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10 Entertainment Properties, LLC

11
12 **UNITED STATES DISTRICT COURT**
13
14 **DISTRICT OF NEVADA**

15 AMERICAN CASINO AND
16 ENTERTAINMENT PROPERTIES, LLC,
17 a Delaware limited liability company,

18 Plaintiff,

19 v.

20 MODERN HOUSING, LLC,
21 a Washington limited liability company,

22 Defendant.

Case No. 2:11-cv-00222-JCM-LRL

FIRST AMENDED COMPLAINT

23 Plaintiff American Casino and Entertainment Properties, LLC ("ACEP"), for its
24 complaint against Defendant Modern Housing, LLC, alleges as follows:

25 **NATURE OF THE CASE**

26 Plaintiff ACEP seeks a declaratory judgment that its use of the ACESTAY and
27 ACEPLAY marks does not infringe, dilute or otherwise violate any of Modern Housing's
28 claimed rights in the ACE mark for hotel services.

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1 7. The largest and most well-known of the ACEP properties is the Stratosphere
2 hotel and casino located on the world famous Las Vegas Strip. The Stratosphere features a
3 tower that is 1,149 feet high -- the tallest observation tower in the United States. The
4 Stratosphere features several thrill rides on top of the tower, including SKY JUMP (a 855-
5 foot controlled freefall from the 108th floor), BIG SHOT (which shoots passengers straight
6 up 160 feet at 45 miles per hour), X-SCREAM (a large teeter-totter that propels passengers
7 over the edge of the Stratosphere Tower, 866 feet above the ground), INSANITY (a
8 massive mechanical arm extending out 64 feet over the edge of the Stratosphere Tower at a
9 height of over 900 feet that spins passengers in the open air at speeds of up to 3 Gs up to
10 an angle of 70 degrees).

11 8. The Stratosphere, Aquarius and Arizona Charlie's properties are well known
12 at least in the markets in which they operate. These properties use the STRATOSPHERE,
13 AQUARIUS and ARIZONA CHARLIE'S marks to identify ACEP as the source or origin
14 of the services and goods provided at the properties.

15 9. Many casinos and hotels have loyalty or reward clubs or programs which
16 actual or potential customers can enroll in to receive special benefits, including discounts,
17 free products and services, and other rewards. These benefits are often tied to the amount
18 that the customer spends at the casinos and hotels that participate in the programs. The
19 names of the clubs often bear no relationship to the name of the parent company or the
20 individual casino or hotel properties. For example, MGM Resorts International's players
21 club is called M LIFE, Stations Casinos' players club is called BOARDING PASS, and
22 Caesar's Entertainment's players club is called TOTAL REWARDS.

23 10. In 2009, ACEP decided to expand and rebrand its players rewards club..
24 Because the acronym of ACEP includes the word "ace" and the term "ace" is closely
25 associated with gaming in Las Vegas as the name of the highest value playing card, ACEP
26 decided to call its players club by the name ACEPLAY. ACEP also decided to launch a
27 guest rewards club. Following the same naming concept, ACEP decided to call its hotel
28 guest club by the name ACESTAY.

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

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



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

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

3 14. On October 20, 2009, ACEP filed a United States trademark application for
4 the ACEPLAY design mark in International Class 41 for “casino and gaming services
5 featuring a frequent customer reward program service which allows participants to earn
6 discounts, free gifts and complementary admission to entertainment and educational
7 events; entertainment services, namely, conducting special events featuring casino and
8 gaming contests and tournaments, online computer games and sweepstakes.”

9 15. The United States Patent and Trademark Office (“USPTO”) approved the
10 ACEPLAY design mark for registration. The mark was published for opposition in the
11 Official Gazette on July 27, 2010. No one opposed the application. Accordingly, the
12 USPTO registered the mark on October 12, 2010.

13 16. Defendant Modern Housing owns and operates four (4) hotels located in
14 Seattle, Washington; Portland, Oregon; Palm Springs, California; and New York, New
15 York. Modern Housing claims to have used the ACE mark for hotel services since 1999.
16 Modern Housing’s ACE hotels have been described as a cross between European pensions
17 and minimalist luxury. One of the hotel owners has referred to the hotels as providing an
18 “urban camping” experience.

19 17. Modern Housing has a guest rewards program, but does not use the ACE
20 mark in the name of that program. Rather, Modern Housing refers to its rewards program
21 as the “A-LIST.”

22 18. Modern Housing owns a United States trademark registration for the ACE
23 mark for hotel services in International Class 43.

24 19. On March 1, 2010, Modern Housing filed a Notice of Opposition in the
25 Trademark Trial and Appeal Board (“TTAB”) of the USPTO in which Modern Housing
26 opposed ACEP’s registration of the ACESTAY mark. In the Notice of Opposition,
27 Modern Housing claims that ACEP’s ACESTAY mark is virtually identical and
28 confusingly similar to Modern Housing’s ACE mark. Modern Housing further alleges that

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

3 20. After settlement negotiations failed to yield a resolution, on September 3,
4 2010, ACEP asked Modern Housing to clarify whether Modern Housing objected merely
5 to ACEP's registration of the ACESTAY mark or ACEP's registration and use of the
6 ACESTAY mark.

7 21. Modern Housing did not respond.

8 22. On September 28, 2010, ACEP informed Modern Housing, through counsel,
9 that its understanding was that Modern Housing objected to both ACEP's registration and
10 use of the ACESTAY mark. Modern Housing's counsel replied that he would try to find
11 out.

12 23. On October 21, 2010, Modern Housing informed ACEP, through counsel,
13 that it opposed ACEP's registration and use of the ACESTAY mark.

14 24. On or about January 21, 2011, Modern Housing filed a Petition for
15 Cancellation in the TTAB seeking cancellation of ACEP's federal trademark registration
16 for the ACEPLAY mark. In the Petition for Cancellation, Modern Housing claims that its
17 ACE mark is famous within the meaning of the Federal Trademark Dilution Act. Modern
18 Housing further alleges that ACEP's ACEPLAY mark is confusingly similar to and is
19 likely to dilute the distinctiveness of Modern Housing's ACE mark.

20 25. Because Modern Housing, through counsel, has informed ACEP that it
21 opposes ACEP's registration and use of the ACESTAY mark, if ACEP commences use of
22 the ACESTAY mark, it runs the risk that Modern Housing will file an infringement action
23 against ACEP.

24 26. ACEP has made and continues to make a substantial investment in the
25 ACEPLAY mark and it cannot sit and wait for Modern Housing to decide if and when it
26 will file suit.

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(4) ACEP's ACESTAY mark does not infringe, dilute or otherwise violate Modern Housing's rights in the ACE mark.

B. Award attorneys' fees and costs to ACEP in an amount to be determined at trial.

C. Grant such other and further relief as the Court deems proper and just.

DATED this 20th day of June, 2011.

LEWIS AND ROCA LLP

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CERTIFICATE OF SERVICE

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Pursuant to Federal Rule of Civil Procedure 5(b), I certify that I am an employee of Lewis and Roca LLP, and that on this date, I caused the foregoing document entitled FIRST AMENDED COMPLAINT, to be served upon the following counsel of record via the Court's CM/ECF system:

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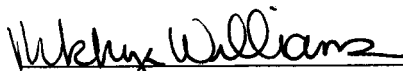
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I further certify that on this date I served the foregoing FIRST AMENDED COMPLAINT on the following counsel of record by placing the same for mailing via first class U.S. mail, postage prepaid:

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Employee of Lewis and Roca LLP