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8 Slep-Tone Entertainment Corporation

9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

11 Slep-Tone Entertainment Corporation,
12 Plaintiff,

Case No.:

COMPLAINT

13 v.

14 Steven C. Brophy and Associated
15 Protective Services, L.L.C. d/b/a APS
16 and Associates,
17 Defendants.

18 The Plaintiff, Slep-Tone Entertainment Corporation (“Slep-Tone”), by its
19 undersigned counsel, hereby complains of the Defendants, and for its Complaint
20 alleges as follows:

21 **THE PARTIES**

22 1. Slep-Tone is a North Carolina corporation having its principal place
23 of business in Charlotte, North Carolina.

24 2. Upon information and belief, Defendant Steven C. Brophy (“Brophy”)
25 is an individual who resides and regularly conducts business in Maricopa County,
26 Arizona.

27 3. Upon information and belief, Defendant Associated Protective
28 Services, L.L.C. (“APS”) is a Montana limited liability company that does business
under its own name and as “APS and Associates.”

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action under

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1 28 U.S.C. § 1332(a), in that the amount in controversy in this action exceeds the
2 sum or value of \$75,000, exclusive of interest and costs, and is between citizens of
3 different States.

4 5. Specifically, Slep-Tone is a citizen of North Carolina, Brophy is a
5 citizen of Montana or Arizona, and APS is a citizen of Montana and Arizona.

6 6. This Court has general personal jurisdiction over Brophy because he
7 resides at least part-time in this State, and because he regularly and principally
8 conducts business in this State (including having personally registered “Associated
9 Protective Services” as a trade name in this State).

10 7. This Court has general personal jurisdiction over APS because it
11 maintains a principal place of business in this State and regularly and principally
12 conducts its business in this State.

13 8. This Court has specific personal jurisdiction over Brophy and APS in
14 this action because the causes of action herein arise from events and occurrences
15 that took place in this State, particularly including that this State is the place in
16 which the contract was made, which contract forms the basis of at least one of the
17 causes of action herein.

18 9. Venue is proper in this State and District pursuant to 28 U.S.C. §
19 1391(a) in that jurisdiction in this matter is founded solely upon diversity of
20 citizenship, both of the defendants reside in this State and District, and a
21 substantial part of the events or omissions giving rise to the claim occurred in this
22 District.

23
24 **BACKGROUND FACTS**

25 10. Slep-Tone is the manufacturer and distributor of karaoke
26 accompaniment tracks sold under the brand SOUND CHOICE, which is a
27 federally registered trademark.

28 11. Slep-Tone created a library of karaoke accompaniment tracks by re-

1 recording, over the course of its 25-year history, approximately 18,000 popular
2 songs from all eras of recorded music.

3 12. Slep-Tone’s karaoke accompaniment tracks are widely recognized as
4 being among the best available in terms of quality and faithfulness to the sound of
5 the original artist.

6 13. As has been the case recently with other parts of the music industry,
7 piracy of Slep-Tone’s accompaniment tracks has been a major factor in the
8 company’s decline. Slep-Tone estimates that for every 20 copies of its
9 accompaniment tracks that are in commercial use, approximately 19 are pirated
10 copies.

11 14. In 2009, Slep-Tone began to address the problem of piracy by
12 aggressively litigating against defendants who were suspected of piracy of its
13 accompaniment tracks in several test jurisdictions.

14 15. After modest success in its initial efforts, Slep-Tone looked to expand
15 its litigation program to other jurisdictions.

16 16. Upon information and belief, Brophy is a licensed private
17 investigator.

18 17. Upon information and belief, APS is a private investigations firm that
19 is owned and operated by Brophy.

20 18. Upon information and belief, Brophy is not a licensed attorney.

21 19. Brophy and APS, who had been contracted by Slep-Tone’s attorneys
22 to complete service of process upon certain defendants in Arizona, became aware
23 of Slep-Tone’s program in early 2010.

24 20. Eventually, Brophy and APS offered to manage Slep-Tone’s
25 investigative, negotiation, and litigation efforts on a more or less nationwide
26 exclusive basis.

27 ///

28 ///

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THE CONTRACT

1
2 21. On or about May 5, 2010, APS and Slep-Tone entered into an
3 “Investigative Collection Services Contract,” a true copy of which is attached
4 hereto as Exhibit A (“the Contract”).

