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Counsel for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SLEP-TONE ENTERTATINMENT CORPORATION,

Plaintiff,

vs.

ELLIS ISLAND CASINO & BREWERY, et al.,

Defendants.

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

REPLY IN SUPPORT OF MOTION TO SEVER BY 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 2, LLC; AND GOLDEN TAVERN GROUP, LLC

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Pursuant to Federal Rules of Civil Procedure 20(a)(2) and 21, 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 2, LLC; GOLDEN TAVERN GROUP, LLC (collectively "PT'S Defendants"), by and through counsel, GREENBERG TRAURIG LLP, hereby respectfully submit this Reply in support of their Motion to Sever the PT'S Defendants from the other defendants in this case and dismissing the PT'S Defendants from this case without prejudice.

This Reply is based upon the attached memorandum of points and authorities, the papers and pleadings on file in this action, and any oral argument that this Court may allow.

/ / /

DATED this 11th day of June, 2012.

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: /s/ Lauri S. Thompson

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this case, Plaintiff has named ninety-five individual co-defendants, including the PT'S Defendants. Some of these co-defendants are actual "Karaoke Jockeys" who provide karaoke entertainment services in restaurants and bars (or "KJs" as Plaintiff defines this occupation in its Complaint), while others are the venues, i.e., the actual owners and/or operators of the bars and restaurants in which the KJs provide their particular brand of karaoke entertainment. In its Opposition, Plaintiff is attempting to blur the line between these very differently situated parties, and improperly join all the of the co-defendants in the same action.

Plaintiff's Opposition to the Motion to Sever by the PT'S Defendants ("Opposition") is essentially based on the premise that if any defendant has allegedly infringed a trademark, then that defendant can be properly joined in an action with any other defendant who has allegedly infringed in the same trademark, regardless of the circumstances surrounding each alleged infringement. Here, Plaintiff's assertion that all the co-defendants can be joined in a single action is erroneous, as it does not take into account the different facts and law relating to the various defendants, and it does not account for the major differences

between the venue defendants and the KJ defendants. As such, this Court should grant the Motion to Sever the PT'S Defendants from the other defendants in this case and dismiss the PT'S Defendants from this case without prejudice.

II. KEY FACTS

The PT'S Defendants incorporate herein the Statement of Facts contained in their Motion to Sever and highlight the following points for the Court's convenience and reference:

- Defendant Golden Tavern Group, LLC ("Golden Tavern") owns and operates a number of bar/restaurants in Las Vegas, Nevada, including PT'S Defendants, under the "PT'S" brand, which is a popular and well-known chain of bar/restaurants in Las Vegas, Nevada specializing in serving Las Vegas residents.
- The PT'S Defendants do not own karaoke equipment or provide karaoke services themselves. Rather, as Plaintiff acknowledges, these karaoke nights are provided by independent contractor and co-defendant Roll N Mobile, LLC to provide KJs to perform at their various venues for special karaoke events and private parties. As such, the PT'S Defendants are strictly venues, not KJs.
- Many of the venue defendants (including the PT'S Defendants), are actually in competition with one another, and are all largely vying for the same locals customer base that frequents these types of restaurant/bar establishments. Similarly, many of the KJ defendants are also in competition with one another, as they each look to sell their particular brand of karaoke services to a local venue. Thus, the co-defendants are largely unrelated and competing entities, and are not acting in concert in the allegedly infringing activities.
- Plaintiff describes the KJs as "entertainers who provide karaoke services in bars, restaurants, and other venues," and such karaoke services include "providing the karaoke music and equipment for playback, entertaining the

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assembled crowd for warm-up purposes, and organizing the karaoke show by controlling access to the stage, setting the order of performance, and operating the karaoke equipment." (See Pl. Slep-Tone's Complaint, ¶ 63 [Docket # 1]).

