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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  
14 CORPORATION,  
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16 Plaintiff,  
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18 v.  
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20 ELLIS ISLAND CASINO & BREWERY,  
21 et al.,  
22  
23 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  
SEVER BY THE PT'S  
DEFENDANTS**

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<sup>1</sup> Defendants PT'S PLACE; GOLDEN-PT'S PUB; CHEYENNE-NELLIS 5, LLC; PT'S PUB; GOLDEN-PT'S PUB WEST SAHARA 8, LLC; PT'S GOLD; GOLDEN-PT'S PUB CENTENNIAL 32, LLC; GOLDEN PT'S PUB STEWART-NELLIS, LLC; and GOLDEN TAVERN GROUP, LLC shall be collectively referred to herein as the "PT Defendants"

1 trademarks being displayed upon playback of the counterfeit tracks during karaoke  
2 shows at the eating and drinking establishments of the venue owner defendants,  
3 including the PT'S Defendants.<sup>2</sup> The factual allegations which explain how Plaintiff's  
4 Marks are displayed in conjunction with the playback of its karaoke tracks, how  
5 counterfeit copies of its tracks are made and the factual basis upon which Plaintiff  
6 contends that the tracks are counterfeit are common to all defendants. See Complaint,  
7 ¶¶ 61-62, 66-77.

8 Each of the venue owner defendants, including the PT'S Defendants, are  
9 business entities rather than individuals. As such they can only "use" and "operate"  
10 karaoke equipment which displays the counterfeit Sound Choice Marks without right or  
11 license through the actions of their agents/employees, the KJs. Whether acting as  
12 employees or independent contractors, the KJs were nevertheless acting as the agents  
13 of the venue owner defendants. Consequently, the venue owner defendants, including  
14 the PT'S Defendants, are liable for the infringement of Plaintiff's Marks by the KJs while  
15 providing karaoke entertainment at the behest of, and for the benefit of, the venue owner  
16 defendants.

17 The Complaint states claims for trademark infringement pursuant to 15 U.S.C. §  
18 1114, trademark counterfeiting and for Lanham Act unfair competition, U.S.C. § 1125.  
19 The defendants are properly joined since the claims against the defendants are similar  
20 in factual background and arise out of a systematic pattern of events with a logical  
21 relationship. Accordingly, the PT'S Defendants' motion to sever must be denied.

## 22 II. FACTUAL SUMMARY

23 Plaintiff is the manufacturer and distributor of karaoke accompaniment tracks sold  
24 under the trademark "Sound Choice" and marked with the Sound Choice display  
25 trademark. Complaint, ¶ 47. Plaintiff is the registered owner of the Sound Choice  
26 trademark and its associated display trademark. Complaint ¶¶ 95-97.

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27  
28 <sup>2</sup> The defendants have 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 Plaintiff's karaoke tracks are manufactured and sold on karaoke compact disk  
2 plus graphics ("CDG") or MP3 plus graphics recordings which contain re-created  
3 arrangements of popular songs for use as "accompaniment tracks" so that a karaoke  
4 participant can sing along, as though he or she were the lead singer. Complaint ¶ 60.  
5 The "graphics" portion of a karaoke recording refers to the encoding of the recording with  
6 data to provide a contemporaneous video display of the lyrics to the song, in order to aid  
7 the performer. Complaint ¶ 61. This graphics data is also utilized to mark the  
8 accompaniment tracks with the Sound Choice trademarks and to cause the Sound  
9 Choice trademarks to be displayed upon playback. Complaint ¶ 62.

10 Plaintiff's original materials have been copied from Plaintiff's original, authentic  
11 compact discs to computer hard drives or other media, an activity known as "media-  
12 shifting." Complaint ¶ 67. Often media-shifting also involves converting the compact disc  
13 files to a different format, such as from CD+G format to MP3G format or WAV+G format;  
14 this is referred to as "format-shifting." Complaint ¶ 68. Plaintiff has never authorized  
15 media-shifting or format-shifting of its accompaniment tracks for any commercial  
16 purpose. Complaint ¶ 71.