5 22. APS’s basic duties under the Contract were to conduct investigations
6 of potential pirates of Slep-Tone’s karaoke tracks, undertake efforts to contact and
7 negotiate pre-suit settlements with those found to be pirates, collect funds from
8 settlements, and—where settlement was not possible—to arrange and pay for an
9 appropriate attorney to commence and prosecute a lawsuit in the name of Slep-
10 Tone.

11 23. As consideration, APS would retain 40% of the collected funds and
12 would remit the remaining 60% to Slep-Tone. After APS had handled 4,000
13 defendants, the percentages were to adjust to 35% and 65%, respectively.

14 24. The Contract required Slep-Tone to guarantee nationwide exclusivity
15 to APS in its collection efforts, except for attorneys already engaged to provide
16 services in specific areas, and subject to APS’s reaching certain periodic
17 milestones with respect to cases handled.

18 25. The Contract required APS to pay certain expenses related to its
19 duties—namely, “[a]ll costs associated with research, investigation, mailing of
20 letters, filing of suits, lawsuit service, and prosecution of cases”—from APS’s own
21 share of the proceeds.

22 26. The Contract required APS to remit Slep-Tone’s share of the proceeds
23 to Slep-Tone every two weeks, until the collection rate exceeded \$25,000 per
24 week, at which point payment would be remitted weekly.

25 27. The Contract required APS, in its handling of the project, to uphold
26 “the reputation and goodwill of [Slep-Tone].”

27 28. The Contract required APS at all times to “conduct its identification,
28 investigation and collection activities in a legal and ethical manner.”

THE PARTIES' PERFORMANCE OF THE CONTRACT

1
2 29. Except for those terms for which performance has been waived or
3 excused, Slep-Tone has performed all of the material terms required of it by the
4 Contract.

5 30. Specifically, Slep-Tone provided APS with potential infringers to
6 investigate on an exclusive basis and permitted it to manage and direct Slep-Tone's
7 infringement claims in those exclusive areas.

8 31. APS has failed and refused to remit 60% of the proceeds of its
9 collection efforts to Slep-Tone as required by the Contract.

10 32. As of April 30, 2012, APS had collected at least \$527,361.16 that it
11 had reported to Slep-Tone.

12 33. Slep-Tone's 60% share of the amount collected as noted above is
13 \$313,416.70.

14 34. As of April 30, 2012, APS had remitted a total of \$167,397.00 to
15 Slep-Tone.

16 35. Consequently, APS has retained and refused to pay at least
17 \$143,020.31 owed to Slep-Tone under the terms of the Contract.

18 36. Upon information and belief, APS has failed and refused to pay the
19 expenses the Contract requires APS to pay.

20 37. At least three law firms that APS engaged to bring lawsuits on Slep-
21 Tone's behalf have complained to Slep-Tone that APS has failed to pay their fees
22 as required.

23 38. In one instance, the law firm of Schmeiser, Olson & Watts, which was
24 engaged by APS to handle cases in Arizona and New York, sought leave to
25 withdraw as counsel from several actions and in doing so cited Slep-Tone's failure
26 to pay its fees.

27 39. Schmeiser, Olson's public withdrawal from those actions created the
28 impression that Slep-Tone was unwilling or unable to pay its fees, which greatly

1 and publicly embarrassed Slep-Tone, even though the failure to pay rest solely at
2 APS's feet.

3 40. In another instance, the law firm of Kalikhmann & Rayz has sought to
4 involve Slep-Tone in a fee dispute proceeding with its local bar association, based
5 upon thousands of dollars of unpaid fees, which APS was required to pay.

6 41. In another instance, the Tracy Jong Law Firm, which was hired by
7 APS to replace Schmeiser, Olson in New York, has complained that it incurred
8 significant travel expenses in taking over the matter on an emergency basis. Upon
9 information and belief, APS and Brophy promised prompt reimbursement for those
10 expenses but failed to pay them.

11 42. Upon information and belief, APS and Brophy promised to pay legal
12 fees to the Tracy Jong Law Firm for its work in handling matters, but has failed
13 and refused to pay those fees.

