN,

Defendants.

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Defendants NP Boulder LLC and NP Palace LLC,¹ (collectively referred to herein as the “Station Defendants”), by and through their attorneys of record, the law firm of Brownstein Hyatt Farber Schreck, LLP, respectfully submit their Motion to Dismiss Pursuant to Rule 12(B)(6) and Motion to Dismiss and/or Sever Pursuant to Rules 20 and 21 (“Motion”). The Station Defendants are entitled to dismissal of Plaintiff Slep-Tone Entertainment Corporation’s (“Plaintiff”) claims for Trademark Infringement and Unfair Competition under the Lanham Act pursuant to Rule 12(b)(6), as well as Plaintiff’s request for counterfeiting damages, because Plaintiff’s allegations fail as a matter of law. Alternatively, the Station Defendants seek dismissal of the Complaint pursuant to Rules 20 and 21, because there is no common transaction, occurrence or series of transactions or occurrences underlying the named defendants’ alleged conduct in this matter.

This Motion is supported by the following Memorandum of Points and Authorities, the record on file herein, and any oral argument the Court may entertain.

DATED this 2nd day of April, 2012.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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¹ “Kixx Bar,” “Boulder Station Casino” and Palace Station,” referenced in the Complaint, are not entities. NP Boulder LLC and NP Palace LLC are the corporate parties properly named in the Complaint, although Plaintiff erroneously names “NPPalace LLC,” omitting the space between “NP” and “Palace.”

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this action for alleged trademark infringement, Plaintiff names an astounding *ninety-five* defendants, including the two Station Defendants. Yet, Plaintiff fails to articulate each defendant's allegedly infringing conduct or give any indication as to how the defendants' alleged conduct is related. That is, Plaintiff rests upon blanket allegations that a number of unaffiliated "karaoke DJs" ("KJs") infringe upon its trademark SOUND CHOICE, which Plaintiff uses in connection with its manufacture of karaoke discs, while performing at various unrelated venues.

This type of pleading is consistent with the agenda of an intellectual property "troll" who, having weak or unprofitable claims, files a single suit against an army of defendants in an attempt to elicit quick settlements and avoid paying the filing fees necessary to state separate claims against each set of defendants. Here, Plaintiff goes beyond mere misjoinder, naming the Station Defendants as perceived "deep pockets" without any regard for whether they engaged in wrongful activity.

Plaintiff's pleading tactics subject the complaint to dismissal on two grounds. First, Plaintiff fails to state a claim against the Station Defendants, because its vague and conclusory allegations merely claim that the KJs "ripped off" its material, and not that the Station Defendants directly or secondarily infringed its mark. In fact, Plaintiff fails to allege *any* conduct that connects *any* KJ or its activities to the Station Defendants. Plaintiff's inartfully pled and cumbersome Complaint fails to state a claim for relief that is plausible on its face against the Station Defendants and, accordingly, should be dismissed pursuant to Rule 12(b)(6).

Second, the claims against the Station Defendants should be dismissed or severed for Plaintiff's improper joinder of unrelated defendants under the umbrella of a single Complaint. The Station Defendants' allegedly infringing conduct is necessarily unrelated to the conduct of other defendants because the KJs are industry competitors who perform their services at different venues and under different terms. Because no "common transaction, occurrence or series of transactions or occurrences" links the defendants' alleged conduct, each defendant (or set of

1 defendants whose conduct does arise from the same transactions) is entitled to be named in a
 2 separate lawsuit.

3 II. DISCUSSION

4 A. The Complaint Fails To State A Claim Under The Lanham Act And Should Be 5 Dismissed Pursuant To Federal Rule Of Civil Procedure 12(b)(6).

