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14 SLEP-TONE ENTERTAINMENT CORPORATION

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

13 SLEP-TONE ENTERTAINMENT CORPORATION,
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15 Plaintiff,
16
17 v.
18 ELLIS ISLAND CASINO & BREWERY,
19 et al.,
20
21 Defendants.

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

PLAINTIFF SLEP-TONE ENTERTAINMENT CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS BY DEFENDANTS NP BOULDER LLC AND NP PALACE LLC

I. INTRODUCTION

Counterfeits of Plaintiff's registered trademarks are being used in connection with pirated copies of its karaoke tracks which the Station Defendants¹ use to produce karaoke shows in their eating and drinking establishments. The Station Defendants attempt to direct the court's attention away from the Complaint's well-pleaded allegations of their infringing conduct and unfair competition by suggesting that the purpose of

¹ Defendants NP BOULDER LLC and NP PALACE LLC shall be collectively referred to herein as "Station Defendants"

1 Plaintiff's litigation is to "elicit quick settlements" rather than protecting Plaintiff's
2 legitimate intellectual property rights. However, as set forth below, Plaintiff has brought
3 this action for the legitimate purpose of policing its registered trademarks which are
4 being routinely infringed by the defendants.

5 The Complaint states claims for trademark infringement pursuant to 15 U.S.C. §
6 1114, trademark counterfeiting and for Lanham Act unfair competition, U.S.C. § 1125.
7 The defendants are properly joined since the claims against the defendants are similar
8 in factual background and arise out of a systematic pattern of events with a logical
9 relationship. Accordingly, the Station Defendants' motion to dismiss and/or sever must
10 be denied.

11 II. FACTUAL SUMMARY

12 Plaintiff is the manufacturer and distributor of karaoke accompaniment tracks sold
13 under the trademark "Sound Choice" and marked with the Sound Choice display
14 trademark. Complaint, ¶ 47. Plaintiff is the registered owner of the Sound Choice
15 trademark and its associated display trademark. Complaint ¶¶ 95-97. 60.

16 Plaintiff's karaoke tracks are manufactured and sold on karaoke compact disk
17 plus graphics ("CDG") or MP3 plus graphics recordings which contain re-created
18 arrangements of popular songs for use as "accompaniment tracks" so that a karaoke
19 participant can sing along, as though he or she were the lead singer. Complaint ¶ 60.
20 The "graphics" portion of a karaoke recording refers to the encoding of the recording with
21 data to provide a contemporaneous video display of the lyrics to the song, in order to aid
22 the performer. Complaint ¶ 61. This graphics data is also utilized to mark the
23 accompaniment tracks with the Sound Choice trademarks and to cause the Sound
24 Choice trademarks to be displayed upon playback. Complaint ¶ 62.

25 Plaintiff's original materials have been copied from Plaintiff's original, authentic
26 compact discs to computer hard drives or other media, an activity known as "media-
27 shifting." Complaint ¶ 67. Often media-shifting also involves converting the compact disc
28 files to a different format, such as from CD+G format to MP3G format or WAV+G format;

1 this is referred to as “format-shifting.” Complaint ¶ 68. Plaintiff has never authorized
2 media-shifting or format-shifting of its accompaniment tracks for any commercial
3 purpose. Complaint ¶ 71.

4 Each of the Station Defendants has used counterfeit copies of Plaintiff’s tracks
5 in connection with karaoke entertainment shows at bars and restaurants owned and
6 operated by the Defendant Owners. Complaint ¶¶ 163, 164, 166, 167. While Plaintiff
7 does tolerate media-shifted and format-shifted copies under very specific conditions
8 (Complaint ¶¶71-72), each defendant, including the Station Defendants, used *copies* of
9 Plaintiff’s karaoke tracks marked with *counterfeit copies* of Plaintiff’s registered
10 trademarks which do not come within the conditions of tolerance. Complaint ¶¶ 74-75.
11 A karaoke accompaniment track that exists outside the conditions of tolerance described
12 above and that has been marked with SLEP-TONE’s federally registered trademarks is
13 a counterfeit. Complaint ¶ 76. Thus, the copies used by the Station Defendants are
14 counterfeits.

15 III. LEGAL ARGUMENT

16 A. Legal Standard

17 A motion to dismiss for failure to state a claim is disfavored and rarely granted.
18 *Gilligan v. Jamco Dev. Corp.* (9th Cir. 1997) 108 F.3d 246, 248-249. The Court must
19 accept all well-pleaded factual allegations as true, and must construe the facts alleged
20 in the complaint in the light most favorable to the plaintiff. See *Shwartz v. United States*
21 (9th Cir. 2000) 234 F.3d 48, 435.

22 Pursuant to Fed.R.Civ.P. 8, the complaint need only contain “a short and plain
23 statement of the claim showing that the pleader is entitled to relief.” Rule 8 does not
24 require detailed factual allegations. *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 129 S.Ct.
25 1937, 1949 (citing *Bell Atl. Corp. V. Twombly* (2007) 550 U.S. 544, 555. Analyzing
26 Plaintiff’s *entire* Complaint in light of these standards, it is clear that Plaintiff’s Complaint
27 states a cause of action.

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1 The Station Defendants' contention that the Complaint fails to state a claim
2 because it improperly lumps the actions into mass allegations against the collective
3 Defendants is without merit. The Complaint contains background facts which are
4 *common to all defendants* which explain how Plaintiff's Marks are displayed in
5 conjunction with the playback of its karaoke tracks, how counterfeit copies of its tracks
6 are made and the factual basis upon which Plaintiff contends that the tracks are
7 counterfeit. See Complaint, ¶¶ 61-62, 66-77. Individual allegations are then made
8 regarding the use by each of the Station Defendants of counterfeit copies of Plaintiff's
9 karaoke tracks during karaoke shows at eating and drinking establishments. Complaint,
10 ¶¶ 163, 164, 166, 167. Individual allegations are likewise made for each of the
11 defendants who have joined in the Station Defendants' motion. Complaint, ¶¶ 107-
12 1113, 197-200, 205-206, 217-219.

13 Unlike the defendants in *Magulat v. Samples* case cited by several of the
14 defendants in which the court stated that the allegations of the complaint made "no
15 distinction among the fourteen defendants charged, though geographic and temporal
16 realities make plain that all defendants could not have participated in every act
17 complained of," in the instant case, the temporal and geographic realities do not
18 preclude the possibility (and indeed the actuality) that each of the defendants used
19 counterfeit copies tracks containing Plaintiff's Marks without right or license as alleged
20 in the Complaint. *Id.* (11th Cir. 2001) 256 F.3d 1282, 1284. The defendants in the
21 instant case have all engaged in the same infringing conduct, i.e., using counterfeit
22 copies of Plaintiff's karaoke tracks, which resulted in counterfeits of Plaintiff's registered
23 trademarks being displayed upon playback of the counterfeit tracks during karaoke
24 shows at the eating and drinking establishments of the Station Defendants.² Thus, the
25 allegations of the Complaint have been pleaded with sufficient specificity.

