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MICHAEL W. SANFT, ESQ.
Nevada Bar. No. 8245
SANFT LAW GROUP
520 South Fourth
Las Vegas, Nevada 89101
(702) 384-5563
Attorneys for Defendants

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CAESAR’S WORLD, INC., a Florida
corporation,
Plaintiff,
vs.
MARCEL JULY, an individual; and
OCTAVIUS TOWER, LLC, a Nevada
limited liability company,
Defendant.

CASE NO. 2:11-CV-0536 GMN-PAL

**SEPARATE ANSWER AND
COUNTERCLAIM**

OF

MARCEL JULY

MARCEL JULY, an individual,
Counterclaimant,
vs.
CAESAR’S WORLD, INC., a Florida
Corporation,
Counterdefendant.

Defendant Marcel July (hereafter “Defendant”), for his Separate Answer, by and through undersigned counsel, herewith answers the Complaint of Plaintiff, Caesar’s World, Inc. (hereafter “Plaintiff”) by ADMITTING, DENYING, or AFFIRMATIVELY ALLEGING as follows (referenced paragraphs are those of Plaintiff’s Complaint):

- 1) Defendant AFFIRMATIVELY ALLEGES that co-Defendant Octavius Tower (hereafter OTLLC) electronically filed its answer to the Complaint of the Plaintiff 3 May 2011; Defendant Marcel July was separately served with Plaintiff’s pleadings in the Netherlands, and so files the instant Separate Answer.
- 2) Defendant is without knowledge of those allegations contained in paragraph 1 and so

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- DENIES the same.
- 3) Defendant ADMITS the allegations of paragraphs 2 and 3.
- 4) Defendant DENIES the allegations of paragraph 4.
- 5) Defendant ADMITS the allegations of paragraphs 5,6, 7 and 8.
- 6) Defendant ADMITS the allegations of paragraphs 9 and 10.
- 7) Defendant is without knowledge of those allegations contained in paragraphs 11, 12, and 13 and so DENIES the same.
- 8) Defendant ADMITS the allegations of paragraph 14.
- 9) Defendant is without knowledge of those allegations contained in paragraphs 15 and 16.
- 10) Defendant ADMITS the allegations of paragraph 17.
- 11) Defendant is without knowledge of those allegations contained in paragraphs 18 and 19.
- 12) Defendant ADMITS the allegations of paragraphs 20 and 21.
- 13) Defendant DENIES the allegations of paragraphs 22, 23, 24, and 25.
- 14) Defendant ADMITS the allegations of paragraphs 26 and 27.
- 15) Defendant DENIES the allegations of paragraph 28.
- 16) Defendant ADMITS the allegations of paragraph 29.
- 17) Defendant DENIES the allegations of paragraphs 30 and 31.
- 18) Defendant ADMITS the allegations of paragraphs 32 and 33.
- 19) Defendant DENIES the allegations of paragraph 34.
- 20) Defendant ADMITS the allegations of paragraph 35.
- 21) Defendant DENIES the allegations of paragraph 36 and 37.
- 22) Defendant ADMITS the allegations of paragraphs 38(a)-(d) and 39.
- 23) Defendant DENIES the allegations of paragraph 40.
- 24) Defendant ADMITS the allegations of paragraphs 41, 42, 43, 44, and 45.

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- 25) Defendant takes no position on paragraph 46.
- 26) Defendant DENIES the allegations of paragraphs 47 and 48.
- 27) Defendant takes no position on paragraph 49.
- 28) Defendant DENIES the allegations of paragraphs 50 and 51.
- 29) Defendant takes no position on paragraph 52.
- 30) Defendant DENIES the allegations of paragraphs 53 and 54.
- 31) Defendant takes no position on paragraph 55.
- 32) Defendant ADMITS the allegations of paragraph 56.
- 33) Defendant DENIES the allegations of paragraph 57, 58, 59, 60, 61.
- 34) Defendant takes no position on paragraph 62.
- 35) Defendant ADMITS the allegations of paragraph 63 and 64.
- 36) Defendant DENIES the allegations of paragraphs 65, 66, 67, 68, 69, 70, and 71.
- 37) Defendant takes no position on paragraph 72.
- 38) Defendant DENIES the allegations of paragraph 73
- 39) Defendant ADMITS the allegations of paragraph 74.
- 40) Defendant DENIES the allegations of paragraphs 75, 76, and 77.
- 41) Defendant takes no position on paragraph 78.
- 42) Defendant ADMITS the allegations of paragraph 79, 80, 81, 82, 83, 84, 85, 86, and 87.
- 43) Defendant takes no position on paragraph 88.
- 44) Defendant is without knowledge of those allegations contained in paragraphs 89 and 90 and so DENIES the same.
- 45) Defendant DENIES the allegations of paragraphs 91, 92, and 93.
- 46) Defendant takes no position on 94.
- 47) Defendant is without knowledge of those allegations contained in paragraphs 95 and 96 and so DENIES the same.