6 One consequence of joining an unreasonable number of unrelated defendants in this action
 7 is that Plaintiff fails to allege sufficient facts as to each defendant to survive a motion to dismiss
 8 under Rule 12(b)(6).² The Court should grant such a motion where the complaint's factual
 9 allegations, even if proven, do not entitle the plaintiff to relief. *Oregon Natural Resources*
 10 *Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991). Although all factual allegations are
 11 assumed to be true, and all reasonable inferences drawn in a plaintiff's favor, the Court need not
 12 accept a complaint that fails to state a claim that is "plausible on its face." *Moss v. U.S. Secret*
 13 *Serv.*, 572 F.3d 962, 972 (9th Cir. 2009). As the Supreme Court has explained, "a plaintiff's
 14 obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and
 15 conclusions." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal alteration
 16 omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* Rather,
 17 the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

18 Here, Plaintiff's Complaint fails to state a claim upon which relief can be granted. In
 19 order to state a claim for trademark infringement, Plaintiff must either state a claim for direct or
 20 secondary infringement. However, the Complaint is totally devoid of facts specific to the Station
 21 Defendants that would support a claim of direct infringement. Moreover, Plaintiff fails to state a
 22 claim under either of the two theories of secondary liability for trademark infringement by failing
 23

24 ² The Complaint alleges two claims under the Lanham Act — (1) Trademark Infringement under
 25 15 U.S.C. § 1114 and (2) Unfair Competition under 15 U.S.C. § 1125. The standard governing
 26 liability for each of these claims is essentially the same. *See Int'l Order of Job's Daughters v.*
 27 *Lindeburg and Co.*, 633 F.2d 912, 915 (9th Cir. 1981) (stating that trademark infringement is a
 28 form of unfair competition, and because "[b]oth statutes preclude the use of another's trademark
 in a manner likely to confuse the public about the origin of goods," the hallmark of both inquiries
 is consumer confusion). Accordingly, this Motion addresses the two claims collectively in
 positing that the Complaint is insufficiently pleaded.

1 to allege the requisite level of knowledge of the infringing activity or control over the direct
2 infringement.

3 Accordingly, the Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to
4 comply with the pleading standard set forth in Rule 8(a). Also, because Plaintiff's request for
5 damages for counterfeiting under the Lanham Act fails as a matter of law, the Station Defendants
6 request that the Court dismiss any counterfeiting claim.³

7 i. *Plaintiff Fails To State A Plausible Claim For Direct Infringement Against*
8 *The Station Defendants In The Complaint.*

9 No claim for direct liability against the Station Defendants is possible, let alone plausible,
10 under the facts alleged in the Complaint. Direct liability attaches to the entity alleged to have
11 actually committed the infringing act. *See Grocery Outlet Inc. v. Albertson's Inc.*, 497 F.3d 949,
12 951 (9th Cir. 2007) ("To establish infringement of a registered trademark, the trademark holder
13 must show that it is (1) the owner of a valid, protectable mark, and (2) that the alleged infringer is
14 using a confusingly similar mark.") (citations omitted); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76
15 F.3d 259, (9th Cir. 1996) (describing "direct trademark infringement" as attaching to "those who
16 actually manufacture or sell infringing materials"). To successfully state a claim, the plaintiff
17 must allege that the defendant used the confusingly similar mark "in commerce . . . in connection
18 with the sale, offering for sale, distribution, or advertising" of goods or services. 15 U.S.C.
19 1114(1).

20 Here, while the Complaint nebulously alleges that the Station Defendants "operate a
21 karaoke system" and "display" the SOUND CHOICE mark (Compl., Dkt. 1 at ¶¶ 163-64, 166-
22 67), it does not allege that the Station Defendants themselves committed the allegedly infringing
23 (though unspecified) act(s); rather, the Complaint focuses on the conduct of the KJs, who "play
24 karaoke songs using compact disks containing files written in one of two special encoded formats
25 . . . in which the disk contains the music and the lyrics, which will display on a screen." (Compl.,
26 Dkt. 1 at ¶ 50.) The Complaint alleges that the KJs engaged in copying, swapping, cloning and

27 _____
28 ³ Plaintiff fails to distinctly articulate a claim for counterfeiting but requests statutory damages for
counterfeiting in its prayer for relief. (Compl., Prayer for Relief, ¶ F.)

1 displaying of the purportedly trademarked materials. (*See* Compl. at ¶ 51–52.) It is the KJs who
2 allegedly “provide the karaoke music and equipment for playback, entertain the assembled crowd
3 for warm-up purposes, and organize the karaoke show by controlling access to the stage, setting
4 the order of performance, and operating the karaoke equipment.” (Compl. at ¶ 63.)

