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9 Starmaker Karaoke and Debbie Harm

10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 SLEP-TONE ENTERTAINMENT
CORPORATION,

14 Plaintiff,

15 vs.

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

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

**DEFENDANTS' HOT SHOTS BAR AND
GRILL, THE PUB, LLC, JOE AND
DAN, DECATUR RESTAURANT &
TAVERN, DDRT, LLC, STARMAKER
KARAOKE AND DEBBI HARM'S
MOTION TO DISMISS**

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1 CASINO; PUGDAWIGS, LLC; STARMAKER
 2 KARAOKE DEBBIE HARMS; DECATUR
 3 RESTAURANT & TAVERN; DDRT, LLC;
 4 PUTTERS; LISA/CARRISON LTR; DJ TARA
 5 KING PRODUCTIONS; TARA KING; KIXX
 6 BAR; BOULDER STATION CASINO; NP
 7 BOULDER, LLC; NPPALACE, LLC; PALACE
 8 STATION; DANCING KARAOKE; KIRK;
 9 GILLEY’S LAS VEGAS; TREASURE
 10 ISLAND; TREASURE ISLAND, LLC; HALF
 11 SHELL SEAFOOD AND GAMIN; HALF
 12 SHELL, LLC; JAMES BELLAMY; MEGA-
 13 MUSIC PRODUCTIONS; MR. D’S SPORTS
 14 BAR; SPORTS BAR, LLC; RICK
 15 DOMINGUEZ; SOUND SELECT; ISLAND
 16 GRILL; OFFICE 7 LOUNGE &
 17 RESTAURANT, INC.; JAKE’S BAR; DOC, G.
 18 & G., INC.; MIKE CORRAL; DAVE CORRAL;
 19 SHOWTYME KARAOKE & DJ; CALICO
 20 JACK’S SALOON; MIKE R. GORDON; RED
 21 LABEL LOUNGE; RED LABEL BAR, INC.;
 22 TERRY CICCI; TERRY-OKE KARAOKE;
 23 KJ’S BAR & GRILL; L.T. BOND, INC.; TIM
 24 MILLER; VISION & SOUND
 25 ENTERTAINMENT; THUNDERBIRD
 26 LOUNGE AND BAR; ARUBA HOTEL AND
 27 SPA; IRVINGTON PROPERTIES, LLC;
 28 THUNDERBIRD BAR & LOUNGE, LLC;
 AUDIO THERAPY DJ; MATTE McNULTY
 (a/k/a DJ Matte); AUDIO THERAPY; GSTI
 HOLDING, 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-STARK KARAOKE; JOHN MENNITI;
 and JOHN DOES NOS. 1-10 INCLUSIVE,
 IDENTITIES UNKNOWN,

Defendants.

**DEFENDANTS HOT SHOTS BAR AND GRILL, THE PUB, LLC, JOE, DAN,
DECATUR RESTAURANT & TAVERN, DDRT, LLC, STARMAKER KARAOKE
AND DEBBI HARM’S MOTION TO DISMISS**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Hot Shots Bar and Grill, The Pub, LLC, Joe, Dan, Decatur Restaurant & Tavern, DDRT, LLC, Starmaker Karaoke and Debbie Harm’s (“Defendants”) by and through their attorneys of record, the law

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1 firm of Marquis Aurbach Coffing, hereby move this honorable Court to dismiss Plaintiff Slep-
2 Tone Entertainment Corporation's ("Slep-Tone's") Complaint for failure to state a claim upon
3 which relief can be granted.¹

4 This Motion is made and based upon the attached Memorandum of Points and
5 Authorities, all papers and pleadings on file herein, and any oral argument allowed at the time of
6 the hearing.

7 Dated this 12th day of April, 2012.

8
9 MARQUIS AURBACH COFFING

10
11 By /s/ Brian R. Hardy
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21 The Pub, LLC, Joe, Dan,
22 Decatur Restaurant & Tavern, DDRT, LLC,
23 Starmaker Karaoke and Debbie Harm

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **I. INTRODUCTION.**

26 Slep-Tone is engaged in a nationwide litigation campaign. As noted by other defendants
27 in the instant litigation, Slep-Tone has filed more than fifty (50) lawsuits, including this one,
28 against multiple defendants to avoid paying multiple filing fees. Slep-Tone manufactures and
distributes compact discs ("CDs") containing music to popular songs along with data that
displays the song lyrics on a video screen when the tracks are played. According to Slep-Tone,

¹ The arguments set forth herein are consistent with those arguments before this Court by many of the other
defendants herein. See e.g. Motions to Dismiss [#13] & [#21]. These arguments apply equally to and are
appropriately asserted by the instant Defendants.

1 karaoke jockeys (or “KJs”) have unlawfully copied the CDs and are using the copied music to
2 perform karaoke shows and, in the course of doing so, are displaying Slep-Tone’s SOUND
3 CHOICE trademark without Slep-Tone’s consent.

