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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

17 CAESARS WORLD, INC., a Florida
corporation,

19 Plaintiff,

20 v.

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

23 Defendants.

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

**CAESARS WORLD, INC.'S RULE 6(b)
 MOTION FOR ENLARGMENT OF TIME
 TO FILE ITS ANSWER TO DEFENDANT
 MARCEL JULY'S REMAINING
 COUNTERCLAIM**

25 Pursuant to Fed. R. Civ. P. 6(b)(1)(B), Plaintiff Caesars World, Inc. ("Caesars") moves
 26 this Court to enlarge the time for Caesars to file its Answer to July's Remaining Counterclaim.
 27 A copy of Caesars' proposed Answer is attached as Exhibit A. This Motion is based upon the
 28

1 pleadings and records on file herein, the Memorandum of Points and Authorities set forth below,
2 the Declaration of David J. Stewart, Esq., attached as Exhibit B (“Stewart Decl.”), the
3 Declaration of Nadya Munasifi Sand, Esq., attached as Exhibit C (“Sand Decl.”), and any oral
4 argument of counsel which this Court may entertain.

5 I. INTRODUCTION

6 This is an action for declaratory judgment in which Caesars seeks a declaration that its
7 use of the service mark OCTAVIUS TOWER to identify a hotel tower at its Caesars Palace
8 casino in Las Vegas does not infringe rights Defendants claim to own in the same mark for a
9 heavy metal band and other entertainment services. Defendant Marcel July (“July”) responded
10 to Caesars’ Complaint with counterclaims for trademark infringement and dilution. Caesars’
11 Complaint is therefore effectively an answer to July’s later filed Counterclaims.

12 July’s dilution counterclaim failed to plead facts sufficient to create a plausible claim that
13 his mark is famous, as required by the federal Trademark Dilution Revision Act. Caesars
14 therefore prepared a Rule 12(b)(6) motion on the dilution claim and an answer on the
15 infringement claim; however, Caesars ultimately decided to file only the Rule 12 motion.
16 Caesars timely filed its motion on June 13, 2011 (*see* Dkt. 22). On November 28th, July
17 voluntarily moved to dismiss this counterclaim (*see* Dkt. 44), and, in an order signed on
18 December 22nd and entered on December 23rd, the Court dismissed the dilution counterclaim
19 and denied Caesars’ Rule 12(b)(6) motion as moot (*see* Dkt. 50). The denial of the Rule 12(b)(6)
20 motion triggered Caesars’ 14 day period to answer.

21 Caesars counsel responsible for calendaring case deadlines was out of the office for the
22 holidays when the Court’s December 22 Order was entered. When she returned, she did not
23 calendar the deadline for a response because she recalled, incorrectly, that Caesars had filed an
24 answer several months earlier when the motion to dismiss was filed. Caesars did not discover
25 this error until a few days ago.

26 It is unclear whether Caesars needs to seek leave to file its answer if a notice of default
27 has not yet issued. *See McMillen v. J.C. Penney Co.*, 205 F.R.D. 557, 558 (D. Nev. 2002).
28 Nevertheless, out of an abundance of caution, and to be certain that it is in compliance with the

1 letter of the rules, Caesars now seeks an extension of time to file its answer to July's
2 counterclaim. A copy of the Answer Caesars will file if this motion is granted is attached hereto
3 as Exhibit A. Caesars' Answer does not raise any issues that have not already been addressed by
4 Caesars' declaratory judgment complaint; accordingly, July is already aware of the nature of
5 Caesars' denials of his claims and will not be prejudiced by the grant of this motion. Caesars has
6 otherwise diligently complied with all of its deadlines and obligations in discovery in this case,
7 and it will build redundancy into the calendaring of all further deadlines in this case to be certain
8 that no further deadlines are missed. Caesars therefore respectfully submits that its failure to
9 answer July's counterclaim within the time period established by Rule 12 constitutes excusable
10 neglect under Fed. R. Civ. P. 6(b) and that good cause exists under Rule 55(c) and 60(b) to grant
11 the requested extension.