5 In sum, the Complaint fails to allege any specific conduct by the Station Defendants
6 amounting to use of Plaintiff’s mark in commerce in connection with any goods or services.
7 Accordingly, even assuming the truth of the allegations in the Complaint, Plaintiff cannot proceed
8 on a theory of direct infringement against the Station Defendants; the facts indicate that some
9 unspecified KJ committed an allegedly infringing act, which Plaintiff now attempts to attribute to
10 the Station Defendants. This is by definition, as discussed below, a claim for secondary liability.
11 However, under either a contributory or vicarious secondary liability theory, the Complaint fails
12 to allege sufficient factual support to plead any claim plausible on its face.

13 ii. *Plaintiff Fails To State A Claim For Contributory Or Vicarious Trademark*
14 *Infringement Under The Facts Alleged.*

15 Assuming, for purposes of this Motion alone, that the facts as alleged in the Complaint are
16 true, the Complaint nonetheless fails to sustain a claim for secondary liability under the Lanham
17 Act for either contributory or vicarious infringement. To successfully state a claim for
18 contributory trademark infringement, a plaintiff must allege actual or constructive knowledge and
19 control over the direct acts of trademark infringement. *Inwood Lab., Inc. v. Ives Lab., Inc.*, 456
20 U.S. 844, 853–54, 102 S. Ct. 2182 (1982); *Louis Vuitton Malletier, S.A. v. Akanoc Sol’ns, Inc.*,
21 658 F.3d 936, 942 (9th Cir. 2011) (holding that where a defendant provides “services rather than
22 a product,” a plaintiff must establish that the defendant “had direct control and monitoring of the
23 instrumentality used by a third party to infringe”).

24 Vicarious liability for trademark infringement requires “a finding that the defendant and
25 the infringer have an apparent or actual partnership, have authority to bind one another in
26 transactions with third parties or exercise joint ownership or control over the infringing product.”
27 *Bangkok Broadcasting*, 742 F. Supp. 2d at 1118 (quoting *Perfect 10, Inc. v. Visa Int’l*, 494 F.3d
28

1 788, 807 (9th Cir. 2007)). Thus, both theories of secondary liability require that the plaintiff
 2 plead some level of actual or apparent knowledge of and/or control over the infringement.

3 Here, Plaintiff has met none of these burdens. Plaintiff has failed to allege that the Station
 4 Defendants possessed any actual or constructive knowledge of the infringement; or had any
 5 partnership with, authority to bind, or ability to exercise control over any specific KJ. Rather,
 6 Plaintiff merely makes the conclusory statement that:

7 [b]ased on the popularity of SLEP-TONE's music and the size of the Defendants'
 8 respective libraries . . . the Plaintiff has a good-faith belief that discovery will
 9 show that each of the Defendants (a) is in possession of unauthorized counterfeit
 10 goods bearing the Sound Choice Marks, or (b) ***knowingly benefits from and/or
 has the capacity to control the infringing conduct of others***"

11 (Compl. at ¶ 232) (emphasis added).

12 In fact, Plaintiff fails to allege ***any*** conduct that connects ***any*** KJ to the Station
 13 Defendants. Plaintiff inappropriately aggregates all the named defendants' conduct into
 14 generalities, and the Federal Rules of Civil Procedure clearly bar such tactics. *Twombly*, 550 U.S.
 15 at 555 (holding that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'
 16 requires more than labels and conclusions"); *see also Jackson v. Nelson*, 405 F.2d 872, 873 (9th
 17 Cir. 1968) (affirming dismissal where the complaint did not specify which defendants took which
 18 actions); *Lincoln v. Silverstein*, No. SACV 09-1072 DOC EX, 2011 WL 318318, at *2 (C.D. Cal.
 19 Jan. 27, 2011) (holding that, where a complaint implicates multiple defendants, a plaintiff fails to
 20 meet the pleading standard of Rule 8(a) where the allegations are "directed to all defendants
 21 generally and thus fail to give each defendant fair notice of the claims asserted against him")
 22 (citing *Twombly*, 127 S. Ct. at 1968); *Tompkins v. Bank of Am. Nat'l Ass'n*, No. CV-09-2014-
 23 PHX-GMS, 2010 WL 396367, at *6 (D. Ariz. Jan. 28, 2010) ("The Complaint generally refers to
 24 '[d]efendants' in all allegations, but this general allegation is insufficient to put *each [d]efendant*
 on notice of the particular claims against it.") (emphasis in original).

