

SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON



1 JAMES D. BOYLE, ESQ.
 Nevada Bar No. 08384
 2 jboyle@nevadafirm.com
 SANTORO, DRIGGS, WALCH,
 3 KEARNEY, HOLLEY & THOMPSON
 400 South Fourth Street, Third Floor
 4 Las Vegas, Nevada 89101
 Telephone: 702/791-0308
 5 Facsimile: 702/791-1912

6 DAVID J. STEWART, ESQ.
 Georgia Bar. No. 681149
 David.Stewart@alston.com
 8 NADYA MUNASIFI SAND, ESQ.
 Georgia Bar No. 156051
 9 Nadya.sand@alston.com
 ALSTON & BIRD LLP
 10 1201 West Peachtree Street
 Atlanta, Georgia 30309-3424
 Telephone: 404/881-7000
 11 Facsimile: 404/881-7777

12 *Attorneys for Caesars World, Inc.*

13
 14 **UNITED STATES DISTRICT COURT**
 15 **DISTRICT OF NEVADA**

16
 17 CAESARS WORLD, INC., a Florida
 corporation,

18
 19 Plaintiff,

20 v.

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

23 Defendants.
 24

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

**CAESARS WORLD, INC.'S
 EMERGENCY MOTION TO COMPEL
 AND FOR SANCTIONS**

25 Pursuant to Rule 37 of the Federal Rules of Civil Procedure and Local Rule 26-7,
 26 Plaintiff Caesars World, Inc. ("Caesars") respectfully moves the Court on an emergency basis to
 27 compel Defendant Marcel July ("July") to personally appear in Las Vegas, Nevada, for his
 28

1 deposition on March 12, 2012. Caesars further requests that the Court sanction July for his
2 failure to appear for a previously noticed deposition without legitimate excuse. As sanctions,
3 Caesars requests that the Court preclude July from testifying at trial, instruct July that the Court
4 will dismiss July's counterclaims if July fails to comply in full with the Court's order on this
5 motion, and award Caesars recovery of the attorney's fees and costs it has been forced to incur in
6 connection with this motion and seeking to secure July's appearance for deposition in this case.

7 Caesars submits this motion on an emergency basis because the discovery deadline is set
8 for April 16, 2012, and Caesars anticipates the need to take third-party discovery based on the
9 information July provides at his deposition. Given the pending discovery cutoff deadline, and
10 the importance of July's deposition to Caesars' ability to timely complete any necessary third
11 party discovery, Caesars respectfully contends that an expedited date for completing July's
12 deposition is required and resolution of the instant Motion on an emergency basis is necessary to
13 obtain such an expedited deposition date.

14 I. FACTUAL BACKGROUND

15 Defendant Marcel July's discovery violations are well documented in this case. (Order
16 on Motion to Compel, Dkt. 49; Motion to Compel, Dkt. 42). On December 19, 2011, this Court
17 granted Caesars' Motion to Compel July to produce responses to Caesars' discovery requests,
18 and sanctioned July for his discovery violations. (Dkt. 49.) The present motion is a result of
19 July's failure, yet again, to comply with his discovery obligations in this case.

20 As counsel for the parties exited the courtroom following the show cause hearing held on
21 January 19, 2012, Caesars' counsel requested that July's counsel provide dates when he and
22 his client would be available for July's deposition in Las Vegas. (Stewart Decl., Ex. A, ¶ 4.)
23 Caesars followed-up with July's counsel on several occasions, hoping to schedule July's
24 deposition at a time that would be convenient for July given that he would be travelling from
25 Europe for the deposition. (*Id.* at ¶ 5.) July never objected to the deposition taking place in Las
26 Vegas or provided Caesars with any dates when he would be available for his deposition. (*Id.* at
27 ¶ 6.)
28

1 After two weeks of trying to get dates from July, and with the then impending discovery
2 cutoff deadline of February 15, 2012, Caesars was left with no choice but to notice July's
3 deposition for February 15. (*Id.* at ¶ 7; Motion to Extend Time, Dk. 56.) Caesars, however,
4 informed July's counsel that if the Court extended the discovery period, Caesars would be
5 willing to push the date back. (Stewart Decl., Ex. A, ¶ 8.) The Court granted Caesars' extension
6 on February 7, 2012, extending discovery until April 16, 2012. (Dkt. 60.) On February 9, 2012,
7 still not having received any dates from July or his counsel, Caesars re-noticed the deposition for
8 February 24, 2012, in Las Vegas, Nevada, giving July more than two weeks notice of the
9 deposition. (Stewart Decl., Ex. A, ¶ 9.)