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- 48) Defendant ADMITS the allegations of paragraph 97.
- 49) Defendant DENIES the allegations of paragraphs 98, 99, 100, 101, and 102.
- 50) Any allegations of Plaintiff's Complaint not answered herein are herewith DENIED.

AFFIRMATIVE DEFENSES

Defendant states the following affirmative defenses:

- 51) Plaintiff's Complaint fails to state a claim upon which relief can be granted.
- 52) Defendant denies any negligence and requisite elements of breach and causation.
- 53) Defendant denies that it proximately caused any damage(s) to the Plaintiff.
- 54) Defendant claims that any damages caused to Plaintiff were caused solely by the actions or omission of third parties not under the control of Defendant.
- 55) Defendant alleges on information and belief that any damages incurred by Plaintiff, if any, were proximately caused or contributed to by its own negligence which bars or reduces any recovery against Defendant.
- 56) Defendant alleges that damages suffered by Plaintiff, if any, were caused by an intervening and/or superseding cause, thus relieving Defendant of any liability.
- 57) Defendant claims that Plaintiff has waived any and all claims against Defendant, thus precluding recovery.
- 58) Defendant claims that Plaintiff's claims are barred by the theory of laches.
- 59) Defendant claims that Plaintiff's remedies are barred by the theory of unclean hands.
- 60) Defendant claims that Plaintiff's claims are barred by the Statute of Frauds.
- 61) Defendant claims that Plaintiff's claims are barred by the theory of estoppel.
- 62) Defendant claims that Plaintiff failed to mitigate its damages, if any.
- 63) Defendant claims the defense of failure of consideration.
- 64) Defendant raises defenses of release and assumption of risk.
- 65) Defendant further raises all defenses contained with Federal Rule of Civil Procedure

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8(c)(1) and 12(b).

ATTORNEYS FEES

66) Defendant has been forced to hire counsel to defend against the claims of the Plaintiff and should be entitled to recover its costs and a reasonable attorneys fee.



COUNTERCLAIM

For his Counterclaim against the Counterdefendant, Caesar’s World, Inc., Counter-claimant Marcel July alleges as follows:

JURISDICTION

67) Pursuant to Fed.R.Civ.Pro. 8(a)(1), this Honorable Court has acquired jurisdiction over the Plaintiff-Counterdefendant and the subject matter of this Counterclaim by reason of Plaintiff’s original Complaint filed herein.

GENERAL ALLEGATIONS

68) The Octavius Tower Band and entertainment company was founded by Marcel July in Köln, Federal German Republic, in 1992.

69) In its original incarnation in 1992, the band was named “Octavius”; the name “Octavius” was taken as a play on Marcel’s surname of “July,” which gave way to his nickname among his friends “Julius,” itself an allusion to Roman Emperor Gaius Julius Caesar, whose heir was Gaius Octavius. Marcel perceived that the name “Octavius” among variants in this allusory line of thought carried more aesthetic “edge” that would come to benefit a rock band.

70) Shortly after its inception, among Mr. July’s first band recruits was its bass guitar player whose own nickname was “*Turm*,” German for “Tower,” derived from his exceptional height of some 6’5”; the two group members’ nicknames (or derivatives thereof) were linked to form “Octavius Tower.”

71) The Octavius Tower Band’s genre falls into that of “Hard Rock.”

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72) The band’s first live, professional performance was a Grand Opening concert for a German Trucking Company named Siegmann International Spedition & Logistik, This live performance took place June 12, 1993 in Honover, Germany. The agreement for the performance was executed by Mr. Gunter Siegmann on May 5, 1993 (see Exhibit “A”: Confirmation Statement from Mr. Siegmann, Performance/Rental Agreement, and 2 photographs taken at the event, and a current photo of a truck advertising the company logo).