17 Each of the PT'S Defendants has used counterfeit copies of Plaintiff's tracks in  
18 connection with karaoke entertainment shows at bars and restaurants owned and  
19 operated by the Defendant Owners. Complaint ¶¶ 130-139. While Plaintiff does tolerate  
20 media-shifted and format-shifted copies under very specific conditions (Complaint ¶¶ 71-  
21 72), each defendant, including the PT'S Defendants, used *copies* of Plaintiff's karaoke  
22 tracks marked with *counterfeit copies* of Plaintiff's registered trademarks which do not  
23 come within the conditions of tolerance. Complaint ¶¶ 74-75. A karaoke  
24 accompaniment track that exists outside the conditions of tolerance described above  
25 and that has been marked with SLEP-TONE's federally registered trademarks is a  
26 counterfeit. Complaint ¶ 76. Thus, the copies used by the PT'S Defendants are  
27 counterfeits.  
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### III. LEGAL ARGUMENT

A. **Since The Defendants Have Been Properly Joined, Defendants' Motion To Sever Pursuant to Rules 20(a)(2) and 21 Should Be Denied.**

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

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

The Supreme Court has stated that “[u]nder the Rules, the impulse is towards entertaining the broadest possible scope of action consistent with fairness to the parties; **joinder of claims, parties and remedies is strongly encouraged.**” *United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 724 (emphasis added). Joinder of defendants is permissible under Rule 20 if:

- (A) any right to relief is asserted against them ... with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
- (B) any question of law or fact common to all defendants will arise in the action.

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

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

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

3                   For purposes of assessing the meaning of “transaction” or “occurrence,” courts in  
4 the Ninth Circuit apply the “logical relationship” test, first articulated by the Supreme Court  
5 in *Moore v. New York Cotton Exchange*:

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

9                   270 U.S. 593, 610 (1926) (construing analogous language in former Equity rule relating to  
10 compulsory counterclaims<sup>3</sup>); *Waterfall Homeowners Assoc. v. Viega, Inc.* (D. Nev. 2012)  
11 2012 WL 271873 (quoting *Mosely v. General Motors* (8<sup>th</sup> Cir. 1974) 497 F.2d 1330, 1333.

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

18                   In applying these rules:

19                   Courts have allowed joinder of defendants where “the operative facts  
20 are related even if the same transaction is not involved,” *C.A.B. v.*  
21 *Carefree Travel, Inc.*, 513 F.2d 375, 384 (2d Cir. 1975), where there  
22 are “enough ultimate factual concurrences that it would be fair to the  
23 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  
24 the claims are “reasonably related.” *Mosley*, 497 F.2d at 1333.

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

26                   The *Waterfall* court noted that *Mosley’s* interpretation of “transaction or occurrence”  
27 is valid precedent in the Ninth Circuit. 2012 WL 271873, \*5 (citing *Hysell v.*  
*Schwartzenegger*, (E.D. Cal. 2011) 2011 WL 2678829, \*14) (“The same transaction  
requirement in Rule 20 refers to similarity in the factual background of the claims; claims

28 <sup>3</sup> 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 that arise out of a systematic pattern of events and have a very definite logical relationship  
2 arise out of the same transaction or occurrence.”) (Emphasis added. Additional citations  
3 omitted.)

4 The PT’S Defendants’ very narrow reading of “same transaction or occurrence” is  
5 inconsistent with the Supreme Court’s “strong encouragement” of joinder of claims, parties  
6 and remedies and its direction that courts should entertain “the broadest possible scope  
7 of action consistent with fairness to the parties.” *United Mine Workers v. Gibbs* (1966) 383  
8 U.S. 715, 724 (emphasis added).

9 Here, it is clear that there is a high degree of similarity of the claims against each  
10 defendant; in fact the facts necessary to establish infringement are identical. All of the facts  
11 necessary to establish infringement by KJs are likewise necessary to establish infringement  
12 by venue owner defendants.<sup>1</sup> That the infringement occurred on different dates, by different  
13 defendants is not sufficient to prevent joinder. As the *Waterfall* court noted, “absolute  
14 identity of all events is unnecessary.” 2012 WL 271873, \*7 (quoting *Mosley*, 497 F.2d at  
15 1333).

16 3. Defendants Have Been Properly Joined – The Claims Against Each  
17 Defendant Arise Out Of A Systematic Pattern Of Events With Logical  
18 Relationships.

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

25 A logical relationship can also be said to exist “if the claims rest on the same set of  
26 facts or the facts, on which one claim rests, activate additional legal rights supporting the

27 \_\_\_\_\_  
28 <sup>1</sup> Each of the PT’S Defendants are business entities rather than individuals. As such they can only “use” or “operate” karaoke  
equipment which displays the counterfeit Marks through the actions of their agents/employees, the KJs. While additional facts will  
be necessary to establish the damages against the venue owners and KJs, the facts establishing liability are essentially the same.

