

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION**

In re SLEP-TONE ENTERTAINMENT
CORP., consolidated cases.

**Civil Action No.
5:11-cv-00032-RS/CJK**

**PLAINTIFF'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

In response to the Court's directive to provide proposed findings of fact and conclusions of law in aid of the Court's deliberations in the trial of this matter concluded on July 3, 2012, the Plaintiff hereby submits the following:

PROPOSED FINDINGS OF FACT

1. Plaintiff Slep-Tone Entertainment Corporation ("Slep-Tone") is engaged in the business of creating and distributing karaoke accompaniment tracks. (Trial Transcript ("T.") 13:23-14:2.)
2. Slep-Tone's karaoke accompaniment tracks consist of original recordings of popular songs, synchronized to a graphical display of the songs' lyrics and other information. (T. 19:24-20:17.)
3. Slep-Tone is the owner of U.S. Trademark Registration No. 1,923,448, for SOUND CHOICE, and of U.S. Trademark Registration No.

2,000,725, for a display trademark SOUND CHOICE & Design® (“the Marks”). Both registrations identify “pre-recorded magnetic audio cassette tapes and compact discs containing musical compositions and compact discs containing video related to musical compositions” as the goods to which the Marks are attached. (Plaintiff’s Exh. (“PE”) #1-#4.)

4. Slep-Tone sells or licenses its karaoke accompaniment tracks only on compact discs in one of two formats known as “CD+G” (or “compact disc plus graphics”) and “MP3G” (or “MP3 audio plus graphics”). (T. 20:20-24.)

5. Slep-Tone attaches the Marks to each of the compact discs it sells or distributes, as well as to the packaging for those compact discs. Slep-Tone also encodes the graphical displays associated with the karaoke accompaniment tracks to cause the Marks to be displayed at various points during the playing of the tracks. (T. 19:9-22.)

6. Slep-Tone uses the ® symbol next to the Marks in order to denote the federal registration of the Marks. (T. 139:22-140:4.)

7. Each of the compact discs Slep-Tone has ever sold carries a legend warning the purchaser not to make unauthorized copies of the discs, among other warnings. (T. 63:23-64:12, 80:15-81:17.)

8. Prior to 2007, Slep-Tone granted specific exceptions to its general prohibition against making copies of the discs in which permission was granted to

make copies of its original compact discs onto backup or archive compact discs on a one-original-to-one-copy basis. (T. 141:7-142:4.)

9. Beginning in 2007, in response to requests from the purchasers of discs to be allowed to make copies of the content of their discs on computer hard drives—an activity known as “ripping” or “media-shifting”—Slep-Tone began implementing a media-shifting policy as an exception to its general prohibition against making unauthorized copies of the discs. (T. 62:22-63:10.)

10. As conditions for permission to conduct a media-shift of content from original compact discs, Slep-Tone’s media-shifting policy requires (a) that the disc owner maintain strict one-to-one correspondence between his or her original compact discs and the copies created on the computer hard drive, (b) that the disc owner own and maintain possession of each of the original compact discs whose contents were copied onto the computer hard drive; (c) that the disc owner notify Slep-Tone of the intent to conduct the media-shift; and (d) that the disc owner submit to an audit by Slep-Tone of his or her holdings of original compact discs and of his or her computer systems in order to verify compliance with the one-to-one correspondence condition. (T. 23:12-25:1.)

11. Slep-Tone prohibits the copying of the content of its original compact discs onto computer hard drives except when there is strict compliance with its media-shifting policy. According to the policy, a disc owner’s failure to follow the

media-shifting policy with respect to even a single karaoke accompaniment track renders all media-shifting of Slep-Tone's tracks by that disc owner outside the policy. (T. 25:14-23, 27:24-28:11.)

12. Defendant Donovan's Reef Lounge and Package Store, Inc. ("Donovan's Reef") is a lounge and package store that is in the business of selling alcoholic beverages in Panama City Beach, Florida. (T. 144:1-4; Doc. 183, Defendants' Pretrial Stipulations, ¶ 1.)

