

SANTORO, DRIGGS, WALCH,  
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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

CAESARS WORLD, INC., a Florida corporation,

Plaintiff,

v.

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

Defendants.

CASE NO.: 2:11-cv-00536-GMN-(CWH)

**PLAINTIFF CAESARS WORLD, INC.'S  
RESPONSE IN OPPOSITION TO  
DEFENDANTS' RULE 60(C) MOTION  
TO SET ASIDE ORDER GRANTING  
SANCTIONS**

Plaintiff Caesars World, Inc. ("Caesars") hereby files its Response in Opposition to Defendants' Rule 60(c) Motion to Set Aside Order Granting Sanctions. For the reasons set forth

1 below, Defendants' Rule 60(c) motion should be denied and the fees Caesars incurred in  
2 connection with its Motion to Compel should be awarded in full.

### 3 I. BACKGROUND

4 Caesars served its first interrogatories and first document requests on Marcel July  
5 ("July") on September 2, 2011, and on Octavius Tower LLC ("OTLLC") on September 8, 2011.  
6 (Motion to Compel, Dkt. 42, Exh. 1, Munasifi Decl., ¶¶ 4, 5.) Defendants' responses were due  
7 on October 2, 2011 and October 11, 2011, respectively. (*Id.*) Defendants requested an extension  
8 of time until October 28, 2011 to respond. (Dk. 42, Exh. 1, Munasifi Decl., ¶ 9.) Caesars  
9 consented to the request, conditioned upon Defendants' agreement that they would provide full  
10 and complete responses by that date. (*Id.*) Defendants failed to respond in any manner to  
11 Caesars' discovery by this date. (*Id.* at ¶ 10.)

12 On November 4, 2011, after Caesars had initiated the meet and confer process, OTLLC  
13 served Caesars with interrogatory responses; however the responses were incomplete and  
14 unverified. (Dkt. 42, p. 15.) July did not respond in any manner to Caesars' interrogatories.  
15 (Dkt. 42, Exh. 1, Munasifi Decl. ¶ 18.) A few days later, Defendants produced some documents  
16 in response to Caesars' document requests, but neither Defendant responded in writing to any of  
17 Caesars' document requests. (*Id.* at ¶¶ 16-17.) Accordingly, Caesars could not verify whether it  
18 had received all documents that Defendants intended to produce, or whether Defendants were  
19 withholding documents for any reason. (Dkt. 42, pp. 10-11.)

20 After the meet and confer process proved fruitless, Caesars filed a Motion to Compel  
21 ("Motion") on November 17, 2011. (Dkt. 42.) Defendants' response to the Motion was due on  
22 or before December 5, 2011. L.R. 7.2(b). Defendants did not file a response to the Motion.  
23 Nevertheless, on December 2, 2011, while the Motion was pending, July served Caesars with  
24 unverified responses to Caesars' interrogatories, and OTLLC produced a DVD of documents  
25 responsive to Caesars' document requests. (Notice of Non-Opposition, Dk. 46, p. 2.) OTLLC  
26 did not supplement its interrogatory responses, and neither party responded in writing to Caesars'  
27 document requests. (*Id.*) On December 12, 2011, Caesars filed its Notice of Defendants' Non-  
28 Opposition to Plaintiff's Motion to Compel, identifying for the Court examples of the continuing

1 deficiencies in July's interrogatory responses despite its recent supplemental discovery  
2 responses. (Dkt 46.) The Court heard and granted the Motion on December 19, 2011, and  
3 ordered Defendants to respond to Caesars' discovery requests by January 18, 2012. (Dkt. 49.)  
4 The Court further granted Caesars' request for sanctions, instructing Caesars to file its  
5 memorandum of costs and fees within 10 days of the Court's Order. (*Id.*) Neither Defendant  
6 appeared at the hearing. (*Id.*) Accordingly, the Court ordered Defendants and their counsel to  
7 appear on January 19, 2012 to "show cause why they should not be held in contempt for failing  
8 to appear at the December 19, 2011, hearing re Plaintiff's Motion to Compel." (*Id.*) The Court  
9 heard from Defendants' counsel at the hearing on January 19 and declined to enter sanctions  
10 against them for their non-appearance at the December 19 hearing. (Dkt. 51.)