10 Four days prior to July's deposition, Timothy Bennett, Esq., an attorney who works with
11 Mr. Sanft, informed Caesars' counsel that July had a conflict with personally appearing for his
12 deposition but could appear by telephone on the scheduled deposition date. (Sand Decl, Ex. B, ¶
13 4.) Mr. Bennett did not know for certain why July was refusing to appear in person as noticed,
14 but speculated that it was because of the expense of traveling to the United States. (*Id.*) Mr.
15 Bennett did not provide alternative dates for when July was available for his deposition. (*Id.*)
16 Caesars' counsel informed Mr. Bennett that Caesars would not agree to a telephonic deposition,
17 but said that she would get back to him regarding the deposition date. (*Id.* at ¶ 5.)

18 The following day, Caesars' counsel emailed Mr. Bennett and Mr. Sanft, informing them
19 that Caesars would not withdraw its deposition notice because it was validly noticed and because
20 Caesars had been trying for weeks without response to get July's cooperation in scheduling the
21 deposition. (*Id.* at ¶ 6.) Caesars' counsel further requested that Mr. Sanft confirm whether his
22 client would be attending the deposition as noticed. (*Id.*)

23 On February 22, Mr. Bennett confirmed that July would not attend his deposition on the
24 24th because of the expense of traveling to Las Vegas, and because "he believes that the burden
25 of such a travel at any time for a deposition would outweigh the benefit that may be conferred by
26 a mere telephonic appearance on such an occasion." (*Id.* at ¶ 7.) Mr. Bennett also informed
27 Caesars for the first time that Mr. Sanft could not attend the scheduled deposition. (*Id.*) No
28 alternative dates for a deposition were offered. (*Id.*)

1 Caesars' counsel and Mr. Sanft had a telephonic meet and confer conference on
2 Thursday, February 23, 2012 regarding the scheduled deposition. (Stewart Decl., Ex. A, ¶ 10.)
3 Although Caesars did not agree to vacate the deposition notice, Mr. Sanft made clear that his
4 client would not be appearing on the noticed date. (*Id.* at ¶ 11.) Caesars requested that Mr.
5 Sanft, by the next day, provide dates when he and his client could personally appear for July's
6 deposition in Las Vegas. (*Id.*) Caesars further explained in detail why it was necessary for
7 July's deposition to take place in person in the United States and requested confirmation that
8 July would appear in person in either Las Vegas or, in the alternative, Atlanta (where Caesars'
9 lead counsel is located). (*Id.*) To date, Caesars has received no response from July as to dates
10 when he is available for deposition or whether he will agree to be deposed in the United States.
11 (*Id.*) July did not appear for his deposition on February 24, 2012. (Boyle Decl, Ex. C, at ¶ 4.)
12 Pursuant to LR 26-7, attached is Caesars' certification that it has personally consulted with July,
13 with sincere efforts, about its discovery dispute and that the parties are unable to resolve the
14 matter without Court action. (Stewart, Decl., Ex. A, ¶¶ 3, 10-12.)

15 II. MEMORANDUM OF POINTS AND AUTHORITIES

16 A. July Should be Compelled to Personally Appear in Las Vegas, Nevada for a 17 Deposition on March 12, 2012.

18 A party may depose another party by oral examination after providing reasonable written
19 notice that includes the time and place of deposition. Fed. R. Civ. P. 30(a)(1). The deponent
20 must attend the deposition as noticed, unless the deponent obtains a protective order from the
21 court. Fed. R. Civ. P. 26(c) ("The court may, for good cause, issue an order to protect a
22 party...from...undue burden or expense, including...specifying terms, including time and place,
23 for the disclosure or discovery"); *see also* Rule 30(b)(4) (The parties may stipulate – or the court
24 may on motion order – that a deposition be taken by telephone or other remote means.). A
25 motion for protective order is timely if filed prior to the subject discovery. *Seminara v. City of*
26 *Long Beach*, 68 F.3d 481, 1995 WL 598097, *4 (9th Cir. 1995) (noting that a movant must have
27 good cause to excuse the untimeliness of a motion filed after discovery); *Collins v. Wayland*, 139
28 F.2d 677 (9th Cir. 1944), cert. denied, 322 U.S. 744 (1944) (stating that deponent could not