13. Defendant Green Glass Mall, Inc. ("GGM") is a lounge and package store that does business in part as "Sweet Dreams Karaoke Lounge." GGM is also a lounge and package store that is in the business of selling alcoholic beverages in Panama City Beach, Florida. (T. 28:23-24, 144:11; Doc. 183, ¶ 2.)

14. Donovan's Reef and GGM are under common control and management and partially common ownership. (T. 143:8-144:25.)

15. Donovan's Reef provides karaoke entertainment to its patrons for approximately 22½ hours per week using computer and sound equipment that it owns. (PE #9.)

16. GGM provides karaoke entertainment to its patrons for approximately 56 hours per week using computer and sound equipment that it owns. (PE #10.)

17. Although Donovan's Reef and GGM do not charge singers for access to their karaoke systems, Donovan's Reef and GGM provide karaoke

entertainment as an inducement to prospective patrons to patronize their respective establishments. (T. 147:4-12, 147:22-148:3, 154:3-155:11.)

18. During the hours in which they provide karaoke entertainment, Donovan's Reef and GGM are at least partially in the business of providing karaoke entertainment, including access to their karaoke systems and to the karaoke accompaniment tracks stored thereon. (T. 202:9-11, 227:6-23.)

19. Donovan's Reef and GGM together own and possess 364 original SOUND CHOICE-branded discs containing karaoke accompaniment tracks. Their collections are intermingled, and the discs therein are generally not separately identifiable. (PE #5; T. 29:15-25, 32:1-16.)

20. The discs that Donovan's Reef and GGM together own and possess comprise 239 unique original SOUND CHOICE-branded discs. They own a second original of 112 of those discs, and a third original of 21 of those discs. (PE #5, p. 6.)

21. Prior to 2007, Donovan's Reef and GGM provided karaoke entertainment by using specialized hardware to play only their original CD+G discs. In 2007, Donovan's Reef and GGM contracted with a third-party vendor to purchase computer equipment and software and to copy the content of their original CD+G discs onto external hard drives in order to create karaoke computer systems for use in their shows. (T. 159:6-160:5.)

22. Together, Donovan's Reef and GGM are in possession of at least three computer hard drives ("the New Drives"), the contents of which the parties have stipulated are identical with respect to the SOUND CHOICE-branded content stored thereon. (T. 160:11-15.)

23. Each of the New Drives contains copies of karaoke accompaniment tracks that are organized according to the Slep-Tone catalog number that corresponds to a particular disc. (T. 37:20-38:8.)

24. Each of the New Drives contains copies of karaoke accompaniment tracks associated with 222 Slep-Tone discs. (PE #6, p. 12.)

25. Each of the New Drives contains copies of karaoke accompaniment tracks associated with 80 separate Slep-Tone discs for which neither Donovan's Reef nor GGM owns or possesses an original. (PE #6, p. 12.)

26. Each of the New Drives contains copies of karaoke accompaniment tracks associated with 135 separate Slep-Tone discs for which Donovan's Reef and GGM together own and possess only one original. (PE #6, p. 12.)

27. Each of the New Drives contains copies of karaoke accompaniment tracks associated with 211 separate Slep-Tone discs for which Donovan's Reef and GGM together own and possess only two originals. (PE #6, p. 12.)

28. Donovan's Reef and GGM own at least three originals of only 11 of the discs that they own and that are associated with copies of Slep-Tone tracks stored on each of the three New Drives. (PE #6, p. 12.)

29. The New Drives deviate substantially from Slep-Tone's media-shifting policy because they do not exhibit one-to-one correspondence between Donovan's Reef and GGM's disc holdings and the content of the New Drives. (PE #6, p. 12; T. 41:13-42:14.)

30. The presence on the New Drives of copies of SOUND CHOICE-branded tracks outside one-to-one correspondence has enabled Donovan's Reef and GGM to offer those tracks for use simultaneously at two or three different locations.

31. If Donovan's Reef and GGM were to operate their karaoke systems using original discs, in order to make those tracks available for simultaneous use at two or three different locations, they would have had to acquire numerous additional discs. (T. 223:5-18.)

32. Donovan's Reef and GGM also own at least two additional computer hard drives ("the Old Drives") that contain SOUND CHOICE-branded karaoke accompaniment tracks, but which they maintain are now inoperable. (T. 34:9-19.)

