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 9 **UNITED STATES DISTRICT COURT**
 10 **DISTRICT OF NEVADA**

12 AMERICAN CASINO AND
 13 ENTERTAINMENT PROPERTIES, LLC,
 a Delaware limited liability company,
 14
 Plaintiff,
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 v.
 16 MODERN HOUSING, LLC,
 17 a Washington limited liability company,
 18
 Defendant.

Case No. 2:11-cv-00222-JCM-LRL
**PLAINTIFF’S RESPONSE TO
 DEFENDANT’S OBJECTION TO
 PLAINTIFF’S PROPOSED ORDER**

1 Plaintiff American Casino and Entertainment Properties LLC (“Plaintiff” and/or “ACEP”)
2 hereby responds to Defendant Modern Housing LLC’s October 14, 2011 letter to the Court. In the
3 letter, Defendant objects to the entry of Plaintiff’s proposed order (Docket No. 31).

4 The Defendant is objecting to two sentences in Plaintiff’s proposed order. Those sentences
5 state:

6 The Court hereby FINDS that Plaintiff American Casino and Entertainment
7 Properties, LLC has not used its ACESTAY mark in commerce. [and]

8 The Court hereby further FINDS that Defendant Modern Housing, LLC has filed
9 with the Court a stipulation and covenant not to sue Plaintiff American Casino and
Entertainment Properties, LLC (Doc. #10) for its use of the ACEPLAY mark.

10 (Doc. #31 at 1, ll. 24-28.)

11 The Defendant’s objection to these two sentences is meritless. Both sentences are true.
12 With respect to the first sentence, at the hearing on the Defendant’s motion to dismiss, the
13 Defendant argued that its stipulation and covenant not to sue would not cover the ACESTAY
14 mark because the mark has not been used in commerce. The hearing transcript states the
15 following:

16 THE COURT: Let me ask the defendants a question. Your proposed stipulation
17 covers ACEPLAY, does it also cover ACESTAY?

18 MR. MERONE: My understanding, your Honor is that because they have not used
19 the mark yet that it wouldn’t be covered because there’s no possibility of an actual
claim.

20 (Tr. at 3, ll. 2-8.) A true and accurate copy of the transcript is attached hereto as Exhibit A.
21 Indeed, the Court went on to conclude that: “There’s no controversy over ACESTAY because you
22 haven’t used it yet.” (Tr. at 13, ll. 11-12.)

23 With respect to the second sentence, the fact that the Defendant filed a stipulation and
24 covenant not to sue is a matter of record. (*See* Doc. #10.)

25 Both of the sentences in Plaintiff’s proposed order (Doc. #31) are also neutrally worded so
26 as not to favor the Plaintiff or the Defendant.

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CONCLUSION

The Defendant’s objection to two true and neutrally worded sentences in Plaintiff’s proposed order is meritless. The Court should enter Plaintiff’s proposed order, Docket No. 31.

Dated: this 14th day of October, 2011.

Respectfully submitted,

LEWIS AND ROCA LLP

By: /s/Jonathan W. Fountain
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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2011, I caused a copy of the foregoing document entitled PLAINTIFF’S RESPONSE TO DEFENDANT’S OBJECTION TO PLAINTIFF’S PROPOSED ORDER to be filed with the Court and served upon the following counsel of record via the Court’s CM/ECF system:

Jonathan D. Reichman
William M. Merone
William R. Urga

/s/Jonathan W. Fountain
An employee of Lewis and Roca LLP

Exhibit A

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
THE HONORABLE JAMES C. MAHAN, JUDGE PRESIDING

AMERICAN CASINO AND
ENTERTAINMENT PROPERTIES,
LLC,

Plaintiff,

vs.

NO. 2:11-CV-0222-JCM-CWH

MODERN HOUSING, LLC,

MOTION HEARING

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, SEPTEMBER 21, 2011

10:00 A.M.

APPEARANCES:

For the Plaintiff: JONATHAN FOUNTAIN, ESQ.
 MICHAEL McCUE, ESQ.

For the Defendant: WILLIAM MERONE, ESQ.
 MINDY FISHER, ESQ.