## 11 II. MEMORANDUM OF POINTS AND AUTHORITIES

### 12 A. The Court Should Deny Defendants' Motion to Set Aside Its Order Granting 13 Sanctions.

14 Rule 60(b)(1) provides that a court may relieve a party from an order for "mistake,  
15 inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1); *see Smith v. Stone*, 308  
16 F.2d 15, 17 (9th Cir. 1962) (upholding a denial of a Rule 60(b)(1) motion where counsel failed to  
17 oppose a summary judgment motion and neglected to inform the court that he would not appear  
18 at the respective hearing). To obtain relief under Rule 60(b)(1), the moving party must set forth  
19 "an adequate showing of exception or extraordinary circumstances." *Westbrook v. GES*  
20 *Exposition Svs., Inc.*, 2007 WL 1288812, \*3 (D. Nev. 2007). Mere negligence or lack of  
21 attention to the case will not suffice. *See Guerin v. Smart City Networks, Limited Partnership*,  
22 2006 WL 5242380, at \*2 (D. Nev. Oct. 13, 2006) ("failure to follow ordinary court procedure  
23 and rules does not constitute excusable inadvertence or neglect"). Courts deciding a motion for  
24 reconsideration do not consider evidence or arguments that could have been made prior to the  
25 decision but were not. *Westbrook*, 2007 WL 1288812 at \*3; *Sphouris v. Aurora Loan Svs.*, 2011  
26 WL 5007300, \*2 (D. Nev. Oct. 20, 2011) ("It is not abuse of discretion for a district court to  
27 decline to address an issue raised for the first time in a motion for reconsideration").

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1 Whether neglect is excusable is determined by an analysis of the following four non-  
2 exhaustive factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay  
3 and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the  
4 movant acted in good faith. *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1223-24 (9th Cir.  
5 2000) (district courts must evaluate these factors). Defendants fail to address any of these factors  
6 in their motion. This alone is sufficient grounds on which to deny the motion. *See Protheroe v.*  
7 *Indymac Bank/One West*, 2011 WL 2295179, at \*2 (D. Nev. June 10, 2011) (“Because Plaintiff’s  
8 Motion only addressed-and unconvincingly so-the third factor in the excusable neglect analysis,  
9 the Court would be within its discretion to deny his Motion on that ground alone.”). Moreover,  
10 by failing to file a written response in opposition to Caesars’ Motion, Defendants consented to  
11 the award of sanction against it. L.R. 7-2(d) (“The failure of an opposing party to file points and  
12 authorities in response to any motion shall constitute a consent to the granting of the motion.”).  
13 Nevertheless, even if the Court were to consider Defendants’ motion, consideration of the  
14 *Bateman* factors demonstrates that Defendants’ failure to timely respond to Caesars’ discovery  
15 was not the result of excusable neglect, or any other exceptional or extraordinary circumstance  
16 that would justify the Court setting aside its sanctions order.

17 Defendants’ only argument as to why the sanctions should be set aside is that they  
18 responded to Caesars’ discovery by December 3, 2011, two days before their response to  
19 Caesars’ motion to compel was due. (*See* Motion to Set Aside, Dkt. 53, p. 6.) The problem with  
20 Defendants’ argument is that December 3 was not the deadline for its discovery responses;  
21 October 28 was the deadline. (*See* Dkt. 42, Exh. 1, Munasifi Decl., ¶ 9; Fed. R. Civ. P. 37.)  
22 Therefore, contrary to Defendants’ assertion, its responses were late. Defendants’ Motion is  
23 further unfounded in that it is premised on the unstated assertion that Defendants fully responded  
24 to Caesars’ discovery responses by December 3, 2011. They did not. Indeed, as of today,  
25 Defendants still have not provided written responses to Caesars’ document requests, as required  
26 by Fed. R. Civ. P. 34(b)(2)(B) and this Court’s December 19 Order, and Defendants’  
27 interrogatory responses remain deficient in a number of respects.

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1 Defendants' failure to timely respond to Caesars' discovery requests has prejudiced  
2 Caesars by forcing it to incur fees and costs in attempting to secure Defendants' compliance  
3 through the meet and confer process and the filing of a motion to compel. Defendants' failure to  
4 cooperate in discovery has also delayed this proceeding and forced Caesars to seek two  
5 extensions of time to complete discovery in the case.