33. The files stored on the New Drives representing 198 of the discs were originally ripped between 2004 and 2006 and were later copied to one of the Old

Drives (or to a predecessor drive used to create the Old Drives), and more recently to the New Drives. (T. 43:18-44:4.)

34. The material copied to the Old Drives could not have been ripped from Donovan's Reef and GGM's original discs, because the placement of that material on the Old Drives (or on predecessor drives used to create the Old Drives) did not begin until 2007. (T. 159:1-9.)

35. The files stored on the New Drives representing 24 of the discs were originally ripped to one of the New Drives in or after May 2012. (T. 43:18-44:4, 161:21-162:1.)

36. Files therefore began to be stored on the New Drives no later than May 2012. (T. 161:21-162:1.)

37. According to the testimony of George Davis, the process of creating the New Drives commenced when one of the Old Drives failed, and the second Old Drive failed approximately three days later. (T. 158:16-24.)

38. However, Kurt Slep's June 13, 2012, inspection of the Donovan's Reef karaoke system revealed that there were karaoke tracks played on June 9, 2012, that the system could not access, indicating that those tracks had been deleted from the New Drive attached to the karaoke system, or that they were located on a hard drive that the Defendants did not produce for inspection, or that they were located on one of the Old Drives and that that drive had not actually

failed. That inspection revealed that no tracks had been deleted from the New Drive. Consequently, either the Defendants failed to produce relevant evidence in response to an order compelling that production, or George Davis falsely testified as to the status of the Old Drives. (T. 35:22-25, 36:19-37:10.)

39. Robert L. Paynter, Sr. (“Paynter”) is an individual who is engaged in the business of providing karaoke services to bars, restaurants, and private engagements. (T. 187:18-19, 191:14-19.)

40. Paynter uses a computer-based karaoke system to play karaoke accompaniment tracks during the course of providing karaoke services. (T. 176:8-25.)

41. Paynter owns approximately 70 SOUND CHOICE karaoke discs comprising approximately 1,100 SOUND CHOICE karaoke accompaniment tracks. (T. 175:20-176:7.)

42. Prior to this litigation, Paynter had media-shifted the content of his SOUND CHOICE karaoke discs to a computer system by ripping the discs to an external hard drive. (T. 178:21-179:8; PE #13.)

43. At the onset of this litigation, Paynter was warned by Slep-Tone against modifying or deleting material from his external hard drive, on the basis that the materials stored on his hard drive were evidence in this dispute. (PE #14; T. 79:1-22.)

44. Notwithstanding that warning, Paynter nevertheless deleted all of the files associated with SOUND CHOICE-branded karaoke accompaniment tracks stored on his system, rendering those files unavailable for analysis by Slep-Tone during discovery. (T. 179:3-8; PE #13.)

45. Paynter does not contest, however, that prior to deleting that material, his hard drive contained karaoke accompaniment tracks that were marked with the SOUND CHOICE marks, and that he used those tracks at times to provide karaoke entertainment services to his customers and patrons. (T. 178:25-179:2, 193:17-21.)

46. Paynter has publicly stated that he has offered as many as three karaoke shows simultaneously. (PE #12; T. 184:4-17.)

47. The playing of three simultaneous karaoke shows requires the existence of three separate karaoke systems.

48. Paynter contends that he owns only a single system and that the two additional shows were carried out using equipment owned by his wife. (T. 176:8-9, 185:24-186:15.)

49. Paynter promotes and manages the karaoke shows carried out using his wife's karaoke equipment. (T. 185:24-186:15.)

50. The SOUND CHOICE Marks are strong, inherently distinctive marks that have been in use in commerce for more than 25 years and that have been

federally registered for more than 15 years without proof of secondary meaning.
(PE #1-#4.)

51. The trademarks displayed by Donovan's Reef, GGM, and Paynter during their karaoke shows are identical copies of the SOUND CHOICE Marks.
(T. 29:9-11, 48:9-17.)