12 II. FACTUAL BACKGROUND

13 On April 8, 2011, Caesars filed the instant action, seeking a declaration of non-
14 infringement of Defendants' claimed rights in the service mark and trade name OCTAVIUS
15 TOWER and associated domain names, and cancellation of July's federal and state service mark
16 registrations in Nevada and Florida for the OCTAVIUS TOWER mark. (Dkt. 1.) On May 19,
17 2011, July filed Counterclaims for federal trademark infringement and dilution. (Dkt. 15.)
18 Caesars timely responded by filing a motion to dismiss July's trademark dilution counterclaim
19 on June 13, 2011 for failure to state a claim upon which relief can be granted. (Dkt. 22). At the
20 time Caesars prepared its motion, it also drafted an answer to July's infringement counterclaim.
21 (Stewart Decl. at ¶ 5.) When Caesars became comfortable through research on the issue that its
22 Rule 12(b)(6) motion tabled its need to file an answer to July's remaining counterclaim, Caesars
23 elected not to file the partial answer. (*Id.* at ¶ 6.)

24 On November 28, 2011, prior to the Court's ruling on Caesars' motion, July voluntarily
25 dismissed his dilution counterclaim and dismissed his claims for monetary relief under his
26 federal trademark infringement counterclaim. (Dkt. 44.) The Court granted July's dismissal and
27 denied as moot Caesars' motion in an order that was signed on December 22, 2012 and entered
28 on December 23, 2012. (Dkt. 50). As a result of the Court's order, Caesars' answer to July's

1 remaining counterclaim became due January 6, 2012. *See* Fed. R. Civ. P. 12(a) (requiring
2 responsive pleading within 14 days after notice that court denies motion). Caesars' counsel
3 responsible for docketing deadlines in the case was out of the office for the Christmas holiday
4 when the Court entered its order. (Sand Decl at ¶ 4). Upon return, she did not docket a date for
5 filing an answer because she remembered, incorrectly, that the Answer previously drafted had
6 been filed six months earlier when the motion was filed. (*Id.* at ¶ 5). When recently examining
7 the docket, Caesars' counsel discovered its error. (*Id.* at ¶ 6).

8 The Answer deadline is the only deadline Caesars has missed in the case, and Caesars has
9 otherwise vigorously prosecuted its claims and defended July's counterclaims. Caesars' actions
10 in this case include filing a motion to dismiss and supporting reply brief (Dkts. 22, 29),
11 defending July's motion for preliminary injunction (filed prior to the date when Caesars was
12 required to file its first responsive pleading) (Dkt. 19), appearance at three hearings in this case
13 (two in person and one telephonic) (Dkts. 49, 55, 57), filing two motions to compel discovery
14 (including a pending emergency motion) to obtain the discovery Caesars needs from July to
15 defend itself at trial (Dkts. 42, 61), and timely filing three motions for extension of the discovery
16 period deadline. (Dkts. 32, 40, 56.)

17 III. MEMORANDUM OF POINTS AND AUTHORITIES

18 Rule 6(b) of the Federal Rules of Civil Procedure permits a court for good cause to accept
19 a late filing upon a proper showing of excusable neglect. Fed. R. Civ. P. 6(b)(1) ("When an act
20 may or must be done within a specified time, the court may, for good cause, extend the time: (B)
21 on motion made after the time has expired if the party failed to act because of excusable
22 neglect."); *Alexander v. Principi*, 16 F. App'x. 755, 759 (9th Cir. 2001). "This rule, like all the
23 Federal Rules of Civil Procedure, '[is] to be liberally construed to effectuate the general purpose
24 of seeing that cases are tried on the merits.'" *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253,
25 1258-59 (9th Cir. 2010) (internal citations omitted); *see Gibson v. Household Int'l, Inc.*, 151 F.
26 App'x. 529, 531 (9th Cir. 2005) (citation omitted) (affirming denial of motion to strike untimely
27 answer and stating that "[t]he strong policy underlying the Federal Rules of Civil Procedure
28 favors decisions on the merits.") "Good cause" is a non-rigorous standard that has been

1 construed broadly across procedural and statutory contexts. *Ahanchian*, 624 F.3d at 1259.

