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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

SLEP-TONE ENTERTAINMENT CORPORATION, Plaintiff, vs. BACKSTAGE BAR AND GRILL, et al., Defendants.	Case No.: CV11-08305 ODW (PLAx) Hon. Otis D. Wright, II **CORRECTED NOTICE OF MOTION AND MOTION BY DEFENDANTS KELLY C. SUGANO AND TAKA-O FOR ATTORNEYS' FEES AND SANCTIONS** Hearing Date: Jan. 7, 2013 Time: 1:30 p.m. Courtroom: 11 Complaint Filed : Oct. 6, 2011

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT at 1:30 p.m. on Monday, January 7, 2013, or soon thereafter as counsel may be heard in the above entitled Court,

pursuant to 15 U.S.C. § 1117(a) and this Court's inherent power, Defendants KELLY SUGANO and TAKA-O, will move this Court for an order requiring Plaintiff SLEP-TONE ENTERTAINMENT CORPORATION and its counsel of record to pay attorneys' fees to said Defendants in the amount of $19,330 and sanctions in the amount of $5,000.

This motion is made following the conference of counsel pursuant to L.R. 7-3 that Defendants' counsel noticed and initiated pursuant to the notice at 10:00 a.m. on October 19, 2012, but in which Plaintiff's counsel did not participate nor suggested any date to reschedule.

This motion is based upon this notice of motion, the accompanying memorandum of points and authorities, the Declaration of J. Marie Gray, Esq. with Exhibits 1-5 thereto, the Declaration of Craig McLaughlin, Esq. with Exhibits 1-9 thereto, other records and papers on file in this action, such further papers and records as may be submitted to the Court at or before the hearing on this motion and the oral argument of counsel at the hearing.

Law Office of Craig McLaughlin

Dated: November 27, 2012

By: /s/ Craig McLaughlin
Craig McLaughlin, Esq.
Attorney for Defendants
Kelly C. Sugano and Taka-O

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SLEP-TONE ENTERTAINMENT CORPORATION, Plaintiff, vs. BACKSTAGE BAR AND GRILL, et al., Defendants.	Case No.: CV11-08305 ODW (PLAx) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANTS KELLY C. SUGANO AND TAKA-O FOR ATTORNEYS' FEES AND SANCTIONS** Hearing Date: Jan. 7, 2013 Time: 1:30 p.m. Courtroom: 11 Complaint Filed : Oct. 6, 2011

I. INTRODUCTION

On November 8, 2012, this Court ordered dismissal of Plaintiff Slep-tone Entertainment Corporation's claims against all defendants with prejudice for failure to prosecute the case. The dismissal was entered on November 9, 2012. [Dkt. No. 89.] As prevailing parties, pursuant to 15 U.S.C. § 1117(a) and this Court's inherent power, Defendants Kelly C. Sugano and Taka-O ("Defendants") move this Court for an award of attorney's fees and sanctions.

II. FACTS

On October 6, 2011, Plaintiff Slep-tone Entertainment Corporation ("Slep-tone") filed a complaint ("Complaint") against over 70 variously situated, unrelated and improperly joined defendants (individual karaoke jockeys, restaurants, and karaoke venues) with identical allegations against each of them for infringing Slep-tone's "Sound Choice" marks and unfair competition in violation of the Lanham Act. [Dkt. No. 1.] This lawsuit was one of many filed by Slep-tone seeking to shake out settlement money from individuals and small businesses throughout the country.[1] Not unlike other cases it filed, this one too improperly

[1] Slep-tone has launched a large number of similar lawsuits in many federal courts across the land accusing its actual customers of infringing its trademarks purportedly by playing pirated Slep-tone karaoke material from a computer without being in possession of the corresponding genuine Slep-tone compact disc from which the computer file originated. Slep-tone continues to sue purchasers of its genuine discs, as here, as an apparent business model to generate settlement revenue from individuals and small businesses. Indeed, as Judge Pregerson recently noted, Slep-tone has extracted over $180,000 in settlements in this very case. Yet ironically when Slep-tone itself was later sued here, it denied sufficient contacts with California. Case No. CV 11-05574 DDP (JEMx), Dkt. No. 8 (C.D. Cal., Jan. 17, 2012). [McLaughlin Decl., Ex. 1, pg. 6 of decision.]