6 The record is devoid of any reason for Defendants' failure to respond in a timely manner  
7 to Caesars' discovery requests, some of which is currently more than ninety days overdue. On  
8 the contrary, the record reflects that Defendants knowingly and willfully failed to comply with  
9 their discovery obligations. (*See* Munasifi Decl., ¶ 21, 23). The parties met and conferred about  
10 Defendants' discovery deficiencies prior to Caesars filing its Motion. (*Id.*) Defendants  
11 acknowledged that they had failed to comply with their discovery obligations, yet made no effort  
12 to provide complete discovery responses, or to even commit to doing so. (*Id.*) Caesars was  
13 therefore forced to incur meaningful time, fees and expenses in filing its motion to compel.  
14 Having forced Caesars to incur this expense, Defendants should not now be heard to complain  
15 about this Court's entry of sanctions against them because they are unhappy with it. *See Fetrow-*  
16 *Fix v. Harrah's Entertainment, Inc.*, 2011 WL 2313650, \*2 (D. Nev. June 9, 2011) ("A party  
17 cannot have relief under this rule merely because he or she is unhappy with the judgment."  
18 (citation omitted)).

19 The fact that Defendants served discovery after Caesars filed its Motion also does not  
20 warrant this Court setting aside its sanctions order. Fed. R. Civ. P. 37(a)(5)(A) makes clear that  
21 "if the disclosure or requested discovery is provided after the motion was filed, the court must,  
22 after giving an opportunity to be heard, require the party or deponent whose conduct necessitated  
23 the motion...to pay the movant's reasonable expenses incurred in making the motion, including  
24 attorney's fees." Fed. R. Civ. P. 37(a)(5)(A) (emphasis added); *U.S. v. LCL Admins., Inc.*, 2011  
25 WL 2577226 at \*1 (E.D. Cal. June 15, 2011) (granting award of expenses in unopposed motion  
26 to compel, even though the non-movant provided the requested discovery prior to the motion to  
27 compel hearing). The court can decline to award fees only if the failure to timely provide  
28 discovery "was substantially justified or other circumstances make an award of expenses unjust."

1 Fed. R. Civ. P. 37(d)(3); *see Ziehlke v. City of Angels Camp*, No. 1:08-cv-1802-A WI-GSA,  
2 2009 WL 2424696, \*3 (E.D. Cal. Aug. 7, 2009) (“An award of expenses does not require a  
3 showing of willfulness or improper intent; rather the standard is whether there was a substantial  
4 justification for the losing party’s conduct.”).

5 In this case, Defendants have made no attempt to argue that their failure to provide  
6 complete, timely responses to Caesar’s discovery requests was justified. Indeed, they give no  
7 reason why they did not provide responses by October 28, or at least during the parties’ meet and  
8 confer process. They also had two opportunities prior to the sanctions order to inform the Court  
9 of any reasons that might support a denial of sanctions: (1) through a response brief (which they  
10 chose not to file); and (2) through an appearance at the hearing (which they did not attend).  
11 Accordingly, Defendants have failed to set forth any evidence or argument that would support  
12 this Court setting aside its sanctions order.

13 Defendants argue that to the extent sanctions were awarded for their failure to appear at  
14 the December 19 hearing on the Motion, these sanctions should be set aside because the failure  
15 was “an operation of inadvertence, mistake, or excusable neglect.” (Dkt. 53, pp. 5-6.) The Court  
16 did not award sanctions based on Defendants’ failure to appear at the hearing. (Show Cause  
17 Hearing, Dkt. 55.) It awarded sanctions because Defendants did not timely or properly respond  
18 to Caesars’ discovery requests. (Order on Motion, Dkt. 49.) This argument therefore does not  
19 save Defendants from the Court’s sanctions order.

