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8	UNITED STATES DISTRICT COURT		
9	DISTRICT OF NEVADA		
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11			
12	AMERICAN CASINO AND ENTERTAINMENT PROPERTIES, LLC,	Case No. 2:11-cv-00222-JCM-LRL	
13	a Delaware limited liability company,	FIRST AMENDED COMPLAINT	
14	Plaintiff,		
15			
16	V.		
17	MODERN HOUSING, LLC, a Washington limited liability company,		
18			
19	Defendant.		
20			
21		ertainment Properties, LLC ("ACEP"), for its	
22	complaint against Defendant Modern Housing, LLC, alleges as follows:		
23	NATURE OF THE CASE		
24		judgment that its use of the ACESTAY and	
25	ACEPLAY marks does not infringe, dilute or otherwise violate any of Modern Housing's		
26	claimed rights in the ACE mark for hotel ser	rvices.	
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JURISDICTION

- 1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a). Jurisdiction is also proper under 28 U.S.C. §1332(a), because there is complete diversity of citizenship between the parties and the amount in controversy in this action exceeds \$75,000, exclusive of costs and interest.
- 2. Plaintiff ACEP is a Delaware limited liability company with its principal place of business in Las Vegas, Nevada.
- 3. Upon information and belief, Defendant Modern Housing is a Washington limited liability company with its principal place of business in Seattle, Washington.
- 4. This Court has personal jurisdiction over Modern Housing based on its operation of a highly interactive web site accessible to residents of the State of Nevada and through which such residents can: (1) make reservations at Modern Housing's ACE hotels; (2) purchase various products from Modern Housing for shipment into Nevada; (3) sign up for and receive information concerning Modern Housing's guest rewards program; and (4) participate in Modern Housing's blog. In addition, this Court has personal jurisdiction over Modern Housing based on its commission of an intentional act aimed at the State of Nevada (namely, its demand that ACEP not use the ACEPLAY mark in connection with ACEP's rewards program) with the knowledge that the brunt of the injury would be felt by ACEP in the State of Nevada. ACEP's claim arises out of Modern Housing's demand.
- 5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b). Venue lies in the unofficial Southern division of this Court.

FACTUAL ALLEGATIONS

6. ACEP is the holding company for entities that own and operate four (4) hotel casino properties: (1) the Stratosphere tower, hotel and casino; (2) Aquarius hotel and casino; (3) Arizona Charlie's Decatur hotel and casino; and (4) Arizona Charlie's Boulder hotel and casino. Aquarius is located in Laughlin, Nevada. The other properties are located in Las Vegas, Nevada.

- 7. The largest and most well-known of the ACEP properties is the Stratosphere hotel and casino located on the world famous Las Vegas Strip. The Stratosphere features a tower that is 1,149 feet high -- the tallest observation tower in the United States. The Stratosphere features several thrill rides on top of the tower, including SKY JUMP (a 855-foot controlled freefall from the 108th floor), BIG SHOT (which shoots passengers straight up 160 feet at 45 miles per hour), X-SCREAM (a large teeter-totter that propels passengers over the edge of the Stratosphere Tower, 866 feet above the ground), INSANITY (a massive mechanical arm extending out 64 feet over the edge of the Stratosphere Tower at a height of over 900 feet that spins passengers in the open air at speeds of up to 3 Gs up to an angle of 70 degrees).
- 8. The Stratosphere, Aquarius and Arizona Charlie's properties are well known at least in the markets in which they operate. These properties use the STRATOSPHERE, AQUARIUS and ARIZONA CHARLIE'S marks to identify ACEP as the source or origin of the services and goods provided at the properties.
- 9. Many casinos and hotels have loyalty or reward clubs or programs which actual or potential customers can enroll in to receive special benefits, including discounts, free products and services, and other rewards. These benefits are often tied to the amount that the customer spends at the casinos and hotels that participate in the programs. The names of the clubs often bear no relationship to the name of the parent company or the individual casino or hotel properties. For example, MGM Resorts International's players club is called M LIFE, Stations Casinos' players club is called BOARDING PASS, and Caesar's Entertainment's players club is called TOTAL REWARDS.
- 10. In 2009, ACEP decided to expand and rebrand its players rewards club.. Because the acronym of ACEP includes the word "ace" and the term "ace" is closely associated with gaming in Las Vegas as the name of the highest value playing card, ACEP decided to call its players club by the name ACEPLAY. ACEP also decided to launch a guest rewards club. Following the same naming concept, ACEP decided to call its hotel guest club by the name ACESTAY.