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28 ² The defendants who have joined in this motions have likewise each engaged in the same conduct. The only difference is that some of the defendants do not own the venues in which they used counterfeit tracks with counterfeits of Plaintiff's registered trademarks during karaoke shows.

1 **B. Plaintiff Has Stated Claims For Trademark Infringement**
2 **Against The Station Defendants.**

3 **1. Direct Trademark Infringement**

4 To prevail upon a claim for direct trademark infringement, “the moving party must
5 establish (1) ownership of the trademark at issue; (2) use by defendant, without
6 authorization, of a copy, reproduction, counterfeit or colorable imitation of the moving
7 party’s mark in connection with the sale, distribution or advertising of goods and services
8 and (3) that defendant’s use of the mark is likely to cause confusion, to cause mistake
9 or to deceive.” *Toho Co., Ltd. v. William Morrow and Company, Inc.* (C.D. Cal. 1998) 33
10 F.Supp.2d 1206, 1210 (citing 15 U.S.C. § 1114(a); *E & J Gallo Winery v. Gallo Cattle*
11 *Co.* (9th Cir. 1992) 967 F.2d 1280, 1288, no. 2.

12 Contrary to the selective reading of the complaint by the Station Defendants, it
13 is clear that Plaintiff has indeed stated a claim for direct infringement. The Complaint
14 alleges facts to establish each of the three elements with regard to *each* of the Station
15 Defendants, and each of the defendants who have joined in their motion. Relevant
16 allegations establishing each element of direct infringement are set forth below:

17 (1) *Ownership of the trademark at issue:*

18 Plaintiff has alleged that it is the owner of the trademark “Sound Choice” and the
19 display trademark for Sound Choice. Complaint ¶¶ 95,96.

20 (2) *Use by defendant, without authorization, of a copy, reproduction,*
21 *counterfeit or colorable imitation of the moving party’s mark in connection*
with the sale, distribution or advertising of goods and services.

22 Plaintiff has alleged that each of the Station Defendants and the venue owner
23 defendants who have joined in this motion³ “operate a karaoke system to produce a
24 karaoke show at their eating and drinking establishment in which counterfeit copies of
25 Slep-Tone’s accompaniment tracks were observed being used.” Complaint ¶¶ 107-

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27
28 ³ The Station Defendants and the venue-owner defendants who have joined in this motion shall be collectively referred to as
“Owner Defendants.”

1 109, 163, 164, 166, 167, 199-200, 205-206, 217-219.⁴ Plaintiff has also alleged that
2 each of the KJ Defendants “were observed operating a karaoke system to produce
3 multiple karaoke shows at multiple venues in this State in which counterfeit copies of
4 SLEP-TONE accompaniment tracks were being used.” Complaint ¶¶ 110-113, 197-198.
5 See also, Complaint ¶¶ 74-76 alleging that *each* defendant has used counterfeit copies
6 of karaoke tracks marked with the Sound Choice Marks.⁵

7 Plaintiff has alleged that in connection with the karaoke shows at their
8 bar/restaurant, **each of the Owner Defendants who have joined in this motion**
9 **“repeatedly displayed the Sound Choice Marks without right or license.”**
10 Complaint ¶¶ 107-109, 163, 164, 166, 167, 199-200, 205-206, 217-219. Plaintiff made
11 similar allegations regarding the KJ Defendants. Complaint, ¶¶ 110-113, 197-198. .

12 The graphics portion of karaoke tracks produced by Plaintiff marks the tracks with
13 the SOUND CHOICE trademarks and causes the Marks to be displayed upon playback.
14 Complaint ¶¶ 61-62. Because the tracks used by the Station Defendants and all other
15 defendants who joined in this motion are counterfeit (Complaint ¶¶ 107-109, 110-113,
16 163, 164, 166, 167, 197-198, 199-200, 205-206, 217-219.), the display of the Sound
17 Choice Marks is without right or license.

18 These very detailed and specific factual allegations of use of counterfeit copies
19 of Plaintiff’s karaoke accompaniment tracks by each of the Owner Defendants in
20 connection with a karaoke show at their eating and drinking establishment, and each of
21 the KJ Defendants at multiple karaoke shows at multiple venues, resulting in the
22 repeated unauthorized display the SOUND CHOICE Marks, are sufficient to allege *use*
23 of Plaintiff’s Marks by Defendants.

24 (3) *Defendant’s use of the mark is likely to cause confusion, to cause*
25 *mistake or to deceive.*

26 _____
27 ⁴ Detailed facts identifying pirated/counterfeit copies are set forth in the complaint at paragraphs 66-77.

28 ⁵ “Media-shifting” and “format-shifting” and their relationship to counterfeit copies are described in the allegations set forth in the
Complaint at ¶¶ 67-76.

1 Plaintiff has alleged that the Station Defendants and as well as each of the
2 defendant who have joined in their motion have used counterfeits. Complaint ¶¶ 107-
3 109, 110-113, 163, 164, 166, 167, 197-198, 199-200, 205-206, 217-219. Plaintiff has
4 also alleged that “counterfeits include SLEP-TONE’s registered trademarks, such that
5 *to the consumers of the illegitimate KJ’s services, the counterfeits are virtually*
6 *indistinguishable from genuine Sound Choice materials.”* Complaint ¶ 82 (emphasis
7 added).

8 Plaintiff has also alleged that “The *Defendants’ use of the Sound Choice Marks*
9 *is likely to cause confusion, or to cause mistake, or to deceive the Defendants’*
10 *customers and patrons* into believing that the Defendants’ services are being provided
11 with the authorization of the Plaintiff and that the Defendants’ music libraries contain
12 bona fide Sound Choice accompaniment tracks.” Complaint ¶ 241 (emphasis added).
13 See also paragraph 247 of the Complaint in which Plaintiff alleges that the “display of
14 the Sound Choice Marks is *likely to cause confusion, or to cause mistake, or to deceive*
15 *those present during the display, in that those present are likely to be deceived* into
16 believing, falsely, that the works being performed were sold by SLEP-TONE and
17 purchased by the Defendants.” (Emphasis added). These allegations, read in
18 conjunction with the factual allegations which establish that the copies of the karaoke
19 tracks used by each and every defendant were *counterfeit copies* is sufficient to
20 establish likelihood of confusion.