20 Finally, Defendants appear to suggest that they should be relieved of their obligation to  
21 respond to Caesars’ discovery because the parties were engaged in settlement discussions.  
22 Settlement discussions do not relieve Defendants of their obligation to respond to outstanding  
23 discovery requests, particularly when Defendants did not seek extensions of time to serve their  
24 responses during the course of those discussions. Moreover, when the parties’ settlement  
25 discussions ended, Caesars gave Defendants a courtesy extension to respond to the requests, as  
26 Defendants’ acknowledged in the Second Stipulated Discovery Plan in October, yet Defendants  
27 still did not respond. (Dkt. 41, p. 2.) Defendants had yet another opportunity to respond, or to  
28 commit to a response date, during the parties’ meet and confer process, yet Defendants did not

1 provide discovery responses during this period either. The settlement discussions between the  
2 parties therefore provide no justification for Defendants' failure to respond.

3 In sum, no justification exists to support a reversal of the Court's sanctions award under  
4 *Bateman* or Fed. R. Civ. P. 60. Defendants' motion should therefore be denied.

5 **B. The Court Should Grant Plaintiff's Fees and Costs in Full.**

6 Defendants' challenge the fees Caesars' seeks on the Court's sanctions order on the  
7 grounds that they are allegedly excessive and do not result from Defendants' conduct. (Dkt. 53,  
8 p. 5) However, Defendants fail to identify any specific time entries that they contend are  
9 unreasonable or excessive. Caesars submits that the fees it incurred are wholly reasonable in  
10 light of the efforts Defendants' actions forced Caesars to undertake. Caesars' Motion involved  
11 four sets of discovery, two on each of the defendants. Each discovery response, or lack thereof,  
12 was addressed in each of the following five phases of prosecuting the Motion: (1) attempting to  
13 secure Defendants' compliance through the meet and confer process; (2) preparation and filing  
14 of the Motion to Compel; (3) preparation and filing of the Notice of Defendants' Non-Opposition  
15 (which involved an analysis of continuing deficiencies in Defendants' responses after the  
16 discovery it produced on December 3, 2011); (4) preparing for and attending the hearing on the  
17 Motion; and (5) preparation of the Fee Petition. The fees Caesars incurred by phase are as  
18 follows:

- 19 1. Meet and Confer Process:
  - 20 • Fees incurred by Santoro, Driggs, Walch ("SDW") = \$700.00
  - 21 • Fees incurred by Alston & Bird (A&B) = \$2,340.50
- 22 2. Preparation and Filing of the Motion to Compel:
  - 23 • Fees incurred by SDW = \$517.50
  - 24 • Fees incurred by A&B = \$9,638
- 25 3. Preparation and Filing of the Notice of Non Opposition:
  - 26 • Fees incurred by SDW = \$270
  - 27 • Fees incurred by A&B = \$5,377.50
- 28 4. Preparation for and Attendance at Hearing on Motion:
  - Fees incurred by SDW = \$1,230
  - Fees incurred by A&B = \$1,060



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5. Preparation and filing of Memorandum of Fee Petition:

- Fees incurred by SDW = \$1052.50
- Fees incurred by Alston & Bird = \$1,550

Caesars respectfully submits that the fees incurred each stage in this process were reasonably and necessarily incurred as a result of Defendants' failure to timely and fully respond to Caesars' discovery requests. Caesars therefore requests that the Court grant these fees in full.

DATED this 6<sup>th</sup> day of February, 2012.

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/s/ James D. Boyle

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**CERTIFICATE OF SERVICE**

Pursuant to Fed. R. Civ. P. 5(b), I certify that on the 6<sup>th</sup> day of February, 2012, I caused the document entitled **PLAINTIFF CAESARS WORLD, INC.'S RESPONSE IN OPPOSITION TO DEFENDANTS' RULE 60(C) MOTION TO SET ASIDE ORDER GRANTING SANCTIONS** to be served as follows:

Attorneys of Record	Parties Represented	Method of Service
Michael W. Sanft, Esq. Sanft Law Group 520 South Fourth St. Suite 320 Las Vegas, Nevada 89101		<input type="checkbox"/> Personal Service <input checked="" type="checkbox"/> Email/E-File <input type="checkbox"/> Fax Service <input type="checkbox"/> Mail Service

DATED this 6<sup>th</sup> day of February, 2012.

  
 An employee of Santoro, Driggs, Walch, Kearney, Holley & Thompson

SANTORO, DRIGGS, WALCH,  
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