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In September 2009, ACEP filed intent-to-use United States trademark 11. applications for the ACEPLAY and ACESTAY word marks. ACEP sought registration of the ACEPLAY word mark in International Class 41 for "[c]asino and gaming services featuring a frequent customer reward program service which allows participants to earn discounts, free gifts and complementary admission to entertainment and educational events; entertainment services, namely, conducting special events featuring casino and gaming contests and tournaments, online computer games and sweepstakes." ACEP also sough registration of the ACEPLAY word mark in International Classes 16 for certain printed matter relating to the program and in International Class 35 for administration of the program and a retail gift shop. ACEP sought registration of the ACESTAY word mark in International Class 43 for "[h]otel and restaurant services featuring a frequent guest reward program with added features which allows participants to earn free or discounted lodging, meals and other travel related benefits."

In September 2009, ACEP relaunched its players club as ACEPLAY. ACEP 12. launched a web site at <aceplayinfo.com> through which consumers could obtain information about the club, including the levels of benefits available and current ACEPLAY members could create a login to review the information in their accounts. ACEP began use of the ACEPLAY design mark show below:



In addition to the use on the website at <aceplayinfo.com>, ACEP is using 13. the ACEPLAY mark in connection with registering players for the ACEPLAY program, issuing ACEPLAY rewards cards to players, advertising and marketing the ACEPLAY program through multiple means, and administering the ACEPLAY program with players, including providing program benefits. ACEP is also planning on using the ACEPLAY mark in connection with mobile applications. ACEP intends to use the ACESTAY mark in the same manner as the ACEPLAY mark, except that the ACESTAY mark will be used

in connection with a rewards program for guests of ACEP hotels rather than for customers who play at ACEP casinos.

- 14. On October 20, 2009, ACEP filed a United States trademark application for the ACEPLAY design mark in International Class 41 for "casino and gaming services featuring a frequent customer reward program service which allows participants to earn discounts, free gifts and complementary admission to entertainment and educational events; entertainment services, namely, conducting special events featuring casino and gaming contests and tournaments, online computer games and sweepstakes."
- 15. The United States Patent and Trademark Office ("USPTO") approved the ACEPLAY design mark for registration. The mark was published for opposition in the Official Gazette on July 27, 2010. No one opposed the application. Accordingly, the USPTO registered the mark on October 12, 2010.
- 16. Defendant Modern Housing owns and operates four (4) hotels located in Seattle, Washington; Portland, Oregon; Palm Springs, California; and New York, New York. Modern Housing claims to have used the ACE mark for hotel services since 1999. Modern Housing's ACE hotels have been described as a cross between European pensions and minimalist luxury. One of the hotel owners has referred to the hotels as providing an "urban camping" experience.
- 17. Modern Housing has a guest rewards program, but does not use the ACE mark in the name of that program. Rather, Modern Housing refers to its rewards program as the "A-LIST."
- 18. Modern Housing owns a United States trademark registration for the ACE mark for hotel services in International Class 43.
- 19. On March 1, 2010, Modern Housing filed a Notice of Opposition in the Trademark Trial and Appeal Board ("TTAB") of the USPTO in which Modern Housing opposed ACEP's registration of the ACESTAY mark. In the Notice of Opposition, Modern Housing claims that ACEP's ACESTAY mark is virtually identical and confusingly similar to Modern Housing's ACE mark. Modern Housing further alleges that

ACEP's ACESTAY mark is intended to be used in connection with services that are identical, similar or related to Modern Housing's services.

