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Attorneys for Plaintiff,
DONNA CORBELLO

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DONNA CORBELLO, an individual,

Plaintiff,

vs.

THOMAS GAETANO DEVITO, an individual, *et al*.,

Defendants.

Case No. 2:08-cv-00867-RCJ-PAL

ORDER **FOR AN EXTENSION OF TIME FOR OPPOSITION TO *MOTION BY DEFENDANTS VALLI, GAUDIO, DSHT, INC., DODGER THEATRICALS, LTD., AND JERSEY BOYS BROADWAY LIMITED PARTNERSHIP FOR PARTIAL SUMMARY JUDGMENT AS TO COUNTS 13 AND 14 OF THE THIRD AMENDED COMPLAINT***

(Fourth Request)

Plaintiff Donna Corbello, by her attorneys, and pursuant to LR 6-1 and 7-2, herewith requests a further extension of time, through Friday, September 9, 2011, in which to file her opposition to the *Motion By Defendants Valli, Gaudio, DSHT, Inc., Dodger Theatricals, Ltd., and Jersey Boys Broadway Limited Partnership for Partial Summary Judgment As To Counts 13 And 14 of The Third Amended Complaint* (Doc. 548). Whereas Plaintiff has previously requested an extension of time through Tuesday, September 6, 2011, the additional requested extension would continue that deadline by three days. This is Plaintiff's fourth request for an extension of time.

Plaintiff submits that good cause exists for grant of the extension requested. Since the time her previous request for an extension was filed, Plaintiff's lead counsel has worked around the clock in an attempt to complete her response, particularly given defense counsel's lengthy, acrimonious opposition to Plaintiff's prior extension request. In fact, Plaintiff's counsel worked each day and night over the Labor Day weekend in an effort to ensure that her response could be completed by today. However, notwithstanding this diligence, the opposition brief is not yet complete; cannot be completed today, and will not be completed by tomorrow, due to the need, once principal drafting is completed, to cross-reference the citations to the record in her substantive brief, with the Exhibits attached to her Separate Statement of Facts .

As also previously reported, the matters raised in the New Defendants' Motion present a number of issues of first impression, and not all of these issues are adequately treated, or even addressed, in Defendants' Motion itself. For example, Defendant's Motion is completely silent regarding the Ninth Circuit's decision in *Gardner v. Nike*, 279 F.3d 774 (9th Cir. 2002), and the potential impact of its preservation of vestiges of the doctrine of indivisibility from the 1909 Copyright Act, on Plaintiff's current accounting claims. The Motion also ignores *Count 12* of the *Third Amended Complaint* (Doc. 457), which includes an alternate scenario for the disposition of these claims, which must be resolved in conjunction with the claims set forth in *Counts 13* and *14*, as the resolution of these claims will necessarily dispose of the alternate claim presented in *Count 12*. Defendant's Motion also fails to mention that the same vestiges of this

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indivisibility doctrine which supply the underpinnings for the Ninth Circuit's decision in *Sybersound Records, Inc. v. UAV Corp.,* 517 F.3d 1137 (9th Cir. 2008), apply primarily to a party's standing to sue for infringement, and are not controlling on matters involving whether a substantive assignment of copyright ownership has occurred.[1] No reported case has previously applied the subject principles in *Gardner* or *Sybersound* to factual circumstances precisely analogous to those presented in this case, and Plaintiff's opposition involves considerable effort and scholarship in order to properly identify and discuss the principles that should control Plaintiff's accounting claims, particularly given that the assignment agreements, and memoranda of assignment relevant to *Counts 12*, *13*, and *14* of the *Third Amended Complaint*, are governed primarily by New York law, rather than federal law, as represented in Defendants' brief. Finally, whereas, Plaintiff submits that most of the relevant issues may be resolved as a matter of law, and that Defendants' extrinsic, parol evidence, is impermissible, given the admitted lack of ambiguity in the underlying agreements, Plaintiff is cross-moving for summary judgment on *Counts 13*, *14*, and portions of *Count 12*, contemporaneously with her response to Defendants' Motion. Plaintiff submits this will expedite the final resolution of several claims in her *Third Amended Complaint*, and narrow, substantially, the issues to be resolved at trial. For all of these reasons, Plaintiff submits that "good cause" exists for the relief requested.