4 Slep-Tone has filed its numerous lawsuits, with little or no pre-filing investigation and no
5 warning. Slep-Tone filed suits against a large number of defendants without differentiating
6 between the parties which targets innocent property owners (such as Defendants Hot Shots Bar
7 and Grill, The Pub, LLC, Joe, Dan, Decatur Restaurant & Tavern and DDRT, LLC (collectively
8 the “Owner Defendants”) who had no knowledge of the alleged infringement, no ability to
9 control the music used by independent contractor KJs, and who have otherwise done nothing to
10 deserve the burden and bear the cost of defending against a no-warning lawsuit. Slep-Tone has
11 filed its lawsuits *en masse* for the purpose of coercing settlements rather than protecting
12 legitimate intellectual property rights. Slep-Tone is obviously banking on the fact that it would
13 be far less expensive for each defendant to settle the case than to fight Slep-Tone. This is
14 perhaps best evidenced by the fact that none of Slep-Tone’s lawsuits have proceeded to trial and
15 few have proceeded past the initial pleading stage.

16 This case should be dismissed because Slep-Tone has failed to state a claim upon which
17 relief can be granted. Simply put, Slep-Tone’s conclusory allegations and failure to sufficiently
18 differentiate between the defendants does not meet even the liberal notice pleading standards
19 under Iqbal² and Twombly.³ Notably, the allegation set forth in the Complaint fail to establish a
20 plausible case of direct, contributory, or vicarious trademark infringement or unfair competition.
21 The Complaint is further barred by the doctrine of nominative fair use. Finally, the Complaint is
22 barred based upon the Dastar doctrine.⁴

23
24
25
26 ² Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)

27 ³ Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007).

28 ⁴ See Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 37, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003).

1 **II. STATEMENT OF FACTS.**⁵

2 The Owner Defendants own and operate bar/restaurants in Las Vegas, Nevada. The
3 Owner Defendants offer restaurant and bar environments which includes dining, alcohol,
4 gaming, and a variety of other amenities for patrons, including, among other things, hosting live
5 entertainment on designated nights, including karaoke.

6 According to the allegations contained in its Complaint, Plaintiff Slep-Tone is the
7 manufacturer and distributor of karaoke accompaniment tracks sold under the name “Sound
8 Choice.” See Compl. [#1] at ¶47. Slep-Tone owns federal trademark registrations for the
9 SOUND CHOICE word mark and the SOUND CHOICE design mark (the “SOUND CHOICE
10 Marks”). Id. ¶¶95-97.

11 Entertainers, such as Starmaker Karaoke and Debbie Harm (the “KJ Defendants”) who
12 provide karaoke services in bars, restaurants, and other venues are known as karaoke jockeys
13 (“KJs”), karaoke hosts, or karaoke operators. Id. ¶63. The services provided by KJs typically
14 include providing the karaoke music and equipment for playback, entertaining the assembled
15 crowd for warm-up purposes, and organizing the karaoke show by controlling access to the
16 stage, setting the order of performance and operating the karaoke equipment. Id. A KJ will
17 typically maintain a catalog of songs available for performance in order to aid participants in
18 selecting a song to sing. Id. ¶64. Slep-Tone alleges that KJs “obtain, copy, share, distribute
19 and/or sell media-shifted copies of the accompaniment tracks via pre-loaded hard drives, USB
20 drives, CD-R's, or the Internet.” Id. ¶66. “Media shifting” occurs when KJs copy the
21 accompaniment tracks from CDs to their computer hard drives or other media. Id. ¶67. “Format
22 shifting” occurs when KJs take compact disc files and convert them from one format to another.
23 Id. ¶68. Slep-Tone alleges, that “[e]ach of the Defendants has used media-shifted and/or format-
24 shifted karaoke accompaniment tracks marked with the SLEP-TONE’s registered trademarks for
25 commercial purposes.” Id. ¶74. Slep-Tone further alleges that “venues such as those operated by

26 _____
27 ⁵ These facts are proffered as alleged facts given that when ruling on a Rule 12(b)(6) motion, the Court must accept
28 all allegations of material fact as true and construe them in a light most favorable to the non-moving party. See
Wylar Summit P’ship v. Turner Broad Sys., Inc., 135 F3d 658, 661 (9th Cir. 1998)

1 the Defendants can enjoy significant savings by turning a blind eye to the actions of the
2 illegitimate KJs they hire.” *Id.* ¶93. Slep-Tone alleges that “[t]hese venues benefit from piracy
3 because unfair competition from pirate KJs pressures legitimate KJs to accept lower
4 compensation from the venues to obtain new business or retain old business. By decreasing the
5 fixed cost of entertainment, the Defendants’ operations become more profitable.” *Id.* ¶94.

6 With respect to the Owner Defendants, Slep-Tone provides its standardized allegation
7 that they “operate a karaoke system to produce a karaoke show at their eating and drinking
8 establishments in which counterfeit copies of SLEP-TONE’s accompaniment tracks were
9 observed being used.” *Id.* ¶¶101 & 152. In its standardized fashion, Slep-Tone further alleges
10 that the Owner Defendants have advertised or otherwise indicated that they are in possession of a
11 library containing hundreds of thousands of tracks stored on their karaoke systems, and that they
12 have “repeatedly displayed the Sound Choice Marks without right or license.” *Id.* ¶¶101-102 &
13 153-154.