- Plaintiff claims that "[t]ypically a KJ will maintain a catalog of songs available for performances in order to aid participants in selecting a song to sing," and "[l]egitimate KJs purchase equipment and purchase or license compact disks containing accompaniment tracks and charge for the above-mentioned karaoke services." (See Id. ¶¶ 64-5).
- Plaintiff does not allege how each of the KJ defendants obtained their catalog of karaoke tracks; however, in its Opposition, Plaintiff speculates how the KJs built their catalogs, including that particular defendants may have "(a) directly copied ("ripped") a Slep-Tone-produced compact disc, (b) copied an electronic file that the defendant or another person had previously ripped, or (c) acquired an electronic file copied from another electronic file that another person had ripped, and so on." (See Pl. Slep-Tone's Opposition, p. 10 [Docket # 75]). Plaintiff also presumes that "[t]here may be numerous intermediaries between the original 'ripper' and the Defendant user." (See Id. fn 9).
- Plaintiff alleges that wide-spread piracy by illegitimate KJs of its SOUND CHOICE brand karaoke disks causes unfair competition in the marketplace because "the illegitimate KJs are able to provide karaoke services with a considerably lower overhead cost and significantly more songs through the pirating of SLEP-TONE's tracks." (See Id. ¶ 87).
- Plaintiff claims that the "pirate KJs'" conduct in turn pressures the "legitimate KJs" to "skirt or ignore the law and become pirates" by engaging in infringement in order to compete with the "pirate KJs." (See Id. ¶¶ 57, 89, 91).

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- The only allegations that Plaintiff makes against the PT'S Defendants are that "[v]enues such as those operated by the Defendants can enjoy significant savings by turning a blind eye to the actions of the illegitimate KJs they hire," and that the PT'S Defendants' "venues benefit from piracy because unfair competition from pirate KJs pressures legitimate KJs to accept lower compensation from the venues to obtain new business or retain old business. By decreasing the fixed cost of entertainment, the Defendants' operations become more profitable." (Id. ¶¶ 93-4).
- Further, Plaintiff alleges that the PT'S Defendants "knowingly benefits" from the KJs' pirating of the SOUND CHOICE karaoke disks. (Id. ¶ 232).
- Plaintiff does not claim that it made any attempt to put the PT'S Defendants on notice of the alleged trademark infringement prior to filing instant Complaint in the United States District Court, District of Nevada on February 15, 2012.
- The PT'S Defendants are not significantly related to any of the other defendants, and the PT'S Defendants' allegedly infringing conduct is unrelated to the conduct of the other defendants named in the instant suit.

III. LEGAL ARGUMENT

A. Severance of The Claims Against the PT'S Defendants Is Warranted.

Rule 21 of the Federal Rules of Civil Procedure provides that when parties are "misjoined", "[a]ny claim against a party may be severed and proceeded with separately." In order to determine whether parties are properly joined, courts look to Federal Rule of Civil Procedure 20. Rule 20 provides two requirements for proper joinder: (1) the plaintiffs must assert a right to relief arising out of the same transaction or occurrence; and (2) there must a question of law or fact common to all plaintiffs in the action. For a joinder to be proper under Rule 20, both requirements of the rule must be satisfied. See, Waterfall

Homeowners Ass'n v. Viega, Inc., 2012 WL 271873, at *3 (D. Nev. Jan. 30, 2012). As demonstrated below, Plaintiff fails to satisfy either of these two requirements.

B. Plaintiff's Claims Do Not Arise Out Of The Same Transaction or Occurrence.

The first prong of Rule 20, the "same transaction" requirement, refers to whether claims share the same factual background. In the Ninth Circuit, the phrase "same transaction, occurrence, or series of transactions or occurrences" refers to "similarity in the factual background of a claim." See, Coughlin v. Rogers, 130 F.3d 1348, 1350 (9th Cir. 1997). "Where a plaintiff sues 'unrelated and competing defendants for their own independent acts of….infringement,' and alleges that those defendants were '*acting separately*,' such conduct cannot 'involve or arise out of the same transaction, occurrence or series of transactions or occurrences' pursuant to Fed. R. Civ. P. 20(a)(2)." Id. (Emphasis in original). Further, "merely committing the same type of violation in the same way does not link defendants together for purposes of joinder." LaFace Records, LLC v. Does 1–38, 2008 WL 544992 at *2 (E.D.N.C. Feb. 27, 2008). Here, the first prong of Rule 20 is not satisfied; therefore, the Court should grant the instant Motion to Sever.