Reported by: Joy Garner, CCR 275
 Official Federal Court Reporter

1 LAS VEGAS, NEVADA, WEDNESDAY, SEPTEMBER 21, 2011

2 10:00 A.M.

3 * * *

4 P R O C E E D I N G S

5
6 THE CLERK: Case Number
7 2:11-CV-222-JCM-CWH, American Casino and
8 Entertainment Properties, LLC versus Modern
9 Housing, LLC.

10 Counsel, would you please state
11 your appearances for the record.

12 MR. FOUNTAIN: Jonathan Fountain,
13 Michael McCue, and Nikkya Williams on behalf of
14 the Plaintiff American Casino Entertainment
15 Properties, LLC.

16 MR. MERONE: All right, thank you, Mr.
17 Fountain.

18 MS. FISHER: Mindy Fisher on behalf of
19 defendant.

20 MR. MERONE: William Merone, Kenyon and
21 Kenyon, on behalf of defendant.

22 THE COURT: All right, I've reviewed
23 this with my brain trust. Let me tell you what
24 I'm inclined to do and then I'll give everyone a
25 chance to argue and admire my brain trust here in

1 the jury box.

2 Let me ask the defendants a
3 question. Your proposed stipulation covers
4 ACEPLAY, does it also cover ACESTAY?

5 MR. MERONE: My understanding, your
6 Honor, is that because they have not used the
7 mark yet that it wouldn't be covered because
8 there's no possibility of an actual claim.

9 THE COURT: Your saying it would?

10 MR. MERONE: There's no -- my -- if
11 they haven't actually used it up and to the point
12 where this case began which is my understanding,
13 then there's nothing to cover. So there's no way
14 we could bring an action for past or present
15 infringement of use of ACESTAY because they
16 haven't used ACESTAY. So, therefore, it would
17 not technically be within the scope of the
18 covenant, but it doesn't need to be because
19 there's nothing to -- we could act on.

20 THE COURT: All right, I understand,
21 all right. What I'm inclined to do is to grant
22 the motion to dismiss because it seems like
23 there's no -- they aren't -- there's just no
24 competition here here in Las Vegas particularly
25 with the stipulation not to sue American Casino

1 for any past, current, or continued use. Now
2 that, of course, in the future -- and I mean a
3 dismissal, by the way, would be without prejudice
4 in the event that some infringement did arise.

5 But, of course, you've got the
6 MedImmune case out of the District Court in
7 California, the Central District, but I'm
8 inclined to grant the motion without prejudice.
9 Really there's no basis the defendants would have
10 to sue the plaintiff at this point and the
11 covenant I think is sufficiently broad to protect
12 you.

13 Now, in the event that the
14 defendants do enter the marketplace here, then
15 there might be something different. It might be
16 a different result. As far as the matters
17 before, the TTAB, they really -- that's almost
18 before you come to court. I mean that's a
19 situation like this, don't register this mark,
20 this mark infringes, do not register it. And, of
21 course, with a court action you're saying they're
22 using the mark, they're infringing on my existing
23 mark.

24 So it's really two different, if
25 you will, two different prongs or two different

1 emphases. One is don't register the mark, that's
2 you do that in TTAB. The other is it's my mark
3 and they are infringing on it, I'm suing for the
4 infringement, and that's where we get involved.
5 So it's like that there are TTAB proceedings
6 pending, or may be pending, or whatever the
7 status of them is I don't think has any bearing
8 on this. So what I'm inclined to do is to grant
9 your motion. Now you can talk me out of that if
10 you want.

11 MR. MERONE: Well, your Honor, unless
12 the Court has any specific questions you wanted
13 to answer, I'd like to just ask permission to
14 respond to counsel.

