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

10 WYNN RESORTS HOLDINGS, LLC a
Nevada limited liability company,

Case No.

11 Plaintiff,

**COMPLAINT FOR DECLARATORY
RELIEF**

12 v.

13 NYLO HOTELS, LLC a Delaware limited
14 liability company,

15 Defendant.

16
17 Plaintiff Wynn Resorts Holdings, LLC ("Wynn"), for its Complaint against Defendant
18 NYLO Hotels, ("NYLO"), hereby alleges as follows:

19 **NATURE OF CLAIMS**

20 1. Wynn seeks a declaratory judgment that its use of the XS trademark for
21 restaurant, bar, nightclub, entertainment or other services or goods has not infringed or
22 otherwise violated NYLO's alleged trademark or other rights in XS for hotel, hotel
23 management, restaurant, bar, spa or any other services or goods.

24 2. Wynn further seeks damages, attorneys' fees, costs, and preliminary and
25 permanent injunctive relief.

26 **JURISDICTION**

27 3. This case arises under the Federal Declaratory Judgments Act, 28 U.S.C. §§
28 2201 and 2202, and the Lanham Act, 15 U.S.C. § 1051 et seq., related to trademark

1 infringement, unfair competition, and/or deceptive trade practices.

2 4. This Court has jurisdiction under 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331
3 and 1338.

4 5. This Court has personal jurisdiction over NYLO because it: (a) attempted to
5 contract with Wynn, whom they knew was located in the State of Nevada, by offering
6 licensing opportunities; (b) solicit or have solicited business in the State of Nevada; and (c)
7 have sent threatening correspondence to Wynn in the State of Nevada threatening to take
8 action if Wynn does not comply with their demands.

9 6. NYLO has created an actual case and controversy and a reasonable
10 apprehension of litigation by, among other things, sending letters threatening to file suit
11 against Wynn on April 22, 2009 and May 28, 2009.

12 **THE PARTIES**

13 7. Plaintiff, WYNN RESORTS HOLDING, LLC is a limited liability company
14 doing business in the State of Nevada.

15 8. Defendant, NYLO HOTELS, LLC, upon information and belief is a Delaware
16 limited liability company with a principal place of business at 260 Peachtree Street, NW,
17 Suite 2301, Atlanta, Georgia 30303.

18 **ALLEGATIONS COMMON TO ALL COUNTS**

19 9. Plaintiff Wynn Resorts Holdings, LLC, is the sole member of Wynn Las
20 Vegas, LLC, a Nevada limited liability company that owns and operates the “Wynn Las
21 Vegas” resort hotel casino in Las Vegas, Nevada.

22 10. The “Wynn” name and mark, as seen in “Wynn Resorts” and “Wynn Las
23 Vegas” is attributed to the President and Chief Executive Officer of Wynn Resorts, Stephen
24 A. Wynn (“Mr. Wynn”), who is world-renowned as a creator, developer and operator of
25 destination casino resorts.

26 11. Before “Wynn Las Vegas,” Mr. Wynn was responsible for conceiving,
27 developing and managing several prominent resort hotel casinos in Las Vegas, namely
28 “Golden Nugget”, “The Mirage”, “Bellagio”, and “Treasure Island”, as well as the “Golden

1 Nugget” in Atlantic City, New Jersey, “Golden Nugget” in Laughlin, Nevada and “Beau
2 Rivage” in Biloxi, Mississippi.

3 12. Mr. Wynn and his related companies have also developed and built a highly
4 publicized casino resort in Macau called “Wynn Macau,” and built an enormous new resort
5 adjacent to the “Wynn Las Vegas” resort called “Encore Wynn Las Vegas” (hereinafter
6 “Encore”).

7 13. Wynn has spent a significant amount of time, resources and money in
8 developing and promoting a restaurant, bar, nightclub and indoor and outdoor
9 entertainment venue at Encore under the XS mark.

10 14. In furtherance of the development and promotion of Wynn’s XS mark, and to
11 protect its trademark rights nationally, on February 4, 2008 Wynn filed two federal
12 trademark applications for the marks XS as follows: (1) U.S. Application Serial No.
13 77/388300 for XS in International Class 41 for “special event planning; arranging and
14 conducting nightclub entertainment events; arranging for reservations for shows and other
15 entertainment events; night club services;” and (2) U.S. App. Serial No. 77/388304 for XS
16 in International Class 43 for “restaurant and bar services; cocktail lounges.” (See Printouts
17 of Electronic Records of Federal Trademark Application Serial Nos. 77/388300 and
18 77/388304, attached hereto as Exhibit 1.)

19 15. Additionally, to further develop and promote Wynn’s XS mark, on August 19,
20 2008 Wynn acquired through assignment prior U.S. Registration No. 2,158,323 for the
21 mark XS in International Classes 41 for “entertainment in the nature of indoor and outdoor
22 amusement complexes” and 42 for “restaurant services, namely, restaurant and bar
23 services” (the “XS Registration”) from XS Entertainment, Inc., Wynn’s predecessor in
24 interest in the XS Registration. (See Printouts of Electronic Records of Federal
25 Registration No. 2,158,323, attached hereto as Exhibit 2.)

26 16. On November 28, 2008, Wynn successfully renewed the XS Registration in
27 its name, and as such, through its predecessor in interest Wynn’s date of first use of the XS
28

1 mark in commerce for the identified services relates back December 22, 1996. (See id.)

