

1 James M. Harrington, *pro hac vice*
2 (N.C. State Bar No. 30005)
3 jharrington@harringtonlawpc.com
4 HARRINGTON LAW, P.C.
5 P.O. Box 403
6 Concord, NC 28026-0403
7 Telephone: 704.315.5800
8 Facsimile: 704.625.9259

9 Kerry P. Faughnan
10 (Nevada Bar No. 12204)
11 kerry.faughnan@gmail.com
12 P.O. BOX 335361
13 North Las Vegas, NV 89033
14 Telephone: 702.310.3096
15 Facsimile: 702.331.4222

16 *Attorneys for Plaintiff*
17 SLEP-TONE ENTERTAINMENT CORPORATION

18 UNITED STATES DISTRICT COURT
19 DISTRICT OF NEVADA

20 SLEP-TONE ENTERTAINMENT
21 CORPORATION,

22 Plaintiff,

23 v.

24 ELLIS ISLAND CASINO &
25 BREWERY, et al.,

26 Defendants.

Case No.: 2:12-cv-00239-KJD-RJJ

**PLAINTIFF'S MOTION TO
RECONSIDER ORDERS GRANTING
DEFENDANTS' MOTIONS TO
DISMISS AND TO ENLARGE TIME
FOR FILING RESPONSES TO
MOTIONS**

27 The Plaintiff, Slep-Tone Entertainment Corporation, by its undersigned
28 counsel, hereby moves the Court pursuant to Fed. R. Civ. P. 54(b) to reconsider and
vacate its Orders (Docs. 55, 73) granting the motions (Docs. 21, 35, 38) of various
of the Defendants to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6) for an
asserted failure to state a claim upon which relief may be granted. The Plaintiff
further moves to enlarge the time for filing responses to those motions, to a date
that is at least 14 days following the entry of an order granting the instant motion.
In support of the motion, the Plaintiff states as follows:

1 1. Slep-Tone was formerly represented in this matter by Donna Boris,
2 Esq., as lead counsel, who maintained principal responsibility for preparing and
3 filing appropriate substantive and procedural documents on behalf of Slep-Tone.

4 2. On March 16, 2012, a group of defendants referred to as the PT'S
5 Defendants moved (Doc. 13) to dismiss the action against them under Fed. R. Civ.
6 P. 12(b)(6). A response to that motion was due not later than April 2, 2012.

7 3. On April 3, 2012, Kurt Slep, the owner of Slep-Tone, discovered that
8 no response had been filed to the motion. Mr. Slep sought immediately to contact
9 Ms. Boris to determine why no response had been filed, and failing that, he
10 contacted the local counsel, Kerry Faughnan, to determine whether some
11 arrangement had been made for late filing. Later that day, Ms. Boris contacted Mr.
12 Slep and informed him that arrangements were being made for an extension of time
13 and that a proper response would be filed. Mr. Slep reviewed the docket with Ms.
14 Boris—a docket that included three other motions, by the Caesars Defendants (Doc.
15 21) on March 21, 2012, by Gilley's Las Vegas and Treasure Island, LLC, (Doc. 35)
16 on March 30, 2012, and by the NP Defendants (Doc. 38) on April 2, 2012. Ms.
17 Boris assured Mr. Slep that proper responses would be filed on time.

18 4. On April 9, 2012, the deadline for responding to the Caesars
19 Defendants' motion ran without a response.

20 5. On April 10, 2012, Ms. Boris and Mr. Faughnan filed a response (Doc.
21 43) to the motion by the PT'S Defendants.

22 6. On May 4, 2012, the Court entered an order dismissing the Caesars
23 Defendants from this action.

24 7. On May 9, 2012, the deadline for responding to the Gilley's and NP
25 Defendants' motions—having been twice extended by stipulation and order—ran
26 without a response.

27 8. On May 21, 2012, some 12 days after the twice-extended deadline, and
28 without a further extension of time, Ms. Boris filed responses (Docs. 69, 71) to the

1 Gilley's and NP Defendants' motions. However, the same day, the Court entered
2 an order granting those motions, noting a lack of timely opposition, and dismissing
3 the Gilley's and NP Defendants from this action.

4 9. During the periods identified above, Ms. Boris repeatedly assured Mr.
5 Slep that the case was being managed appropriately and that arrangements were
6 being made to file appropriate responses or obtain extensions of time.