21 Contrary to the contentions of the Station Defendants, the display of *counterfeit*
22 *copies* of Plaintiff’s Marks in conjunction with the playback of the *counterfeit copies* of
23 karaoke tracks *is likely to “confuse the viewer as to the source, sponsorship, affiliation*
24 *or approval”* by Plaintiff and to “cause confusion and deception in the viewer’s mind,”
25 causing customers to wrongfully conclude that the counterfeit marks and counterfeit
26 copies of Plaintiff’s karaoke tracks are genuine and authentic Sound Choice Marks and
27 karaoke tracks.

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1 The cases cited by the Station Defendants regarding likelihood of confusion are
2 inapposite as those cases involved different products whereas the instant case involves
3 *counterfeit* marks displayed with *counterfeit* copies of the same product that Plaintiff
4 manufactures and distributes, i.e., karaoke accompaniment tracks.

5 (a) *The KJs Acted As Agents Of The Owner Defendants.*

6 The Station Defendants attempt to assert that the KJs were independent
7 contractors (although no such allegations are contained in the Complaint). Since this is
8 a motion to dismiss based on a failure to state a claim, the defendants may not dispute
9 the facts of the complaint.

10 The Station Defendants apparently mistakenly believe that if the KJs are later
11 held to be independent contractors, that determination will preclude liability on the part
12 of the Station Defendants (and other venue owner defendants). However, independent
13 contractors may nonetheless act as agents for the persons for whom they perform work.
14 Thus, any possible independent contractor status of the Defendant KJs does not insulate
15 the Station Defendants and other venue owner defendants from liability.

16 It is clear that the KJs were acting as the agents (and possibly employees
17 notwithstanding the label of "independent contractor" which *might* have been assigned
18 to *some* KJs) of the Owner Defendants. Consequently, the Owner Defendants are liable
19 for the actions taken by the agent KJs in providing karaoke entertainment at the behest
20 of, and for the benefit of, the Owner Defendants. Plaintiff has alleged sufficient
21 allegations regarding a principal-agent relationship between the Owner Defendants and
22 the KJ Defendants. Plaintiff has alleged that:

- 23 * the Owner Defendants operate eating and drinking establishments at which
24 karaoke entertainment is provided (Complaint ¶¶ 7, 25,26, 36, 39, 43);
- 25 * karaoke entertainment is provided as part of, and/or in conjunction with, the
26 commercial enterprise of those persons and entities named herein who own
27 and/or operate eating and drinking establishment(s) (Complaint ¶ 56);
- 28 * the Station Defendants and other venue-owner defendants each "operate a

1 karaoke system to produce a karaoke show at their eating and drinking
2 establishment in which counterfeit copies of SLEP-TONE’s “accompaniment
3 tracks were observed being used” and they each “repeatedly displayed the
4 Sound Choice Marks without right or license.” (Complaint ¶¶ 107-109, 163,
5 164, 166, 167, 199-200, 205-206, 217-219.).

6 * The KJ Defendants each “were observed operating a karaoke system to
7 produce multiple karaoke shows at multiple venues in this State in which
8 counterfeit copies of SLEP-TONE accompaniment tracks were being used.”
9 Complaint ¶ 110-112, 197-200. See also, Complaint ¶¶ 74-76 alleging that
10 *each* defendant has used counterfeit copies of karaoke tracks marked with the
11 Sound Choice Marks.

12 Each of the Owner Defendants are business entities rather than individuals. As
13 such they can only “use” and “operate” karaoke equipment which displays the counterfeit
14 Sound Choice Marks without right or license through the actions of their agents, the KJs.

15 Even if the Owner Defendants are able to later produce a contract with the KJs
16 which states that the KJs are independent contractors and not agents of the Owner
17 Defendants, an agency relationship may nevertheless be found by the trier of fact. Even
18 a “clause negating agency in a written contract is not controlling.” *Shaw v. Delta Airlines*
19 (D. Nev. 1992) 798 F.Supp.1453, 1457 (citations omitted). “[T]he trier of fact must
20 examine the facts surrounding the relationship to see if a true principal-agent relationship
21 existed.” *Id.*

22 Moreover, even assuming *arguendo* that such an allegation had been contained
23 in the Complaint, it nevertheless would not insulate the Owner Defendants from liability.
24 If a trier of fact finds that despite the Owner Defendants’ classification of the KJs as
25 independent contractors, the KJs were acting as their agents in providing the karaoke
26 services for the patrons of the Owner Defendants, the Owner Defendants will be liable
27 for the trademark infringement of the KJs committed within the course and scope of the
28 authority of the KJs to provide karaoke entertainment.

1 It is well established in Nevada that a “principal is bound by the acts of its agent
2 while acting in the course of his or her employment, and a principal is liable for those
3 acts within the scope of the agent’s authority.” *Id.* citing *Nevada Nat’l Bank v. Gold Star*
4 *Meat Co.*, (1973) 89 Nev. 427, 429. When a complaint’s allegations are capable of
5 more than one inference, the court must adopt whichever inference supports a valid
6 claim. *Columbia Natural Resources, Inc. v. Tatum* (6th Cir. 1995) 58 F.3d 1101, 1109;
7 *Hamilton v. Palm* (8th Cir. 2010) 621 F3d 816, 819 [complaint raised plausible inference
8 of both employee and independent contractor status]. Plaintiff has alleged sufficient facts
9 to draw the reasonable inference that the KJs were acting as the agents of the Owner
10 Defendants when they operated karaoke systems at the establishments owned and
11 operated by the Owner Defendants in which counterfeit copies of Plaintiff’s Marks were
12 used, resulting in the display of Plaintiff’s Marks without right or license.

13 (b) *Plaintiff’s Marks Were Used In Commerce By The Owner*
14 *Defendants Without Right or License.*

15 Plaintiff has alleged that the Defendants used Plaintiff’s Marks in commerce.
16 Plaintiff has alleged that its Marks are displayed when counterfeit copies of Plaintiff’s
17 karaoke accompaniment tracks are used to produce a karaoke show at each of the
18 Owner Defendants’ bar/restaurant. Plaintiff alleges, “Karaoke entertainment is provided
19 as a part of, and/or in conjunction with, the commercial enterprise of those persons and
20 entities named herein who own and/or operate eating and drinking establishment(s).”
21 Complaint, ¶ 56. Clearly, the use of the counterfeit Marks during the provision of karaoke
22 entertainment at a bar/restaurant in Las Vegas constitutes use in commerce. Plaintiff has
23 likewise alleged that karaoke is a commercial enterprise for KJs.