25 Plaintiff's other allegations likewise fail under Rule 12(b)(6) because they fail to put the
 26 Station Defendants on notice of their allegedly infringing activity. Plaintiff alleges that "SLEP-
 27 TONE's investigators observed each of the defendants possessing, using or authorizing or
 28 benefiting from unauthorized counterfeit copies of at least one work bearing the Sound Choice

1 Marks.” (Compl. at ¶ 98; *see also* Compl. at ¶ 230.) Broad allegations such as these do not put
2 any particular defendant on notice because they fail to specify which act (e.g., “possessing, using
3 or authorizing or benefiting”) the defendant took or which “work bearing the Sound Choice
4 Marks” the defendant displayed. Additionally, the Complaint alleges that “[e]ach of the
5 [d]efendants is accused of committing acts of infringement, unfair competition, and deceptive and
6 unfair trade practices in substantially the same way” (Compl. at ¶ 233), without describing
7 any individual conduct. Plaintiff does not even attempt to describe the nature or source of the
8 allegedly infringing materials, but merely alleges that “the counterfeit karaoke tracts obtained or
9 made by [d]efendants all originated, directly or indirectly in an unbroken sequence, from the . . .
10 master recordings belonging to the Plaintiff.” (Compl. at ¶ 233.) Accordingly, the Court should
11 dismiss the Complaint against the Station Defendants.

12 iii. *Plaintiff’s Request For Counterfeiting Damages Fails As A Matter Of Law.*

13 Even if Plaintiff could allege conduct amounting to direct, contributory or vicarious
14 liability against the Station Defendants, it cannot claim the heightened statutory damages afforded
15 counterfeiting plaintiffs as a matter of law. (Compl., Prayer For Relief, ¶ F, requesting
16 \$2,000,000 per trademark infringed, per defendant.) While the counterfeiting provisions of the
17 Lanham Act provide for statutory damages in a range of between \$1,000 and \$2,000,000 for
18 counterfeit marks as a court considers “just,” and depending on whether the Court finds the
19 infringement willful (*see* 17 U.S.C. § 117(b)-(c)), Congress limited the availability of these
20 damages to narrow circumstances, which are not present here.

21 Specifically, in order to sustain a counterfeiting claim, a plaintiff must allege and prove
22 that the defendant is using the allegedly counterfeit mark in connection with the exact goods and
23 services set forth in its registration. *Louis Vuitton Malletier, S.A. v. Akanoc Soutions, Inc.*, 658
24 F.3d 936, 945–46 (9th Cir. 2011); *see also* 15 U.S.C § 1116(d)(1)(B)(i) (limiting the definition of
25 “counterfeit” to the counterfeit of a mark used in connection with the “goods or services sold,
26 offered for sale, or distributed” under the mark). Thus, a plaintiff cannot succeed in claiming that
27 an infringing mark is a counterfeit for purposes of heightened statutory damages if the allegedly
28 infringing goods and services differ from those listed in its registration.

1 Here, Plaintiff's exclusive rights are limited to following the goods enumerated in its
2 registrations: "pre-recorded magnetic audio cassette tapes and compact discs containing musical
3 compositions and compacts containing video related to musical compositions." (Compl. ¶¶ 95-
4 96, citing U.S. Reg. Nos.1,923,448 and 2,000,725.) Plaintiff does not allege that the Station
5 Defendants use its marks in commerce in connection with the sale or distribution of compact
6 discs to others; rather, Plaintiff alleges that the Station Defendants "operate a karaoke system to
7 produce a karaoke show" where the allegedly infringing "accompaniment tracks" were used.
8 (Compl. ¶¶ 163, 166.) In other words, Plaintiff does not (and cannot reasonably) allege that the
9 Station Defendants have attempted to pass off its discs to consumers as if the discs were their
10 own. Thus, if the Court does not find that Plaintiff's claims against the Station Defendants fail as
11 a matter of law, Plaintiff's damages under the Lanham Act must be limited to those generally
12 available for trademark infringement under 15 U.S.C. 1117(a).

13 B. Plaintiff Has Improperly Joined Unrelated Defendants In This Action And The
14 Complaint Should Be Dismissed Pursuant to Federal Rules of Civil Procedure
15 20(a)(2) and 21.