14 **III. LEGAL STANDARD**

15 When ruling on a Rule 12(b)(6) motion, the Court must accept all well-pleaded
16 allegations of material fact as true and construe them in a light most favorable to the non-moving
17 party. See *Wyler Summit P’ship*, 135 F.3d at 661 (9th Cir. 1998). However, the Court is not
18 required to accept as true allegations that are merely conclusory. *Sprewell v. Golden State*
19 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A complaint must plead “enough facts to state a
20 claim to relief that is plausible on its face.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017,
21 1022 (9th Cir. 2008) quoting *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at 1949. This
22 “requires more than labels and conclusions, and a formulaic recitation of a cause of action’s
23 elements will not do.” *Twombly*, 550 U.S. at 555. Bald contentions, unsupported
24 characterizations, and legal conclusions are not well-plead allegations, and will not suffice to
25 defeat a motion to dismiss. See *G.K. Las Vegas Ltd. Partnership v. Simon Prop. Group, Inc.*, 460
26 F. Supp. 2d 1246, 1261 (D. Nev. 2006); see also *Sprewell*, 266 F.3d at 988. The Supreme Court
27 observed that “[t]hreadbare recitals of the elements of a cause of action, supported by mere
28

1 conclusory statements, do not suffice.” Iqbal, 129 S. Ct. at 1949. Further, “only a complaint that
2 states a plausible claim for relief survives a motion to dismiss.” Id. at 1950.

3 Although detailed factual allegations are not required for a complaint to pass muster
4 under Rule 12(b)(6), the factual allegations “must be enough to raise a right to relief above the
5 speculative level” Twombly, 550 U.S. at 555. The pleading must convince the court that the
6 facts provide more than “a suspicion [of] a legally cognizable right of action.” Id. Thus,
7 “[w]here a complaint pleads facts that are ‘merely consistent’ with a defendant’s liability, it
8 ‘stops short of the line between possibility and plausibility of entitlement to relief.’” Id. *citing*
9 Twombly, 550 U.S. at 557.

10 As set forth herein, Plaintiff’s Complaint has wholly failed to alleged sufficient facts such
11 that any relief can be granted in this action against the Defendants. As such, this Motion should
12 be granted.

13 **IV. ARGUMENT**

14 **A. THE COMPLAINT FAILS TO STATE A PLAUSIBLE CLAIM FOR 15 TRADEMARK INFRINGEMENT AND SHOULD BE DISMISSED.**

16 **1. The Complaint Fails To Allege Claims For Trademark Infringement.**

17 Slep-Tone’s Complaint fails to: (a) allege use of the SOUND CHOICE mark in
18 commerce or differentiate the allegations among each of the defendants in this case; and (b)
19 allege facts establishing any likelihood of confusion as a matter of law.

20 **a. The Complaint Fails to Allege Use In Commerce or 21 Differentiate Among Each Defendant in this Case.**

22 To state a claim for trademark infringement under the Lanham Act, the plaintiff must
23 allege facts demonstrating: (1) ownership of a valid trademark and (2) likelihood of confusion
24 from the defendant's use of the mark. Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1354
25 (9th Cir. 1985). In addition, trademark infringement and unfair competition claims “are subject
26 to a commercial use requirement.” Bosley Med Inst., Inc. v. Kremer, 403 F.3d 672, 676 (9th Cir.
27 2005); New Kids on the Block v. News Am. Publ’g, Inc., 971 F.2d 302, 307 (9th Cir.1992). The
28 inclusion of a commercial use requirement serves “to secure the owner of the mark the goodwill

1 of his business and to protect the ability of consumers to distinguish among competing
 2 producers.” Bosley, 403 F.3d at 676 (citing Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763,
 3 774, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992)). As Professor McCarthy notes:

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

14 4 J. Thomas McCarthy, McCarthy On Trademarks and Unfair Competition § 23:11.50 (4th ed.
 15 2008).

16 In the case at bar, Slep- Tone has failed to allege that the Owner Defendants used the
 17 SOUND CHOICE mark in commerce. Further, Slep-Tone makes only general allegations
 18 against KJs, such as the KJ Defendants, stating “[f]or KJs, karaoke is a commercial enterprise”
 19 and that “[k]araoke entertainment is provided as part of, and/or in conjunction with, the
 20 commercial enterprise of those persons and entities named herein who own and/or operate eating
 21 and drinking establishment(s).” Compl. [#1] ¶¶55-56. Slep-Tone’s general allegations regarding
 22 commercial use are conclusory and, therefore, cannot be accepted as true. In Enea Embedded
 23 Tech., Inc. v. Eneas Corp., No. 08-CV-1595-PHX-GMS, 2009 WL 648891, at *4-7 (D. Ariz.
 24 Mar. 11, 2009), the court held that conclusory allegations of commercial use are insufficient to
 25 state a claim for trademark infringement. Moreover, as the Supreme Court held in Iqbal: “A
 26 pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause
 27 of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion [s] devoid of
 28 ‘further factual enhancement.’”, See Iqbal, 129 S.Ct. at 1949 (internal citation omitted); see also
Sprowell, 266 F.3d at 988.