1 complain of deposition location after failing to file a motion to seek relief); *see also* Fed. R. Civ.
2 P. 37(d)(2) (failure to attend deposition is not excused on grounds that discovery was
3 objectionable unless there is pending Rule 26(c) motion). The party seeking the protective order
4 bears the burden of demonstrating “specific prejudice or harm will result if no protective order is
5 granted,” and broad allegations of harm are not sufficient to satisfy Rule 26(c). *Luangisa v.*
6 *Interface Operations*, 2011 WL 6029880, * 12 (D. Nev. Dec. 5, 2011) (quoting *Phillips v. Gen.*
7 *Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002)).

8 “[A]bsent extreme hardship, a nonresident plaintiff should appear for his deposition in
9 the chosen forum.” *U.S. v. Rock Springs Vista Devel.*, 185 F.R.D. 603, 604 (D. Nev. April 19,
10 1999) (requiring plaintiff to appear in person for deposition in chosen forum because plaintiff
11 “has not only taken the volitional step of initiating the lawsuit or claim, he or she stands to gain a
12 substantial monetary sum and/or other beneficial relief as a result of suing a defendant”).
13 Conclusory assertions that travel results in severe financial hardship are insufficient to meet this
14 standard. *Joseph v. Las Vegas Metropolitan Police Dept.*, 2010 WL 3238992, *6. (D. Nev. Aug.
15 13, 2010) (finding that plaintiffs failed to show extreme hardship by merely asserting “that travel
16 to Las Vegas would subject [plaintiff] to sever financial hardship and [plaintiff’s] travel is
17 limited by unspecified ailments”); *Rock Springs Vista Devel.*, 185 F.R.D. at 604 (mere
18 inconvenience or expense is not a legitimate reason to refuse to appear for a deposition).

19 Indeed, this Court has recognized that telephonic depositions are not an adequate
20 substitute for an in person deposition. “Telephone depositions are not recommended for
21 obtaining controversial testimony. You cannot observe the impact of your questions or the
22 witness’ nonverbal responses. Moreover, you will be unable to ascertain if anyone is listening in
23 or ‘coaching’ the witness.” *Rock Springs Vista Development*, 185 F.R.D. at 604 (quoting William
24 W Schwarzer, A. Wallace Tashima, & James M. Wagstaffe, FEDERAL CIVIL PROCEDURE
25 BEFORE TRIAL § 11.443 (1997)). Depositions by telephone for foreign deponents are further
26 complicated by the Court’s limited ability to resolve disputes during the pendency of the
27 deposition. *Hyde & Drath v. Baker*, 24 F.3d 1162 (9th Cir. 1994) (affirming that deposition
28 should take place in San Francisco and not Hong Kong so that the court could oversee the

1 proceedings and because deponents had done business in forum); *HTC Corp. v. Tech. Prop.*,
2 2008 WL 5244905, *2 (N.D. Cal. Dec. 16, 2008) (“this court’s authority to resolve any disputes
3 arising during a deposition could be compromised by sovereignty issues if depositions took place
4 in Taiwan, rather than the United States”).

5 Having requested dates since January 19 when July would be available for his deposition,
6 and receiving none, Caesars served a proper Notice of Deposition on July. It was days before his
7 deposition that July unilaterally decided that it was not worth traveling to the United States for
8 his deposition – not for his noticed deposition date or apparently any other date. At no point
9 prior to the noticed deposition date did July seek a protective order. Having failed to seek a
10 protective order prior to his deposition, this Court should find that July waived any right to
11 object to appearing in the United States and compel him to appear in Las Vegas for his
12 deposition.