14 43. Upon information and belief, APS engaged the services of another
15 law firm on a contingent-fee basis, in which the firm's contingent fee was 40% of
16 the recovery—in other words, the entire portion of the recovery to which APS was
17 entitled, leaving no money from which APS could pay the expenses of the suit.

18 44. At least one private investigative firm APS engaged to perform
19 investigations of potential defendants has complained to Slep-Tone that their fees
20 were not paid by APS.

21 45. Even when APS has remitted payments, those payments have in some
22 cases been significantly delayed from the schedule required in the Contact.

23 46. APS has additionally failed and refused to uphold the reputation and
24 goodwill of Slep-Tone when representing Slep-Tone in negotiations and has failed
25 to act in an ethical manner at all times.

26 47. In one instance, APS conducted an investigation of a karaoke operator
27 in Orange County, California, Rodney Burge, and demanded that the karaoke
28 operator pay a significant sum of money to APS or to face a lawsuit from Slep-

1 Tone. The purported basis of the lawsuit was that the karaoke operator was using
2 counterfeit copies of Slep-Tone's karaoke accompaniment tracks to provide
3 commercial karaoke services.

4 48. In fact, that operator was exclusively using original karaoke media to
5 provide those services, an activity that is unquestionably not an infringement of
6 Slep-Tone's rights.

7 49. Despite having been informed of these facts, APS caused the operator
8 to be named as a defendant in a federal lawsuit in California and refused to arrange
9 for the lawsuit to be dismissed unless the operator signed a document exonerating
10 APS for any misconduct and paid APS \$1,000.

11 50. After the operator contacted Slep-Tone directly, APS and Brophy
12 refused to provide Slep-Tone with a copy of the written report, if one existed, from
13 its investigation of the operator.

14 51. After Slep-Tone conducted its own investigation of the situation and
15 determined that there was no reasonable basis for maintaining the suit, it instructed
16 the attorney handling the matter to enter an immediate voluntary dismissal of that
17 operator from the case. Upon information and belief, APS and Brophy
18 countermanded that instruction, causing a significant delay in the execution of
19 Slep-Tone's instructions.

20 52. Slep-Tone has received numerous complaints from persons targeted
21 by APS regarding APS's conduct in negotiating pre-suit and post-suit settlements.

22
23 **SLEP-TONE'S TERMINATION OF APS**

24 53. APS failed to meet milestone targets required under the contract in
25 order to maintain its exclusivity.

26 54. Accordingly, on or about February 25, 2011, Slep-Tone notified APS
27 that it had failed to meet the required milestones and that APS's exclusivity was
28 terminated. At the same time, Slep-Tone notified APS that as a show of good faith

1 it would not initiate separate actions in several states (California, Texas, Nevada,
2 Arizona, New Jersey, New York, Idaho, Montana, North Dakota, and South
3 Dakota) if APS showed progress toward the completion of investigations and the
4 filing of lawsuits in those states.

5 55. Despite Slep-Tone's unilateral show of good faith, APS failed to
6 make significant progress toward the completion of investigations and the filing of
7 lawsuits in those states, and Slep-Tone eventually withdrew that exclusivity as
8 well.

9 56. On or about January 18, 2012, following the incident involving
10 Rodney Burge, Kurt Slep, the owner of Slep-Tone, wrote to Brophy by email and
11 left several telephone messages, requesting an in-person meeting in Phoenix to
12 discuss the future of APS's involvement in Slep-Tone's anti-piracy project.

13 57. The proposed meeting was to coincide with Mr. Slep's trip to Phoenix
14 on other business January 23-26, 2012.

15 58. In his request, Mr. Slep indicated a desire to revise the contract to
16 enable APS and Brophy to continue to provide services, since APS and Brophy
17 appeared to be incapable of following the terms of the contract as previously
18 agreed.

19 59. Mr. Slep continued to telephone and email Brophy up to the last day
20 of Mr. Slep's time in Phoenix, but Brophy refused to respond and refused to meet.

21 60. Accordingly, on January 27, 2012, upon Mr. Slep's return to
22 Charlotte, and consistent with the termination procedure described in the contract,
23 Slep-Tone notified Brophy and APS by registered letter of its termination of the
24 contract based upon the breaches.

25 61. The termination was delivered to Brophy and APS on February 2,
26 2012.