15 THE COURT: Of course. Let me hear
16 from the plaintiff now.

17 MR. FOUNTAIN: Thank you, Judge.

18 THE COURT: Yes, sir. Mr. Fountain.

19 MR. FOUNTAIN: And I certainly would
20 like to try and talk you out of your inclination.

21 THE COURT: Sure.

22 MR. FOUNTAIN: I think the fact that we
23 are here arguing over whether there is a dispute
24 is strong evidence that there really is a dispute
25 substantial enough for the Court to have subject

1 matter jurisdiction. Essentially American Casino
2 and Entertainment Properties, who I'll call ACEP
3 or plaintiff, you know, applied to register two
4 trademarks, ACEP for its casino player awards
5 program and ACESTAY on an intent to use basis for
6 its hotel rewards program.

7 Now, the defendants opposed the
8 ACEPLAY -- excuse me -- the ACESTAY application
9 and have moved to cancel the ACEPLAY registration
10 on two basis, the likelihood of confusion and
11 trademark dilution. The parties entered into
12 discussions with respect to discovery and such in
13 the TTAB litigation and one of the questions was,
14 Modern Housing, do you oppose simply maintenance
15 of these registrations, or do you also oppose
16 ACEP's use of the marks? And we were informed
17 that they, in fact, opposed the use of the marks
18 in commerce. That's why we have the dec action
19 for trademark infringement.

20 THE COURT: But I mean that's something
21 in front of the TTAB.

22 MR. FOUNTAIN: Well, no, not use,
23 Judge. The trademark --

24 THE COURT: Well, I understand, but I
25 mean you're talking now about the TTAB hearing or

1 proceeding or whatever it was.

2 MR. FOUNTAIN: Well, they said they
3 want to do away with our registrations and it
4 said they object to our use in commerce of the
5 mark. Now objecting to the use in commerce,
6 that's tantamount to saying you're committing
7 trademark infringement which is what prompted the
8 declaratory relief action.

9 THE COURT: Well, I understand, but why
10 isn't there a stipulation sufficient to allay
11 your concerns when they say we're not going to
12 sue you for any past, present, or continued use
13 of the marks?

14 MR. FOUNTAIN: Well, ACEP has
15 specifically announced its intent to use ACESTAY
16 for its hotel guest rewards program. They
17 concede that their stipulation doesn't even cover
18 ACESTAY. So that's one reason. Their
19 stipulation is under inclusive. It's also very
20 nonspecific.

21 THE COURT: Well, I mean that's why I
22 asked because I might be inclined at the most to
23 allow the suit to continue as far as ACESTAY is
24 concerned because you wouldn't know without a
25 stipulation, yeah, we cover ACESTAY as well.

1 MR. FOUNTAIN: But as far as ACEPLAY is
2 concerned, their stipulation doesn't identify
3 specific uses that they say are okay or ones that
4 are not okay.

5 THE COURT: Well, have you used it?
6 Yes. In the past, how did you use it? So
7 however you use it in the past and you continue
8 to use it in the future, you can't be sued under
9 this stipulation.

10 MR. FOUNTAIN: Well, Judge, that's
11 actually not what they say in their reply brief.
12 They say that if we engage in any expansion of
13 our use, they can sue us.

14 THE COURT: But I mean that's future
15 use. I mean who knows what you do with that with
16 ACEPLAY. I mean you may decide, well, you're
17 going to do something different. We want to use
18 it here, we want to do something else with it.
19 And, God knows, my crystal ball is broken, I
20 can't see into the future. So whatever other
21 uses, oh, they can't say you can use that any way
22 you want to in the future and we won't do
23 anything about it. You can't expect them to make
24 that kind of a stipulation. Do you understand?

25 I mean because you can say,

1 well, good, we'll sell it to Marriott, and I'm
2 making this up obviously, but sell it to the
3 Marriott, or the Hilton, or somebody, and they
4 are going to use it all over the world. Now
5 there is competition, you see, so they can't
6 be -- you can't say I expect the defendants to
7 say, no, you can use it however you want to in
8 the future and we won't do anything. No, they
9 can't do that, but the uses you made in the past
10 and the continued use in the present and into the
11 future, that same continued use is -- they're not
12 going to sue you for it.

13 MR. FOUNTAIN: Well, Judge, your point
14 is well taken, however, the purpose of the
15 declaratory action was brought is so we can have
16 some certainty. Our client has invested money in
17 its marks. It wants to be able to continue to
18 invest in its marks.