52. Slep-Tone offers its karaoke accompaniment tracks and the compact discs it sells and distributes under the SOUND CHOICE Marks. Donovan's Reef, GGM, and Paynter offer access to the karaoke accompaniment tracks stored on their karaoke systems under marks that are identical copies of the SOUND CHOICE Marks. The offerings of Slep-Tone and the offerings of Donovan's Reef, GGM, and Paynter are therefore highly similar. (T. 19:3-22, 29:9-11, 48:9-17.)

53. Slep-Tone and the Defendants, in part, share a customer base, namely, fans of karaoke entertainment. With respect to Slep-Tone, those persons purchase compact discs containing karaoke tracks for their own personal use. (T. 21:3-7.) With respect to Donovan's Reef and GGM, those persons patronize their establishments in order to consume beverages and to be entertained by karaoke shows. (T. 147:4-25.) With respect to Paynter, the establishments who pay for his services, including for access to the karaoke tracks he possesses, do so on behalf of patrons who wish to be entertained by karaoke shows while they consume the food and beverages they purchase. (T. 190:15-191:9.)

54. The Defendants, not Slep-Tone, created the physical copies of the karaoke accompaniment tracks that they use to provide karaoke entertainment. (T. 20:25-21:1, 25:14-19.)

55. The Defendants created those copies in order to use karaoke accompaniment tracks from media other than Slep-Tone chose and authorized while seeking to retain the branding and benefits of SOUND CHOICE-branded tracks. They did so without following the protocols established by Slep-Tone to govern the conversion. (T. 41:13-42:14.)

56. Donovan's Reef and GGM in particular, by using copies of karaoke accompaniment tracks from compact discs they did not purchase, misappropriated the branding and benefits of SOUND CHOICE-branded tracks. (T. 41:13-42:14.)

57. GGM identifies its business operation as a "karaoke lounge." (T. 72:22.)

58. Even if their possession of karaoke accompaniment tracks from compact discs they did not purchase initially resulted from the unauthorized actions of a third-party contractor, Donovan's Reef and GGM never undertook any serious inquiry to verify whether the karaoke accompaniment tracks stored on their computer systems matched the compact discs they owned and possessed, despite being prompted to do so by this lawsuit, Slep-Tone's discovery requests, and an

order compelling them to permit Slep-Tone to inspect their karaoke systems and discs. (T. 159:21-160:5.)

59. Donovan's Reef and GGM were thus willfully blind to their use of the misappropriated material.

60. Based upon the warnings given on each of the SOUND CHOICE-branded discs in their possession and their knowledge that Slep-Tone had never given permission for the making of copies on a hard drive, Donovan's Reef, GGM, and Paynter knew at the time of the creation of the karaoke accompaniment tracks stored on their systems that they were making unauthorized copies of Slep-Tone's tracks, and they knew that those copies were marked with the SOUND CHOICE Marks.

61. Because Slep-Tone did not make or authorize the making of the karaoke accompaniment tracks stored on the Defendants' karaoke systems, and because those tracks are nonetheless marked with the SOUND CHOICE Marks, those karaoke accompaniment tracks and the marks applied thereto are counterfeits.

62. Donovan's Reef, GGM, and Paynter knowingly and intentionally used their counterfeit goods in connection with the sale and distribution of their respective goods and services and access thereto.

63. The Defendants' use of the SOUND CHOICE Marks is likely to cause consumer confusion by deceiving their customers and patrons into the false belief that the karaoke accompaniment tracks they are accessing are bona fide goods made or authorized by Slep-Tone and that the services the Defendants provide are being provided with the Plaintiff's authorization.

64. The Defendants' use of the SOUND CHOICE Marks has caused damage to Slep-Tone by interfering with and infringing upon Slep-Tone's exclusive right to use and to control the use of the SOUND CHOICE Marks in the United States, and by depriving Slep-Tone of revenues associated with the sale of compact discs commensurate with the demand for and use of that material. (T. 125:7-126:28.)

65. The Defendants' use of karaoke accompaniment tracks is financially motivated. Donovan's Reef and GGM use karaoke shows and the karaoke accompaniment tracks stored on their karaoke systems in order to attract and entertain the patrons of their establishments in the hope that those patrons will make purchases of alcoholic beverages while there. (T. 147:4-25.) Paynter sells his services and access to his karaoke systems and tracks to bars, restaurants, and other venues who use the shows he puts on and the karaoke tracks he possesses to attract and entertain patrons. (T. 190:18-20.) Paynter's customers, the venues who

hire him, do so in the hope that the patrons will purchase food and beverages while there. (T. 191:23-192:4.)

