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18 Attorneys for Plaintiff Hy Cite Corporation

19 **IN THE UNITED STATES DISTRICT COURT**  
 20 **FOR THE DISTRICT OF ARIZONA**

21 Hy Cite Corporation, a Wisconsin corporation,

22 Plaintiff,

23 vs.

24 badbusinessbureau.com, L.L.C., a St.  
 25 Kitts/Nevis Corporation d/b/a  
 26 badbusinessbureau.com and/or  
 27 ripoffreport.com and/or  
 28 badbusinessbureau.com/Rip-  
 OffReport.com; Xcentric Ventures, LLC,  
 an Arizona Limited Liability Company  
 d/b/a badbusinessbureau.com and/or  
 ripoffreport.com and/or  
 badbusinessbureau.com/Rip-  
 OffReport.com; and Ed Magedson, an  
 Arizona resident,

Defendants.

Case No: CV-04-2856-PHX-EHC

**PLAINTIFF’S OPPOSITION TO  
 DEFENDANTS’ MOTION FOR  
 ENLARGEMENT OF TIME TO  
 FILE AN ANSWER**

1 Plaintiff Hy Cite Corporation opposes Defendants' Motion for Enlargement of Time to  
2 File an Answer. This Opposition is supported by the accompanying Memorandum of Points and  
3 Authorities.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **1. INTRODUCTION**

6 Defendants' failure to timely answer Plaintiff Hy Cite Corporation's ("Hy Cite") First  
7 Amended Complaint did not result from excusable neglect, and is not an isolated event.  
8 Defendants have a history of intentionally and deceptively evading justice that extends beyond  
9 the confines of this lawsuit. In light of that history, Defendants' failure to comply with the  
10 answer deadline compels the denial of Defendants' Motion and the entry of default against  
11 Defendants.  
12

13 Alternatively, because Defendants' failure to timely file an answer caused Hy Cite to  
14 incur substantial fees and costs addressing the matter, Defendants request that the Court order  
15 Defendants to pay such fees and costs as a sanction for Defendants' non-compliance.

16 **2. DEFENDANTS' MOTION SHOULD BE DENIED BECAUSE DEFENDANTS' FAILURE TO  
17 TIMELY FILE AN ANSWER DID NOT RESULT FROM EXCUSABLE NEGLIGENCE.**

18 Because Defendants filed their Motion nearly two weeks after the January 17, 2006  
19 answer deadline, an enlargement should not be granted unless Defendants can show "excusable  
20 neglect." Fed. R. Civ. P. 6(b)(2). Defendants assert the following excuses as their sole basis for  
21 missing the deadline:

22 The reason for the failure to file in a timely manner was that the  
23 Order came in during the holidays, right before undersigned was  
24 beginning a complex securities law arbitration in Utah. Due to an  
oversight, undersigned neglected to request that staff docket the ten-  
day time period for filing the answer.

25 (Motion at 2.) The "holidays" and the busy schedule of Defendants' counsel do not constitute  
26 excusable neglect. Indeed, federal courts uniformly reject such excuses asserted in support of  
27 motions to enlarge under Rule 6(b)(2). *See Grover v. Commercial Insurance Co.*, 104 F.R.D.  
28

1 136, 138 (D. Maine 1985) (long holiday weekend and counsel’s busy schedule do not form  
2 basis for excusable neglect); *McLaughlin v. LaGrange*, 662 F.2d 1385, 1387 (11<sup>th</sup> Cir. 1981)  
3 (busy law practice does not establish excusable neglect); *Citizen’s Protective League v. Clark*,  
4 178 F.2d 703, 704 (D.C. Cir. 1949) (having other matters in office does not constitute  
5 excusable neglect); *Maghan v. Young*, 154 F.2d 13, 13 (D.C. Cir. 1946) (other professional  
6 engagements do not create excusable neglect); *Mawhinney v. Heckler*, 600 F.Supp. 783, 784-  
7 85 (D. Maine 1985) (backlog of cases does not amount to excusable neglect).

8  
9 Even if a busy schedule during the holidays might, in some instances, be relevant to a  
10 finding of excusable neglect, Defendants’ vague excuses, wholly unsupported by sworn  
11 testimony, are unconvincing. The Court’s Order was issued and received electronically by  
12 counsel for both parties on Tuesday, December 27, 2006. Defendants do not allege that  
13 counsel was out of town on that date or that counsel did not receive the Order. Rather,  
14 Defendants merely allege that the Order arrived “right before” the Utah arbitration.  
15 Defendants fail to identify the date that counsel actually began the arbitration. Defendants do  
16 not explain how the holidays, or the Utah arbitration, interfered with counsel’s ability to  
17 docket the answer deadline or with Defendants’ ability to timely answer. At the time of the  
18 Court’s Order, Hy Cite’s First Amended Complaint had been pending, unanswered, for nearly  
19 a year. Defendants had three full weeks from receipt of the Court’s Order to file an answer.  
20 Simply stated, Defendants have no reasonable explanation – much less an explanation that  
21 constitutes excusable neglect – for their failure to timely answer the Complaint.