1 other claim.” *Republic Health*, 755 F.2d at 1455 (citing *Plant v. Blazer Fin. Serv.*, 598 F.2d  
2 1357, 1361 (5th Cir. 1979).

3 Joinder is particularly appropriate in the context of intellectual property disputes  
4 where multiple defendants have committed acts of infringement of the same intellectual  
5 property. The Eastern District of Texas, frequently the venue for multi-defendant patent  
6 infringement litigation, is regularly confronted with cases in which unrelated parties are  
7 accused of infringing the same patent. In rejecting a *per se* rule that unrelated defendants  
8 alleged to have infringed the same patent must be sued separately, that court instead  
9 focuses on determining whether there is a “nucleus of operative facts or law” common to  
10 the defendants. See *MyMail, Ltd. v. America Online, Inc.*, 223 F.R.D. 455, 456-57  
11 (E.D.Tex. 2004). The *MyMail* court stated that joinder is proper if “there is some  
12 connection or logical relationship between the various transactions or occurrences,” and  
13 that a logical relationship requires only a “nucleus of operative facts or law. *Id.*

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

20 The cases cited by the defendants are inapposite as they involved individually and  
21 independently created products, with no commonality beyond the fact of infringement of  
22 the same intellectual property. Such is not the case here, because there is a common  
23 nucleus of operative facts with respect to the Defendants’ infringing activities, and the  
24 infringing activities of all defendants are enabled by a commonality of origin.

25 4. The *Mainville* Decision Is Inapposite As It Rejected The Logical  
26 Relationship Test Which Is The Standard Used In The Ninth Circuit.

27 The PT’S Defendants mistakenly attempt to rely upon the holding in *Slep-Tone*  
28 *Entertainment Corp. v. Mainville* 2011 WL 4713230, ignoring the analysis of controlling  
authority presented in *Waterfall* (which they cited) which applied a different standard for

1 determining motions to sever, and expressly rejected the logical relationship test which the  
2 Ninth Circuit applies.

3 In *Waterfall*, the Nevada District Court held earlier this year that the logical  
4 relationship test is the standard in the Ninth Circuit. *Waterfall*, 2012 WL 271873, \*5.  
5 Defendants' reliance on *Mainville* is thus misplaced because the *Mainville* court declined  
6 to apply the logic from *MyMail Ltd. v. Am. Online, Inc.* 223 F.R.D. 455 (E.D. Tex. 2004).  
7 Since *MyMail* applied the "logical relationship" test which this Court held in *Waterfall* is the  
8 applicable standard in the Ninth Circuit, the *Mainville* decision is inapposite. Thus, since  
9 the actions of the defendants are logically related, the motion to sever should be denied.

10 5. Plaintiff's Claims Involve Common Questions of Law and Fact.

11 Curiously, the PT'S Defendants contend that Plaintiff's claims against defendants  
12 do not involve common questions of law or fact. Apparently the PT'S Defendants have not  
13 read the pleadings of the other parties in this case. Clearly, common questions of law are  
14 involved. One need only look at the motions to dismiss filed by the various defendants to  
15 ascertain the numerous legal issues raised by the defendants which are *identical*.

16 The factual questions are likewise virtually identical. The manner in which the  
17 infringement occurred is identical, and the facts necessary to establish the infringement are  
18 identical with respect to the various defendants. Infringement on different dates by different  
19 defendants is not sufficient to prevent joinder. As the Nevada District Court noted in  
20 *Waterfall*, "absolute identity of all events is unnecessary." 2012 WL 271873, \*7 (D. Nev.  
21 2012)

22 6. The Defendants' Actions Are Logically Related Because They Are  
23 Predicated, Without Exception, upon the Existence of an Unbroken Chain of  
Infringement Originating from a Common Ultimate Source.

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



1 The claims against each Defendant rest upon substantially the same fact pattern.  
2 The differences are of the “time and place” variety. Whether an act constitutes trademark  
3 infringement or unfair competition depends upon the nature and quality of the acts of which  
4 the Defendants are accused and not upon the times or places where those acts were  
5 undertaken. As to the particular claims against these Defendants, the areas of  
6 commonality predominate over the areas of difference.<sup>1</sup> This is the “nucleus of operative  
7 facts” to which the *MyMail* court was referring.