In its Opposition, Plaintiff argues that the "Logical Relationship Test" applies here, and that the Court's opinion in Waterfall Homeowners Ass'n supports Plaintiff's position that all the co-defendants in this case are properly joined. However, the facts in Waterfall are distinguishable from the present case. Specifically, in coming to the conclusion that the Waterfall defendants were properly joined, this Court reasoned that the defendants' defective products "were installed in the same residential development project and Defendants are being jointly sued by the Homeowners Association of that development for the damages caused to their members. There is, thus, a logical relationship between the Defendants and the alleged defects in the Waterfall community." Waterfall Homeowners Ass'n, 2012 WL 271873, at *7.

Unlike here, in Waterfall there was a commonality of the parties - they were all members of the same Homeowners Association and were all damaged by the defendants'

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allegedly defective products installed in the same residential development. In the instant case, none of the other co-defendants are related to the PT'S Defendants in anyway - they are all either completely separate and competing bar/restaurant venues that also host karaoke events, or they are KJs themselves, with whom the PT'S Defendants have no relationship, save one independent contractor KJ entity and its principal (i.e., co-defendants Roll N Mobile, LLC and Kenneth Angell). Thus, Waterfall is distinguishable from the present case.

Similar to its argument in the case Slep-Tone Entertainment Corporation v. Mainville, 2011 WL 4713230, at *4 (W.D.N.C. Oct. 6, 2011), Plaintiff here is attempting to convince the Court to adopt the position taken by the Eastern District of Texas in MyMail, Ltd. v. America Online, Inc., 223 F.R.D. 455 (E.D. Tex. 2004). There, the MyMail Court focused its joinder inquiry on a determination of whether there is a "nucleus of operative facts or law" common to the defendants. Id. at 456–457. In support of its request for joinder here, Plaintiff argues that all the co-defendants' actions are logically related because they are predicated, without exception, upon the existence of an unbroken chain of infringement originating from a common ultimate source. However, just as this argument was rejected by the Mainville Court, this Court should also reject this argument because "[o]bviously, the infringement of any trademark, copyright, or patent originates from a common ultimate source, that being the trademark, copyright, or patent itself. Here, Defendants may have committed the 'same type of violation in the same way,' but, again, that 'does not link defendants together for purposes of joinder.'" Mainville, 2011 WL 4713230, at *4 (citing LaFace, 2008 WL 54492, at *2).

Here there is no allegation that the PT'S Defendants acted in concert with any of the other co-defendants also sued. Although each of the co-defendants allegedly infringed upon the same SOUND CHOICE trademark, each co-defendant allegedly did so separately, in time and place, from the PT'S Defendants and their other co-defendants with no knowledge that the others were also engaged in any allegedly infringing activity.

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Thus, just as the Mainville Court declined to follow MyMail, the PT'S Defendants urge this Court to also decline to follow MyMail and find that joinder is improper in this instance.

C. Plaintiff's Claims Do Not Involve Common Questions Of Law Or Fact.

Plaintiff also fails to satisfy the second requirement of Rule 20(a) - their claims do not involve sufficiently common questions of law or fact. Regarding the questions of law, although Plaintiff's claims against all of the co-defendants arise under the Lanham Act, "[t]he mere fact that all claims arise under the same general law does not necessary establish a common question of law or fact." See, Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997).

Further, Plaintiff has effectively alleged different theories of trademark infringement against the various defendants, and each of these theories entails proving different elements. For example, Plaintiff has not alleged direct trademark infringement against the PT'S Defendants, but has alleged this cause of action against the individual KJs. Instead, Plaintiff has alleged contributory and/or vicarious trademark infringement against the PT'S Defendants, but these claims are not alleged against the individual KJs. As set forth in more detail in the PT'S Defendants Motion to Dismiss [Docket # 13], all of these causes of action include different elements that will have to be established and proved to a jury. Therefore, the questions of law as between the PT'S Defendants and the other co-defendants are not sufficiently common to allow joinder here.