24 The U.S. Supreme Court has long recognized that the activities of local restaurants
25 constitute interstate commerce. *Katzenbach v. McClung* (1964) 379 U.S. 294. Plaintiff’s
26 detailed allegations are thus sufficient to state a claim for direct infringement. Thus, the
27 Station Defendants’ motion to dismiss for failure to state a claim must be denied.

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1 **2. The Complaint States A Claim For Contributory and Vicarious**
2 **Trademark Infringement.**

3 A defendant may be liable for contributory trademark infringement when it
4 continues to supply an infringing product to an infringer with knowledge that the infringer
5 is mislabeling the particular product supplied. *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n* (9th
6 Cir. 2007) 494 F.3d 788, 807. Contributory liability can be imposed if a defendant is
7 “willfully blind” to ongoing trademark infringement violations. *Fonovisa, Inc. v. Cherry*
8 *Auction, Inc.* (9th Cir. 1996) 76 F.3d 259, 265. This is based on the principle that “a
9 company ‘is responsible for the torts of those it permits on its premises ‘knowing or
10 having reason to know that the other is acting or will act tortiously.’” *Fonovisa*, 76 F.3d at
11 265 quoting Restatement (Second) of Torts § 877(c) & cmt. d (1979).

12 (a) *Willful Blindness Has Been Sufficiently Alleged.*

13 Plaintiff has alleged that the defendants *knowingly benefit* from the pirating of
14 Plaintiff’s karaoke discs (Complaint ¶ 232), that the piracy of its discs is widespread
15 (Complaint ¶¶ 51-53, 81, 83-85), that the venues operated by the Owner Defendants
16 “can enjoy significant savings by turning a blind eye to the actions of the illegitimate KJs
17 they hire,” (Complaint ¶ 93), and that the Owner Defendants’ bar/restaurants become
18 more profitable as the competition from KJs using pirated copies of Plaintiff’s discs
19 pressure legitimate KJs to accept lower compensation. (Complaint ¶ 94). Thus,
20 construing the complaint as a whole in the light most favorable to Plaintiff, willful
21 blindness on the part of the Owner Defendants has been sufficiently alleged.

22 (b) *Control Has Been Sufficiently Alleged.*

23 “When the alleged direct infringer supplies a service rather than a product . . . , the
24 court must ‘consider the extent of control exercised by the defendant over the third party’s
25 means of infringement.’” *Perfect 10, Inc.* 494 F.3d at 807 (citing *Lockheed Martin Corp.*
26 *v. Network Solutions, Inc.* (9th Cir. 1999) 194 F.3d 980, 984). Plaintiff has alleged that
27 each of the Defendants *knowingly benefit* from the infringing conduct of the KJs, and that
28 they have the capacity to control the infringing conduct of the KJs. Complaint ¶ 232.

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1 The instant case is substantially different from the contributory and vicarious
2 liability cases cited by the Station Defendants. It is clear that persons who rent space at
3 swap meets are not agents of the swap meet operator; they do not sell their goods in
4 order to benefit the swap meet operator. Likewise in cases involving credit card
5 companies and internet service providers, the infringing conduct was not done at the
6 behest of, and for the benefit of, those companies. There is no dispute that the parties
7 who engaged in the alleged infringing conduct in those cases were not acting as agents
8 of the swap meet, credit card companies, or internet service providers. Here, since the
9 KJs were acting as agents of the Owner Defendants in providing karaoke entertainment,
10 the Owner Defendants are liable for the infringing conduct under long-standing principles
11 of agency law.

12 Karaoke entertainment is provided for the benefit of the Owner Defendants and
13 their patrons. As the restaurant/bar owners, it can be inferred that the Owner Defendants
14 determine the starting time and ending times for the karaoke entertainment, the number
15 of nights karaoke is provided, and they seek out and authorize KJs to operate the
16 karaoke systems (whether as employees or independent contractors) in their venues for
17 the entertainment of the customers of the Owner Defendants.

18 Karaoke entertainment is provided at the behest of the Owner Defendants. Any
19 advertising that is done is also done by the Owner Defendants in order to entice
20 customers to patronize their bar/restaurants. KJs provide karaoke services on the
21 premises of the Owner Defendants for the express benefit of the Owner Defendants. As
22 the agents of the Owner Defendants, the KJ Defendants are therefore subject to the
23 control by the Owner Defendants. Clearly, the Owner Defendants have ultimate control
24 over the KJ Defendants because the Owner Defendants can simply elect not to utilize the
25 KJ for karaoke shows within their venues, or can elect not to provide karaoke shows at
26 all. Having made the decision to provide karaoke in order to increase venues, the Owner
27 Defendants may not later disclaim responsibility for damages which result from trademark
28 infringement which occurs during the shows. Plaintiff has thus alleged sufficient control

1 by the Owner Defendants to state a claim for contributory infringement, as well as for
2 vicarious liability for trademark infringement.

3 **C. The Complaint States A Claim For Counterfeiting.**

4 The Station Defendants contend that Plaintiff has not stated a claim for
5 counterfeiting because its Marks are registered for cassette tapes and compact discs
6 containing music and video but Defendants contend that Plaintiff purportedly has alleged
7 that the counterfeit marks are being used in the provision of karaoke entertainment
8 services. Defendants have misread the Complaint.

9 Plaintiff has alleged that its Marks are displayed upon playback of the karaoke
10 accompaniment tracks. Complaint ¶ 62. Plaintiff has alleged that its Marks were
11 displayed without right or license when Defendants operated a karaoke system in which
12 counterfeit copies of its karaoke tracks were observed being used. Complaint ¶¶ 107-
13 109, 163, 164, 166, 167, 199-200, 205-206, 217-219. Thus, the marks displayed by the
14 Owner Defendants were likewise counterfeit copies of Plaintiff's Marks. The counterfeit
15 marks were used in conjunction with the *counterfeit copies of Plaintiff's karaoke tracks*
16 *copied from its compact discs*, not any karaoke entertainment *services*. Accordingly,
17 Plaintiff has sufficiently pled a claim for counterfeiting.

18 Defendants have misstated the law regarding the elements of a claim for
19 counterfeiting, incorrectly assuming that the scope of validity and the scope of relief for
20 infringement are coextensive, but they are not. "Although the *validity* of a registered mark
21 extends only to the listed goods or services, an owner's *remedies* against confusion with
22 its valid mark are not so circumscribed. The language of the infringement statute, 15
23 U.S.C. § 1114, does not limit remedies for allegedly infringing uses to those goods within
24 the ambit of registration." *Applied Information Sciences Corp. v. Ebay, Inc.* (9th Cir. 2007)
25 511 F.3d 966, 971.