Moreover, the Complaint improperly lumps the actions of each of the defendants actions
 into mass allegations against the collective “Defendants.” See, e.g., Magluta v. Samples, 256
 F.3d 1282, 1284 (11th Cir. 2001)(“The complaint is replete with allegations that ‘the defendants’

1 engaged in certain conduct, making no distinction among the fourteen defendants charged,
 2 though geographic and temporal realities make plain that all of the defendants could not have
 3 participated in every act complained of.”); Myers v. Winn Law Group, No. 2:11-cv-02372 JAM
 4 KJN PS, 2011 WL 4954215, at *2 (E.D. Cal. Oct. 18, 2011) (“All of plaintiffs allegations are
 5 targeted at the four named defendants collectively, such that it is impossible to tell which
 6 defendant took which alleged actions ... Because plaintiff does not make any factual allegations
 7 as to particular defendants, he cannot proceed unless he cures these deficiencies in an amended
 8 complaint.”); Corazon v. Aurora Loan Services, LLC, No. 11-00542 SC, 2011 WL 1740099, at
 9 *4 (N.D. Cal. May 5, 2011) (“Undifferentiated pleading against multiple defendants is
 10 improper.”); In re Sagent Tech., Inc., 278 F.Supp. 2d 1079, 1094 (N.D. Cal. 2003) (“[T]he
 11 complaint fails to state a claim because plaintiffs do not indicate which individual defendant or
 12 defendants were responsible for which alleged wrongful act.”); Gauvin v. Trombatore, 682 F.
 13 Supp. 1067, 1071 (N.D. Cal. 1988) (lumping together multiple defendants in one broad
 14 allegation fails to satisfy notice requirement of Federal Rule of Civil Procedure 8(a)(2)).

15 In addition to the *en mass* allegations, the Complaint does not distinguish between
 16 defendants who have provided karaoke services as KJs and defendants who merely hired KJs to
 17 put on karaoke shows at their properties. It contains no specific factual allegation that anyone of
 18 the Owner Defendants acted as a KJ who provides karaoke services in exchange for money in
 19 interstate commerce. Rather, the Complaint wholly relies upon the general allegations set forth
 20 above. See Compl. ¶¶55-56. Because the Complaint fails to allege *specific* facts showing that
 21 anyone of the Defendants has used the SOUND CHOICE Marks in interstate commerce, it fails
 22 to state a claim upon which relief may be granted and must be dismissed.

23 **b. The Complaint Fails To Allege Facts Establishing A**
 24 **Likelihood Of Confusion.**

25 Here, Slep-Tone has alleged likelihood of confusion among viewers and participants in
 26 karaoke shows, not confusion among its customers -- KJs who purchase CDs. If the Court
 27 determines as a matter of law from the pleadings that confusion is unlikely, the complaint should
 28 be dismissed. See Murray v. Cable Nat’l Broadcasting Co., 86 F.3d 858, 860 (9th Cir. 1996)

1 *citing* Toho Co. Ltd. v. Sears Roebuck & Co., 645 F.2d 788, 790-91 (9th Cir. 1981). A
 2 likelihood of confusion exists when a consumer viewing a service mark is likely to purchase the
 3 services under a mistaken belief that the services are, or are associated with, the services of
 4 another provider. Murray, 86 F.3d at 861 *citing* Rodeo Collection, Ltd. v. West Seventh, 812
 5 F.2d 1215, 1217 (9th Cir. 1987). The confusion must “be probable, not simply a possibility.” Id.

6 It is well established that the relevant type of confusion is confusion among the trademark
 7 owner’s customers in the trademark owner’s channels of trade. In the case of In re The W W
 8 Henry Company, L.P., 82 U.S.P.Q.2d 1213 (T.T.A.B. 2007), the United State Trademark Trial
 9 and Appeal Board found that there was no likelihood of confusion between the mark PATCH 'N
 10 GO for chemical filler marketed and sold to plastic manufacturers for the repair of plastic and the
 11 trademark applicant’s PATCH & GO mark for a drywall and cement patch compound marketed
 12 and sold to do-it-yourselfers in hardware stores. Id. The Board found that confusion was
 13 unlikely because the two products would be sold “to different classes of purchasers through
 14 different channels of trade.” Id. Likewise, the Federal Circuit found no likelihood of confusion
 15 where the plaintiff sold “E.D.S.” computer services while the defendant sold “EDS” power
 16 supplies and battery chargers. Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.,
 17 954 F.2d 713 (Fed. Cir. 1992). Even though there was some overlap in the markets at issue, the
 18 Federal Circuit viewed this as a case of sales occurring in separate channels of trade. Id. Even
 19 though both parties sold products to the medical industry, the plaintiff sold its “E.D.S.” data
 20 processing services to medical insurers while the defendant sold its “EDS” batteries and power
 21 supplies to makers of medical equipment such as bedside alert systems and crib monitors. Id.