19 THE COURT: And it will be able to. It
20 will be able to use the mark as it has used it in
21 the past, not a problem. And in the future, not
22 a problem because they stipulated to that. We
23 won't sue you over that. You've got a covenant
24 not to sue. They won't sue you over that. So
25 you can continue to use the mark the way you've

1 used it in the past, that's it.

2 Now, as far as what's the scope
3 of that, that's the scope of it. In other words,
4 did you use it to sell candy bars? No, in the
5 past, well, then now you may have a problem in
6 the future, or used it for something else selling
7 swimming pools, or hardware, or something,
8 there's a problem now.

9 MR. FOUNTAIN: And that's exactly why
10 we think the covenant not to sue begs future
11 litigation because it is so unspecific and so
12 vague that even the slightest change in use by
13 our client could result in an infringement suit.

14 THE COURT: Okay. All right, anything
15 else?

16 MR. FOUNTAIN: Yes, Judge. They spent
17 a lot of time in their reply brief arguing the
18 Dawn Donut rule, and they say that they cannot
19 currently bring a trademark infringement claim.
20 Essentially what the Dawn Donut rule says, and
21 I'm paraphrasing, is that where goods and
22 services are offered by a junior user in a
23 geographically remote area, the senior user of a
24 registered trademark cannot enjoin the junior
25 user's use of a confusingly similar mark unless

1 and until the senior user enters the territory
2 where the junior user is using the mark. The
3 problem with Dawn Donut, it's a 1959 case.

4 THE COURT: '69.

5 MR. FOUNTAIN: '59, I believe.

6 THE COURT: Well, I show '69, but
7 that's all right.

8 MR. FOUNTAIN: Okay. The Internet
9 didn't exist then. In this case the parties
10 compete in a national market. They're both on
11 the Internet. The complaint alleges our client's
12 use of ACEPLAY in connection with the website on
13 the Internet. They're both advertising and
14 promoting hotel services to a national market.

15 THE COURT: Well, see, you're using the
16 mark now on the Internet, right?

17 MR. FOUNTAIN: Yes.

18 THE COURT: Yeah.

19 MR. FOUNTAIN: So in addition to there
20 being a national market --

21 THE COURT: But I mean so you're using
22 that and you can continue to use that in the
23 future and they can't do anything about that.

24 MR. FOUNTAIN: That's ACEPLAY. Now
25 we've also said we want to use ACESTAY in the

1 same way but haven't done that yet, but again the
2 stipulation doesn't cover that. The other basis
3 they brought in the TTAB --

4 THE COURT: But I mean it's not ripe
5 for a controversy until we see what you -- and
6 how you're using it. There's no controversy, no
7 case or controversy, until you actually use
8 ACESTAY, and they say, oh, my God, you can't use
9 that to sell cantaloupe, or whatever, because
10 that's what we do, or we've got farm division, or
11 whatever, and there is some competition.

12 MR. FOUNTAIN: Well, I think it's a
13 matter of degree, Judge. And we've come out
14 straightforwardly and said we're going to use
15 ACESTAY in the same manner we've used ACEPLAY,
16 and we think that definite statement of intention
17 is sufficient to create a case of controversy.

18 THE COURT: Okay. I mean and talk
19 about vague, I mean that's -- we'd use it the
20 same way, what does that mean? Oh, we'll use it
21 on the Internet. I mean do you understand?
22 That's so expansive, so nondescriptive, it could
23 be anything.

24 MR. FOUNTAIN: You know, well --

25 THE COURT: You won't use it the same

1 way, oh, we're going to use it to market our
2 product. I mean what's your product now? Well,
3 now we're selling cantaloupe and so we want to
4 use it. I don't know. That doesn't seem very
5 specific.

6 MR. FOUNTAIN: Well, we can certainly
7 make it specific.

8 THE COURT: I mean understand we deal
9 with cases of controversy and, of course, you
10 know that, but it's got to be a real case or
11 controversy. There's no controversy over ACESTAY
12 because you haven't used it yet.