Regarding questions of fact, it is well settled that "[e]ach case of trademark infringement must be analyzed based on its own facts." See, J.B. Williams Co., Inc. v. Le Conte Cosmetics, Inc., 523 F. 2d 187, 191 (9th Cir. 1975). Here, there are no common questions of fact because there are no allegations that the alleged infringements took place at the same time, in the same place, or in the same manner. Specifically, it is clear that the PT'S Defendants, as venues, and the individual KJ defendants, who Plaintiff alleges actually "provide karaoke services in bars, restaurants, and other venues," (see Pl. Slep-Tone's Complaint, ¶ 63 [Docket # 1]), are not similarly situated at all. The PT'S Defendants did not purchase, create, rip or copy any karaoke tracks, nor was it alleged that they did. In

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its complaint, Plaintiff alleges that it is the KJs whose duties include "providing the karaoke music and equipment for playback, entertaining the assembled crowd for warm-up purposes, and organizing the karaoke show by controlling access to the stage, setting the order of performance, and operating the karaoke equipment." (See Id.)

Further, Plaintiff alleges that "[t]ypically a KJ will maintain a catalog of songs available for performances in order to aid participants in selecting a song to sing," and "[l]egitimate KJs purchase equipment and purchase or license compact disks containing accompaniment tracks and charge for the above-mentioned karaoke services." (See Id. ¶¶ 64-5). While Plaintiff does not allege exactly how each of the KJ defendants came into possession of their karaoke track libraries, Plaintiff speculates that a particular defendant may have "(a) directly copied ("ripped") a Slep-Tone-produced compact disc, (b) copied an electronic file that the defendant or another person had previously ripped, or (c) acquired an electronic file copied from another electronic file that another person had ripped, and so on." (See Pl. Slep-Tone's Opposition, p. 10 [Docket # 75]).

However, Plaintiff's conjecture shows that the circumstances surrounding each KJs acquisition of the allegedly infringing tracks must be individually investigated to determine exactly where the tracks originated and the ownership history of the tracks. Such an investigation may even show that there are some KJ defendants who are legitimately in possession of Plaintiff's karaoke tracks, and are using them properly (e.g., by way of the "First Sale Doctrine," and/or other reasons). Therefore, the questions of fact as between the PT'S Defendants and the other co-defendants (including even as between various individual KJs) are different, and there will need to be individualized discovery conducted on the issues of where the particular KJs obtained their karaoke tracks, whether or not the various KJs have legitimate copies tracks and are using them properly, as well as other issues specifically related to the KJs that do not involve the PT'S Defendants as venues. Therefore, the questions of fact as between the PT'S Defendants and the other co-defendants are not sufficiently common to allow joinder here.

As a result, Plaintiff's claims do not raise common questions of law or fact within the

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meaning of Rule 20. Therefore, the Court should enter an order severing the PT'S Defendants from this case.

II. CONCLUSION

Based on the foregoing, severance of the PT'S Defendants from this case is appropriate. Plaintiff fails to satisfy Rule 20, as their claims do not arise out of the same transaction or occurrence and do not involve common questions of law and fact within the meaning of the rule. Accordingly, the PT'S Defendants respectfully request that the Court grant their motion and enter an order severing the PT'S Defendants from the other defendants and dismissing them from this case without prejudice.

DATED this 11th day of June, 2012.

Respectfully submitted,

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By: /s/ Lauri S. Thompson

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2012, I served the foregoing **REPLY IN SUPPORT OF MOTION TO SEVER BY 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 2, LLC; AND GOLDEN TAVERN GROUP, LLC** via the Court's CM/ECF filing system to all counsel of record and parties as listed.

/s/ Sara Haro
An employee of GREENBERG TRAURIG, LLP

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