22 Here, as in these cases, there can be no likelihood of confusion as a matter of law. The
 23 Complaint alleges that viewers and participants in karaoke shows will be confused by the
 24 Defendants’ use of the SOUND CHOICE Marks. See Compl. [#1] ¶241. Simply put, the
 25 viewers and participants in karaoke shows are not Slep-Tone’s customers. Rather, Slep-Tone
 26 admittedly sells its CDs to KJs. Id. ¶¶49, 52 & 65. The Complaint does not allege that Slep-
 27 Tone is in the business of providing karaoke services or that the defendants are in the business of
 28 selling karaoke accompaniment tracks to KJs. Accordingly, there is no likelihood of confusion

1 as a matter of law because the persons allegedly confused -- viewers of and participants in
 2 karaoke shows -- are not the same class of persons who purchase Slep-Tone's karaoke
 3 accompaniment tracks for use in connection with the provision of karaoke services.

4 **2. The Complaint Fails to Allege Contributory Infringement.**

5 To the extent Slep-Tone seeks to hold the Defendants liable for contributory trademark
 6 infringement or unfair competition, the Complaint's allegations fail to state an actionable claim
 7 for relief. To be liable for contributory trademark infringement, a defendant must have: (1)
 8 "intentionally induced" the primary infringer to infringe, or (2) continued to supply an infringing
 9 product to an infringer with knowledge that the infringer is mislabeling the particular product
 10 supplied. Perfect 10, Inc. v. Visa Int'l Service Ass'n, 494 F.3d 788, 807 (9th Cir. 2007) *quoting*
 11 Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 855, 102 S. Ct. 2182, 72 L. Ed. 2d 606
 12 (1982). Further, "[w]hen the alleged direct infringer supplies a service rather than a product,
 13 under the second prong of this test, the court must 'consider the extent of control exercised by
 14 the defendant over the third party's means of infringement.'" Perfect 10, Inc., 494 F.3d at 807
 15 *citing* Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980, 984 (9th Cir. 1999).
 16 "For liability to attach, there must be '[d]irect control and monitoring of the instrumentality used
 17 by a third party to infringe the plaintiff's mark.'" Id. Accordingly, when a defendant offers a
 18 service instead of a product, a plaintiff can base its contributory trademark infringement claim on
 19 the "extent of control" theory or the "intentional inducement" theory. Id.

20 **a. The Complaint Fails to Allege that the Owner Defendants had**
 21 **Knowledge of the Infringement or Direct Control or**
 22 **Monitoring of the Instrumentalities of Infringement.**

23 The Complaint fails to allege that the Owner Defendants knew of the infringement or had
 24 direct control over or monitoring of the instrumentalities of infringement. Under the extent of
 25 control theory, "a plaintiff must prove that the defendant had knowledge and '[d]irect control and
 26 monitoring of the instrumentality used by the third party to infringe the plaintiff's mark.'" Louis
 27 Vuitton Malletier, S.A. v. Akanoc Solutions, Inc., 591 F. Supp. 2d 1098, 1111 (N.D. Cal. 2008)
 28 *quoting* Lockheed Martin, 194 F.3d at 984. Actual knowledge exists where it can be shown by a
 defendant's conduct or statements that it actually knew of specific instances of direct

1 infringement. See A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020 (9th Cir.2001).
 2 Constructive knowledge exists where it can be shown a defendant should have known of the
 3 direct infringement. Id. In addition, a defendant’s “willful blindness” to “blatant” and repeated
 4 acts of infringement may satisfy the knowledge requirement. See Fonovisa, Inc. v. Cherry
 5 Auction, Inc., 76 F.3d 259, 265 (9th Cir. 1996).

6 In this case, the Complaint fails to allege facts showing that anyone of the Owner
 7 Defendants had actual or constructive knowledge of the alleged infringement. There are literally
 8 no allegations in the Complaint that any of the Owner Defendants actually knew that karaoke
 9 shows were being performed using counterfeit copies of Slep-Tone’s CDs. The Complaint does
 10 not allege that Slep-Tone sent any of the Owner Defendants a cease and desist letter or otherwise
 11 put them on notice. Nor does the Complaint allege facts showing that any of the Owner
 12 Defendants should have known of the alleged infringement. The most the Complaint alleges is
 13 that KJs who use illegal copies of Slep-Tone’s tracks are able to offer lower priced karaoke
 14 services. See Compl. [#1] ¶89. And that “[v]enues such as those operated by the Defendants can
 15 enjoy significant savings by turning a blind eye to the action of the illegitimate KJs they hire.”
 16 Id. ¶ 93. These generic allegations do not evidence that anyone of the Owner Defendants were
 17 on notice of even a single act of infringement. Nor do these allegations demonstrate “willful
 18 blindness.” See Fonovisa, Inc., 76 F.3d at 265. Willful blindness is defined as a “deliberate
 19 failure to investigate suspected wrongdoing.” Hard Rock Cafe Licensing Corp. v. Concession
 20 Servs., Inc., 955 F.2d 17 1143, 1149 (7th Cir. 1992). Here, there are no facts alleged in the
 21 Complaint from which the Court can conclude that anyone of the Owner Defendants
 22 “deliberately” failed to investigate any suspicion of infringing conduct. Nor are there any facts
 23 from which the Court can conclude that anyone of the Owner Defendants suspected or were
 24 advised of any wrongdoing.