16 Plaintiff has improperly joined the named defendants named in this matter. Federal Rule
17 of Civil Procedure 20(a)(2) allows a plaintiff to join multiple defendants in one action if two
18 conditions are met — (1) plaintiff asserts a right to relief against the defendants "jointly,
19 severally, or in the alternative with respect to or arising out of the same transaction, occurrence,
20 or series of transactions or occurrences[,] and (2) "any question of law or fact common to all
21 defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). However, where a plaintiff
22 haphazardly joins defendants, unrelated both in terms of identity and conduct, in flagrant
23 violation of Rule 20, it is appropriate to order the institution of "separate actions in conformity
24 with the Federal Rules." *Bravado Int'l Group v. Cha*, No. 09-9066, 2010 WL 2650432, at *6
25 (C.D. Cal. June 30, 2010); *see Arista Records LLC v. Does 1-4*, 589 F. Supp. 2d 151, 155 (D.
26 Conn. 2008) (addressing the joinder issue in the context of pseudonymous defendants and
27 concluding that, absent allegations of conspiracy or joint action, commission of copyright
28 infringement using the same Internet service provider was insufficient to satisfy Rule 20). To

1 hold otherwise would allow plaintiffs to avoid paying filings fees for separate actions against
2 each of the improperly joined defendants. *Id.*

3 Here, no common “transaction, occurrence, or series of transactions or occurrences” exists
4 upon which Plaintiff may base the joinder of these ninety-five named defendants. Fed. R. Civ. P.
5 20(a)(2). Accordingly, for the reasons set forth below, the Station Defendants request that the
6 Court dismiss them from this action without prejudice.

7 i. *The Ninety-five Named Defendants’ Alleged Infringement Does Not Arise*
8 *Out Of The Same Transaction, Occurrence, Or Series Of Transactions Or*
Occurrences Under Rule 20(a)(2).

9 Plaintiff’s joinder of all the named defendants is inappropriate here under the first prong
10 of Rule 20(a)(2), because no common transaction or occurrence links the defendants’ alleged
11 conduct in this matter. In the Ninth Circuit, the phrase “same transaction, occurrence, or series of
12 transactions or occurrences” refers to “similarity in the factual background of a claim.” *Coughlin*
13 *v. Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997). It requires “a degree of factual commonality
14 underlying the claims,” which typically means that a plaintiff “must assert rights that arise from
15 *related activities.*” *Innovus Prime, LLC v. LG Electronics, Inc.*, No. C 11-04223 JW, 2012 WL
16 161207, at *2 (N.D. Cal. Jan. 18, 2012) (internal citations omitted) (emphasis in original).

17 In intellectual property cases, “allegations against multiple and unrelated defendants for
18 acts of patent, trademark, and copyright infringement do not support joinder under Rule 20(a).”
19 *Golden Scorpio Corp. v. Steel Horse Bar & Grill et al.*, 596 F. Supp. 2d 1282, 1285 (D. Ariz.
20 2009). Accordingly, even where all defendants allegedly infringed the same trademark, “[a]
21 finding of a common question of law or fact does not necessarily mean that the claims against the
22 various defendants arise from a common transaction or occurrence.” *Id.*; *see also Interval*
23 *Licensing, LLC v. AOL, Inc.*, No. C10-1385 MJP, 2011 WL 1655713, at *1 (W.D. Wash. April
24 29, 2011) (“It is difficult to find joinder proper when the only shared facts alleged against
25 multiple defendants is that each infringed the same patent.”). Indeed, many times “[e]ach
26 [d]efendant operates differently and offers products that often compete with those of the other
27 [d]efendants.” *Interval Licensing*, 2011 WL 1655713, at * 2; *see Wynn v. National Broadcasting*
28 *Co., Inc.*, 234 F. Supp. 2d 1067, 1094 (C.D. Cal. 2002) (finding improper joinder where, in part,

1 nature of defendants as “unaffiliated competitors in the industry” would result in prejudice to
 2 joint trial); *Optimum Power Solutions LLC v. Apple Inc.*, No. C 11-1509 SI, 2011 WL 4387905,
 3 at *3 (N.D. Cal. Sept. 20, 2011) (finding improper joinder, in part, because plaintiff failed to
 4 allege any action in concert; “indeed defendants appear to be ardent competitors of one another in
 5 the marketplace for their products”).