27 62. The contract provided for a 10-business-day cure period from the date
28 of receipt of the notice. Accordingly, APS had until February 16, 2012, to cure its

1 breaches before the termination became final.

2 63. APS did not cure its breaches in any respect prior to February 16,
3 2012.

4 64. Accordingly, the contract was terminated as of that date.

5
6 **APS's POST-TERMINATION CONDUCT**

7 65. APS's conduct immediately prior to and following the contract
8 termination reflects an apparent attempt to cause significant damage to Slep-
9 Tone's ability to take over the litigation brought in its name and to conduct its anti-
10 piracy activities in those areas where APS had been active.

11 66. On February 15, 2012, one day before the termination became
12 effective, and after Brophy and APS had been made aware of Slep-Tone's desire
13 that APS arrange to bring no new cases on behalf of Slep-Tone, Brophy and APS
14 caused a new action, *Slep-Tone Entertainment Corp. v. Ellis Island Casino &*
15 *Brewery et al.*, No. 2:12cv239-KJD-RJJ, to be filed in the District of Nevada.

16 67. That action named approximately 53 defendants, including a wide
17 array of types of offenders (including karaoke jockeys, venues that owned their
18 own karaoke systems, and venues that had contracted with others to provide
19 karaoke services).

20 68. The action greatly exceeded Slep-Tone's preferred maximum number
21 of defendants to be named in a single action and included several large
22 multinational gaming conglomerates whom Slep-Tone would have preferred, as a
23 matter of policy, to name in individual suits.

24 69. After several weeks had passed, it became clear that the attorney APS
25 had engaged to prosecute the Nevada action had missed one or more deadlines for
26 responding to motions to dismiss the action.

27 70. After becoming aware of the missed deadlines, Slep-Tone contacted
28 the attorney handling the Nevada action to express its distaste at missed deadlines

1 and indicating that it would engage another attorney to take over the case, unless
2 the appropriate steps were taken to mitigate the damage.

3 71. Upon information and belief, when Brophy learned that Slep-Tone
4 had indicated that it would take over the case if necessary to protect its interests, he
5 threatened to telephone the defendants in that action and inform them, falsely, that
6 no investigations had been undertaken prior to bringing the suit, in the belief that
7 doing so would expose Slep-Tone to sanctions.

8 72. Brophy only relented from his threat when Slep-Tone agreed that an
9 additional 30% of the revenues recovered from the lawsuit would be designated as
10 APS revenues and applied to APS's outstanding balance, provided that Brophy's
11 designated attorney remained as counsel in the case.

12 73. Despite Slep-Tone's flexibility and good faith efforts to resolve a
13 dispute that was not of its own making—having been entirely instigated by APS as
14 a “rogue operator”—Slep-Tone's good faith was met with incompetence, if not
15 willful misconduct, in that the attorney handling the Nevada matter failed and
16 refused to meet several other deadlines, which resulted in the dismissal of
17 numerous defendants from the action.

18 74. Ultimately, Slep-Tone was required to engage other counsel to take
19 over the litigation in order to salvage what it could from the case.

20 75. Upon information and belief, Brophy and APS took responsibility for
21 serving the summons and complaint upon the defendants in the Nevada action;
22 however, no return-of-service documents have been filed in that case, and as a
23 result, Slep-Tone has no way of determining which defendants (other than those
24 who have appeared) have been served with process and which have not.

25 76. Brophy and APS were responsible for bringing and managing another
26 case, *Slep-Tone Entertainment Corp. v. Buckmueller et al.*, No. 2:11cv4636-JLL-
27 MAH (D.N.J.), which had been filed well before Slep-Tone terminated APS.

28 77. Despite the avoidance of a dismissal under Rule 12 in the early stages

1 of that case, upon information and belief, acting after APS's authority had been
2 terminated and without informing the attorneys of APS's change in status, Brophy
3 instructed the attorneys handling that matter to enter a voluntary dismissal of the
4 entire action, with prejudice.

5 78. For their part, the attorneys objected to the dismissal of the action
6 with prejudice, but upon information and belief, Brophy insisted that the matter be
7 dismissed with prejudice.

8 79. Although Slep-Tone voluntarily forwent investigations in the areas
9 where, and investigations of the prospective defendants whom, APS was
10 investigating, and despite APS's having caused lawsuits to be brought in Slep-
11 Tone's name supposedly based upon APS's own investigations, APS has largely
12 failed and refused to turn over reports, detailed or otherwise, of the investigations
13 APS claims were conducted prior to causing the suits to be filed.