13 Even if July had timely filed for a protective order, he will not suffer undue burden or
14 expense in traveling to the United States. July is a counterclaim plaintiff in this lawsuit asserting
15 trademark rights that he claims are protected by Nevada law through registrations with the state
16 of Nevada. As a counterclaimant to a declaratory judgment action, he is functionally the plaintiff
17 in this case, and it was his groundless threats that he would sue Caesars if it did not stop use of
18 its OCTAVIUS TOWER mark in Las Vegas that led to the filing of this lawsuit. Moreover, July
19 claims that he is in the process of opening a new entertainment center in Las Vegas less than
20 three miles from the location of the noticed deposition. (Sand Decl, Ex. B., ¶ 8) July’s claim
21 that he would suffer severe financial hardships by appearing in this District for his deposition is
22 thus baseless. It is clear that his reason for not showing up is to further thwart Caesars’
23 legitimate attempts at getting discovery in this case for the purpose of stalling and increasing the
24 cost of the case to Caesars, despite that fact that *July* is the true plaintiff.

25 A telephonic deposition is not acceptable to Caesars for a number of reasons:

26 1. July has been identified as the Defendants’ sole witness. It is crucial for Caesars
27 to see first-hand July’s nonverbal responses to gage his credibility in response to questions asked
28 at the deposition and to determine how he will appear at trial.



1 2. July speaks with a German accent that could make effective questioning of him
2 by telephone difficult or impossible.

3 3. Taking a deposition by telephone leaves the examiner in a position where it
4 cannot control the deposition environment, opening the possibility of inappropriate activity or
5 coaching of the witness by a third party without the examiner's knowledge. That possibility is
6 quite real in this case. Throughout this matter, July has been counseled by a German attorney
7 named Christian Kaldenhoff, who, perhaps not unexpectedly, has shown a lack of knowledge of
8 U.S. laws and procedural and ethical rules (including contacting Caesars' officers directly
9 despite knowledge that Caesars is represented by counsel and engaging in the unauthorized
10 practice of law in the United States). (Stewart Decl., Ex. A., ¶ 12.) It is reasonable to assume
11 that Mr. Kaldenhoff would be present at July's deposition and could inappropriately counsel or
12 coach July without Caesars' knowledge.

13 4. Based on July's history of failing to comply with his discovery obligations, it is
14 reasonable to assume that Caesars might seek the Court's intervention during the course of the
15 deposition. Having the deposition take place in this forum will facilitate more ready resolution
16 of any issues.

17 5. Finding a U.S. court reporter in Germany who could take the deposition would be
18 difficult and expensive, if such a person even exists. Requiring Caesars to pay for a court
19 reporter to travel to Germany would be an unreasonable expense in light of July's claims for
20 relief from this Court and his active business activities in the State. It is also unclear to Caesars
21 whether, under international treaties, it is even legally permissible for Caesars to take a
22 deposition of a German national in Germany.

23 6. Caesars has numerous exhibits it needs to question July about, including
24 documents written in German and contracts that would be difficult to examine or discuss via
25 telephone.

26 For these reasons, the Court should compel July to personally appear in Las Vegas for his
27 deposition on March 12, 2012 at the offices of Caesars' Las Vegas counsel commencing at 9:00
28 am PDT.

1 **B. July Should be Sanctioned for Failing to Comply with his Discovery Obligations.**

2 This Court should impose sanctions upon July pursuant to Fed. R. Civ. P. Rule 37(d)(1)
3 for his second unjustified failure to comply with his discovery obligations. Rule 37(d)(1)(A)(i)
4 provides that “[t]he court where the action is pending may, on motion, order sanctions if: (i) a
5 party... fails, after being served with proper notice, to appear for that person’s deposition.” Rule
6 37(d)(2) further provides that failure to attend a deposition “is not excused on the ground that the
7 discovery sought was objectionable, unless the party failing to act has a pending motion for a
8 protective order under Rule 26(c).” Even if the deponent notifies opposing counsel in advance of
9 the deposition that he will not be attending, that still constitutes a sanctionable failure to appear
10 unless the party seeks relief from the court in advance of the noticed deposition date. *See Henry*
11 *v. Gill Indus., Inc.*, 983 F.2d 943 (9th Cir. 1993).