6 In fact, if a plaintiff sues “unrelated and competing defendants for their own independent
 7 acts of [] infringement, and alleges that those defendants were *acting separately*, such conduct
 8 cannot involve or arise out of the same transaction, occurrence, or series of transactions or
 9 occurrences pursuant to Fed. R. Civ. P. 20(a)(2).” *Innovus Prime*, 2012 WL 161207, at *2
 10 (internal citations omitted) (emphasis in original); see *Wynn*, 234 F. Supp. 2d at 1094 (finding
 11 prejudice to defendants in joining of competitors). Where a plaintiff fails to allege that
 12 defendants knew of the other defendants’ transactions or illegal purposes, “each transaction
 13 represents a separate and independent act.” *Heritage Pac. Financial, LLC v. Cole*, No. CV 10-
 14 0394 PSG (JEMx), 2010 WL 1838106, at *2 (C.D. Cal. May 3, 2010) (quoting *DIRECTV v.*
 15 *Loussaert*, 218 F.R.D. 639, 643 (S.D. Iowa 2003).

16 Applying Rule 20 in this context, the Western District of North Carolina recently ruled in
 17 favor of a defendant on a Rule 20 motion to dismiss, in a case brought by this Plaintiff against
 18 several unrelated defendants for trademark infringement of the SOUND CHOICE mark related to
 19 certain KJs’ use of karaoke discs. See *Slep-Tone Entmt Corp. v. Mainville, et al.*, No. 3:11-cv-
 20 00122, 2011 WL 4713230 (W.D. Wash. Oct. 6, 2011). There, the moving defendant argued that
 21 Slep-Tone failed to show any relationship between the named defendants’ actions or
 22 instrumentalities, and the court agreed. *Id.* at *4. In so holding, the court rejected Slep-Tone’s
 23 argument that violation of the same trademark linked defendants by a common transaction or
 24 occurrence for the purpose of joinder. *Id.* at *4. The court found:

25 Obviously, the infringement of any trademark, copyright, or patent originates
 26 from a common ultimate source, that being the trademark, copyright, or patent
 27 itself. Here, [d]efendants may have committed the same type of violation in the
 28 same way, but again, that does not link defendants together for purposes of
 joinder There is no allegation that the twenty-three [d]efendants sued here
 acted in concert. ***Although each [d]efendant allegedly infringed upon the same
 trademark, each [d]efendant allegedly did so separately, in time and place, from***

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1 *the other [d]efendants with no knowledge that the other [d]efendants were also*
2 *engaged in any alleged infringement of their own.*

3 *Id.* (emphasis added) (internal citations and quotations omitted).⁴ Rather, it appeared that
4 Plaintiff instituted a collective suit, which should have been filed as separate actions against each
5 named defendant, “for no apparent reason except to avoid paying filing fees.” *Id.* at *5.

6 Even taking all of Plaintiff’s allegations as true, the same conclusion is warranted here.
7 Although the Complaint alleges that each of the defendants violated the same SOUND CHOICE
8 trademark, the defendants, many of which are competitors, necessarily did so separately from the
9 other defendants both in time and place. Plaintiff does not allege joint and several liability
10 amongst all the defendants, nor does Plaintiff allege that each of the defendants had knowledge of
11 the others’ alleged infringements. As in *Mainville*, it appears that Plaintiff has instituted a
12 massive lawsuit against these defendants for no reason other than that it wishes to avoid paying
13 the required filing fees. Its joinder of the defendants in a single suit is therefore inappropriate
14 under Rule 20(a)(2).

15 ii. *Because The Joinder Is Inappropriate Under Rule 20(a)(2), The Proper*
16 *Result Is Dismissal Under Rule 21.*

17 Joinder being inappropriate under Rule 20(a)(2), the Court should exercise its discretion
18 pursuant to Rule 21 and dismiss the Station Defendants from this action. In circumstances such
19 as these, where a plaintiff has improperly joined parties, “the court may at any time, on just terms,
20 add or drop a party . . . [or] may also sever any claim against a party.” Fed. R. Civ. P. 21. “An
21 accepted practice under Rule 21 is to dismiss all defendants except for the first defendant named
22 in the complaint, . . . and dropping a defendant for improper joinder operates as a dismissal
23 without prejudice.” *Bravado Int’l*, 2010 WL 2650432, at *5; see also *Coughlin*, 130 F.3d at
24 1350 (holding that “the court can generally dismiss all but the first named plaintiff without