joined vast numbers of disparate defendants without allegation of a connection between them.[2]

In its Complaint, Slep-tone asserted millions of dollars in actual and statutory damages against parties from Santa Barbara south to include even out-of-venue defendants from Carlsbad and Oceanside in San Diego County. [Dkt. No. 1, see ¶¶ 30, 36, and 42.] For the past 30 years, Defendant Kelly C. Sugano has been a proprietor of Taka-O, a small neighborhood Japanese restaurant in San Clemente, California, which also offers karaoke.

Early in discovery, to support their denials of any wrongdoing, and without any discovery request, Defendants had invited Slep-tone to visit Taka-O to inspect all of Defendants' genuine Slep-tone discs and receipts of purchase. Defendants had signed Slep-tone's audit form submitting to a full inspection of Defendants' computer and genuine Slep-tone discs. The executed audit form was sent to Slep-tone's counsel, Donna Boris, Esq., on February 9, 2012. [Gray Decl., ¶ 6, Ex. 1.] Slep-tone never followed up to arrange for an inspection. [Gray Decl., ¶ 6.]

After months of inaction from Slep-tone, on July 7, 2012, Defendants propounded interrogatories and document requests asking Slep-tone to provide information to support its claims. [Gray Decl., ¶ 7.] Slep-tone, however,

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[2] The Complaint was filed one day after U.S. District Court Judge Graham Mullin ordered Slep-tone, on its home turf in North Carolina, to file separate cases against each of the disparate defendants. *Slep-tone Entertainment Corp. v. Robert Manville, et al.*, Case No. 3:11-cv-00122 (W.D. N.Car., Oct. 5, 2011). [McLaughlin Decl., Ex. 2.] Slep-tone's practice of filing improperly joined defendants continued despite order to sever from the same court in *Slep-tone Entertainment Corp. v. Nebraska 41 Group LLC, et al.*, Case No. 8:12-cv-157-T-30MAP (M.D. Fl., April 30, 2012). [McLaughlin Decl., Ex. 3.] Slep-tone's practice also includes exercising the court for three extensions of time, then not responding. *Slep-Tone Entertainment Corp., v. Ellis Island Casino & Brewery, et al.*, Case No. 2:12-CV-00239-KJD-RJJ, Doc. No. 73 (D. Nev., May 21, 2012) (order granting defendants' motion to dismiss (motion to sever mooted) for failure to respond after three extensions of time granted to Slep-tone, represented *pro hac vice* by Donna Boris, Esq.). [McLaughlin Decl., Ex. 4.]

responded in bad faith with only frivolous boilerplate objections. [Gray Decl., ¶ 7, Exs. 2, 3 and 4.] Slep-tone did not produce any documents or interrogatory answers in discovery. [McLaughlin Decl., ¶ 10.] Indeed, Slep-tone stiffed Defendants and their requests for information to support its claims. Slep-tone's bad faith discovery tactics in this case, however, were not new. Slep-tone had similarly stiffed others' efforts to discover the basis of its claims. [McLaughlin Decl., ¶ 10, Ex. 5.]