73) The initial Octavius Tower website was designed by Mr. July and uploaded to a German web server company, MartinBrandt Computer-Server-Webseiten, on November 11, 1993 (*see* Exhibit “B1” a copy of the initial web service contract. *see also* Exhibit “B2” a copy of the original source code showing at line # 8 “creation date” 11/11/1993, 10:55:33 GMT and a last upload date: 7/22/2007. *see also* Exhibit “B3” website photos of the web pages printed on 7/22/2007. *see also* Exhibit “B4,” Affidavit executed by Mr. Brandt attesting to providing Internet Server services to Mr. July starting 2/27/1993 to 06/9/2003). The original website used sub domain names, example: “octaviustower.Plexiglas-verarbeitung.com.” This site can still be viewed using this domain name.

74) During the years from 1993 through 1996, the Octavius Tower band performed live concerts in various venues in Europe. (*see* Exhibit “C” copies of posters for concerts in Germany in 1993, England 1994, France 1995).

75) During the years 1996 through 2003, Octavius Tower, LLC maintained the Website promoting concerts, bands, and streaming videos of performances. (*see* Exhibit “D” which is Marcel July’s Agreement with his attorney, Christian Kaldenhoff, giving him “*Vollmacht*” (“Power of Attorney”) for Octavius Tower, LLC. Original in German with English translation is provided).

76) Also during this period of 1996 through 2003, the company provided entertainment services which included renting sound systems, stages, lighting and laser-light equipment and also setting up, testing and dismantling the stages and related equipment. (*see* Exhibit “E” for equipment photos and equipment rental agreements). The band did not perform live concerts during this period.

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77) During the years 2003 through 2009, the Octavius Tower band performed live concerts in the United States including California, Arizona, Nevada and Florida (see Exhibit “F1” concert ticket and band photo from Mr. D’z Restaurant in Kingman, Arizona in May 3, 2003. See also Exhibit “F2” a poster from Ricks Halloween Bash at the Grand Canyon in Arizona in October 29, 2005. See also Exhibit “F3”: a poster for a concert on April 22, 2006 at Gloria’s Lounge in Visalia, California whereby Octavius Tower played with the band “Kingscrossing”. See also Exhibit “F4” which is a poster and Engagement Contract for a concert in February 4, 2006 at Chris’ Event Center located at the intersection of Jones and Cheyenne in Las Vegas, Nevada, together with a contract to appear at a concert at Tailspin in Las Vegas, executed April 6, 2006 (see also Exhibit “F5” showing a contract and photos from live concerts in Punta Gorda, Florida in 2008 and 2009. See also Exhibit “F6” which includes a commercial lease, by and between Marcel July dba Octavius Tower and DBC, LLC of 1009 Tropical Ave., Port Charlotte, FL, for band practicing facility and band equipment storage, and receipts for rent payments).

78) In July 2010, Marcel July’s wife, Ede, was diagnosed in Florida with breast cancer and their insurance company, Blue Cross Blue Shield refused coverage stating a pre-existing condition as the reason. As a result, Marcel and his family were forced to return to Europe in August 2010 to confirm the diagnosis and seek treatment for the cancer. (see Exhibit “G” letter from the Medical Clinic in Amsterdam confirming the diagnosis and treatment). Due to this diagnosis/treatment, and the family’s relocation to Europe, the band’s live performances were discontinued as of this time; however the website has remained active and maintained as well as the services for entertainment equipment rental.

79) Mr. July purchased the domain name, “octaviustower.com,” as a result of Harrahs’ Entertainment’s announcement of their plans to build a new hotel tower named, “Octavius Tower”. Mr. July purchased this domain name, solely and strictly, because he believed this would protect his already existing band and website names. Thereafter, he designed and uploaded a new website under this domain name.