66. Between 2007 and 2011, Donovan's Reef earned lounge revenues of \$382,114.90 during the hours in which it provided karaoke entertainment, and it has earned an estimated \$38,211.49 during the first six months of 2012. (PE #8, #9, #11.)

67. Between 2007 and 2011, GGM earned lounge revenues of \$492,939.95 during the hours in which it provided karaoke entertainment, and it has earned an estimated \$49,293.99 during the first six months of 2012. (PE #8, #10, #11.)

68. Neither Donovan's Reef nor GGM introduced any specific evidence concerning their expenses associated with the production of revenues.

69. Paynter earns at least \$200 per week from his karaoke activities based upon a single weekly show, 52 weeks per year. (T. 188:3-14.)

70. Paynter did not introduce any evidence concerning his expenses associated with the production of those revenues.

71. The commercial value at retail of a complete set of SOUND CHOICE-branded CD+G discs from the series targeted at the commercial market, including purchasers such as the Defendants, is approximately \$25,000. The

wholesale price typically charged by Slep-Tone for karaoke accompaniment tracks is approximately \$1.50 per track. (T. 60:15-20, 77:1-5.)

72. The Defendants' application of the SOUND CHOICE Marks to the karaoke accompaniment tracks stored on their karaoke systems was not intended to describe those karaoke accompaniment tracks, but to indicate falsely that Slep-Tone was the origin of those karaoke accompaniment tracks.

73. The Defendants' use of media-shifted karaoke accompaniment tracks and the application of the SOUND CHOICE Marks to those karaoke accompaniment tracks was not reasonably necessary, because they could have instead used the original compact discs they owned to play those tracks, and in fact did so for a period of years. (T. 159:21-24, 170:5-7, 181:21-25.)

CONCLUSIONS OF LAW

1. The SOUND CHOICE Marks are valid, protectable trademarks.
2. Slep-Tone is the owner of the SOUND CHOICE Marks.
3. Slep-Tone has the exclusive right to use the SOUND CHOICE Marks in commerce on or in connection with the goods specified in the registrations of those marks.

4. Donovan's Reef, GGM, and Paynter are the "origin" of the karaoke accompaniment tracks stored on their karaoke systems for purposes of the Trademark Act.

5. Donovan's Reef, GGM, and Paynter each used a substantially identical copy of the SOUND CHOICE Marks on the karaoke accompaniment tracks stored on their respective karaoke systems.

6. Donovan's Reef's, GGM's, and Paynter's use of the SOUND CHOICE Marks was "in commerce" as defined in the Trademark Act.

7. Of the factors used to assess likelihood of confusion, the factors relating to the distinctiveness of the SOUND CHOICE Marks; the similarity of the SOUND CHOICE Marks and to the marks applied by the Defendants; the similarity between the goods or services offered under the two marks; the similarity of the actual sales methods used by the two parties, such as their sales outlets and customer base; and the intent of the Defendants to misappropriate Slep-Tone's good will all weigh in favor of a finding of a likelihood of infringement. Of those, the first three factors are entitled to significant weight because they are primary indicators of the opportunity for confusion, and those factors weigh strongly in favor of a finding of a likelihood of confusion. The parties put on no evidence regarding the similarity of advertising methods, and that factor is therefore considered neutral. The parties also put on no substantive evidence

regarding the existence and extent of actual confusion in the consuming public, but the Defendants testified that they were unaware of any confusion on the part of their customers; this factor therefore weighs weakly against a finding of likelihood of confusion.

8. Based upon an analysis of the question of likelihood of confusion as indicated above, Donovan's Reef's, GGM's, and Paynter's use of the SOUND CHOICE Marks was in a manner that is likely to cause confusion among the consumers of their goods and services as to the source, sponsorship, affiliation, or approval of the goods and services by Slep-Tone.

9. As a direct and proximate result of the Defendants' infringement of the SOUND CHOICE Marks, Slep-Tone has been damaged.