Slep-tone's responses to Defendants' Interrogatory Nos. 6 and 7 were especially telling. [Gray Decl., Exs. 2 and 3.] The interrogatories asked Slep-tone to describe the alleged infringing conduct and to describe how and by what means Slep-tone determined the conduct to be infringing and not authorized. In response, Slep-tone improperly objected to the request for facts on grounds of privilege, but it would "consider"[3] waiving its claim to privilege on the conditions that a protective order be entered and that Defendants submit "a binding declaration of Defendants' holdings of Sound Choice original media . . . ." [*Id*.; see same response to defendant Santo's Interrogatory No. 5 at McLaughlin Decl., Ex. 5.] Yet as set forth above, Slep-tone had requested and had been invited for months to visit Defendants' karaoke venue and inspect Defendants' computer, their inventory of genuine Sound Choice disc material and corresponding purchase receipts. Slep-tone's bad faith is further revealed given that facts forming the basis of a lawsuit, if they exist at all here, are not privileged. Additionally, offering an illusory bargain

[3] The imposition of improper conditions and impediments is a favored tactic by Slep-tone. Indeed, on June 22, 2012, Slep-tone's frequent counsel, James M. Harrington, was found in contempt of court for such tactics. *In Re Slep-Tone Entertainment Corporation, Consolidated Cases*, Case No. 5:11cv32/RS/CJK (N.D. Fl.). [McLaughlin Decl., Ex. 6.] Mr. Harrington is also no stranger to filing baseless lawsuits. *Precision Links Inc. v. USA Products Group, Inc. and Home Depot U.S.A., Inc.*, Case No. 3:08-cv-00576-MR, Doc. 113 (W.D. N.Car., April 4, 2012) (order granting defendants' fee petition in the amount of $250,395 plus interest for filing and maintaining baseless patent infringement lawsuit).

does not satisfy one's Rule 33 and 34 obligations to respond to discovery in good faith. Moreover, the duty to obtain a protective order rests with the answering party which Slep-tone never sought.

These interrogatory responses also exposed Slep-tone's true plan to extract settlement money from Defendants without a basis. In fact, Slep-tone had no interest in discovering Defendants' proof of what it already knew - that its claims against Defendants were meritless.

The facts also show that Slep-tone had no interest in proving its own allegations. Indeed, Slep-tone did not serve any discovery. [McLaughlin Decl., ¶ 13.] Instead, Slep-tone preferred to continue to maintain this meritless action against Defendants in bad faith and at lowest possible cost to itself, waiting until the specter of spending more fees by Defendants grew near.

Slep-tone's conduct shows that it had failed to conduct an adequate pre-filing investigation before filing suit, that it had no evidence to present at trial, and that it never intended to seek a decision on the merits. Rather, its strategy was to sue first without any basis and then prolong litigation to drive up Defendants' expenses so that Defendants would be motivated to cough up settlement money.

Slep-tone carried out its plan to settle out as many defendants as possible before it was required to expend resources to prepare for trial. If any unsettled defendants remained at the pre-trial conference stage, it would simply walk away avoiding preparation expense. And it did. [Dkt. No. 89.]

Unaware of Slep-tone's plan, to avoid the expense of a dispositive motion, preparation of pre-trial papers and pursuit of the expensive course to trial, on Oct. 4, 2012, Defendants submitted to paying a nuisance value of $5,000 as set forth in Slep-tone's form settlement agreement. [McLaughlin Decl., Ex. 7.] The payment was made in exchange for Slep-tone's promise to dismiss its claims within 5 business days of receipt of payment. [McLaughlin Decl., Ex. 7 – see ¶ 5 therein.]

The payment in the form of a cashier's check was mailed to Slep-tone's counsel on October 4, 2012. [McLaughlin Decl., ¶ 15, Ex. 8.]

Slep-tone, however, was not finished with its bad faith and delaying tactics. Pursuant to the terms of the settlement agreement, payment was timely made by Defendants and all terms of the agreement had been fulfilled except one: Slep-tone failed to dismiss Defendants from the case within 5 days of receiving the settlement payment, which, on October 15, 2012, was belatedly acknowledged by Slep-tone's counsel to have been received. [McLaughlin Decl., Ex. 8.]