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- 80) Thereafter, in 2008 while Mr. July was living in the United States, on advice of counsel, Mr. July filed service and trademarks with the United States Patent Trademark Office USPTO as a necessary step to protect his Octavius Tower tradename.
- 81) Mr. July then contacted the USPTO and confirmed with the attorneys at the USPTO that these registrations were, indeed, necessary in order to protect both his website and his band name.
- 82) Therefore, on May 7, 2008, Mr. July applied for a word mark, “Octavius Tower” for entertainment services on the worldwide web under Serial #77467916. On Sept. 9, 2009, he was granted a service mark under Registration #3675168 (*see* Exhibit “H1”).
- 83) In addition, on July 23, 2009, Mr. July applied for another service mark for entertainment in the nature of audio/video and live performances under Serial #77787941. On January 12, 2010 he was granted that mark under Registration #3736945 (*see* Exhibit “H2”).
- 84) During both of these application processes, his applications were published for opposition (*see* Exhibits “H3 and H4”). On neither occasion did Counterdefendant lodge an objection to either application.
- 85) On June 30, 2009, Mr. July applied for two (2) trademarks in the State of Nevada. The first, under classification 101, providing website entertainment services (*see* Exhibit “I-1”). The second, under classification 107, also for website entertainment services (*see* Exhibit “I-2”). On the applications for these marks, they listed a first date of use in Nevada of April 6, 2008 even though the entertainment services offered on this website have been active on the worldwide web since November 11, 1993 on the old website, and September 18, 2007 on the new website. The reason Mr. July included April 6, 2008 as his first date of use in Nevada is the date he uploaded a Las Vegas band, named Kingscrossing, to his website as a means of promoting the band. Then on September 9, 2009, Mr. July applied for a service mark for entertainment services of audio/video and live performances, stating a first date of use in Nevada as April 6, 2006. This date was submitted as it was the first date that Octavius Tower performed live in Las Vegas (*see* Exhibit “I-3” --*refer to* Exhibit “F4” listed above in item #5).

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86) On June 29, 2009, Mr. July applied for a trademark for Octavius Tower in the State of Florida for entertainment services on the worldwide web, and submitted a first date of use of May 10, 2008, which was his first live concert date in Florida. (see Exhibit “J”).

87) On November 6, 2009, Mr. July filed Articles of Organization for a Limited Liability Company in Nevada under the name “Octavius Tower, LLC”. (see Exhibit “K”). The purpose for setting up this company was to enter into a Joint Venture Agreement with the Kingscrossing Band to build an entertainment center (see Exhibit “L”) which will contain a recording studio, a live performance area, and food concessions in the Las Vegas area. This project has been put on hold, temporarily, so that Mr. July could return to Europe to deal with his wife’s medical issues.

88) At the same time that Mr. July purchased the OctaviusTower.com domain name, he also purchased the CaesarsTower.com domain name, for the sole purpose being that “Caesars Tower” was the name of his elder brother’s band, (see the old website where the “Caesars Tower band” is mentioned). In January 2008 Mr. July received notification from the National Arbitration Forum that Caesars World, Inc. wanted to recover this domain name. Mr. July did not respond to this notification due to the fact that his brother’s band had dissolved, and therefore, Mr. July saw no reason to defend his purchase of that domain name.

89) Caesars World, Inc. alleges in their lawsuit that Mr. July had a website for the purpose of selling numerous domain names. Mr. July did **not** operate a website to sell domain names, and this fact can be confirmed by a letter dated March 5, 2011 from Martin Fuchs, who was the webhosting company for Mr. July’s website from June 10, 2003 until September 15, 2008. Mr. Fuchs confirms that Mr. July’s website NEVER contained domain names for sale. (see Exhibit “M-1”).

90) Mr. July did not act upon Caesars’ infringement of the Octavius Tower name because he was advised by his German attorney that until Caesars’ application with the USPTO was completed with a statement of the “First Date of Use,” coupled with the fact that they did not advertise Octavius Tower on their official website, a letter informing them to “Cease and Desist” would have been premature. However, on February 24, 2011, the USPTO issued a Refusal to Caesars World, Inc. for the mark, Octavius Tower, based upon

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2 “Likelihood of Confusion” (*see* Exhibit “N”). This confusion is based upon Mr. July’s
3 two existing Federal Registrations (*see above* mentioned Exhibits “H1” and “H2”).
4 91) Upon learning of the USPTO’s Refusal to Caesars, Mr. July then issued, on March 8,
5 2011, through his German Attorney, a letter to Cease and Desist the use of the Octavius
6 Tower name, addressed to Mr. Gary Loveman, CEO, and Mr. Tim Donovan, General
7 Counsel, for Caesars Entertainment (*see* Exhibit “O”). This Cease and Desist letter was
8 issued on the advice of counsel in an effort to protect Mr. July’s lawfully obtained
9 Federal Registered Marks.
10 92) Caesars contends in their lawsuit that the USPTO found no likelihood of confusion on
11 two occasions during the application process for Mr. July, but the reason the USPTO
12 found no likelihood of confusion is because “pending” applications are NOT considered,
13 ONLY PREVIOUSLY ISSUED REGISTRATIONS ARE GIVEN CONSIDERATION
14 IN THE PROCESS.
15 93) Because of the foregoing, according to the USPTO, Mr. July owns the “Octavius Tower”
16 registered trademark or trade name within the meaning of 15 U.S.C. § 1115.