26 Section 1114 provides liability for the unauthorized use of "any reproduction,
27 counterfeit, copy or colorable imitation of a registered mark in connection with the sale,
28 offering for sale, distribution, or advertising of *any goods or services* on or in connection

1 with which such use is likely to cause confusion, or to cause mistake, or to deceive...”
2 (Emphasis added). “Thus a trademark owner may seek redress if another’s use of the
3 mark on different goods or services is likely to cause confusion with the owner’s use of
4 the mark in connection with its registered goods.” *Ebay*, 511 F.3d at 971 (quoting J.
5 Thomas McCarthy on Trademarks and Unfair Competition § (4th ed. 1992); citing Gilson
6 on Trademarks, § 4.03[3][a] (2007)). Accordingly, even if the Plaintiff *had* alleged that
7 Defendants are using counterfeit trademarks in the provision of karaoke entertainment
8 services as Defendants contend, it would nonetheless be sufficient to allege a claim for
9 counterfeiting.

10 **D. The Lanham Act Allegations Are Sufficient To State A Claim.**

11 Since Plaintiff has stated claims for trademark infringement, it has likewise stated
12 claims for Lanham Act unfair competition. *Toho Co., Ltd. v. William Morrow and Co., Inc.*
13 (C.D. Cal. 1998) 33 F.S.2d 1206, 1210 (citing *E & J Gallo Winery v. Gallo Cattle Co.* (9th
14 Cir. 1992) 967 F.2d 1280, 1288, n. 2. (“When trademark and unfair competition claims
15 are based on the same infringing conduct, courts apply the same analysis to both
16 claims.”))

17 **E. Since The Defendants Have Been Properly Joined, Defendants’ Motion**
18 **To Dismiss And/Or To Sever Pursuant to Rules 20(a)(2) and 21 Should**
19 **Be Denied.**

20 Defendants’ acts cannot be fairly said to be independent of each other. Indeed,
21 their acts are highly interdependent, and that interdependence is central to the
22 defendants’ ability to undertake the acts of which they are accused. Their actions are
23 logically related and thus joinder is appropriate.

24 **1. The Joinder Rules Are to Be Construed as Broadly as Possible**
25 **Consistent with Fairness to the Parties.**

26 Joinder of defendants is permissible under Rule 20 if:

- 27 (A) any right to relief is asserted against them ... with respect to or
28 arising out of the same transaction, occurrence, or series of
transactions or occurrences; and

1 (B) any question of law or fact common to all defendants will arise
2 in the action.

3 Fed. R.Civ. P. 20(a)(2).

4 It is clear that there are questions of law common to all defendants that will arise in
5 the action. In fact, many of the same legal arguments have been raised by different
6 defendants in the various motions to dismiss which have been filed to date. Moreover,
7 because the same trademark registrations are asserted against each of the defendants,
8 there are questions of fact common to all defendants as well. In fact, the facts underlying
9 the infringement alleged against each defendant are identical. The only fact which differs
10 is whether a defendant is the owner of the venue in which the infringement occurred.

11 **2. The Logical Relationship Test Applies For Purposes of
12 Determining “Transactions” or “Occurrences.”**

13 Each defendant is alleged to have infringed Plaintiff’s trademarks in the exact same
14 manner - by using counterfeit karaoke tracks in conjunction with the display of counterfeit
15 copies of Plaintiff’s registered trademarks during a karaoke show in a bar/restaurant. The
16 facts necessary to establish trademark infringement are thus the same. The facts which
17 differ (date and location of the infringement) are not material to whether or not infringement
18 occurred.

19 The Supreme Court has stated that “[u]nder the Rules, the impulse is towards
20 entertaining the broadest possible scope of action consistent with fairness to the parties;
21 **joinder of claims, parties and remedies is strongly encouraged.**” *United Mine Workers*
22 *v. Gibbs* (1966) 383 U.S. 715, 724 (emphasis added). For purposes of assessing the
23 meaning of “transaction” or “occurrence,” courts in the Ninth Circuit apply the “logical
24 relationship” test, first articulated by the Supreme Court in *Moore v. New York Cotton*
25 *Exchange*:

26 “Transaction” is a word of flexible meaning. It may comprehend a
27 series of many occurrences, depending not so much upon the
28 immediateness of their connection as upon their logical relationship.

1 270 U.S. 593, 610 (1926) (construing analogous language in former Equity rule relating to
2 compulsory counterclaims⁶); *Waterfall Homeowners Assoc. v. Viega, Inc.* (D. Nev. 2012)
3 2012 WL 271873 (quoting *Mosely v. General Motors* (8th Cir. 1974) 497 F.2d 1330, 1333.

4 “Accordingly, all “logically related” events entitling a person to institute a legal action
5 against another generally are regarded as comprising a transaction or occurrence. The
6 analogous interpretation of the terms as used in **Rule 20 would permit all reasonably**
7 **related claims for relief by or against different parties to be tried in a single**
8 **proceeding. Absolute identity of all events in unnecessary.**” *Waterfall Homeowners,*
9 2012 WL 271873 (quoting C. Wright, Federal Practice and Procedure § 1653 at 270 (1970)
10 (emphasis added).

11 In applying these rules:

12 Courts have allowed joinder of defendants where “the operative facts
13 are related even if the same transaction is not involved,” *C.A.B. v.*
14 *Carefree Travel, Inc.*, 513 F.2d 375, 384 (2d Cir. 1975), where there
15 are “enough ultimate factual concurrences that it would be fair to the
parties to require them to defend jointly,” *Hall v. E.I. DuPont de*
Nemours & Co., 345 F. Supp. 353, 381 (E.D.N.Y 1972), and where the
claims are “reasonably related.” *Mosley*, 497 F.2d at 1333.

16 *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1369 (M.D.Ala. 1986).

17 The *Waterfall* court noted that *Mosley*’s interpretation of “transaction or occurrence”
18 is valid precedent in the Ninth Circuit. 2012 WL 271873, *5 (citing *Hysell v.*
19 *Schwartzenegger*, (E.D. Cal. 2011) 2011 WL 2678829, *14) (“The same transaction
20 requirement in Rule 20 refers to **similarity in the factual background** of the claims; claims
21 that **arise out of a systematic pattern of events and have a very definite logical**
22 **relationship** arise out of the same transaction or occurrence.”) (Emphasis added.
23 Additional citations omitted.)

