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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Slep-Tone Entertainment Corporation, Plaintiff, v. Tara King, Defendant.	Case No.: 2:13cv00352-APG-VCF **RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

The Plaintiff, Slep-Tone Entertainment Corporation ("Slep-Tone"), by its undersigned counsel, hereby responds in opposition to the motion (Doc. 10) of Defendant Tara King to dismiss this action with prejudice.

DISCUSSION

In her memorandum of law, Ms. King advances a number of arguments in support of her proposed dismissal with prejudice, all of which are meritless. Ms. King additionally bases these arguments on a needlessly inflammatory version of the facts, in the hope of painting the Plaintiff's conduct as fraud in order to avoid being called to account for her tortious behavior.

Ms. King was sued, along with other defendants, in a case titled *Slep-Tone Entertainment Corporation v. Ellis Island Casino & Brewery*, No. 2:12cv239-

KJD-NJK. On February 11, 2013, the Court entered an order in which the joinder of multiple defendants, including Ms. King, was found to be improper. On March 1, 2013, consistent with the terms of the order, Slep-Tone opened a new case number—the present case—naming Ms. King as the sole defendant.

In similar situations in other districts, in the experience of counsel for the Plaintiff, a finding of misjoinder coupled with an order to open new cases for individual defendants has resulted in those cases being treated as continuations of the original case, with neither new service of process nor a new pro hac vice admission being required. Accordingly, when the new case was opened, counsel for the Plaintiff did not think it necessary to file a new petition for admission pro hac vice, since he had been admitted in the prior case, nor to obtain a summons, since Ms. King had already been served in the prior case.

The Plaintiff likely would have proceeded to seek entry of Ms. King's default but for the fact that the attorney who had been representing her, Robert Kossack, was suspended from practice by the Nevada Supreme Court for 18 months in May 2013. The Plaintiff learned of this suspension on June 18, 2013. Because the Plaintiff could not be certain that Ms. King had been informed of the re-institution of the suit against her, the decision was made to obtain a summons and serve her with the amended complaint. A summons was timely issued and served upon her on July 1, 2013.[1]

Likewise, once Ms. King brought to the Plaintiff's attention that no new pro hac vice petition had been filed for Mr. Harrington, in an abundance of caution, the Plaintiff and its attorneys took the appropriate steps to have Mr. Harrington admitted—and the Court granted the petition on July 29, 2013, without comment.

Ms. King accuses counsel for the Plaintiff of fraud upon the Court for

[1] Ms. King correctly points out that service was made on Monday, July 1, 2013, the 122d day after the complaint was filed, while Rule 4(m) requires service within 120 days. However, the 120th day after the complaint was filed, June 29, was a Saturday, and Rule 6(a) provides for the automatic extension, to the following business day, of any period stated in days and expiring on a Saturday, Sunday, or holiday.

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several reasons—specifically including "tricking" the Clerk into issuing a summons, listing Mr. Harrington as "pro hac vice" before the filing of a verified petition in this case, and Mr. Faughnan not signing the complaint. That is a serious charge.

There were procedural irregularities in this action. Although Ms. King is quick to attribute those irregularities—somewhat bombastically—to fraud, deceit, and trickery, she proffers no actual evidence of fraud or deception, and the irregularities are more easily and sensibly explained by the unusual posture of this case and the unusual disposition of the case that begat it. In retrospect, for example, counsel for the Plaintiff should have undertaken earlier to ensure that Mr. Harrington was properly admitted for this case. However, those procedural irregularities did not confer any advantage on the Plaintiff or any disadvantage on Ms. King, and their existence was the result—at worst—of misunderstanding, not fraud or trickery.

Moreover, those procedural irregularities have been addressed by the Plaintiff: Mr. Harrington has been admitted pro hac vice; Mr. Faughnan has been designated as local counsel; the Complaint has been signed by an attorney of record; and Ms. King was served within the 120-day period prescribed by Rule 4(m).

The result is that the case presents itself in exactly the same disposition as it would have been in had the procedures specified in the rules been followed appropriately. It is therefore respectfully suggested that no further action is needed by the Court to ensure the just and speedy resolution of this case.

Even if the Court were to consider the conduct sanctionable, however, dismissal as Ms. King urges would amount to an extreme sanction for a minor, effectively inconsequential, fully remedied error. The Ninth Circuit has identified five factors that a district court must consider before dismissing a case as a sanction:

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> (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the other party; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions.

Malone v. United States Postal Service, 833 F.2d 128, 130 (9th Cir. 1987). On the facts before the Court, the public's interest in expeditious resolution of litigation has not been impaired; the Court's ability to manage its docket is unimpeded; and there is no prejudice to Ms. King. The fourth factor always counsels against dismissal. As to the fifth factor, the Plaintiff's compliance with the rules has already been obtained, and not even a light sanction, such as a warning, was necessary to achieve that. It is therefore respectfully suggested that dismissal in this case would be wholly inappropriate.

In addition to dismissal, Ms. King demands that the dismissal be "with prejudice." There is simply no basis for a dismissal with prejudice. Ms. King was dropped as a party from the prior suit on the basis of misjoinder. Rule 21 provides that "[m]isjoinder of parties is not a ground for dismissing an action." That provision has been interpreted as prohibiting the dismissal of a party with prejudice based upon misjoinder. *See, e.g., Allen v. County of Stanislaus*, 478 Fed. Appx. 446 (9th Cir. 2012) (unpublished) (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964); *Coughlin v. Rogers*, 130 F.3d 1348, 1351 (9th Cir. 1997) ("If the test for permissive joinder is not satisfied . . . the court can generally dismiss all but the first named plaintiff without prejudice") (emphasis added).

In view of the foregoing, the Plaintiff respectfully urges the Court to deny Ms. King's motion.

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Respectfully submitted this the 2d day of August, 2013.

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By: /s/
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing paper is being served on the date indicated below by depositing a copy thereof as First Class Mail, postage prepaid, addressed as follows:

TARA KING
1904 CHAVEZ CT
NORTH LAS VEGAS NV 89031-5527

Date: August 2, 2013

/s/
James M. Harrington

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