12 Rule 37(d)(3) provides that any of the sanctions listed in Fed. R. Civ. P. 37(b)(2)(A) can
13 be entered for failure to appear at a deposition, but that rule mandates an award of fees “unless
14 the failure was substantially justified or other circumstances make an award of expenses unjust.”
15 Fed. R. Civ. P. 37(d)(3); *Ziehlke v. City of Angels Camp*, No. 1:08-cv-1802-A WI-GSA, 2009
16 WL 2424696, *3 (E.D. Cal. Aug. 7, 2009) (“An award of expenses does not require a showing of
17 willfulness or improper intent; rather the standard is whether there was a substantial justification
18 for the losing party’s conduct.”). The Ninth Circuit has previously affirmed as a sanction for
19 failing to appear at a properly scheduled and noticed deposition an order precluding the deponent
20 from testifying at trial. *Caesars World, Inc. v. Milanian*, 126 Fed.Appx. 775, 777 (9th Cir. 2005)
21 (affirming district court’s ruling to preclude defendant from testifying at trial).

22 July’s failure to attend his deposition is another wholly unjustified discovery violation.
23 July’s sole reasons for not attending his deposition – articulated only days before his deposition –
24 is that traveling to the deposition is expensive, and that he believes a deposition in Las Vegas is a
25 burden on him. As indicated *supra*, July’s reasons for not attending his deposition are meritless
26 given that July is asserting claims against Caesars in this Court, under the laws of this State, and
27 is preparing to open a business in Las Vegas. At no time has July claimed that the deposition
28 notice was invalid. He simply chose unilaterally not to attend without seeking any relief from



1 this Court. July has also refused to provide an alternate date for his deposition or agree that he
2 will appear in person for a re-noticed deposition.

3 July has thwarted Caesars' attempts to complete its discovery at every phase of this case,
4 and this Court has already sanctioned July once for his blatant disregard for his discovery
5 obligations. As a result of July's constant discovery violations, Caesars has incurred significant
6 expense and time trying to obtain discovery from July, and has been forced to file three
7 extensions of time to complete its discovery in this case (and it may be forced to file a fourth
8 extension due to July's failure to appear for his deposition). July's refusal to engage his
9 discovery obligations is a blatant attempt to thwart Caesars legitimate discovery in this case and
10 to deny Caesars the relief it seeks through its declaratory judgment claims. As the true plaintiff
11 in this case, July's conduct is inexcusable, and Caesars respectfully submits that it should not be
12 tolerated by this Court further.

13 Accordingly, Caesars requests that the Court: (1) order that July is precluded from
14 testifying at trial in this case; (2) order July to appear for a discovery deposition in Las Vegas at
15 the offices of Caesars' Las Vegas counsel on March 12, 2012 at 9:00 AM PDT; and (3) order
16 July to pay the reasonable fees and costs Caesars has incurred in connection with this motion and
17 otherwise attempting to secure July's deposition. Caesars further requests that the Court instruct
18 July in its Order that any further discovery violations could lead to this Court dismissing July's
19 counterclaims. If Caesars' request for fees and costs is granted, Caesars will submit a fee
20 petition and bill of costs within ten (10) days of the Court's order on this motion, and Caesars
21 requests that the Court order Defendants to pay the awarded fees and costs within ten (10) days
22 after the Court's order on Caesars' fee petition.

23 Respectfully submitted, this 28th day of February, 2012.

24 SANTORO, DRIGGS, WALCH,
25 KEARNEY, HOLLEY & THOMPSON

26 /s/ James D. Boyle
27 JAMES D. BOYLE, ESQ.
28 Nevada Bar No. 08384
400 South Fourth Street, Third Floor



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Las Vegas, Nevada 89101

ALSTON & BIRD LLP
David Stewart, Esq.
Georgia Bar. No. 681149
Nadya Munasifi Sand, Esq.
Georgia Bar No. 156051

Admitted Pro Hac Vice

Attorneys for Caesars World, Inc.

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Fed. R. Civ. P. 5(b), I certify that on the February 28, 2012, I served
3 **CAESARS WORLD, INC.'S EMERGENCY MOTION TO COMPEL AND FOR**
4 **SANCTIONS** as follows:

5

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

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12 DATED this 28th day of February, 2012.

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14 /s/ Nadya Munasifi Sand
15 Nadya Munasifi Sand

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SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON

