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October 17, 2011

VIA FACSIMILE (702) 464-5521

The Honorable James C. Mahan
United States District Courthouse
333 S. Las Vegas Blvd.
Las Vegas, Nevada 89101

Re: American Casino and Entertainment Properties, LLC. v. Modern Housing, LLC, Case No. 2:11-cv-00222-JCM-LRL

Dear Judge Mahan:

On behalf of Defendant Modern Housing, LLC, we wish to reply to Plaintiff's most recent filing (D.I. 32) concerning Defendant's submission of a Proposed Order in this action.

Plaintiff's attempt to turn a simple procedural matter into a dispute is truly perplexing, as is Plaintiff's dissatisfaction with the entry of an Order which correctly states that the motion to dismiss is being granted "for the reasons stated in court." One can only presume that Plaintiff is pushing its own draft because it somehow wants to put a spin on the record.

To this end, Plaintiff points to two sentences it wants to add, arguing that they should be included because they are both supposedly "true." *See* D.I. 32, p. 2. That is not, however, necessarily the case. Moreover, even if the statements *were* true, there would still be no reason or need to include them, especially in the absence of clarifying context.

For example, Plaintiff wants the Order to reflect that the Court supposedly "found" that Plaintiff has not used the ACESTAY mark in commerce. *See id.*; *see also* D.I. 31. The motion before the Court, however, was *a motion to dismiss*, which means the Court was required to *accept* all of the allegations in the Amended Complaint—including Plaintiff's claim that it had not yet used the ACESTAY mark; *see* D.I. 18, ¶13—**as true**. This Court took no evidence on the subject of "use," nor was any submitted by either party.

To be sure, Defendant has no reason to doubt Plaintiff's allegation that it has not yet used the ACESTAY mark in commerce. However, while it is one thing to *accept* an allegation as true, it is quite another to suggest that the Court made a judicial *finding* to that effect. This Court properly made no such finding, and the Order should not reflect that it did.

Plaintiff's request that the Order include a "finding" that Defendant filed a covenant "not to sue Plaintiff ... for its use of the ACEPLAY mark" (*see* D.I. 32, p. 2; *see also* D.I. 31) is also misleading. There is no question, of course, that Defendant filed a covenant not to sue (D.I. 10), the terms of which are of record in this case. Plaintiff's *characterization* of the terms, however, is both inaccurate and incomplete. For example, the covenant covers only past and current uses of the mark that were disclosed to Defendant, *see* D.I. 10, p. 2, and contains important caveats concerning "new uses" and "future rights." *See id.* None of these terms, however, are captured in the "finding" which Plaintiff asks the Court to make.

Moreover, there is no logical reason why Plaintiff's self-serving claims should be elevated to the status of a judicial "finding". After all, the terms of the covenant, as well as any statements made by the parties at the hearing, *are already of record* in this case. Thus, there is no doubt as to the terms; the record, as some might say, speaks for itself.

Defendant therefore asks that this Court enter the Proposed Order (D.I. 30) submitted by Defendant in this case. As noted in our previous letter, the text of the Proposed Order simply states that the motion to dismiss is being granted "for the reasons stated in court," which is a truthful proposition with which no party can take any issue. *See* D.I. 30.

Respectfully submitted,

KENYON & KENYON LLP

By: _____
Jonathan D. Reichman

cc: Jonathan W. Fountain, Esq.
(Attorney for Plaintiff; by fax)
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file

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