7 10. When Mr. Slep discovered that numerous defendants had been
8 dismissed, however, he telephoned and emailed Ms. Boris repeatedly to demand
9 information. Ms. Boris failed and refused for more than a week to return his calls.
10 Finally, on June 6, 2012, not having received any communications from Ms. Boris,
11 Mr. Slep terminated her as counsel and instructed her to file a motion for leave to
12 withdraw from the case. Ms. Boris failed to do so and continued to act as counsel
13 for approximately two weeks thereafter, despite having been informed of her
14 termination.

15
16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 Slep-Tone never intended to default on its obligation to respond to the
18 various motions to dismiss. To the contrary, it specifically instructed its attorney,
19 Donna Boris, to file proper substantive responses, and it received assurances that
20 she was doing so. As a result of what can only be described as gross neglect by
21 Slep-Tone's attorney, several defendants have been released from this litigation
22 despite the existence in the Complaint of a claim for relief against them. It is unfair
23 and unjust to penalize Slep-Tone—which by law must be represented by counsel—
24 for the malfeasance of its attorney so early in this litigation.

25 Rule 54(b) provides, in pertinent part:

26 [A]ny order or other decision, however designation, that adjudicates
27 fewer than all the claims or the rights and liabilities of fewer than all
28 the parties does not end the action as to any of the claims or parties
and may be revised at any time before the entry of a judgment
adjudicating all the claims and all the parties' rights and liabilities.

1
2 Fed. R. Civ. P. 54(b). This language has been interpreted as granting the Court the
3 authority to modify or revoke prior nonfinal orders. *See WPP Lux. Gamma Three*
4 *Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1059 (9th Cir. 2011); *United States v.*
5 *Martin*, 226 F.3d 1042, 1048-49 (9th Cir. 2000) (stating that until final judgment is
6 entered that a district court has the “inherent jurisdiction to modify, alter, or
7 revoke” interlocutory decisions); *accord Am. Canoe Ass’n v. Murphy Farms, Inc.*,
8 326 F.3d 505, 514-15 (4th Cir. 2003).

9 Of course, that the Court *has* the authority to vacate its prior orders of
10 dismissal does not automatically mean that the Court *should* do so. As the Court
11 has noted in each of the orders of dismissal, District of Nevada Local Rule 7-2(d)
12 states that “[t]he failure of an opposing party to file points and authorities in
13 response to any motion shall constitute a consent to the granting of the motion.” D.
14 Nev. L.R. 7-2(d).

15 Notwithstanding Local Rule 7-2(d), however, the equities of this matter
16 justify the setting aside of the prior orders of dismissal because, as will be shown
17 below, the neglect that led to the dismissals was excusable as to Slep-Tone, if not
18 its attorney.

19 Although this is not a motion under Rule 60(b)(1), the posture of this case is
20 akin to the situation in which a defendant has been subjected to a default judgment,
21 but with the roles reversed. Excusable neglect is an appropriate basis for vacating a
22 default judgment. *See* Fed. R. Civ. P. 60(b)(1). The determination of whether
23 neglect is excusable is an equitable one that depends on several factors, including:
24 1) prejudice to the opposing party; 2) the length of the delay and its potential impact
25 on the proceedings; 3) the reason for the delay; and 4) the movant’s good faith. *See*
26 *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997) (citing
27 *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993)).
28 Where a movant’s culpable conduct led to default, no meritorious defense exists, or

1 prejudice to the opposing party will occur, the Court may decline to vacate the
2 default. *See Brandt v. Am. Bankers Ins. Co. of Fl.*, 653 F.3d 1108, 1111 (9th Cir.
3 2011); *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001).
4 However, cases should be decided on their merits if possible. *See TCI Group*, 244
5 F.3d at 696; *In re Roxford Foods, Inc.*, 12 F.3d 875, 879 (9th Cir. 1993).

6 Here, there can be no prejudice to the opposing parties, who will be in no
7 worse position than they would have been had timely responses been filed (since
8 their motion will merely be decided on its merits), and who cannot have incurred
9 significant costs or fees attributable to the delay, since no further conduct on their
10 part was required to obtain the order. Likewise, the length of the delay is too short
11 to be of significance, because there is at least one similar motion (Doc. 13), filed
12 prior in time to the earliest granted motion, that has not yet been decided by the
13 Court. Slep-Tone has filed substantive responses to those similar motions that have
14 not yet been granted, and it has taken a nontrivial, supported, and therefore
15 meritorious position with respect to those motions.