14 80. The Defendants' activities as complained of herein have been
15 conducted willfully and intentionally, with malice toward the interests of Slep-
16 Tone.

17
18 **COUNT I**
Breach of Contract

19 81. The relationship between Slep-Tone and the Defendants was the
20 subject of a valid and enforceable contract for the provision of certain investigative
21 and management services.

22 82. By failing to perform as agreed and by failing to remit funds as
23 required, at least, the Defendants have breached the contract between Slep-Tone
24 and the Defendants.

25 83. As a direct result of the Defendants' breach of the contract, Slep-Tone
26 has suffered a pecuniary loss, to wit: the loss of \$143,020.31 in funds owed to it
27 that were collected and retained by the Defendants.

28 84. Slep-Tone has also suffered contingent losses predicated upon the

1 Defendants' failure to pay the fees and expenses incurred with service providers
2 whom the Defendants engaged, in Slep-Tone's name, which fees and expenses
3 Slep-Tone may be required to pay.

4 85. Slep-Tone has further suffered reputational damage, in that the
5 Defendants have failed to uphold their contractual obligation to the reputation and
6 good will of Slep-Tone by engaging in behavior that is inconsistent with Slep-
7 Tone's goals and values, including the non-payment of vendors and counsel and
8 poor treatment of defendants, prospective defendants, and Slep-Tone customers.

9 86. Slep-Tone's reputational damage has caused unknown and untold
10 damage by harming Slep-Tone's ability to prosecute its claims for infringement of
11 its trademarks and by alienating customers, vendors, and others.

12
13 **COUNT II**
Conversion

14 87. The Defendants are in possession of at least \$143,020.31 in funds
15 owed to Slep-Tone as a result of those funds having been paid to the Defendants by
16 third parties in trust for Slep-Tone.

17 88. Rather than paying those funds over to Slep-Tone immediately as
18 required, the Defendants have instead converted those funds to their own use.

19 89. The Defendants are thus exerting wrongful control over those funds in
20 a manner than is inconsistent with Slep-Tone's right to receive and have those
21 funds.

22 90. Consequently, Slep-Tone has been damaged by the Defendants'
23 wrongful acts.

24
25 **COUNT III**
Unjust Enrichment

26 91. The Defendants are in possession of a substantial volume of
27 information, in the form of investigative reports and other documents, they have
28 collected in Slep-Tone's name in pursuit of their contractual duties.

1 92. The Defendants have used that information to initiate litigation on
2 behalf of Slep-Tone in various courts, which litigation is binding upon Slep-Tone
3 as to the disputes encompassed therein.

4 93. The Defendants have used that information in some cases to induce
5 third parties to settle claims against Slep-Tone, without remitting to Slep-Tone the
6 appropriate share of the proceeds.

7 94. Upon termination of the contract with the Defendants by Slep-Tone,
8 Slep-Tone has been in some cases obligated to continue the litigation or suffer
9 unpalatable consequences, such as dismissal of cases with prejudice.

10 95. The Defendants have likewise used their more or less exclusive
11 possession of that information to seek concessions from Slep-Tone in this dispute,
12 using extortionate language.

13 96. In particular, the Defendants have threatened to inform defendants in
14 certain pending cases, falsely, that no pre-suit investigations of their conduct were
15 undertaken, which—if it were true—would potentially expose Slep-Tone to
16 sanctions for litigation misconduct.

17 97. Consequently, the Defendants have been enriched by their possession
18 and retention of the information, and Slep-Tone has been impoverished by it.

19 98. The Defendants' enrichment is directly related to Slep-Tone's
20 impoverishment.

21 99. The Defendants' refusal to turn over documents, which they used as
22 the basis for obligating Slep-Tone to certain litigation, is entirely without legal
23 justification, and is based solely upon the Defendants' desire to maintain an illicit
24 revenue stream.

25 100. Slep-Tone's losses are not readily compensable by money, because its
26 lack of possession of this information, through no fault of its own, has caused it to
27 be potentially unable, if pressed to do so, to demonstrate good faith when the
28 Defendants caused the litigation to be brought.