2 “Excusable neglect” under Rule 6(b) is an “elastic concept” that is not limited to
3 omissions caused by circumstances beyond the movant’s control. *Pioneer Inv. Servs. Co. v.*
4 *Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 392 (1992). “The Supreme Court has established
5 that the appropriate legal standard for excusable neglect is a four-part test that takes ‘account of
6 all relevant circumstances surrounding the party’s omission.’” *Alexander*, 16 F. App’x. at 759
7 (quoting *Pioneer Inv. Servs. Co.*, 507 U.S. at 395). These factors include (1) the danger of
8 prejudice to the non-moving party; (2) the length of the delay and its potential impact on judicial
9 proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *Id.* A
10 district court’s failure to consider each of these four factors is an abuse of discretion. *Id.*

11 Because failure to grant a motion for extension of time to answer results in the entry of
12 default and default judgment, consideration of whether to permit an answer out of time must also
13 be considered in light of the standards of Federal Rule 55(c), which governs relief from the entry
14 of default, and Rule 60(b), which governs relief from a default judgment. *See McMillen*, 205
15 F.R.D. at 558. Both of these rules set forth liberal standards for relief. *See Fed. R. Civ. P. Rules*
16 *55, 60; McMillen*, 205 F.R.D. at 558 (Rule 55(c)’s “good cause shown” standard is a “liberal and
17 mutable standard”). “The general rule in the Ninth Circuit is that default judgments are
18 ordinarily disfavored. Cases should be decided on their merits whenever possible.” *Gibson*, 151
19 F. App’x. at 530 (citing *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986)); *see TCI Grp. Life*
20 *Ins. Plan v. Knoebber*, 244 F.3d 691, 697 (9th Cir. 2001), *overruled on other grounds by*
21 *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141 (2001) (stating that default judgments are only
22 appropriate in extreme circumstances).

23 Rule 55(c) provides that the “court may set aside an entry of default for good cause, and
24 it may set aside a default judgment under Rule 60(b).” Fed. R. Civ. P. 55(c). The “good cause”
25 standard that governs vacating an entry of default under Rule 55(c) is the same as the standard
26 that governs vacating a default judgment under Rule 60(b) for excusable neglect. *Brandt v. Am.*
27 *Bankers Ins. Co. of Fla.*, 653 F.3d 1108, 1111 (9th Cir. 2011). The good cause analysis
28 considers three factors: (1) whether culpable conduct led to the default; (2) whether the defaulter

1 had a meritorious defense; or (3) whether reopening the default judgment would prejudice the
2 other party. *Id.* With regard to culpability, “a defendant’s conduct is culpable if he has received
3 actual or constructive notice of the filing of the action and *intentionally* failed to answer.” *TCI*
4 *Group Life Ins. Plan*, 244 F.3d at 697. The Ninth Circuit has further “typically held that a
5 defendant’s conduct was culpable for purposes of the [good cause] factors where there is no
6 explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to
7 respond.” *Id.* at 698.

8 **A. Caesars’ Delay in Filing Constitutes Excusable Neglect Under Rule 6(b)**

9 **1. July Will Not be Prejudiced if this Motion is Granted.**

10 Caesars’ complaint for a declaration of non-infringement is in essence a denial of July’s
11 counterclaim before he filed the counterclaim. July has thus been aware that Caesars denies any
12 infringement, and has been aware of the grounds for that denial, since Caesars’ served its
13 Complaint in April 2011. For the last eleven months, Caesars has continuously denied that its
14 mark infringes July’s Octavius Tower mark and has vigorously prosecuted its claims and
15 defended July’s counterclaims.

16 Caesars’ proposed Answer does not include any new information that was not included in
17 its Complaint, and Caesars does not assert any affirmative defenses in its Answer because its
18 Complaint already seeks all relief it would request by way of affirmative defenses. *See*
19 *McMillen*, 205 F.R.D. at 558 (refusing to grant default judgment, and allowing defendant to
20 untimely join co-defendant’s answer, on the basis that plaintiff would not suffer prejudice since
21 defendant did not assert any new defenses or counterclaims). Because July has been aware of
22 Caesars’ denial of his claims and the grounds for that denial since April 2011, he will not suffer
23 any prejudice if this motion is granted. *See Alexander*, 16 F. App’x. at 759, 760 (finding no
24 prejudice where defendant was aware of plaintiff’s opposition). Moreover, there is remaining
25 time in the discovery period for July to conduct any discovery he may choose to take (he has not
26 taken any discovery to date), and Caesars will almost certainly need to request a further
27 extension to the discovery period as a result of July’s refusal to appear for the deposition Caesars
28 noticed of him for February 24, 2012. (Dkt. 61); *see also TCI Grp. Life Ins. Plan*, 244 F.3d at

1 700) (noting in default context that prejudice does not occur simply because the parties must
2 continue litigating; rather prejudice must be tangible harm such as loss of evidence, increased
3 difficulties in discovery, or greater opportunity for fraud.) This factor therefore strongly favors
4 the grant of Caesars' motion.

5 **2. Caesars' Delay is Not Unreasonable.**

6 Caesars' answer is approximately two months late. Caesars submits that this delay is not
7 unreasonable, especially in light of its continuing vigorous defense of July's claims in this case
8 and the fact that its Complaint is effectively an answer; thus, allowing Caesars leave to file the
9 attached Answer will not result in any delay in this proceeding. Indeed, delays of this length
10 have been found to be "relatively innocuous." *See Welch v. Centex Home Equity Co.*, No. 03-
11 2132-JWL-DJW, 2004 WL 2348295, at *1 (D. Kan. Apr. 23, 2004) ("Viewed in the context of
12 the activity in this case during the approximately two-month period of time between the original
13 deadline and Plaintiff's request for leave to file an answer out of time, the Court finds the length
14 of delay relatively innocuous."); *see Johnson v. Exec. Protective Agency K-9*, No. 07-cv-0570 J
15 (AJR), 2007 WL 2819712, at *3 (S.D. Cal. Sept. 26, 2007) (finding three month delay did not
16 affect the scheduling of the proceeding). This factor therefore also weighs in favor of allowing
17 Caesars to file its Answer.

18 **3. Caesars' Delay is Unintentional and Not the Result of Bad Faith Conduct.**

19 As set forth above, Caesars' failure to timely file its answer to July's Counterclaim was a
20 calendaring error based on a mistaken recollection that Caesars had filed the attached Answer
21 when it was first prepared months earlier. Caesars appreciates that deadlines set by this Court
22 and the Federal and Local Rules are to be adhered to. However, the error in this case was
23 unintentional, and Caesars is moving for this relief immediately after self-discovering the error.
24 Calendaring errors have been found to constitute excusable neglect in similar circumstances.
25 *Ahanchian*, 624 F.3d at 1262 (finding a calendaring mistake under Rule 60(b) is excusable
26 neglect); *Keohokalole v. Williams*, No. 2:10-cv-0859-KJD-LRL, 2011 WL 1884767, at *3 (D.
27 Nev. May 17, 2011) (noting that calendaring error was excusable neglect); *see also Tesillo v.*
28 *Emergency Physician Assocs., Inc.*, 230 F.R.D. 287, 289 (W.D.N.Y. 2005) (vacating entry of

1 default and granting motion for leave to serve answer in case where defendant's attorney had
2 "prepare[d] an answer prior to deciding to file the motion to dismiss, and merely forgot to file the
3 answer once that motion was denied.").

4 Caesars' calendaring error, while a mistake, was done in good faith. Caesars has not
5 missed any other deadline in this case, and has diligently sought discovery extensions when
6 necessary. (*See* Dkts. 32, 40, 56); *see also Ahanchian*, 624 F.3d at 1260, 1262 ("Ahanchian's
7 counsel acted conscientiously throughout the litigation, promptly seeking extensions of time
8 when necessary.... We have found good faith in situations where attorneys acted far less
9 diligently and conscientiously."). Although regretful for its mistake, Caesars submits that the
10 "good faith" factor also weighs strongly in favor of allowing Caesars leave to file its Answer.

11 Based on the foregoing, each of the excusable neglect factors weighs in favor of allowing
12 Caesars to file its Answer. Caesars therefore submits that this motion should be granted.

13 **B. Caesars' Motion is Supported by Rules 55(c) and 60(b)**

14 As set forth above, motions for enlargement with regard to the filing of an answer should
15 also be considered within the context of the liberal standards of Rule 55(c) regarding default and
16 Rule 60(b) for setting aside default judgments because of the consequences of a denial to grant a
17 Rule 6(b) motion with regard to an answer.¹ Grant of this motion aligns with the Ninth Circuit's
18 preference that cases be resolved on their merits, and not through default judgments. *TCI Grp.*
19 *Life Ins. Plan*, 244 F.3d at 697 (reversing denial of motion to vacate judgment, and stating that
20 default judgments are only appropriate in extreme circumstances). Finding in favor of Caesars is
21 supported by the good cause standard to set aside entries of default under both Rules 55 and 60,
22 which would govern if the Court does not grant this motion under Rule 6(b).² Caesars'
23 calendaring mistake was not intentional, devious, deliberate, willful or in bad faith. As further

24 _____
25 ¹ An argument can be made that even though Rule 6(b) applies to extension requests, extension requests with regard
26 to answers are more properly considered under Rule 55(c) because of the consequence of a denial of a Rule 6(b)
27 motion. That appears to be the approach this Court adopted in *McMillen*, 205 F.R.D. at 558.

28 ² The entry of default judgment would also produce a procedural anomaly under the facts of this case because, even
with the entry of default, the Court would still have to consider and rule upon the allegations of Caesars' declaratory
judgment complaint, which are independent of its answer but, as stated above, effectively serve as an answer to
July's counterclaim.



1 demonstrated above, Caesars' complaint sets forth meritorious defenses to Caesars'
2 counterclaim, and July would not suffer any prejudice by opening a default. *See Tesillo*, 230
3 F.R.D. at 288-90. Caesars' motion thus satisfies all three elements of the Rule 55(c) standard.
4 *See Brandt*, 653 F.3d at 1111.

5 **IV. CONCLUSION**

6 For the foregoing reasons, Caesars respectfully submits that this Court should grant
7 Caesars an extension of time to file its Answer within three (3) days of the Court resolving this
8 motion. A proposed order granting Caesars' motion is attached as Exhibit D.

9 Respectfully submitted, this 14th day of March, 2012.

10 SANTORO, DRIGGS, WALCH,
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23 *Attorneys for Caesars World, Inc.*

CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I certify that on March 14, 2012, I served **CAESARS WORLD, INC.'S RULE 6(b) MOTION FOR ENLARGMENT OF TIME TO FILE ITS ANSWER TO DEFENDANT MARCEL JULY'S REMAINING COUNTERCLAIM** 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 14th day of March, 2012.

/s/ James D. Boyle
James D. Boyle

SANTORO, DRIGGS, WALCH,
KEARNEY, HOLLEY & THOMPSON



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