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SLEP-TONE ENTERTAINMENT CORPORATION

11
12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14 SLEP-TONE ENTERTAINMENT
CORPORATION,
15 Plaintiff,
16
17 v.
18 BACKSTAGE BAR AND GRILL, *et al.*,
19 Defendants.

Case No.: CV 11-08305-ODW-PLA

**NOTICE OF MOTION AND
MOTION FOR
RECONSIDERATION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
THE MOTION**

Date: March 18, 2013
Time: 1:30 p.m.
Courtroom: 11

1 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT at 1:30 p.m. on March 18, 2013, or as soon
3 thereafter as it can be heard, at courtroom 11 of the above-entitled court, located at
4 312 North Spring Street, Los Angeles, CA 90012-4701, Plaintiff Slep-Tone
5 Entertainment Corporation (“Plaintiff”) will and hereby move the Court to reconsider
6 its Order dated January 15, 2013 (Docket No. 104).

7 This motion is made pursuant to Rule 60(b)(6), and, in the alternative, Rule
8 59(e), of the Federal Rules of Civil Procedure, and on the grounds that Defendants
9 Kelly Sugano and Taka-O are not the “prevailing party” as defined by the Ninth
10 Circuit Court of Appeals for the purposes of the fee-shifting provision contained in the
11 Lanham Act.

12 This motion is made following the telephone conference of counsel which took
13 place on February 12, 2013, and will be based on this Notice, the accompanying
14 memorandum of points and authorities, as well as the pleadings, files, and records in
15 the above-entitled action, and any such oral and documentary evidence as may be
16 presented prior to or at the hearing on this motion.

17 Respectfully submitted,

18 Dated: February 12, 2013

HARRINGTON LAW, P.C.

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20 By /James M. Harrington/

21 _____
22 James M. Harrington
23 Attorneys for Plaintiff,
24 SLEP-TONE ENTERTAINMENT
25 CORPORATION
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Slep-Tone Entertainment Corporation (“Slep-Tone”) respectfully
4 requests that the Court reconsider its Order dated January 15, 2013, pursuant to Rule
5 60(b)(6) or, in the alternative, under Rule 59(e), for the following reasons.

6 **II. ARGUMENT**

7 The Trademark Act contains a fee-shifting provision that provides that the
8 Court “in exceptional cases may award reasonable attorney fees to the prevailing
9 party.” 15 U. S. C. § 1117(a)(3). In its order, the Court found this case to be
10 “exceptional” under 15 U. S. C. § 1117(a)(3) and issued an order directing the
11 payment of attorney fees to Defendants Kelly Sugano and Taka-O.

12 Regardless of the Court’s conclusion that this matter constitutes an exceptional
13 case under the Trademark Act, the Court erred by awarding Defendants Sugano and
14 Taka-O attorney fees, because they are not a “prevailing party” under the applicable
15 law.

16 It is true that the Court issued an order on November 8, 2012, dismissing this
17 action with prejudice because of the Plaintiff’s failure to prosecute the action.
18 Ordinarily, such a dismissal would render these Defendants prevailing parties.
19 However, the existence of a prior settlement agreement altered the parties’
20 relationship, such that the Defendants cannot be considered prevailing parties.

21 The centerpiece of the Defendants’ motion for attorney fees was the fact that
22 they had entered into a settlement agreement with Slep-Tone that provided for the
23 payment of money from the Defendants to Slep-Tone in exchange for certain other
24 consideration. While Slep-Tone’s attorney, who was and is inexplicably missing-in-
25 action, failed to cooperate with opposing counsel to prepare and file the necessary
26 dismissal paperwork, it cannot be disputed that the Court’s November 8 order gave to
27 the Defendants precisely the benefit of the bargain they claimed, in their motion for
28 attorney fees, not to have received: a dismissal of the action with prejudice.

1 That settlement agreement was made of record as a part of the Defendants’
2 motion for attorney fees. Because it provides for an alteration of the parties’
3 relationship as well as for the payment of money from the Defendants to Slep-Tone,
4 the existence of the settlement agreement renders Slep-Tone the “prevailing party”
5 under the law of the Ninth Circuit.

6 Under applicable Ninth Circuit law, a plaintiff “prevails” when he or she enters
7 into a legally enforceable settlement agreement against the defendant: “[A] plaintiff
8 ‘prevails’ when actual relief on the merits of his claim materially alters the legal
9 relationship between the parties by modifying the defendant's behavior in a way that
10 directly benefits the plaintiff.” *See Fischer v. SJB-P.D. Inc.*, 214 F. 3d 1115, 1118
11 (9th Cir. 2000) (*quoting Farrar v. Hobby*, 506 U. S. 103, 111-12, 113, 121 L. Ed. 2d
12 494, 113 S. Ct. 566 (1992)). “[A] material alteration of the legal relationship occurs
13 [when] the plaintiff becomes entitled to enforce a judgment, consent decree, or
14 settlement against the defendant.” *Farrar*, 506 U.S. at 113. A settlement agreement
15 alters the legal relationship between the parties because Slep-Tone can force—in this
16 case, has forced—the Defendants to do something they otherwise would not have to
17 do, *i.e.*, pay money. *See Barrios v. Cal. Interscholastic Fed’n*, 277 F. 3d 1128, 1134
18 (9th Cir. 2002).

19 Even if the Court were to consider the Defendants to have “prevailed” because
20 the Court entered a dismissal of the case against them with prejudice, their claim to be
21 the prevailing party is no better than Slep-Tone’s, because Slep-Tone was able,
22 through the settlement, to modify their behavior. The plain meaning of “the
23 prevailing party” in 15 U. S. C. § 1117(a)(3) appears to preclude an award of attorney
24 fees when both sides can be said to be a prevailing party.

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1 **III. CONCLUSION**

2 In view of the foregoing, it is respectfully submitted that good cause exists to
3 vacate the award of attorney fees. Slep-Tone accordingly requests reconsideration of
4 the order dated January 15, 2013.

5 Respectfully submitted,

6 Dated: February 12, 2013

HARRINGTON LAW, P.C.

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/James M. Harrington/

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By

James M. Harrington
Attorneys for Plaintiff,
SLEP-TONE ENTERTAINMENT
CORPORATION

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