16 As shown in the Declaration of Kurt Slep, attached hereto as Exhibit A, Slep-
17 Tone's failure to file the appropriate points and authorities in response to the
18 various motions was attributable not to a lack of substantive response, nor to its
19 failure to provide appropriate information to counsel to enable her to prepare a
20 response, nor to any other act on its part beyond the hiring of counsel who was
21 apparently constitutionally incapable of filing timely responses. Ms. Boris was first
22 licensed to practice law in California in 1991 and has no public record of discipline.
23 (*See* Exh. B.) Slep-Tone was reasonable in relying on her, given her assurances
24 that this matter was being handled with due care. When it became clear that the
25 matter was not being handled correctly, Slep-Tone took prompt action to remove
26 her as counsel and to hire other counsel.

27 Slep-Tone always intended that responses be filed to these motions, and
28 Slep-Tone instructed its attorney to file responses. There must be some credit given

1 to the idea, at least for a corporate entity that must be represented by counsel, that
2 relying upon the appointed attorney to do as she is instructed amounts to good faith.
3 Slep-Tone may well have recourse against Ms. Boris for her neglect, but that will
4 not be a just result—on the merits, as the law of this Circuit prefers—as to those
5 Defendants who have been granted an unearned windfall by that neglect.

6 In view of the foregoing, it is respectfully suggested that the equities lie with
7 vacating the orders dismissing the various defendants under Rule 12(b)(6) and that
8 those defendants' motions should be considered on the merits.

9 Wherefore, the Plaintiff prays unto the Court for an order (1) setting aside its
10 orders (Docs. 55, 73), (2) extending the time in which to respond to the motion
11 (Doc. 21) of the Caesars Defendants to dismiss this action to a date that is at least
12 14 days after the entry of the order, and (3) considering the Plaintiff's responses to
13 the remaining motions (Docs. 35 and 38) to have been timely filed, and that the
14 Court proceed to consideration of the underlying motions on the merits thereof.
15 Respectfully submitted this the 26th day of June, 2012.

16 **HARRINGTON LAW, P.C.**

17
18 BY: /s/
19 JAMES M. HARRINGTON
20 (*pro hac vice*) (N.C. Bar No. 30005)
P.O. Box 403
Concord, NC 28026-0403
(704) 315-5800

21 AND

22 KERRY P. FAUGHNAN, ESQ.
23 (Nevada Bar No. 12204)
kerry.faughnan@gmail.com
24 P.O. BOX 335361
North Las Vegas, NV 89033
25 Telephone: 702.310.3096
Facsimile: 702.331.4222

26 Attorneys for Plaintiff
27 SLEP-TONE ENTERTAINMENT
28 CORPORATION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing paper is being filed using the Clerk’s CM/ECF system, which will send a Notice of Electronic Filing to counsel of record as follows:

- Frank A Ellis - fellis@lvbusinesslaw.com
- John M. Sacco - jsacco@marquisaurbach.com
- Lauri S. Thompson - thompsonl@gtlaw.com
- Mark G Tratos - tratasm@gtlaw.com
- Tamara Beatty Peterson - TPeterson@bhfs.com
- Terry A. Coffing - tcoffing@marquisaurbach.com
- Peter H. Ajemian - AjemianP@gtlaw.com
- Kendele Leascher-Works - kworks@weidemiller.com
- Brian R. Hardy - bhardy@marquisaurbach.com
- Jonathan W Fountain - jfountain@lrlaw.com
- Ryan R Gile - rgile@weidemiller.com
- Laura Bielinski - lbielinski@bhfs.com
- Nikkya G. Williams - nwilliams@lrlaw.com
- Thomas D Boley - tboley@boleylawgroup.com
- Robert Beyer - rbeyer@siegelcompanies.com
- Joseph Bistriz - jbistriz@siegelcompanies.com

CM/ECF non-participants are being served on the date indicated below by depositing a copy of this paper as First Class Mail, postage prepaid, addressed as follows:

Tara King
1904 Chavez Ct.
N. Las Vegas, NV 89031

Date: June 26, 2012

/s/

James M. Harrington