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 RESPONSE TO MOTION OF DEFENDANT ROBERT L. PAYNTER TO DISMISS

The Plaintiff, Slep-Tone Entertainment Corporation ("Slep-Tone"), by its counsel, hereby responds in opposition to the motion of Defendant Robert L. Paynter, Sr. to dismiss this action.

Mr. Paynter's motion should be denied for both procedural and substantive reasons. Because Mr. Paynter does not identify the rule under which he is seeking dismissal and because Mr. Paynter does not cite any case law in support of his position, Slep-Tone has no reasonable way to ascertain exactly what standard should apply to the motion. It does not appear that Mr. Paynter has properly presented a motion under any of the usual rules for doing so.[1] Accordingly, the motion should be denied.

[1] A Rule 12(b) motion could only have been filed with or before Mr. Paynter's answer. Mr. Paynter refers to material outside the pleadings, so Rule 12(c) seems inappropriate as well. If Mr. Paynter intended it as a motion for summary judgment, he failed to follow the requirements of N.D. Fla. Loc. R. 56.1 and failed to assert the absence of genuine disputes of material fact.

Substantively, however, Mr. Paynter presents eight points of argument that he contends support dismissal of this action, as follows:

1. **"Sound Choice has never verified any facts before filing this law suit."**

Mr. Paynter's contention is flat-out wrong. In fact, Slep-Tone and its counsel conducted an extensive investigation of Mr. Paynter's activities prior to filing this action. Those activities included a review of advertising materials placed by Mr. Paynter, an on-site field investigation at which Mr. Paynter's operation was observed, and an extensive review of publicly available information about Mr. Paynter, including his personal and business Facebook pages, other internet-based sources of information, and information available from various agencies of the State of Florida. That information revealed that Mr. Paynter was operating a business that made use of three separate karaoke systems to produce shows at three locations simultaneously and that he was making use of unauthorized media-shifted Sound Choice content stored on those systems.

2. **"Sound Choice has a history of filing lawsuits first and asking questions later."**

In support of this position, Mr. Paynter cites a 2009 television news report from Knoxville, TN, in which a venue that Slep-Tone sued claimed that its operator played karaoke shows strictly from original discs. Leaving aside the fact that a television news report is not evidence, the venue in question was sued not

because Slep-Tone failed to conduct an investigation, but because its investigator mistook the player used at that venue for a different type of player frequently used to play unauthorized media-shifted content. That situation is inapposite to Mr. Paynter's situation, in which he has admitted to media-shifting the content.

3. **"Sound Choice uses the courts and the legal system to overwhelm and intimidate KJ's into submission into gain monetary awards without a foundation of facts before filing lawsuits."**

Mr. Paynter's position is actually the opposite of the truth, particular with respect to his case. Slep-Tone sent Mr. Paynter a copy of the complaint and an invitation to allow his karaoke systems and discs to be examined at no charge, well before serving the summons and complaint upon him. If Mr. Paynter could demonstrate 1:1 correspondence between his discs and his computer systems, the suit would be dismissed. Mr. Paynter declined that offer. Slep-Tone also offered very reasonable settlement terms, including installment payments, in exchange for original material designed to bring Mr. Paynter into 1:1 correspondence. Mr. Paynter also declined that offer. At every step of the way, Slep-Tone encouraged Mr. Paynter to seek out counsel to assist him in making a good decision.

It may well be that Mr. Paynter was overwhelmed and intimidated by being confronted with efforts to police his unlawful conduct. But that is hardly the fault of Slep-Tone.

4. **"To this very day, Sound choice has failed to prove one ounce of factual or physical evidence of any alleged wrong doing by me."**

Slep-Tone produced evidence—both "factual" and "physical"—of Mr. Paynter's wrongdoing in connection with its motion (Doc. 78) for default judgment.

5. **"By not embedding a simple computer encoding device on their CD+G disc and by tolerating media shifting, Sound Choice effectively is condoning the placement of their product into the public domain, with their lawsuits against any KJ who uses the Sound Choice CD+G they are 'after the fact' trying to put the genie back into the bottle."**

Actually, Slep-Tone has never filed a lawsuit against any operator for "using the Sound Choice CD+G." Slep-Tone is unfamiliar with the "simple computer encoding device" that could be "embedded on [a] CD+G disc." Slep-Tone tolerates media-shifting, but only on specified terms that require verification of 1:1 correspondence—something that Mr. Paynter has never submitted to despite his admission that he media-shifted his Sound Choice content. Slep-Tone has never "condon[ed] the placement of [its] product into the public domain."

6. **"As owner of Sound choice CD+G I am entitle to fair use of my property."**

Mr. Paynter is certainly entitled to use the original physical media he purchased, if any, as he sees fit. The problem—and the crux of this suit—is that Mr. Paynter was not using his original physical media. He was using the multiple copies of the physical media. Those copies were unauthorized. There is no

definition of "fair use" that encompasses the making of three copies of purchased media for simultaneous use at three different locations.

7. **"Sound Choice has fail to answer any of my request for discovery, pertaining to the disclosure of all factual evidence in their possession which supports their claim against me."**

Mr. Paynter did not propound discovery requests until after the deadline for doing so, nor did he move the Court for an extension of time to conduct discovery. Slep-Tone is hardly obligated to respond to late discovery requests. However, Slep-Tone informed Mr. Paynter that it would provide a response to his discovery requests and is doing so today.

8. **This lawsuit should be dismissed for lack of merit. Sound Choice has failed to offer any physical or factual evidence to support their allegations.**

This point is merely a rehash of point 4 and provides no additional argument.

Mr. Paynter's motion is notable for the lack of any articulated basis for dismissing the complaint. Instead, the motion appears to be nothing more than a statement that he disputes the facts as alleged in the complaint. That is not a proper ground for dismissal at any stage of an action.

As a *pro se* litigant, Mr. Paynter is entitled to some leeway as to the form of the documents he submits, and the Court should be careful not to ignore bona fide points and authorities merely because of the container holding them.

Unfortunately, Mr. Paynter presents no substantial reason at all for dismissing the action. against him.

Moreover, Mr. Paynter admits that he has destroyed evidence. In paragraph 6 under the heading "Facts," Mr. Paynter states that he "voluntarily removed all Sound Choice music from my computer external hard drive." Such an act constitutes spoliation of evidence, against which Mr. Paynter was specifically warned by letter on April 3, 2010:

> By this letter, you are hereby given notice not to destroy, conceal, or alter any paper or electronic files, computer equipment, or storage media related to your karaoke business. … You are required by law to preserve all materials in your possession, custody, or control that may be relevant to this lawsuit.
>
> If you destroy, conceal, or alter evidence relevant to this lawsuit, the Court may impose severe sanctions (penalties) on you.

(Exh. A.) That letter was included in a packet mailed to Mr. Paynter on April 3, 2010—a packet that Mr. Paynter undoubtedly received, because it prompted him to call counsel for the Plaintiff.

Whether or not the Court chooses to sanction Mr. Paynter for his admitted spoliation, what is clear is that he cannot on the one hand admit to having destroyed evidence and on the other complain of a lack of evidence.

In view of all of the foregoing, the Plaintiff respectfully urges the Court to deny Mr. Paynter's motion and to take such other and further steps with respect to the spoliation of evidence as the Court deems appropriate.

Respectfully submitted this the 27th day of April, 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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Date: April 27, 2012 s/James M. Harrington