Fed. R. Civ. P. 6(b)(1) provides: "(1) In General. When an act may or must be done within a specified time, the court may, for good cause, extend the time: (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or (B) on motion made after the time has expired if the party failed to act because of excusable neglect." *Id.* "Good cause" is a non-rigorous standard that has been construed broadly across procedural and statutory contexts. *See, e.g., Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 187 (1st Cir. 2004); *Thomas v. Brennan*, 961 F.2d 612, 619 (7th Cir. 1992); *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 954 (4th Cir. 1987). It is well-established that the rule, "[is]

[1] In fact, on August 19, 2011, the Ninth Circuit released a new decision which clarifies *Sybersound,* and will be mentioned in Plaintiff's response. *See Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, No. 2:10-cv-00557, 2011 U.S. App. LEXIS 17220, 10-13 (9th Cir. Aug. 19, 2011)

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to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits." *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983) (*quoting Staren v. American Nat'l Bank & Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976)). *See also* Fed. R. Civ. P. 1 ("[The Federal Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."). Consequently, requests for extensions of time made before the applicable deadline has passed should "normally . . . be granted in the absence of bad faith or prejudice to the adverse party." *Ahanchian v. Xenon Pictures, Inc*., 624 F.3d 1253, 1258-1259 (9th Cir. Cal. 2010) (citing 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure § 1165* (3d ed. 2004)). In the absence of such bad faith or prejudice, a Court's refusal to grant an extension request governed by the "good cause" standard can constitute an abuse of discretion. *E.g., Ahanchian,* 624 F.3d at 1258.

Critically, the record is devoid of any indication either that Plaintiff's counsel have acted in bad faith or that an extension of time would prejudice defendants. To the contrary, the record reflects that Plaintiff's counsel have acted conscientiously throughout this litigation, promptly seeking extensions of time as soon as they are known to be necessary, without allowing applicable deadlines to first pass, and stipulating to Defendants' various requests for extensions of time without fail. This is not a situation in which Plaintiff has simply disregarded, or missed, a deadline to file a response, without first notifying the Court that additional time was needed. In such circumstances, Plaintiff's request would be governed by the more stringent "excusable neglect" standard, rather than simply requiring a showing of "good cause," and even the "excusable neglect" standard is less stringent than that which the New Defendants would prefer to apply here, in an effort to place Plaintiff in a position of default, with respect to her accounting claims. *See, e.g*., *Kelley v. Allen*, No. 2:10-cv-00557, 2011 U.S. Dist. LEXIS 84741 (E.D. Cal. Aug. 1, 2011). *See also, Bateman v. United States Postal Serv.*, 231 F.3d 1220, 1225 (9th Cir. 2000) (stating a delay of "a little more than one month" is "not long enough to justify denying relief[,]" under the "excusable neglect standard, even though Plaintiff's attorney "should have responded more quickly," and his reason for the delay – "recovery from jet lag and the time it

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took to sort through the mail that had accumulated while he was away" was "admittedly [] weak"). Under that more stringent standard, the *Bateman* Court found no excusable neglect, because there was no evidence that Plaintiff's attorney acted with anything less than good faith. *Id.* Instead, "his errors resulted from negligence and carelessness, not from deviousness or willfulness." *Id.* But that standard does not govern the present circumstances, and Plaintiff's counsel have neither been negligent nor careless. Instead, notwithstanding a Herculean effort since the date the previous extension request was filed, they simply have not yet completed the brief.

Finally, any argument that Defendants would be prejudiced by having less time to reply than Plaintiff has had to draft her opposition, is an argument that has previously been found "unpersuasive," as it neglects the fact that, in the majority of districts, more time is given for drafting oppositions than replies. See *Ahanchian*, 624 F.3d at 1258 (citing N.D. Cal. Local R. 7-3(a), (c); S.D. Cal. Local R. 7.1(e)(1), (2)). *See also*, LR 7-2(b), (c). Moreover, as explained in her previous extension request, Plaintiff's counsel have not expended all of the time that has passed working on Plaintiff's response to Defendants' Motion, due to the other, major deadlines in this case throughout July and August, as well as lead counsel's significant obligations to other clients during the last week in August. Whereas, Plaintiff's opposition will include a cross-motion, New Defendants will likely also need additional time in which to reply/oppose, and Plaintiff, as always, will accommodate their requests. The fact is, that if defense counsel were cooperative with respect to Plaintiff's reasonable, recent extension requests, and willing to extend the customary professional courtesies, Plaintiff's counsel may have been able to complete her response by now – the needless, and needlessly contentious battles over whether a two-day extension should be granted consume considerable, valuable time that could best be expended by completing the brief. It is a litigation tactic, transparently intended to deprive Plaintiff of the opportunity to respond substantively to an important motion, rather than a sincere expression of concern regarding the impact of the scant additional time requested for that response.

In sum, the requested extension is sorely needed, and, as stated above, is not requested

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for any improper purpose.

IN VIEW OF THE ABOVE, Plaintiff respectfully requests entry of the attached *Order*, indicating that she may file and serve her Opposition to (Doc 548) on or before September 9, 2011.

Dated: September 6, 2011 RESPECTFULLY SUBMITTED:

By: /s/ Gregory H. Guillot__
Gregory H. Guillot
George L. Paul
John L. Krieger
Robert H. McKirgan

Attorneys for Plaintiff, Donna Corbello

IT IS SO ORDERED:

The Honorable Robert C. Jones
UNITED STATES DISTRICT JUDGE

Dated: 10-27-2011

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