25 **b. The Complaint Does Not Allege Intentional Inducement.**

26 Slep-Tone has failed to plead facts showing that anyone of the Owner Defendants
 27 intentionally induced any party to infringe Slep-Tone’s SOUND CHOICE Marks. The
 28 Complaint alleges that the defendants have “benefitted [sic] from the use and display of

1 unauthorized media-shifted and format-shifted copies of karaoke accompaniment tracks which
 2 have been marked falsely with SLEP-TONE's federally registered trademarks." Compl. [#1] ¶70.
 3 The Complaint also alleges that the defendants have "possessed, used, or authorized or benefited
 4 from the use and display of unauthorized counterfeit goods bearing the Sound Choice Marks, or
 5 has provided, advertised, or authorized or benefited from the provision of services in connection
 6 with the Sound Choice Marks." Id. ¶230. And finally, the Complaint alleges that the defendants
 7 have "used, or authorized or directly benefited from the use of, a reproduction, counterfeit, or
 8 copy of the Sound Choice Marks in connection with the provision of services including karaoke
 9 services, by manufacturing or acquiring the reproduction, counterfeit, or copy of the Sound
 10 Choice Marks and by displaying the reproduction, counterfeit, or copy of the Sound Choice
 11 Marks during the provision of those services." Id. ¶238. However, none of these conclusory
 12 allegations evidence that any one of the Owner Defendants intentionally induced anybody to do
 13 anything.

3. The Complaint Fails to Allege Vicarious Infringement.

14 To the extent that Slep-Tone seeks to hold the Owner Defendants vicariously liable for
 15 trademark infringement or unfair competition, the Complaint's empty allegations fail to state an
 16 actionable claim. "Vicarious liability for trademark infringement requires 'a finding that the
 17 defendant and the infringer have an apparent or actual partnership, have authority to bind one
 18 another in transactions with third parties or exercise joint ownership or control over the
 19 infringing product.'" Perfect 10, Inc., 494 F .3d at 808. Here, Slep-Tone does not allege facts
 20 supporting the existence of any apparent or actual partnership between any KJ and any of the
 21 Owner Defendants. The Complaint does not allege facts showing that any KJ and any of the
 22 Owner Defendants have entered into a legal relationship with mutual legal authority to bind the
 23 other in transactions with third parties. Nor does the Complaint allege facts showing that any KJ
 24 and any one of the Owner Defendants exercise joint ownership or control over any infringing
 25 CD. Quite simply, there are no allegations which have been or could reasonably be asserted to
 26 substantiate a claim for vicarious infringement.

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1 **B. THE DEFENDANTS ARE PROTECTED UNDER THE DOCTRINE OF**
 2 **NOMINATIVE FAIR USE.**

3 The Defendants are protected under the doctrine of nominative fair use. Nominative fair
 4 use refers to a defendant's use of a plaintiff's trademark to describe or identify the plaintiff's
 5 product. 3 J. Thomas McCarthy, McCarthy On Trademarks And Unfair Competition § 23:11 (4th
 6 ed. 2006 & Supp. 2012). “[A] defendant who raises the nominative fair use issue need only
 7 show that it uses the mark to refer to the plaintiffs trademarked goods or services. The burden
 8 then reverts to the plaintiff to show a likelihood of confusion under the nominative fair use
 9 analysis.” Id. § 23:11. Here, the Defendants allegedly used Slep-Tone’s SOUND CHOICE
 10 Marks to, at most, identify Slep-Tone's music and lyrics. The Complaint alleges that the
 11 Defendants have provided karaoke entertainment in connection with the operation of eating and
 12 drinking establishments and that the SOUND CHOICE Marks are displayed when KJs play Slep-
 13 Tone’s CDs. See Compl. [#1] ¶¶55 & 62. Slep-Tone further alleges that the music tracks played
 14 are copies of Slep-Tone’s music. So, when the Defendants play CDs during karaoke shows, the
 15 SOUND CHOICE Marks are seen in connection with Slep-Tone’s actual music and lyrics. Thus,
 16 the SOUND CHOICE Marks are used in connection with Slep-Tone's music and lyrics, not those
 17 of some other party.

18 The Court may consider the issue of nominative fair use on a motion to dismiss. See In
 19 re Dual-Deck Video Cassette Recorder Antitrust Litig., 11 F.3d 1460, 1466-67 (9th Cir. 1993); 1
 20 800 Get Thin, LLC v. Hiltzik, No. CV11-00505 ODW (PJWx), 2011 WL 3206486 (C.D. Cal.
 21 July 25, 2011) (dismissing trademark infringement claim against the Los Angeles Times for
 22 using plaintiffs 1 800 GET THIN trademark in seven news articles); Architectural Mailboxes,
 23 LLC v. Epoch Design, LLC, No. 10cv974 DMS (CAB), 2011 WL 1630809 (S.D. Cal. Apr. 28,
 24 2011) (dismissing trademark infringement claim based upon the defendant's use of plaintiffs
 25 OASIS trademark on defendant's website where website identified plaintiff as the manufacturer
 26 of the “Oasis Jr.” metal mailbox at issue). The Ninth Circuit considers three factors to determine
 27 whether nominative fair use has occurred. It considers whether: (1) the product was “readily
 28 identifiable” without use of the mark; (2) the defendant used more of the mark than necessary;

1 and (3) whether the defendant falsely suggested he was sponsored or endorsed by the trademark
2 holder.” Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d 1171, 1175-76 (9th Cir. 2010)
3 *citing* Playboy Enterprises, Inc. v. Welles, 7 279 F.3d 796, 801 (9th Cir. 2002). This test
4 “evaluates the likelihood of confusion in nominative use cases.” Id. It is designed to address the
5 risk that nominative use of the mark will inspire a mistaken belief on the part of consumers that
6 the speaker is sponsored or endorsed by the trademark holder. Id. If the nominative use satisfies
7 the three-factor test, it does not infringe. Id. Here, each of the nominative fair use factors are
8 fully satisfied.