During much of the month of October, Defendants' counsel had urged Slep-tone's counsel, Ms. Donna Boris, several times to dismiss the case against Defendants. Defendants' counsel had sent a simple stipulation to Ms. Boris to sign and offered to tend to its filing making it as easy as possible for her to dismiss the case. [McLaughlin Decl., Ex. 8.] However, each of Defendants' counsel's requests for such cooperation was ignored as was a noticed meet and confer on October 19th and two further follow-up voice mails to Ms. Boris on October 23rd and October 26th asking her to simply provide an approval via e-mail to Defendants' counsel to sign the stipulation on Slep-tone's counsel's behalf. [McLaughlin Decl., ¶ 17.] By failing to timely dismiss the claims against Defendants, Slep-tone breached the settlement agreement.

On Nov. 7, 2012, Defendants' counsel filed a Notice of Settlement. [Dkt. No. 88.] The following day, the entire case was dismissed against all defendants with prejudice for Slep-tone's failure to prosecute. [Dkt. No. 89.]

III. ARGUMENT

A. Legal Standards

A district court retains jurisdiction to resolve collateral issues after an action has been dismissed. See *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 395, 110

S. Ct. 2447, 110 L. Ed. 2d 359 (1990). "This Court has indicated that motions for costs or attorney's fees are 'independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree.'" *Id*. citing *Sprague v. Ticonic National Bank*, 307 U. S. 161, 170, 59 S.Ct. 777, 781, 83 L.Ed. 1184 (1939).

Under the Lanham Act, which governs this action, 'the court may in exceptional cases award reasonable attorney fees to the prevailing party.' 15 U.S.C. § 1117(a). When a case is "either groundless, unreasonable, vexatious, or pursued in bad faith," the Ninth Circuit has held that it is an exceptional case which warrants the award of attorney's fees. *Cairns v. Franklin Mint Co*., 292 F.3d 1139, 1156 (9th Cir. 2002) (fee award under Lanham Act of $2,308,000 to prevailing defendant affirmed).

Additionally, this Court has the power and responsibility to manage its docket, including to promptly dispose of unnecessary matters in order to make opportunity available to others who wish to seek efficient redress in the courts. This Court has inherent power to sanction for conduct that interferes with its responsibility. "These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) quoting *Link v. Wabash R. Co*., 370 U. S. 626, 630-631, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). "'[B]ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-66, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

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B. Conduct by Slep-tone and its Counsel Warrant a Fee Award and Sanctions

Slep-tone's business model has been to seek out karaoke jockeys and karaoke venues as prospective settlement targets and, with one filing fee, file knowingly groundless claims against many dozens of them at once to extract settlements. Based on its previous filings, Slep-tone has merely changed the names of the defendants and filed the same complaint in a variety of district courts. Slep-tone is a vexatious litigant and should be declared so. *Molski v. Mandarin Touch Restaurant*, 347 F.Supp.2d 860 (C.D.Cal.2004).

During litigation against Defendants in this case, Slep-tone unreasonably has failed and refused to provide any support for its claims, has failed and refused to inspect Defendants' evidence of non-liability, has failed and refused to engage in good faith discovery, and has maintained this unmeritorious action in bad faith. Slep-tone even failed to keep its promise to dismiss Defendants from the action after receiving the desired shakedown payment. Slep-tone should not be allowed to use this Court or the court system to further its illegitimate course of conduct.

Here, the conduct of Slep-tone and its counsel has been groundless, unreasonable, vexatious, and in bad faith. Any one of these grounds provides ample basis for a finding of exceptionality and a fee award. *Cairns.* A fee award should be ordered.