- 20. After settlement negotiations failed to yield a resolution, on September 3, 2010, ACEP asked Modern Housing to clarify whether Modern Housing objected merely to ACEP's registration of the ACESTAY mark or ACEP's registration and use of the ACESTAY mark.
 - 21. Modern Housing did not respond.
- 22. On September 28, 2010, ACEP informed Modern Housing, through counsel, that its understanding was that Modern Housing objected to both ACEP's registration and use of the ACESTAY mark. Modern Housing's counsel replied that he would try to find out.
- 23. On October 21, 2010, Modern Housing informed ACEP, through counsel, that it opposed ACEP's registration and use of the ACESTAY mark.
- 24. On or about January 21, 2011, Modern Housing filed a Petition for Cancellation in the TTAB seeking cancellation of ACEP's federal trademark registration for the ACEPLAY mark. In the Petition for Cancellation, Modern Housing claims that its ACE mark is famous within the meaning of the Federal Trademark Dilution Act. Modern Housing further alleges that ACEP's ACEPLAY mark is confusingly similar to and is likely to dilute the distinctiveness of Modern Housing's ACE mark.
- 25. Because Modern Housing, through counsel, has informed ACEP that it opposes ACEP's registration and use of the ACESTAY mark, if ACEP commences use of the ACESTAY mark, it runs the risk that Modern Housing will file an infringement action against ACEP.
- 26. ACEP has made and continues to make a substantial investment in the ACEPLAY mark and it cannot sit and wait for Modern Housing to decide if and when it will file suit.

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	27.	Modern Housing's position puts ACEP in the position of either abandoning
its r	ights in t	he ACEPLAY mark and its planned use of the ACESTAY mark or risk a civil
trad	emark in	fringement and dilution action by Modern Housing.

- 28. Upon information and belief, consumers are not likely to be confused between Modern Housing's ACE mark for hotels and ACEP's ACEPLAY and ACESTAY marks for rewards programs and related goods and services when used in connection with ACEP's properties.
- 29. Upon information and belief, Modern Housing's ACE mark for hotels is not famous within the meaning of the Federal Trademark Dilution Act. Upon information and belief, Modern Housing has no good faith basis for claiming that the ACE mark for hotels is famous. Even if the ACE mark were famous, ACEP's use of the ACEPLAY and ACESTAY marks is not likely to dilute the distinctiveness of the ACE mark.

COUNT I (Declaratory Judgment under 28 U.S.C. § 2201)

- 30. Plaintiff incorporates the allegations set forth in each of the preceding paragraphs as if fully set forth herein.
- 31. An actual case and controversy exists between Plaintiff ACEP and Defendant Modern Housing.
 - 32. This controversy is ripe for adjudication.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff ACEP respectfully requests that the Court:

- A. Enter a declaratory judgment that:
 - (1) Modern Housing's ACE mark is not famous.
 - (2) Modern Housing's ACE mark is entitled to a narrow scope of protection.
 - (3) ACEP's ACEPLAY mark does not infringe, dilute or otherwise violate Modern Housing's rights in the ACE mark; and

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1		(4) ACEP's ACESTAY mark does not infringe, dilute or otherwise
2		violate Modern Housing's rights in the ACE mark.
3	B.	Award attorneys' fees and costs to ACEP in an amount to be determined at
4		trial.
5	C.	Grant such other and further relief as the Court deems proper and just.
6	DATED thi	s 20th day of June, 2011.
7		LEWIS AND ROCA LLP
8		
9		By: <u>/s/Michael J. McCue</u> MICHAEL J. McCUE (NV Bar #6055)
10		JONATHAN W. FOUNTAIN (NV Bar #10351)
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CERTIFICATE OF SERVICE

1	<u>CERTIFICATE OF SERVICE</u>
2	Pursuant to Federal Rule of Civil Procedure 5(b), I certify that I am an employee of Lewis
3	and Roca LLP, and that on this date, I caused the foregoing document entitled FIRST AMENDED
4	COMPLAINT, to be served upon the following counsel of record via the Court's CM/ECF
5	system:
6	Jonathan D. Reichman
7	Kenyon & Kenyon LLP One Broadway
8	New York, NY 10004
9	William M Merone Kenyon & Kenyon LLP
10	1500 K Street, N.W. Washington, DC 20005
11	William R. Urga Jolley Urga Wirth Woodbury & Standish
12	3800 Howard Hughes Parkway 16th Floor
13	Las Vegas, NV 89169
14	Mindy Fisher Letter Lines Winth Woodhum, & Standish
15	Jolley Urga Wirth Woodbury & Standish 3800 Howard Hughes Parkway
16	Las Vegas, NV 89169
17	I further certify that on this date I served the foregoing FIRST AMENDED COMPLAINT on the
18	following counsel of record by placing the same for mailing via first class U.S. mail, postage
19	prepaid:
20	Anthony Giaccio
21	Kenyon & Kenyon LLP One Broadway
22	New York, NY 10004
23	Employed of Laving and Rosa LLP
24	Employee of Lewis and Roca LLP
25	
26	

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