24 The defendants’ very narrow reading of “same transaction or occurrence” is
25 inconsistent with the Supreme Court’s “strong encouragement” of joinder of claims, parties
26 and remedies and its direction that courts should entertain “the broadest possible scope
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28 ⁶ The Eleventh Circuit has noted the applicability of precedent construing analogous language in Rule 13(a) to
questions of joinder. See *Alexander v. Fulton County*, 207 F.3d 1303, 1323 (11th Cir. 2000).

1 of action consistent with fairness to the parties.” *United Mine Workers v. Gibbs* (1966) 383
2 U.S. 715, 724 (emphasis added).

3 Here, it is clear that there is a high degree of similarity of the claims against each
4 defendant; in fact the facts necessary to establish infringement are identical. That the
5 infringement occurred on different dates, by different defendants is not sufficient to prevent
6 joinder. As the *Waterfall* court noted, “absolute identity of all events is unnecessary.” 2012
7 WL 271873, *7 (quoting *Mosley*, 497 F.2d at 1333).

8 **3. Defendants Have Been Properly Joined – The Claims Against**
9 **Each Defendant Arise Out Of A Systematic Pattern Of Events With**
10 **Logical Relationships.**

11 SLEP-TONE’s claims against each defendant arise out a systematic pattern of
12 events which have a definite logical relationship. The *Waterfall* court refused to sever the
13 defendants in that case, even though the claims involved two independent product
14 suppliers, and there was no allegation that they engaged in any joint action or had any
15 contractual or business relationship with one another. The allegation of a common defect
16 was sufficient for permissive joinder since it satisfied the requirements of a series of
17 logically-related transactions. 2012 WL 271873, *7.

18 A logical relationship can also be said to exist “if the claims rest on the same set of
19 facts or the facts, on which one claim rests, activate additional legal rights supporting the
20 other claim.” *Republic Health*, 755 F.2d at 1455 (citing *Plant v. Blazer Fin. Serv.*, 598 F.2d
21 1357, 1361 (5th Cir. 1979).

22 Joinder is particularly appropriate in the context of intellectual property disputes
23 where multiple defendants have committed acts of infringement of the same intellectual
24 property. The Eastern District of Texas, frequently the venue for multi-defendant patent
25 infringement litigation, is regularly confronted with cases in which unrelated parties are
26 accused of infringing the same patent. In rejecting a *per se* rule that unrelated defendants
27 alleged to have infringed the same patent must be sued separately, that court instead
28 focuses on determining whether there is a “nucleus of operative facts or law” common to
the defendants. See *MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455, 456-57 (E.D.Tex.

1 2004). The *MyMail* court stated that joinder is proper if “there is some connection or logical
2 relationship between the various transactions or occurrences,” and that a logical relationship
3 requires only a “nucleus of operative facts or law. *Id.*

4 In finding the defendants properly joined, the *MyMail* court noted that the record
5 before it “does not show that the products or methods at issue are so different that
6 determining infringement in one case is less proper or efficient than determining
7 infringement in multiple cases.” *Id.* at 457. By contrast, the *per se* rule urged by the
8 defendants in *MyMail* “does not further the goals of Rule 20, especially for discovery and
9 motion purposes.” *Id.*

10 The cases cited by the defendants are inapposite as they involved individually and
11 independently created products, with no commonality beyond the fact of infringement of the
12 same intellectual property. Such is not the case here, because the Defendants’ infringing
13 activities share and are enabled by a commonality of origin.

14 Moreover, although Defendants contend that the *MyMail* standard is inconsistent with
15 Ninth Circuit law, citing the decision of a district court in Washington, *Interval Licensing, LLC*
16 *v. AOL, Inc.* (D. Wash.) 2011 WL 655713, *2, the Nevada District has held earlier this year
17 that in fact the logical relationship test *is* the standard in the Ninth Circuit. *Waterfall*, 2012
18 WL 271873, *5. Defendants’ reliance on *Slep-Tone Entertainment Corp. v. Mainville* 2011
19 WL 4713230 is thus misplaced because the *Mainville* court declined to apply the logic from
20 *MyMail Ltd. v. Am. Online, Inc.* 223 F.R.D. 455 (E.D. Tex. 2004). Since *MyMail* applied the
21 “logical relationship” test which this Court held in *Waterfall* is the applicable standard in the
22 Ninth Circuit, the *Mainville* decision is inapposite. Thus, since, as set forth below, the
23 actions of the defendants are logically related, the motion to dismiss and/or sever should
24 be denied.

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1 **4. The Defendants' Actions Are Logically Related Because They Are**
2 **Predicated, Without Exception, upon the Existence of an**
3 **Unbroken Chain of Infringement Originating from a Common**
4 **Ultimate Source.**

5 A careful review of the allegations against each Defendant reveals that the
6 Defendants' acts of infringement are strikingly parallel. That is, they are using material
7 associated with the same company (Slep-Tone), marked with the same mark (SOUND
8 CHOICE®), in exactly the same way (by displaying the marks as part of a karaoke show in
9 which counterfeit copies of Plaintiff's karaoke tracks are played).

10 The claims against each Defendant rest upon substantially the same fact pattern.
11 The differences are of the "time and place" variety. Whether an act constitutes trademark
12 infringement or unfair competition depends upon the nature and quality of the acts of which
13 the Defendants are accused and not upon the times or places where those acts were
14 undertaken. As to the particular claims against these Defendants, the areas of commonality
15 predominate over the areas of difference.⁷ This is the "nucleus of operative facts" to which
16 the *MyMail* court was referring.

17 Even more important than the massive parallelism in the Defendants' alleged acts,
18 however, is the common origin of the instrumentality of their infringement.

19 **a. *The Plaintiff Produces and Distributes Karaoke Accompaniment***
20 ***Tracks Only on Compact Discs.***

21 In order to understand how the Defendants' infringement came to occur, some
22 background explanation is necessary. The Plaintiff is a manufacturer of karaoke
23 accompaniment tracks (hereinafter, "tracks"). In order to manufacture a track, the Plaintiff
24 begins with a popular song, sung by a particular artist in a style that a karaoke singer may
25 desire to emulate. In its recording studio, professional musicians and sound engineers re-
26 record every aspect of the original recording except the lead vocals. The Plaintiff is
27 particularly known in the industry for the technical accuracy of its recordings, and it takes

28 ⁷ It should be noted that statutory damages for trademark infringement involving counterfeiting are
assessed not upon the number of times that the infringer used the mark, nor upon the number of units that
the infringer sold or made use of, but a particular dollar amount "per counterfeit mark per type of goods or
services sold, offered for sale, or distributed" 15 U.S.C. § 1117(c)(1), (2). This places the focus of the
tort upon use of the marks for particular goods and services, not upon the volume, frequency, or location
of infringement.