25 ⁴ The Court in *Mainville* also declined to apply the logic from *MyMail Ltd. v. Am. Online, Inc.*,
26 223 F.R.D. 455 (E.D. Tex. 2004), which Slep-Tone cited for the proposition that joinder should
27 be allowed where “a ‘nucleus of operative facts or law’ common to the defendants” exists. 2011
28 WL 4713230, at * 4. At least one court in the Ninth Circuit has also explicitly declined to follow
the *MyMail* standard as inconsistent with our Circuit’s law. See, e.g., *Interval Licensing*, 2011
WL 1655713, at * 2 (“This [the *MyMail* holding] is not the state of the law in the Ninth Circuit as
to Rule 20.”).

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1 prejudice to the institute of new, separate lawsuits”); *Innovus Prime*, 2012 WL 161207, at * 3
2 (“[C]ourts in the Northern District of California routinely dismiss defendants in similar patent
3 cases involving misjoinder.”); *Heritage Pac. Financial*, 2010 WL 1838106, at *3 (“An accepted
4 practice under Rule 21 is to dismiss the parties that have been improperly joined [which]
5 operates as a dismissal without prejudice.”). This result is especially necessary where “the
6 potential prejudice to the individual defendants if their cases were to be tried together, given that
7 the proof against each of them is separate and unique, is patently obvious.” *Mainville*, 2011 WL
8 4713230, at *5; *see also Wynn*, 234 F. Supp. 2d at 1094 (finding prejudice to defendants in
9 joining of competitors whose cases would require presentation of independent facts); *Bravado*
10 *Int’l*, 2010 WL 2650432, at *6 (granting motion to dismiss where the plaintiff “lumped all
11 [d]efendants together . . . and it is not the Court’s responsibility to sort them out for [p]laintiff.”).

12 The facts before the Court in this case demonstrate the need for dismissal. Plaintiff has
13 joined an unreasonable number of defendants in this matter without alleging any connection
14 between them. Indeed, many of the defendants are competitors, and the proof against each in the
15 event that the case goes forward will be “separate and unique,” meaning the potential prejudice to
16 the individual defendants in trying the cases together is “patently obvious.” This argument
17 dovetails with Station Defendants’ request for dismissal based on Rule 12(b)(6), in that Plaintiff
18 has failed to allege facts to distinguish each of the defendants’ particular conduct. It is not the
19 Court’s responsibility, nor is it defendants’, to fill in the gaps. Plaintiff should be required to file
20 individual, specific Complaints against each defendant (or set of defendants as appropriate), pay
21 the required filing fees and generally abide by the federal procedural rules. Accordingly,
22 dismissal is warranted.

23 Therefore, in light of both the pleading deficiencies and the improper joinder of parties,
24 the Station Defendants urge the Court to dismiss the Complaint against them.

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28

1 **III. CONCLUSION**

2 For the foregoing reasons, the Station Defendants respectfully urge the Court to dismiss
3 the Complaint against them based on Federal Rules of Civil Procedure 12(b)(6), 20(a)(2) and/or
4 21.

5 DATED this 2nd day of April, 2012.

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7
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CERTIFICATE OF SERVICE

Pursuant to Fed.R.Civ.P.5(b), and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of Brownstein Hyatt Farber Schreck, LLP, and that a true and correct copy of the DEFENDANTS NP BOULDER LLC AND NP PALACE LLC’S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) AND MOTION TO DISMISS AND/OR SEVER PURSUANT TO RULES 20 AND 21 was served via electronic service, via CM/ECF, on this 2nd day of April, 2012 and to the address(es) shown below:

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I further certify that I am familiar with the firm’s practice of collection and processing documents for mailing; that in accordance therewith, I caused DEFENDANTS NP BOULDER

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1 LLC AND NP PALACE LLC'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) AND
2 MOTION TO DISMISS AND/OR SEVER PURSUANT TO RULES 20 AND 21 to be deposited
3 with the U.S. Postal Service at Las Vegas, Nevada, in a sealed envelope, with first-class postage
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