1 101. Slep-Tone therefore has no legal remedy for the Defendants' unjust
2 enrichment.

3
4 **COUNT IV**
Constructive Trust

5 102. The Defendants have been unjustly enriched by their possession and
6 unreasonable retention of the investigative reports and other documents.

7 103. Those investigative reports and other documents belong to Slep-Tone
8 by virtue of their having been used to initiate litigation and pre-litigation
9 settlements on Slep-Tone's behalf.

10 104. Slep-Tone is entitled to the imposition of a constructive trust over all
11 investigative reports and related documents created or obtained by the Defendants
12 during the course of investigations they conducted on behalf of Slep-Tone.

13
14 **COUNT V**
Declaratory Judgment Regarding Contract

15 105. In April 2012, seeking to salvage litigation (*Slep-Tone Entertainment*
16 *Corp. v. Backstage Bar and Grill et al.*, No. 2:11cv8305-ODW (C.D. Calif.)) in
17 which the Defendants' refusal to cooperate materially damaged Slep-Tone's ability
18 to prosecute, Slep-Tone entered into an agreement ("the Salvage Agreement") with
19 APS & Associates whereby APS would "share the APS Files with [Slep-Tone's
20 counsel, Donna Boris] for the purpose of negotiating settlements and litigating the
21 cases currently on file." In return, APS would receive 30% of the settlement
22 proceeds, Boris 40% as counsel, and Slep-Tone 30%.

23 106. The term "APS Files" was defined in the Salvage Agreement to
24 include "all of APS's investigative files, including documents, photos, recordings,
25 reports, notes, etc. generated in connection with all investigations performed by
26 APS regarding infringing activities by KJs and/or venues."

27 107. Despite APS's agreement to do so, APS never provided Boris with
28 any APS Files.

1 108. Due in part to APS's failure to provide such files, Boris was severely
2 restricted in her ability to litigate in the California case.

3 109. APS's failure to provide files was a contributing factor in Boris's
4 failure to prosecute the matter, which led eventually to a dismissal of all
5 defendants with prejudice.

6 110. Because of its breach, APS is not entitled to any portion of funds
7 generated through settlements with defendants in the California case.

8 111. An actual controversy between APS and Slep-Tone exists in that
9 Boris has refused to pay over to Slep-Tone any portion of settlement proceeds from
10 the California case.

11 112. Slep-Tone is entitled to a declaratory judgment voiding the Salvage
12 Agreement and/or relieving Slep-Tone of any obligation to compensate APS based
13 upon settlements with defendants in the California case, and declaring that Slep-
14 Tone is the owner of all settlement funds derived therefrom, free of any claims by
15 APS, and subject to any other agreement with third parties including Boris
16 regarding those funds.

17
18 **PRAYER FOR RELIEF**

19 WHEREFORE, the Plaintiff prays unto the Court for relief in the following
20 forms:

21 A. That the Court find for the Plaintiff and against the Defendants on
22 each of the claims herein;

23 B. That the Court award the Plaintiff compensatory damages in the
24 amount of \$143,020.31, or such other amount as may be proven at trial;

25 C. That the Court declare the Salvage Agreement to be void, or relieve
26 Slep-Tone of any obligation to compensate APS under that agreement;

27 D. That the Court declare Slep-Tone to be the rightful owner of all funds
28 derived from settlements with defendants in *Slep-Tone Entertainment Corp. v.*

1 *Backstage Bar and Grill et al.*, No. 2:11cv8305-ODW (C.D. Calif.), free of any
2 claims by APS, and subject to any other agreement with third parties including
3 Boris regarding those funds;

4 E. That the Court award the Plaintiff enhanced or special damages, in an
5 amount to be proven at trial, for the Defendants' willful and intentional
6 misconduct;

7 F. That the Court grant the Plaintiff preliminary and permanent
8 injunctive relief against the Defendants' continuing bad acts, and particularly
9 including an injunction against the Defendants' continuing to hold themselves out
10 as authorized representatives of Slep-Tone and an injunction against failing to turn
11 over to the Plaintiff the investigative reports and related documents; and

12 G. That the Court grant the Plaintiff such other and further relief as the
13 interests of justice require.

14
15
16 Respectfully submitted this the 18th day of December, 2012.

17
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