1 great pains to use period-appropriate instruments and recording techniques to produce a
2 sound that is faithful to the original style. The end result of this process is a master sound
3 recording, just as would be produced in any recording studio in the world.

4 The Plaintiff then takes the master sound recording and synchronizes that recording
5 with a visual component, whereby the lyrics to the song may be displayed on a screen, line
6 by line, along with visual cues that indicate to the performer when and what to sing and,
7 most importantly for purposes of these disputes, the trademarks that are the subject of this
8 suit. The result of that process is a master karaoke recording, and that master karaoke
9 recording has been “marked” with the Plaintiff’s trademarks at that point.

10 The master karaoke recording is then grouped with other master karaoke recordings
11 for different songs, usually on the basis of a common theme—such as the same original
12 recording artist or group, similar musical style or genre, common lyrical theme, or popularity
13 in the same time frame. The masters are used to make (“press”) compact discs, which are
14 likewise marked with the SOUND CHOICE® marks and other identifying information, and
15 sold into various distribution channels. The Plaintiffs do not distribute their karaoke tracks
16 on any medium other than compact discs.

17 b. *The Counterfeit Karaoke Accompaniment Tracks in the*
18 *Defendants’ Possession Could Only Have Been Obtained by*
Starting with the Original Material.

19 Each of the Defendants in these cases is accused of making use of unauthorized
20 counterfeit copies of the tracks. The Defendants’ ability to make use of those counterfeit
21 tracks is predicated on one or more acts of counterfeiting that are traceable to the Plaintiff’s
22 original stock.

23 Significantly, the Plaintiff has not accused any of these Defendants, or indeed any
24 person at all, of re-creating the content of its accompaniment tracks. That is, no one has
25 been accused of duplicating the Plaintiff’s recording process and merely attaching the
26 Plaintiff’s trademark to an independent product.⁹ Rather, without exception, the tracks
27 stored on these defendants’ computer hard drives can be traced in an unbroken line back

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⁹ There may be numerous intermediaries between the original “ripper” and the Defendant user.

1 to the original recordings the Plaintiff made. This is true whether a particular defendant (a)
2 directly copied (“ripped”) a Slep-Tone-produced compact disc, (b) copied an electronic file
3 that the defendant or another person had previously ripped, or (c) acquired an electronic
4 file copied from another electronic file that another person had ripped, and so on.¹
5 Regardless of their precise methods of obtaining these tracks, however, the ultimate source
6 of these tracks is an original track that Slep-Tone produced.¹⁰

7 What has occurred, then—and, more precisely, the wrongful activity that the Plaintiff
8 is seeking to remedy through these lawsuits—is a single series of transactions, starting with
9 the creation and distribution of lawful original discs, followed by unlawful copying of those
10 discs by these Defendants or by one or more intermediaries and distributed to these
11 Defendants.

12 These acts are not “independent” of each other. Rather, each act of infringement
13 depends upon, and is therefore logically related to, access to the original content of the
14 karaoke accompaniment tracks. This fact establishes an unbroken sequence of infringing
15 acts, all with a common source and a common goal, as a necessary and enabling factor in
16 the Defendants’ infringement. Without it, the Defendants would be utterly unable to commit
17 the infringement of which they are accused. This is the kind of logical relationship that the
18 *Moore* court was referring to:

19 The refusal to furnish the quotations is one of the links in the chain
20 which constitutes the transaction upon which appellant here bases its
21 cause of action. It is an important part of the transaction constituting
22 the subject-matter of the counterclaim. It is the one circumstance
23 without which neither party would have found it necessary to seek
24 relief.

25 *Moore*, 270 U.S. at 610.

26 ¹⁰ A major reason why the Plaintiff can state this fact with confidence is that in all of the years that Slep-
27 Tone has been in business, it has never authorized a copy of its tracks to be made for commercial
28 purposes. It tolerates media-shifting only with prior notice and only with significant restrictions that
specifically prohibit the transfer of the media-shifted copy. Neither has it ever issued a license to use its
trademarks without imposing restrictions that prevent the media-shifted track from being copied. The
Plaintiff regularly issues “covenant not to sue” documents to persons who have lawful original discs and
who notify the Plaintiff that they intend to engage in media-shifting. Those covenants require proof of
original discs and strict adherence to the Plaintiff’s media-shifting policy. Since the Plaintiff lacks the
authority to bind other rights holders who have an interest in the recordings, such as music publishers, it
lacks the authority to give any person “permission” or “authorization” to conduct media-shifting, although
the nature of the other rights may not allow those rights holders to prohibit media-shifting.

1 **5. The Unfair Competition Claims Against the Defendants Are Also**
2 **Logically Related Because of Their Aggregate Impact upon the Market**
3 **in Nevada for the Plaintiff's Goods.**

4 There is also commonality of occurrences and therefore a logical relationship among
5 the Defendants with respect to the unfair competition claims. There is a market in the State
6 of Nevada for karaoke accompaniment tracks. That market is expressed through demand
7 by consumers of karaoke services (including bars, restaurants, and social or service clubs,
8 as well as private parties such as weddings); it is served by lawful operators and by pirates
9 such as the defendants, both of which groups utilize the Plaintiff's tracks.

10 Indeed, unfair competition under these conditions is particularly nefarious because
11 of the difficulty inherent in detecting differences between a track played from an original
12 compact disc and a counterfeit track. The general public can often examine a purported
13 Louis Vuitton or Gucci handbag closely and determine whether it is genuine or
14 counterfeit—or, at least, considerable effort is necessary merely to *produce* the counterfeit
15 goods and to avoid detection. Accordingly, a high-end leather goods store is rewarded
16 more handsomely than the swap-meet purveyor of bogus goods.

17 By contrast, members of the general public usually cannot discern the difference
18 between an original SOUND CHOICE® track and a counterfeit. Very little effort is required
19 to copy computer files because of the degree to which the copying function is automated.
20 By obtaining pirated tracks through unauthorized channels of trade, the defendants are
21 able to provide services using the same high-quality karaoke tracks as the lawful operators,
22 but at a greatly reduced fixed cost or, in some cases, no cost at all. All that is required is
23 a willingness to violate the Plaintiff's rights in these materials.