10. Donovan's Reef, GGM, and Paynter, each having owned original SOUND CHOICE-branded compact discs, had actual and statutory notice of the registration of the SOUND CHOICE Marks.

11. Donovan's Reef, GGM, and Paynter also had actual notice of Slep-Tone's policy prohibiting the unauthorized reproduction of SOUND CHOICE-branded karaoke accompaniment tracks sold on compact discs.

12. Notwithstanding their notice of Slep-Tone's claims and policy with respect to trademark rights and reproduction, Donovan's Reef, GGM, and Paynter each engaged in the creation of goods, namely karaoke accompaniment tracks, that

were designed to mimic Slep-Tone's goods, and during the creation of those goods caused the SOUND CHOICE Marks to be applied thereto.

13. None of the Defendants had Slep-Tone's authorization to engage in the creation of those goods or to apply the SOUND CHOICE Marks to them.

14. Consequently, the marks placed upon the Defendants' computer-based karaoke accompaniment tracks, which are identical to the SOUND CHOICE Marks, are spurious designations and therefore counterfeit marks.

15. Donovan's Reef, GGM, and Paynter did not engage in "classic" trademark fair use when they created the computer-based karaoke accompaniment tracks they used to put on karaoke shows, because their use of the SOUND CHOICE Marks was as a trademark, to indicate, however falsely, the source of the goods, rather than to describe a quality or feature of their own goods.

16. Donovan's Reef, GGM, and Paynter did not engage in "nominative" trademark fair use when they created the computer-based karaoke accompaniment tracks they used to put on karaoke shows, because their use of the SOUND CHOICE Marks on counterfeit goods was not in connection with Slep-Tone's goods and because their use of the SOUND CHOICE Marks on counterfeit goods was not necessary to identify Slep-Tone's goods.

17. The Defendants' acts constitute infringement of the SOUND CHOICE Marks.

18. The Defendants' acts also constitute a violation of § 43(a) of the Trademark Act of 1946, as amended, in that the display of the SOUND CHOICE Marks as attached to goods the Defendants made constitutes a false designation of the origin of those goods.

19. The Defendants' same acts further constitute a *per se* violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). *See TracFone Wireless, Inc. v. Access Telecom, Inc.*, 642 F. Supp. 2d 1354, 1365 (S.D. Fla. 2009) ("Engaging in trademark infringement is an unfair and deceptive trade practice that violates" FDUTPA).

20. Slep-Tone is entitled to recover the damages it sustained due to Donovan's Reef's and GGM's infringement, plus Donovan's Reef's and GGM's profits attributable to the use.

21. Slep-Tone has proven actual damages as to Donovan's Reef and GGM in the aggregate amount of \$9,585.00, attributable to lost wholesale sales based upon 426 discs' worth of material in use outside of one-to-one correspondence, at 15 tracks per disc and \$1.50 wholesale price per track.

22. Slep-Tone has proven total sales attributable to karaoke entertainment in the amount of \$420,326.39 as to Donovan's Reef and \$542,233.94 as to GGM, and annual sales of at least \$10,400 as to Paynter.

23. Slep-Tone bears the burden only of proving the Defendants' sales, while the Defendants bear the burden of providing all elements of costs or deductions claimed.

24. The Defendants have provided no substantive evidence regarding costs.

25. Permanent injunctive relief against each of the Defendants is necessary to prevent continuing harm to Slep-Tone.

26. The Trademark Act permits the destruction of infringing articles as an additional remedy for trademark infringement involving counterfeiting.

27. Because of the ease with which karaoke tracks may be duplicated from a computer hard drive and the difficulty in monitoring and enforcing compliance with the permanent injunctive relief, an order requiring the Defendants' computer hard drives and other media containing counterfeit karaoke tracks to be surrendered for the destruction of unauthorized Slep-Tone karaoke tracks is appropriate under the law and warranted by the facts of this case.

Respectfully submitted this the 13th day of July, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing paper is being filed on the date indicated below using the Clerk's CM/ECF system, which will send a Notice of Electronic Filing to counsel of record as follows:

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Service on the following CM/ECF non-participants is being made on the same date by depositing a copy of same as First Class Mail, postage prepaid, in envelopes addressed to:

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