9 First, Slep-Tone admits that it is not the sole provider of karaoke accompaniment tracks
10 in the market. See e.g. Compl. [#1] ¶48 & 91. Since Slep-Tone is not the sole provider of
11 karaoke accompaniment tracks, its CDs are not readily identifiable without referring to its
12 SOUND CHOICE Marks. Second, the Defendants have not used more of the mark than
13 necessary. The Complaint alleges only that the Defendants have used the SOUND CHOICE
14 Marks during “playback” of Slep-Tone’s tracks. Id. ¶62. Third, with respect to whether “the
15 defendant falsely suggested he was sponsored or endorsed by the trademark holder,” the
16 defendants used Slep-Tone’s mark to, at most, identify Slep-Tone’s music and lyrics, not to
17 falsely associate themselves with Slep-Tone. This element does not require a defendant to have
18 made an affirmative statement that its product or service is not sponsored by the plaintiff.
19 Mattei, Inc. v. Walking Mountain Prods., 353 F.3d 792, 811 (9th 25 Cir. 2003). “A defendant’s
20 use is nominative where he or she used plaintiff’s [mark] to describe or identify the plaintiff’s
21 product, even if the defendant’s ultimate goal is to describe or identify his or her own product.”
22 Id. 353 F.3d 792 at 809-810. “Where use of the trade dress or mark is grounded in the
23 defendant’s desire to refer to the plaintiff’s product as a point of reference for defendant’s own
24 work, a use is nominative.” Id. at 810.

25 Here, Slep-Tone uses its SOUND CHOICE Marks to identify itself as the source of the
26 goods listed in its trademark registrations - its karaoke CDs. Slep-Tone does not use its SOUND
27 CHOICE Marks to identify itself as a provider of karaoke services. Indeed, its trademark
28 registrations do not cover karaoke services. In addition, the Complaint alleges nothing more than

1 the display of the SOUND CHOICE Marks during karaoke shows, which are displayed
 2 automatically when Slep-Tone's CDs are played. The SOUND CHOICE Marks are being used,
 3 if at all, to identify Slep-Tone as the source of the CDs. The SOUND CHOICE Marks are not
 4 being used to identify the defendants' karaoke services. Accordingly, the Court should dismiss
 5 the Complaint because it is barred by the doctrine of nominative fair use.⁶

6 **C. THE COMPLAINT IS BARRED BY *DASTAR* AND SHOULD BE
 7 DISMISSED.**

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

16 Here, Slep-Tone impermissibly seeks to redress the unlawful copying and distribution of
 17 its music and lyrics -- claims that are properly brought under the copyrights laws -- through a
 18 trademark infringement action. Slep-Tone's claims are barred by the United States Supreme
 19 Court's decision in Dastar Corporation v. Twentieth Century Fox Film Corporation, which holds
 20 that the Lanham Act does not protect against confusion as to the identity of the author of any
 21 idea, concept, or communication (i.e., copyrightable expression). See Dastar, 539 U.S. at 37.

22 Under Dastar, Slep-Tone cannot state a Lanham Act claim based on the notion that
 23 viewers and participants of karaoke shows are confused as to whether Slep-Tone is the creator of
 24 the music and lyrics on the CDs. The Complaint states, in pertinent part, that "[t]he Defendants'
 25 use of the Sound Choice Marks is likely to cause confusion, or to cause mistake, or to deceive
 26 the Defendants' customers and patrons into believing that . . . the Defendants music libraries

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 28 ⁶ To the extent Slep-Tone complains about confusion as to whether it is the origin of the copyrighted music and lyrics, its claim is barred by the United States Supreme Court's decision in Dastar, as set forth more fully below.

1 contain bona fide Sound Choice accompaniment tracks." Compl. [#1] ¶241. Accordingly, to the
 2 extent Slep-Tone is complaining about confusion occurring in the marketplace as to whether it is
 3 the author of its karaoke accompaniment tracks, as opposed to whether it is a source from which
 4 karaoke CDs are available for purchase, Slep-Tone fails to state a claim upon which relief can be
 5 granted.

6 **D. THE COMPLAINT FAILS TO STATE A CLAIM FOR UNFAIR**
 7 **COMPETITION.**

8 The Complaint purports to allege a cause of action for unfair competition under the
 9 Lanham Act. However, "[w]hen trademark and unfair competition claims are based on the same
 10 [allegedly] infringing conduct, courts apply the same analysis to both claims." Toho Co., Ltd. v.
 11 William Morrow and Company, Inc., 33 F. Supp. 2d 1206, 1210 (C.D. Cal. 1998) *citing* E. & J
 12 Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1288 n.2 (9th Cir. 1992). Given that Slep-
 13 Tone's unfair competition claim is based upon the same allegedly infringing conduct as its
 14 infringement claim it is subject to the same analysis for both claims. As set forth above, Slep-
 15 Tone has failed to state a claim for trademark infringement, and likewise has failed to state a
 16 claim for unfair competition.