24 Because these defendants have a lower fixed cost, obtained through illegal conduct,
25 they are able to accept engagements for less money than lawful operators. This puts price
26 pressure on lawful operators, who cut costs by reducing their purchases of lawful music
27 from the Plaintiff. A single act of a single defendant would have little impact on the
28 Plaintiff's sales beyond the mere loss of a sale, but the aggregated acts of piracy by these

1 defendants have a significant impact on the market for karaoke accompaniment tracks, far
2 beyond their proportional share of the market for their services.

3 The Lanham Act predicates a plaintiff's right to relief for unfair competition upon the
4 damage the defendant has caused. See 15 U.S.C. § 1127(a)(1) ("shall be liable in a civil
5 action by any person who believes that he or she is or is likely to be damaged by such act").
6 The major part of the damages associated with these claims is measurable only in the
7 context of aggregate action, for which these Defendants bear responsibility together. For
8 that reason also, their acts are logically related and consequently form part of the same
9 series of transactions.

10 In view of the foregoing, the Court should find these matters to be properly joined.
11

12 **6. The Practical Considerations Posed by These Multi-defendant Actions Can Be**
13 **Fully Managed Using Tools Other than Outright Severance or Dismissal of**
14 **Particular Defendants.**

15 Rule 20 permits the Court to "issue orders—including an order for separate trials—to
16 protect a party against embarrassment, delay, expense, or other prejudice that arises from
17 including a person against whom the party asserts no claim and who asserts no claim
18 against the party." Fed. R.Civ. P. 20(b). Thus, the joinder rule expressly countenances the
19 idea of accommodations that make joinder more palatable to the Defendants.

20 As a rule, these actions can be most efficiently administered during the pretrial phase
21 as multi-defendant actions, without preventing separate trials if necessary. Generally, most
22 of the defendants are effectively removed from the action due to settlement with the Plaintiff
23 or by their default. For example, in Case No. 5:10cv71, *Slep-Tone Entertainment*
24 *Corporation v. Kara-O-King Inc. et al.*, there were 37 named defendants in the initial
25 Complaint, of whom 25 were dismissed due to settlement or because they could not be
26 located for service of process. Of the remaining 12 named defendants, at least eight are
27 in default, and the case is proceeding against four, three of whom operate together. In the
28 event that there is a need for a trial as to those defendants, the Court can easily conduct
separate trials if necessary to prevent prejudice to any party.

1 (It perhaps goes without saying that the Plaintiff has no way of predicting, when filing a suit,
2 which defendants will settle, which will default, and which will defend.)

3 The Defendants themselves can take advantage of joinder during pretrial by pooling
4 resources to defend the action (and in fact, many of the defendants have in fact taken
5 advantage of their joinder in a single action by pooling resources as evidenced by the
6 representation of multiple defendants by the same counsel). A number of Defendants have
7 also already benefitted by joining in motions to dismiss and to sever which were filed by
8 other defendants rather than by filing their own separate motions. Since they have been
9 grouped in one action, groups of defendants have been able to reduce their individual cost
10 of defense by pooling their resources to hire a single attorney to jointly defend several
11 defendants. Even if they do not share or even hire counsel, the Defendants can
12 nevertheless work together to conduct discovery or to plan defense strategies. It is
13 considerably more difficult to pool resources in that manner should the defendants be
14 severed and Plaintiff is forced to litigate the claims against each defendant (or related group
15 of defendants) in separate cases.

16 Moreover, joinder of these Defendants increases the likelihood that a single judge
17 will preside over all of them. This conserves judicial resources by enabling familiarity with
18 the basic facts and the law, and it promotes consistent handling of particular issues, such
19 as procedural motions.

20 When these cases become ready for trial, it may well be “impossible to try a case”
21 in a single trial, but the Rules are clear on the point: separate trials, in virtually any
22 configuration the Court deems expeditious, are available to the Court under Rule 42.

23 **7. The Motion To Sever Is Premature.**

24 Plaintiff is informed and believes that the actions of various defendants are directly
25 related to one another. For example, Plaintiff is informed and believes that equipment used
26 to conduct karaoke shows for one group of defendants was sold (or equipment containing
27 a duplicate of the hard drive was sold) and subsequently used to conduct karaoke shows
28 for a number of the other defendants. Should that be determined to be the case, even under

1 the defendants' interpretation of the joinder provisions, all of the defendants whose
2 counterfeit tracks were directly copied from the same source would appropriately be joined
3 in the same suit. Accordingly, to the extent the court is inclined to sever any of the
4 defendants, Plaintiff requests that the ruling on the motion to sever be continued until
5 Plaintiff has had an opportunity to conduct discovery and to supplement its response to the
6 motion to dismiss and/or sever, accordingly. Additionally, Plaintiff intends to file an
7 amended complaint which sets forth additional logical relationships among the defendants.

8 **8. Request for Oral Argument**

9
10 The Court's and the parties' understanding of complex issues of fact or law can often
11 be enhanced through colloquy that is not possible in written submissions. If the Court is so
12 inclined, the Plaintiff believes that the resolution of this issue may be materially enhanced
13 through a hearing and therefore requests the same.

14 **III. CONCLUSION**

15 For the reasons stated above, Plaintiff respectfully requests that the Court deny the
16 Station Defendants' motion to dismiss. Alternatively, if the Court grants the motion, Plaintiff
17 requests leave to amend. Where a more carefully drafted complaint might state a claim,
18 a plaintiff must be given at least one more chance to amend the complaint before the district
19 court dismisses the action with prejudice. *Silva v. Bieluch* (11th Cir. 2003) 351 F.3d 1045,
20 1048; Fed.R.Civ.P. 15(a).

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1 Additionally, Plaintiff respectfully requests that the Court find the Defendants are
2 properly joined and thus not dismiss any of the Defendants, and to defer any ruling on
3 whether to have separate trials of any claims or issues until such time as the particular
4 posture of these cases at the time of trial is better known.

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6

7 Dated: May 21, 2012

BORIS & ASSOCIATES

8

By: _____ /s/ _____

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donna@borislaw.com
Attorneys for Plaintiff
Slep-Tone Entertainment Corporation

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12 Dated: May 21, 2012

LAW OFFICES OF KERRY FAUGHNAN

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By: _____ /s/ _____

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Kerry Faughnan
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Attorneys for Plaintiff
Slep-Tone Entertainment Corporation

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 21st, 2012, I served the foregoing **PLAINTIFF**
3 **SLEP-TONE ENTERTAINMENT CORPORATION'S MEMORANDUM OF POINTS AND**
4 **AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS BY DEFENDANTS NP**
5 **BOULDER LLC AND NP PALACE LLC** via the Court's CM/ECF filing system to all
6 counsel of record and parties listed.

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/s/

Donna Boris