C. Finding Exceptionality, this Court Should Award $19,330 in Fees

Defendants have engaged two different counsels during different periods in this case. From December 2011 through much of August 2012, Defendants engaged the services of general practitioner J. Marie Gray, Esq. For this period, Ms. Gray's billing amounted to reasonable attorneys' fees of $11,525. [Gray Decl., Ex. 5.] Subsequently, as the specter of trial grew closer, Defendants substituted in intellectual property attorney Craig McLaughlin, Esq. on August 22,

2012. [Dkt. Nos. 80, 81.] Mr. McLaughlin's reasonable fees have been $3,780 through November 9, 2012. [McLaughlin Decl., Ex. 9.] An additional $4,025 worth of work is expected by Mr. McLaughlin for the preparation of this motion, review of Slep-tone's expected opposition papers, preparation of a reply thereto and to attend and argue at the hearing. [McLaughlin Decl., ¶ 19.] In sum, Defendants seek an order awarding payment of attorneys' fees to Defendants by Slep-tone and its counsel in the amount of $19,330. Such an award is authorized and well warranted under the Lanham Act. *Cairns.*

D. Sanctions Are Warranted to Make Defendants Whole

In addition to the remedies provided in the Lanham Act to prevailing parties, this Court's inherent authority permits it to make "the prevailing party whole for expenses caused by his opponent's obstinacy." *Hutto v. Finney*, 437 U.S. 678, FN14, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978). Here, a full award of attorney's fees does not represent the entire cost of the litigation to Defendants. Indeed, Defendants paid $5,000 in nuisance value to Slep-tone and Slep-tone dishonored its promise to dismiss Defendants from the case.

In its answer to the Complaint, Defendants requested costs incurred in the action and any relief the court deems proper. [Dkt. No. 19.] Using its inherent equitable power, this Court should return the parties to the status quo and order Slep-tone to pay sanctions in the amount of $5,000 as restitution. *Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946) (indicating that under the court's inherent power, restitution involves "restoring the status quo and ordering the return of that which rightfully belongs" to another); see also *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 760-64 (6th Cir.1999) (Government requested its costs and any such other relief the court deemed proper and restitution was awarded).

In addition to filing knowingly baseless claims, ignoring evidence of Defendants' non-liability, and refusal to engage in good faith discovery, Slep-tone and its counsel have wasted the resources of this Court and unnecessarily caused delay in removing the Defendants from this Court's docket. Sanctions for this conduct are also warranted against Slep-tone and its counsel under this Court's inherent power. Indeed, this Court has the "ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers*, 501 U.S. at 44.

In this case, the facts show that Slep-tone did not concern itself with its promise to Defendants or with the Court's docket. Allowing Slep-tone to keep the $5,000 would unjustly enrich Slep-tone without consequence of its dishonor and without consequence of its disrespect for this Court, its process and for the court system as a whole. Slep-tone's conduct throughout the entire litigation has shown that such an order is warranted.

IV. CONCLUSION

For all the reasons set forth above, Defendants' motion should be granted and Slep-tone and its counsel should be ordered to promptly pay Defendants attorneys' fees in the amount of $19,330 and sanctions in the amount of $5,000.

Respectfully submitted,

Law Office of Craig McLaughlin

Dated: November 25, 2012

By: /s/Craig McLaughlin
Craig McLaughlin, Esq.
Attorney for Defendants
Kelly C. Sugano and Taka-O

PROOF OF SERVICE

I, the undersigned, declare and certify as follows:

I am a member of the Bar of the U.S. District Court, Central District of California. My business address is Law Office of Craig McLaughlin, 650 Town Center Drive, Suite 1300, Costa Mesa, California 92626 and I make the following declaration on personal knowledge.

On November 27, 2012, I served the **CORRECTED NOTICE OF MOTION AND MOTION BY DEFENDANTS KELLY C. SUGANO AND TAKA-O FOR ATTORNEYS' FEES AND SANCTIONS and MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANTS KELLY C. SUGANO AND TAKA-O FOR ATTORNEYS' FEES AND SANCTIONS** on the following interested parties in *Slep-tone Entertainment Corp., v. Backstage Bar & Grill, et al.*, Case No.: CV11-08305 ODW (PLAx):

☒ By transmitting a true copy thereof to those addressees listed on the Service List below by electronic mail pursuant to permission of the addressee(s) or, if no permission has been granted, then by prepaid first class U.S. Mail.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 27, 2012, at Los Angeles County, California.

/s/Craig McLaughlin
Craig McLaughlin

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