22  
23 The significance of Defendants’ failure to timely answer is made clearer against the  
24 backdrop of Defendants’ history of intentionally evading their obligations to confront Hy  
25 Cite’s legal claims. As this Court is aware, Hy Cite engaged in substantial efforts near the  
26 commencement of this lawsuit to personally serve Defendant Ed Magedson, who controls all  
27 of the other defendants in this case. (*See generally* Hy Cite Corporation’s Memorandum of  
28 Support of Motion for Alternative Service on Defendant Ed Magedson, filed March 24, 2005

1 (“Service Memo”).) Hy Cite’s efforts included multiple attempts to serve Magedson at  
2 residential addresses, a three-week stake-out near Magedson’s post office box, and a request to  
3 Magedson’s counsel that she accept service on Magedson’s behalf. (*Id.* at 3-5.) As a result of  
4 Magedson’s deliberate efforts to avoid service, none of Hy Cite’s efforts were successful, and  
5 Hy Cite had to seek an order from the Court compelling Magedson’s attorney to accept service  
6 on Magedson’s behalf. (*See id.*) Magedson’s evasive actions in this lawsuit mirror his actions  
7 in a previous lawsuit in which repeated attempts to serve Magedson were also unsuccessful.  
8 (*Id.* at 7, n. 26.) In that lawsuit, service was finally effectuated on Magedson at his deposition,  
9 which he attended only because he was compelled to do so by court order. (*Id.*)

10  
11 Defendants’ disregard for the federal rules governing deadlines continued upon  
12 discovering that the answer deadline had expired. Defendants allege that an attorney from  
13 their firm, Adam Kunz, contacted Hy Cite’s counsel, Kevin St. John, and requested an  
14 extension. Defendants omit, however, that Mr. Kunz’s phone call to Mr. St. John was not  
15 made until *after* the answer deadline had already expired. (2/02/2006 Declaration of Kevin St.  
16 John (“St. John Decl.”) ¶4.) Moreover, Mr. Kunz did not ask for an “extension,” but instead,  
17 requested that Hy Cite stipulate to withdraw its Application for Entry of Default.<sup>1</sup> (*Id.* ¶ 5.)  
18 Mr. St. John informed Mr. Kunz that Hy Cite would not agree to withdraw the Application.  
19 (*Id.* ¶ 7.) Despite knowing that the answer deadline had expired and that Hy Cite would not  
20 agree to withdraw its Application, Defendants filed their untimely Answer without permission  
21 from the Court.

22 ///

23 ///

24  
25 \_\_\_\_\_  
26 <sup>1</sup> Defendants’ counsel apparently learned that the deadline had expired from the Application for Entry of Default filed by Hy  
27 Cite on January 17, 2006. That Application, which was filed on the date that Defendants’ answer was due, has no bearing on  
28 Defendants’ Motion for an Enlargement. Additionally, although the Application was filed prematurely, the premature filing  
does not disrupt the entry of default against Defendants because their failure to “plead or otherwise defend as provided by”  
the Federal Rules has now been “made to appear” before this Court by means other than the affidavit attached to Hy Cite’s  
Application. *See* Fed. R. Civ. P. 55(a).

1 **3. CONCLUSION**

2 Defendants' failure to timely answer Hy Cite's longstanding First Amended Complaint  
3 is only the most recent example of Defendants' indifference toward this litigation. Defendants  
4 have gone to great lengths to avoid the consequences of their wrongful conduct. Had Hy Cite  
5 not filed its Application for Entry of Default, thereby notifying Defendants that their answer  
6 was past due, Hy Cite's First Amended Complaint would likely still remain unanswered.  
7 While the basis for denying Defendants' Motion is simple – Defendants have failed to show  
8 excusable neglect – the historical context in which Defendants' recent non-compliance should  
9 be evaluated solidifies the justification for denying the Motion. Accordingly, Hy Cite  
10 respectfully requests that the Court deny Defendants' Motion for an Enlargement and enter  
11 default against Defendants.  
12

13 In the alternative, should the Court decide to permit Defendants' untimely filing of their  
14 Answer, Hy Cite requests that Defendants be ordered to pay all of the costs and fees incurred by  
15 Hy Cite having to address Defendants' untimely filing, including the costs and fees arising out  
16 of the Application for Default and responding to Defendants' Motion for an Enlargement. *See*  
17 *Kleckner v. Glover Trucking Co.*, 103 F.R.D. 553, 556-57 (M.D. Pa 1984) (although motion to  
18 enlarge granted, defendant ordered to pay plaintiff's attorneys fees and expenses "incident to the  
19 various motions filed as a result of [defendant's] failure to timely file its answer"); *Schmir v.*  
20 *Prudential Ins. Co. of America*, 220 F.R.D. 4, 6 (D. Maine 2004) (motion for entry of default  
21 denied, but defendant ordered to pay fees incurred in bringing motion).  
22  
23  
24  
25

26 ///

27 ///

28 ///

1 RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of February, 2006.

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14 CERTIFICATE OF SERVICE

15 I hereby certify that on February 2<sup>nd</sup>, 2006, I electronically transmitted the attached  
16 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice  
17 of Electronic Filing to the following CM/ECF registrants:

18 Maria Crimi Speth  
19 Jaburg & Wilk  
20 3200 North Central Avenue, Suite 2000  
21 Phoenix, Arizona 85012  
22 Attorney for Defendants  
23 [mcs@jaburgwilk.com](mailto:mcs@jaburgwilk.com)

24 s/E.E. Szafranski

25 I further certify that on February 2<sup>nd</sup>, 2006, I served the attached document by U.S. Mail,  
26 postage prepaid, on the following, who is not a registered participant of the CM/ECF System:

27 Honorable Earl H Carroll  
28 United States District Court  
401 West Washington Street  
Phoenix, Arizona 85003

s/E.E. Szafranski

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