17 **COUNT ONE**

18 **Infringement of Trademark or Tradename**

- 19 94) Counterclaimant incorporates paragraphs 1 through 92 above as if fully set forth
20 herein.
21 95) Counterclaimant has received phone calls and emails from Octavius Tower Band’s
22 fans inquiring when there will be a performance of the same at Caesar’s Palace in Las
23 Vegas, based on advertisements and other communications of Counterdefendant.
24 96) From the foregoing, it is clear that Counterdefendant’s conduct as alleged above has
25 caused actual confusion and is likely to continue to cause confusion, or to cause
26 mistake, or to deceive the public such that the same infringes upon a right to
27 trademark or tradename rightfully belonging to and therefore harming the
28 Counterclaimant.
97) For these reasons, it is just and proper that Counterdefendant be preliminarily and
permanently enjoined from infringing upon the rights of Counterclaimant, and to

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2 recover profits, monetary damages, costs, and attorneys fees from such infringement,
3 all pursuant to 15 U.S.C. §§ 1114, 1116, and 1117.

4 **COUNT TWO**

5 **Dilution of Trademark or Tradename**

6 98) Counterclaimant incorporates paragraphs 1 through 96 above as if fully set forth
7 herein.

8 99) Count Two as herein alleged is plead in the alternative to Count One, *supra*.

9 100) “Octavius Tower” is a “famous mark” within the meaning of 15 U.S.C. § 1125,
10 and because of Counterdefendant’s conduct as alleged above, Counterclaimant’s
11 capacity to identify and distinguish the “Octavius Tower” is diluted, regardless of
12 further presence or absence of competition between the parties or likelihood of
confusion, mistake, or deception.

13 101) For these reasons, it is just and proper that Counterdefendant be preliminarily and
14 permanently enjoined from infringing upon the rights of Counterclaimant, and to
15 recover profits, monetary damages, costs, and attorneys fees from such infringement,
16 all pursuant to 15 U.S.C. §§ 1114, 1116, 1117, and 1125.

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18 **PRAYER FOR RELIEF**

19 WHEREFORE, Defendant-Counterclaimant, having fully answered the Complaint of the
20 Plaintiff-Counterdefendant, and in consequence of the allegations affirmatively stated above,
21 prays for relief as follows:

- 22 A) That this Honorable Court will dismiss the Complaint of the Plaintiff-
23 Counterdefendant with prejudice and grant Plaintiff no relief thereby.
- 24 B) That this Honorable Court will grant Defendant-Counterclaimant preliminary
25 injunctive relief against the Plaintiff-Counterdefendant during the pendency of these
26 proceedings.
- 27 C) That this Honorable Court will grant Defendant-Counterclaimant permanent
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injunctive relief against the Plaintiff-Counterdefendant upon a final determination that Defendant-Counterclaimant owns the intellectual property rights associated with “Octavius Tower” and that Plaintiff-Counterdefendant’s use of the same infringes or dilutes said rights.

- D) That this Honorable Court will grant a judgment for the Defendant-Counterclaimant and against the Plaintiff-Counterdefendant in recovery of profits, monetary damages, costs, and attorneys fees, all in accordance with 15 U.S.C. § 1117.
- E) That pursuant to 15 U.S.C. § 1115, this Honorable Court will direct that Plaintiff-Counterdefendant destroy all materials infringing upon Defendant-Counterclaimant trademark and/or tradename “Octavius Tower.”
- F) That this Honorable Court will grant Defendant judgment for its costs and reasonable attorneys fees against the Plaintiff.
- G) That this Honorable Court will grant such further and other relief as deemed proper in the circumstances.

DATED THIS 18th DAY OF May 2011.

SANFT LAW GROUP

/s/ Michael W. Sanft
MICHAEL W. SANFT, ESQ.
Nevada Bar. No. 8245
SANFT LAW GROUP
520 South Fourth
Las Vegas, Nevada 89101
Attorneys for Defendants