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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 CAESAR'S WORLD, INC., a Florida
11 corporation,

12 **Plaintiff,**

13 **vs.**

14 MARCEL JULY, an individual; and
15 OCTAVIUS TOWER, LLC, a Nevada
16 limited liability company,

17 **Defendant.**

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

**RESPONSE TO PLAINTIFF CAESARS
WORLD INC.'S MOTION FOR
PARTIAL DISMISSAL OF DEFENDANT
MARCEL JULY'S COUNTERCLAIMS
PURSUANT TO R.CIV.P. 12(B)(6)**

18 Defendant Marcel July, by and through undersigned counsel, herewith responds to
19 Plaintiff Caesars World Inc.'s Motion for Partial Dismissal of Defendant Marcel July's
20 Counterclaims pursuant to R.Civ.P. 12(b)(6), specifically of Defendant's Counterclaim for
21 trademark dilution under 15 U.S.C. § 1125(c) by requesting that this Honorable Court deny
22 Plaintiff's Motion and grant Defendant a reasonable attorneys fee for responding to Plaintiff's
23 Motion. This Response is based upon the following Memorandum of Points and Authorities,
24 attached exhibits, pleadings and records on file, incorporated herein by reference.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **FACTUAL BACK GROUND**

27 This matter arises from alleged infringement of Caesar's World, Inc. (hereafter
28 "Caesar's"), against the trademark or tradename "Octavius Tower," owned by Marcel July and
registered in his name with the United State Patent and Trademark Office (USPTO). Marcel July

1 has been the owner and manager of "Octavius Tower," originally an international rock band
2 formed in Germany in or about 1992, but whose activities have included more broadly other
3 entertainment services and merchandizing. Caesar's operates the Caesar's Palace Casino in Las
4 Vegas, Nevada, including a concern also named "Octavius Tower," offering luxury
5 entertainments and accommodations to guests. Both Mr. July and Caesar's advertise their
6 respective "Octavius Tower" offerings to the public. Caesar's filed initial suit against July and
7 co-defendant Octavius Tower, LLC, seeking, among other remedies, cancellation of Mr. July's
8 registration at the USPTO as well as with the state of Nevada and Florida. Mr. July has
9 countersued Caesar's, alleging infringement and dilution of trademark.

10 As an international rock band, Octavius Tower enjoys recognition from sources all over
11 the world, including Las Vegas, Nevada, where the band has performed and provided
12 entertainment to thousands. Octavius Tower has a fan base spanning the globe. Exhibit 1,
13 attached to this Response, is a statistics sheet provided by www.strato.de webserver customer
14 service, indicating the number of page views for Octavius Tower's webpage. Exhibit 1, largely
15 printed in German, shows dates in the European format of day/month/year; accordingly Exhibit 1
16 shows Octavius Tower's webpage views from 1 April 2011 through 15 June 2011. During this
17 two and a half month period, the number of views amounts to some 175,000, with 117,073
18 originating from within the United States. More than 12,600 of these views originated with China
19 during this period of time. The scope of Octavius Tower's fame is both worldwide and well-
20 established in the United States.

21 LEGAL ARGUMENT

22 As Plaintiff's own Motion indicates, the essence of dilution is in fame. More specifically,
23 Marcel July's in his Counterclaim alleges that Octavius Tower (the band) is a famous trademark
24 or tradename, and, to the extent that Octavius Tower (Caesar's luxury facility) is also
25 internationally advertised and present in Las Vegas, Nevada, the use of the identical tradename is
26

1 actually, presently causing confusion among Octavius Tower's (the band) fan base.¹ The issue is
2 how famous must famous be to qualify for protection from dilution of trademark under 15 U.S.C.
3 § 1125.

4
5 In answering this question, Plaintiff relies primarily upon *Thane Int'l Inc. v. Trek Bicycle*
6 *Corp.*, 305 F.3d 894 (9th Cir. 2002) and *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868 (9th Cir.
7 1999). In *Thane*, an elliptical machine manufacturer's product had a name containing the mark of
8 another company. The trial court granted summary judgment. The 9th Circuit reversed and
9 remanded a grant of summary judgment "(b)ecause a reasonable jury could decide the likelihood
10 of confusion issue in favor of either party." Neither *Thane* nor *Avery* raises the issue of "how
11 famous is famous," but rather whether there is likelihood of confusion based upon identity of
12 marks.

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14
15 Nevertheless, without foundation or authority, Plaintiff invites this Honorable Court to
16 place itself in the position of finder of fact—in effect, to deprive Mr. July his right to a
17 determination of fact by a jury of his peers of the issue of "famousness" and whether that
18 Octavius Tower's (band) fame has been diluted by Plaintiff's conduct. Rather, Plaintiff relies
19 upon R.Civ.Pro. 12(b)(6), namely "a failure to state a claim upon which relief can be granted."
20 Plaintiff would encourage this Honorable Court to find on its face that Mr. July's copious and
21 candid allegations comprise a "(t)hreadbare recital of the elements of a cause of action" not
22 crossing "the line from conceivable to plausible."²

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26 ¹ See Defendant Marcel July's Separate Answer and Counterclaim ¶ 95 and Motion for Rule 65 Injunction pp. 3.
27 ² Plaintiff's Motion to Dismiss, pp. 4 citing *Aschroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) and *Slaughter v. Am.*
Arbitration Assoc., No. 2:10-CV-01437-KJD-GWF, 2011 WL 2174403, at 2 (D.Nev. June 2, 2011).

1 ATTORNEYS FEES

2 On its face, Plaintiff's motion is entirely frivolous; clearly the issue of "fame" within the
3 meaning of 15 U.S.C. § 1125 is a question for the finder of fact, not one to be decided summarily
4 as a matter of procedure. To the extent that Plaintiff has, in effect, abused the procedures of this
5 Honorable Court by utilizing R.Civ.P. 12(b)(6) for this purpose, Defendant objects to Plaintiff's
6 request for an award of attorneys fees and asks that Defendant be reimbursed for his fees in
7 responding to Plaintiff's Motion to Dismiss.
8

9
10 CONCLUSION

11 The question of "fame" is inherently one of fact. Because Plaintiff has established that
12 Octavius Tower (band) has a significant international fan following, this matter is not one
13 susceptible to summary disposition, but rather one to be heard by the trier of fact. As such, it just
14 just and proper that Plaintiff's Motion to Dismiss be denied and Defendant be awarded his
15 attorneys fees for responding to the same.
16

17 DATED THIS 30th DAY OF June 2011.

18 SANFT LAW GROUP

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Exhibit

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Page views (laufender Monat)

01. 04. 2011 - 15. 06. 2011

- ▶ Page views / Top 5 Tage einblenden
- ▶ Page views / Top 5 Stunden einblenden
- ▶ Page views / Top 5 Minuten einblenden
- ▶ Page views / Top 5 Sekunden einblenden
- ▶ Page views pro Land ausblenden

No	Land	Page views	Clicked	Klicks/Seiten
1	United States of America	117.073	870	2.890,267
2	Germany	26.009	316	1.844,225
3	Netherlands	17.284	162	1.448,880
4	China	12.618	108	61.092
5	Russia	3.840	72	5.462

Zur Übersicht