8 In addition to the massive parallelism in the Defendants’ alleged acts, there is a  
9 common origin of the instrumentality of their infringement.

10 a. *The Plaintiff Produces and Distributes Karaoke*  
11 *Accompaniment Tracks Only on Compact Discs.*

12 In order to understand how the Defendants’ infringement came to occur, some  
13 background explanation is necessary. The Plaintiff is a manufacturer of karaoke  
14 accompaniment tracks (hereinafter, “tracks”). In order to manufacture a track, the Plaintiff  
15 begins with a popular song, sung by a particular artist in a style that a karaoke singer may  
16 desire to emulate. In its recording studio, professional musicians and sound engineers re-  
17 record every aspect of the original recording except the lead vocals. The Plaintiff is  
18 particularly known in the industry for the technical accuracy of its recordings, and it takes  
19 great pains to use period-appropriate instruments and recording techniques to produce a  
20 sound that is faithful to the original style. The end result of this process is a master sound  
21 recording, just as would be produced in any recording studio in the world.

22 The Plaintiff then takes the master sound recording and synchronizes that recording  
23 with a visual component, whereby the lyrics to the song may be displayed on a screen, line  
24 by line, along with visual cues that indicate to the performer when and what to sing and,  
25 most importantly for purposes of these disputes, the trademarks that are the subject of this

26 <sup>7</sup> It should be noted that statutory damages for trademark infringement involving counterfeiting are  
27 assessed not upon the number of times that the infringer used the mark, nor upon the number of units that  
28 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 suit. The result of that process is a master karaoke recording, and that master karaoke  
2 recording has been “marked” with the Plaintiff’s trademarks at that point.

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

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

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

16 Significantly, the Plaintiff has not accused any of these Defendants, or indeed any  
17 person at all, of re-creating the content of its accompaniment tracks. That is, no one has  
18 been accused of duplicating the Plaintiff’s recording process and merely attaching the  
19 Plaintiff’s trademark to an independent product.<sup>9</sup> Rather, without exception, the tracks  
20 stored on these defendants’ computer hard drives can be traced in an unbroken line back  
21 to the original recordings the Plaintiff made. This is true whether a particular defendant (a)  
22 directly copied (“ripped”) a Slep-Tone-produced compact disc, (b) copied an electronic file  
23 that the defendant or another person had previously ripped, or (c) acquired an electronic  
24 file copied from another electronic file that another person had ripped, and so on.<sup>10</sup>  
25 Regardless of their precise methods of obtaining these tracks, however, the ultimate  
26 source of these tracks is an original track that Slep-Tone produced.<sup>10</sup>

27 <sup>9</sup> There may be numerous intermediaries between the original “ripper” and the Defendant user.

28 <sup>10</sup> A major reason why the Plaintiff can state this fact with confidence is that in all of the years that Slep-Tone has been in business, it has never authorized a copy of its tracks to be made for commercial

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

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

13                     The refusal to furnish the quotations is one of the links in the chain  
14                     which constitutes the transaction upon which appellant here bases its  
15                     cause of action. It is an important part of the transaction constituting  
16                     the subject-matter of the counterclaim. It is the one circumstance  
17                     without which neither party would have found it necessary to seek  
18                     relief.

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

20           7.     The Unfair Competition Claims Against the Defendants Are Also Logically  
21                     Related Because of Their Aggregate Impact upon the Market in Nevada for  
22                     the Plaintiff’s Goods.

23           There is also commonality of occurrences and therefore a logical relationship among  
24 the Defendants with respect to the unfair competition claims. There is a market in the  
25 State of Nevada for karaoke accompaniment tracks. That market is expressed through  
26 demand by consumers of karaoke services (including bars, restaurants, and social or  
27 service clubs, as well as private parties such as weddings); it is served by lawful operators

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 and by pirates such as the defendants, both of which groups utilize the Plaintiff's tracks.

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

9 By contrast, members of the general public often cannot discern the difference  
10 between an original SOUND CHOICE® track and a counterfeit. Very little effort is required  
11 to copy computer files because of the degree to which the copying function is automated.

12 By obtaining pirated tracks through unauthorized channels of trade, the defendants are  
13 able to provide services using copies of the same karaoke tracks as the lawful operators,  
14 but at a greatly reduced fixed cost or, in some cases, no cost at all. All that is required is  
15 a willingness to violate the Plaintiff's rights in these materials.