17 **E. THE COMPLAINT FAILS TO STATE A CLAIM FOR TRADEMARK**
 18 **COUNTERFEITING AND SHOULD BE DISMISSED.**

19 Although Slep-Tone does not expressly denominate a "count" in its Complaint for
 20 trademark counterfeiting, its prayer for relief requests that the Court find each of the defendants
 21 liable for trademark counterfeiting and seeks enhanced statutory damages under 15 U.S.C.
 22 §1117(c) for trademark counterfeiting in the amount of \$2 million per infringed mark. See
 23 Compl. [#1] at pp.36-37. The Complaint, however, fails to state a claim for trademark
 24 counterfeiting. To state a claim for trademark counterfeiting, the plaintiff must allege that: (1)
 25 the defendant infringed a registered trademark in violation of 15 U.S.C. §1114; and (2) the
 26 defendant intentionally used the mark knowing it was a counterfeit, as the term counterfeit is
 27 defined in 15 U.S.C. § 1116. See Too, Inc. v. TJX Companies, Inc., 229 F. Supp. 2d 825, 837
 28 (S.D. Ohio 2002) *citing* Babbit Electronics, Inc. v. Dynascan Corp., 38 F.3d 1161, 1180 (11th

1 Cir. 1994). A “counterfeit mark” is defined in 15 U.S.C. §1116 as: “a counterfeit of a mark that
2 is registered on the principal register in the United States Patent and Trademark Office for such
3 goods or services sold, offered for sale, or distributed” 15 U.S.C. § 1116(d)(1)(B)(i).

4 Here, the Complaint fails to state a claim for trademark counterfeiting because the
5 SOUND CHOICE Marks do not meet the statutory definition of a “counterfeit mark.” To meet
6 that definition, “[s]ection 1116(d) requires that the mark in question be (1) a non-genuine mark
7 identical to the registered, genuine mark of another, where (2) the genuine mark was registered
8 for use on the same goods to which the infringer applied the mark.” Louis Vuitton Malletier,
9 S.A. v. Akanoc Solutions, Inc., 658 F.3d 936, 945-46 (9th Cir. 2011). The SOUND CHOICE
10 Marks may satisfy the first part of the test because they are allegedly each a “non-genuine mark”
11 which is “identical to the registered, genuine mark” of Slep-Tone when used by KJs who have
12 illegally copied Slep-Tone’s CDs. However, the SOUND CHOICE Marks do not meet the
13 second part of the test because they do not cover the same goods and services allegedly offered
14 by the defendants. The Complaint identifies Slep-Tone’s U.S. trademark registrations for the
15 SOUND CHOICE Marks as United States Trademark Registration Nos. 1,923,448 and
16 2,000,725. See Compl.[#1] ¶¶95-96. Slep-Tone’s trademark registrations permit use of the
17 SOUND CHOICE Marks on “pre-recorded magnetic audio cassette tapes and compact discs
18 containing musical compositions and compact discs containing video related to musical
19 compositions.” See Trademark Registration for SOUND CHOICE Marks. The defendants are
20 accused of using SOUND CHOICE in connection with karaoke services. See Compl. ¶¶233
21 (stating “[e]ach of the Defendants is accused of committing acts of infringement, unfair
22 competition, and deceptive and unfair trade practices in substantially the same way, namely,
23 through the use of counterfeit karaoke tracks to perform karaoke-related services”).
24 Accordingly, the SOUND CHOICE Marks are not “counterfeit marks” under the circumstances
25 alleged in the Complaint. The Complaint fails to state a claim for trademark counterfeiting
26 because the SOUND CHOICE Marks do not meet the statutory definition of “counterfeit marks”
27 where, as here, the goods and services they cover are different from those allegedly offered by
28 the defendants.

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V. CONCLUSION.

For the reasons identified above, the Defendants respectfully request that this honorable Court dismiss them from the instant action with prejudice. Simply put, Slep-Tone’s conclusory allegations and failure to sufficiently differentiate between the litany of defendants in this action does not meet even the most liberal notice pleading standards. Plaintiff has not alleged a single claim or asserted any facts in support of any claim against the Defendants evidencing any trademark infringement or unfair competition. Further, the Defendants cannot be liable to Plaintiff for any of the damages alleged for counterfeiting. Accordingly, the Defendants respectfully request that they be dismissed from this action with prejudice.

Dated this 12th day of April, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2012, I served a copy of the foregoing **DEFENDANTS HOT SHOTS BAR AND GRILL, THE PUB, LLC, JOE, DAN, DECATUR RESTAURANT & TAVERN, DDRT, LLC , STARMAKER KARAOKE AND DEBBI HARM'S MOTION TO DISMISS** upon each of the parties via electronic service through the United States District Court for the District of Nevada's ECF system to the following

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/s/ Rosie Wesp
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