2 That registration is now incontestable.

3 17. NYLO filed an "Intent to Use" Federal Trademark Application for the mark XS
4 in International Classes 35, 43 and 44 for, hotel, bar and restaurant services, among
5 various other services, on February 6, 2007 ("NYLO's XS Mark"). (See Printout of
6 Electronic Records of Federal Trademark Application Serial No. 77/100257, attached
7 hereto as Exhibit 3.)

8 18. Because NYLO's XS mark was filed on an "Intent to Use" basis, there is no
9 first date of use of the mark in commerce, and upon information and belief, to date NYLO
10 has not begun using its XS mark in commerce for any of the services identified in its
11 Federal Trademark Application Serial No. 77/100257. (See id.)

12 19. On April 22, 2009, NYLO sent a cease and desist letter to Wynn, claiming
13 exclusive rights in the XS mark for the identified services and demanding that Wynn
14 "immediately cease [its] use of 'XS' to avoid any conflict with NYLO, or contract NYLO's
15 General Counsel...to discuss licensing opportunities." (See Correspondence from David E.
16 Rogers, dated April 22, 2009, attached hereto as Exhibit 4.)

17 20. By and through the undersigned counsel, Wynn responded to NYLO's April
18 22, 2009 correspondence by teleconference with NYLO's counsel David E. Rogers, Esq.,
19 and directed his attention to Wynn's valid ownership of its prior XS Registration and its
20 actual use of the XS mark in commerce at Encore. Mr. Rodgers responded by requesting
21 additional time to investigate Wynn's assertion of priority of use of the XS mark, which
22 request was granted by the undersigned.

23 21. On May 28, 2009, after having ample opportunity to investigate the facts
24 surrounding Wynn's ownership of the XS Registration and priority of use of the XS mark,
25 NYLO sent correspondence to Wynn's counsel, again demanding that Wynn cease all use
26 of the XS mark, or enter into a licensing agreement with NYLO, and basing its second
27 demand on the allegations that Wynn's XS Registration was invalid because (1) its renewal
28 was wrongly accepted by the United States Patent and Trademark Office; (2) the original

1 application was impermissibly broadened; and (3) the mark had been abandoned. (See
2 Correspondence from David E. Rogers, dated May 28, 2009, attached hereto as Exhibit 5.)

3 22. Based upon NYLO's allegations that Wynn's XS Registration is invalid, NYLO
4 has asserted that Wynn only has common law trademark rights in the XS mark stemming
5 from its actual use of the mark in commerce at Encore beginning in January of 2009, and
6 NYLO claims that "[t]he filing date of NYLO's 'XS' application predates these common-law
7 rights and, when NYLO's use commences, it would clearly have the right to enjoin Wynn's
8 use." (See id.)

9 23. Due to NYLO's threats and demands against Wynn, Wynn has a reasonable
10 apprehension that NYLO will file legal action against it.

11 **CLAIMS FOR RELIEF**

12 **FIRST CLAIM FOR RELIEF**

13 **Declaration as to Rights Pursuant to 28 U.S.C. § 2201 and Trademark Infringement**
14 **under The Lanham Act, 15 U.S.C. § 1125(a)**

15 24. Wynn incorporates the allegations in the preceding paragraphs as if set forth
16 fully herein.

17 25. Declaratory relief actions are available when an actual case or controversy
18 exists between two parties.

19 26. Beginning on April 22, 2009, NYLO has asserted that Wynn's use of the XS
20 mark constitutes an infringement of trademark rights allegedly held by NYLO in violation of
21 The Lanham Act, and demanding, *inter alia*, that Wynn immediately cease and desist all
22 use of the XS mark and similar variations thereof.

23 27. Wynn maintains that its use of the XS mark is lawful and does not infringe
24 upon the rights of NYLO.

25 28. Therefore, an actual case or controversy exists between the parties.

26 29. Wynn has no adequate remedy at law under administrative law and before
27 the United States Patent and Trademark Office.

28 30. NYLO's assertions that Wynn is violating its legal rights irreparably injures

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1 and adversely affects Wynn and, unless prevented by this Court, will continue to so affect
2 Wynn's business and the immense investment it has made in the XS mark and attendant
3 good will. To resolve the legal and factual questions raised by NYLO and to afford relief
4 from the uncertainty and controversy which NYLO's assertion has precipitated, Wynn is
5 entitled to a declaratory judgment of its rights under 28 U.S.C. §§ 2201-02. Wynn's use of
6 the XS mark is not in violation of any rights NYLO might have pursuant to 15 U.S.C. §
7 1125(a).

8 31. Wynn hereby seeks a judicial declaration of its continued right to use the XS
9 mark free and clear of interference or harassment by NYLO and without any obligation or
10 liability to NYLO.

11 32. Wynn additionally seeks reimbursement of its attorneys' fees and costs from
12 NYLO associated with bringing the action at hand.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Wynn respectfully requests that the Court grant the following relief:

- 15 A. A determination and adjudication of the rights and liabilities of the parties with
16 regard to the XS marks as they relate to this dispute;
- 17 B. A declaration that Wynn's use of the XS mark is lawful and does not infringe
18 upon any rights of NYLO;
- 19 C. A permanent injunction prohibiting NYLO from further vexing conduct or
20 harassment of Wynn;
- 21 D. An award of interests, costs, and attorneys' fees incurred by Wynn in
22 prosecuting this action; and
- 23 E. All other relief to which Wynn is entitled.

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