16 Because these defendants have a lower fixed cost, obtained through illegal conduct,  
17 they are able to accept engagements for less money than lawful operators. This puts price  
18 pressure on lawful operators, who cut costs by reducing their purchases of lawful music  
19 from the Plaintiff. A single act of a single defendant would have little impact on the  
20 Plaintiff's sales beyond the mere loss of a sale, but the aggregated acts of piracy by these  
21 defendants have a significant impact on the market for karaoke accompaniment tracks, far  
22 beyond their proportional share of the market for their services.

23 The Lanham Act predicates a plaintiff's right to relief for unfair competition upon the  
24 damage the defendant has caused. See 15 U.S.C. § 1127(a)(1) ("shall be liable in a civil  
25 action by any person who believes that he or she is or is likely to be damaged by such  
26 act"). The major part of the damages associated with these claims is measurable only in  
27 the context of aggregate action, for which these Defendants bear responsibility together.  
28

1 For that reason also, their acts are logically related and consequently form part of the same  
2 series of transactions.

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

4  
5 8. The Practical Considerations Posed by These Multi-defendant Actions Can  
6 Be Fully Managed Using Tools Other than Outright Severance or Dismissal  
7 of Particular Defendants.

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

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

25 The Defendants themselves can take advantage of joinder during pretrial by pooling  
26 resources to defend the action (and in fact, many of the defendants have in fact taken  
27 advantage of their joinder in a single action by pooling resources as evidenced by the  
28 representation of multiple defendants by the same counsel). A number of Defendants  
have also already benefitted by joining in motions to dismiss and to sever which were filed

1 by other defendants rather than by filing their own separate motions. Since they have been  
2 grouped in one action, groups of defendants have been able to reduce their individual cost  
3 of defense by pooling their resources to hire a single attorney to jointly defend several  
4 defendants. Even if they do not share or even hire counsel, the Defendants can  
5 nevertheless work together to conduct discovery or to plan defense strategies. It is  
6 considerably more difficult to pool resources in that manner should the defendants be  
7 severed and Plaintiff is forced to litigate the claims against each defendant (or related  
8 group of defendants) in separate cases.

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

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

16 9. Plaintiff Should Be Given An Opportunity To Conduct Discovery Prior To  
17 Ruling On The Motion To Sever.

18 Plaintiff is informed and believes that the actions of various defendants are directly  
19 related to one another. For example, Plaintiff is informed and believes that equipment used  
20 to conduct karaoke shows for one group of defendants was sold (or equipment containing  
21 a duplicate of the hard drive was sold) and subsequently used to conduct karaoke shows  
22 for a number of the other defendants. Should that be determined to be the case, even  
23 under the defendants’ interpretation of the joinder provisions, all of the defendants whose  
24 counterfeit tracks were directly copied from the same source would appropriately be joined  
25 in the same suit. Accordingly, to the extent the court is inclined to sever any of the  
26 defendants, Plaintiff requests that the ruling on the motion to sever be continued until  
27 Plaintiff has had an opportunity to conduct discovery and to supplement its response to the  
28 motion to sever accordingly. Additionally, Plaintiff intends to file an amended complaint  
which sets forth additional logical relationships among the defendants.

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10. Request for Oral Argument

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

**III. CONCLUSION**

For the reasons stated above, Plaintiff respectfully requests that the Court deny the PT'S Defendants' motion to sever and find the Defendants are properly joined. Alternatively, Plaintiff requests that the Court defer any ruling on whether to have separate trials of any claims or issues until such time as the particular posture of these cases at the time of trial is better known.

Dated: May 31, 2012

BORIS & ASSOCIATES

By: \_\_\_\_\_ /s/ \_\_\_\_\_

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Attorneys for Plaintiff  
Slep-Tone Entertainment Corporation

Dated: May 31, 2012

LAW OFFICES OF KERRY FAUGHNAN

By: \_\_\_\_\_ /s/ \_\_\_\_\_

Kerry Faughnan  
kerry.faughnan@gmail.com  
Attorneys for Plaintiff  
Slep-Tone Entertainment Corporation

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 31st, 2012, I served the foregoing **PLAINTIFF**  
3 **SLEP-TONE ENTERTAINMENT CORPORATION'S MEMORANDUM OF POINTS AND**  
4 **AUTHORITIES IN OPPOSITION TO MOTION TO SEVER BY THE PT DEFENDANTS**  
5 via the Court's CM/ECF filing system to all counsel of record and parties listed.

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