13 MR. FOUNTAIN: I understand the Court's
14 position.

15 THE COURT: Okay.

16 MR. FOUNTAIN: I just have a couple of
17 more points I'd like to make.

18 THE COURT: Yes, sir, sure.

19 MR. FOUNTAIN: Now, one of the other
20 basis in the Trademark Trial and Appeal Board
21 that Modern Housing has used to say the ACEPLAY
22 mark should be cancelled is trademark dilution.
23 Now their reply brief doesn't say anything about
24 trademark dilution. They say they can't bring an
25 infringement claim against ACEP, but they don't

1 argue they can't bring a dilution claim today
2 against ACEP.

3 And their argument goes with
4 respect to infringement because we can't bring an
5 infringement claim, no case of controversy, but
6 you would say, look, they're free to bring a
7 dilution claim, there is a case of controversy
8 with respect to dilution, and dilution doesn't
9 concern geographically isolated markets.
10 Dilution is concerned with the fame of a mark in
11 a nationwide market. So they can't rely on the
12 Dawn Donut rule to say they can't bring a
13 dilution suit.

14 And the last point I would make,
15 Judge, is that this Court has concurrent
16 jurisdiction over the and Trademark Trial and
17 Appeal Board to decide issues of trademark
18 registrability and cancellation. In addition,
19 after the Trademark Trial and Appeal Board
20 proceedings conclude, a party has a right to
21 appeal to this court, to the district court. So
22 I think it's highly likely that we can be back
23 here either on appeal from the TTAB or we're
24 going to be back here on an infringement suit
25 because they're going to allege that we've

1 changed our use in some minor way that
2 constitutes infringement. Judicial economy would
3 compel resolving the entire dispute right here
4 right now.

5 THE COURT: All right. Thank you.

6 Let me hear from the defense.

7 MR. MERONE: Thank you, your Honor.

8 THE COURT: Yes, sir.

9 MR. MERONE: I just want to clarify a
10 couple of things and make sure we keep two
11 different things separate. There's the issue of
12 let's set aside the coming of the suit as the
13 first issue raised as to whether or not there is
14 a case or controversy, and we all agree it has to
15 be -- it must be an actual case in controversy in
16 order to support declaratory judgment action plus
17 the DJ Act doesn't confer jurisdiction anywhere.

18 And so the question I would pose
19 is in response is what exactly is the
20 controversy? At present we cannot bring a claim
21 against them for trademark infringement,
22 definitely no likelihood of confusion because
23 we're not in this market, therefore, people
24 really haven't heard of us here, therefore, under
25 the Sleekcraft factors, or the multifactor test,

1 there's no way we could sustain a claim for
2 confusion.

3 If the question is, well, what
4 about in the future? Five years from now if we
5 have a hotel here, it's a completely different
6 story, but we can't speculate as to what's going
7 to be happening into the future. The only other
8 possible controversy then is the issue of
9 registrability. And contrary to what counsel
10 said, opposition proceedings are the exclusive
11 jurisdiction of the TTAB.

12 Under Section 1071, yes, there
13 is a --

14 THE COURT: Well, I mean we've been
15 through that. I mean that's just they do
16 something different from what I do so they're --
17 they --

18 MR. MERONE: What they do just so we're
19 clear is they work on a hypothetical. What they
20 say is, it doesn't matter where you are, if
21 someone is familiar with your mark, hotel
22 services, for any hotel service, not just --
23 because we get your trademark case. Oh, no, no,
24 my hotel, that's only a ten-dollar a night hotel
25 and we're having this different classes,

1 different class of purchasers, different price
2 points, none of that matters to the trademark
3 office. They say any hotel, any possible
4 conceivable hotel, just name it, and if that same
5 person is going to encounter a guest reward
6 program for a hotel under ACESTAY, they might
7 think there's a connection. It's a hypothetical.
8 It's not what's actually happening in the real
9 world. So it's a different process so there's
10 and no controversy to begin with on any level.

11 Now, separately the covenant not
12 to sue, that's a belt and suspenders. What I'm
13 saying is, listen, there's no controversy, but if
14 you're afraid that your past or your current
15 activities were -- and I did check and it
16 actually does cover ACEP even though it doesn't
17 have to because there was no ability to cover.

18 THE COURT: I didn't have the exact
19 language right here in front of me right now, but
20 my recollection was that it did, but that's why I
21 asked. I wanted to be sure.

22 MR. MERONE: Yeah, it didn't need to,
23 but I do want to make sure we're clear on one
24 point so there's no confusion in that it covers
25 their past infringement and says if the world

1 stays the same as it is right now, we're not
2 going to come after you, but if you engage in
3 different use, for example, what if they open a
4 casino in Seattle? Or if we change our use, what
5 if we open a hotel in Las Vegas? Then we are
6 going to have a conflict because now --

7 THE COURT: That's why I said my
8 crystal ball is broken, Mr. Merone, I don't know.

9 MR. MERONE: So they can keep doing
10 today what they're doing, but in the future it's
11 not a covenant for whatever use they may make in
12 the future because if we enter this market ten
13 years from now under the presumptions afforded by
14 the Lanham Act, we're the senior registrant,
15 senior national user, they are displaced. And
16 the way that gets resolved as to, well, would
17 there be that problem in the future? That's what
18 the TTAB proceedings are all about.

19 THE COURT: Yeah.

20 MR. MERONE: Thank you.

21 THE COURT: Thank you.

22 MR. FOUNTAIN: Judge, just one further
23 point about ACESTAY.

24 THE COURT: Sure.

25 MR. FOUNTAIN: We said we want to use

1 it, they say we cannot use it. That's a
2 controversy. We shouldn't have to risk an
3 infringement suit where, you know, potentially
4 we're exposed to treble damages.

5 THE COURT: But again until you
6 actually use it, then what are we talking about?
7 I mean --

8 MR. MERONE: And the only point I would
9 make on that, your Honor, is -- your Honor, I
10 wish to make two points on that. I don't think
11 it's a major point, but, one, first there's no
12 evidence about that. It's an allegation in their
13 complaint that's no --

14 THE COURT: Say that again, I'm sorry.

15 MR. MERONE: There's no evidence about
16 the conversation they're referencing. There's an
17 allegation in the complaint which is for purposes
18 of a 12(b) motion is insufficient. So there's
19 actually no evidence, but be that as it may,
20 according to the dates what they said is when you
21 had a conversation with someone in the context of
22 discussing particular cases at a time when they
23 weren't using the mark and said, yeah, we're
24 going to object to your use. What use? Again if
25 they opened in Seattle, absolutely I'd be

1 objecting.

2 THE COURT: Yeah, there's just no case
3 or controversy with that. Okay, all right, thank
4 you.

5 All right, I'm going to go ahead
6 with my inclination. Let me ask the defendants
7 to prepare an appropriate order granting your
8 motion, and I will talk to the brains of the
9 outfit. And that's a joke for the record because
10 I know the associates are going to be preparing
11 the order. So if you will go and prepare an
12 order granting your motion and run it by the
13 plaintiff. And if you can't agree on the
14 language, then you can submit it to me and we'll
15 decide the appropriate language, but again
16 there's just no case. I don't see a case for
17 controversy here yet. When there is, and again
18 we deal in actuality, so I intend to use your
19 mark to sell something -- I keep saying to sell
20 cantaloupes I guess because cantaloupes are in
21 the news -- to sell cantaloupes, you know, well,
22 then we'll deal with that when it comes up, but
23 until then, there's just no case or controversy
24 with your stipulation that they can continue to
25 use ACEPLAY and you won't use them for any use in

1 the past or continued use into the future, all
2 right?

3 MR. MERONE: Understood.

4 THE COURT: All right. Thank you. We
5 will be in recess.

6

7 (Whereupon, the proceedings concluded.)

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I hereby certify that pursuant
20 to Section 753, Title 28, United States Code, the
foregoing is a true and correct transcript of the
21 stenographically reported proceedings held in the
above-entitled matter.

22

23 Date: September 29, 2011 /s/ Joy Garner
24 JOY GARNER, CCR 275
U.S. Court Reporter

25