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13 THE GATOR CORPORATION

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN FRANCISCO DIVISION

14 THE GATOR CORPORATION, a Delaware  
15 corporation,

16 Plaintiff,

17 v.

18 EXTENDED STAY AMERICA, INC., a  
19 Delaware corporation,

20 Defendant.

Case No.

**COMPLAINT FOR DECLARATORY  
RELIEF; DEMAND FOR JURY TRIAL**

21  
22 Plaintiff The Gator Corporation ("Plaintiff" or "TGC") complains of defendant Extended  
23 State America, Inc. ("Defendant") and alleges as follows:

24 **NATURE OF THE ACTION**

25 1. Plaintiff brings this action for declaratory relief under the trademark and copyright  
26 laws of the United States and related state laws. Defendant claims that Plaintiff's delivery of  
27 pop-up windows containing commercial advertisements over the Internet to a computer user's  
28 screen display constitutes trademark infringement, unfair competition, trademark dilution,

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NORTHERN DISTRICT OF CALIFORNIA

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1 copyright infringement, contributory copyright infringement and interference with prospective  
2 economic advantage under state and federal law. In fact, Plaintiff does not violate any applicable  
3 law and Defendant has no right to prevent computer users from choosing to obtain Plaintiff's  
4 software and viewing separate works, comprising commercial advertising on, that user's own  
5 computer screen, even when other works share the screen.

#### 6 JURISDICTION

7 2. This Court has subject matter jurisdiction over this action under 15 U.S.C. § 1121,  
8 28 U.S.C. § 1331 and 28 U.S.C. § 1338(a).

9 3. This action seeks a declaratory judgment under the Declaratory Judgment Act, 28  
10 U.S.C. § 2201. It presents an actual case or controversy under Article III of the United States  
11 Constitution and serves a useful purpose in clarifying and settling the legal rights at issue.

12 4. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c).

#### 13 THE PARTIES

14 5. Plaintiff is a Delaware corporation with its principal place of business in Redwood  
15 City, California.

16 6. On information and belief, Defendant Extended Stay America, Inc. ("ESA" or  
17 "Defendant") is a Delaware corporation with its principal place of business in Spartanburg, South  
18 Carolina.

#### 19 FACTS

20 7. Founded in 1998, Plaintiff is a developer and distributor of innovative software  
21 products and also offers online advertising services. Through its Gator Advertising and  
22 Information Network ("GAIN"), Plaintiff offers a highly effective means to advertise to  
23 consumers whose computers are connected to the Internet by applying contextual marketing  
24 concepts that allow it to deliver highly relevant advertising to individual consumers' computers.  
25 Plaintiff distributes its GAIN AdServer software at the request of GAIN subscribers by offering it  
26 together with popular software programs that are provided to the consumer free of charge. In  
27 obtaining the GAIN AdServer software and the associated free program, consumers are provided  
28 with clear notice that the GAIN AdServer software will deliver GAIN-branded advertisements to

1 their computers and consumers must agree to Plaintiff's Privacy Statement and End User License  
2 Agreement ("Legal Agreements").

3 8. On information and belief, Defendant is in the business of developing and  
4 operating hotels located across the country, including California.

5 **CLAIM FOR DECLARATORY RELIEF**  
6 **(28 U.S.C. § 2201)**

7 9. On or about October 21, 2002, Defendant's counsel sent a letter to Plaintiff  
8 asserting that Plaintiff was "causing 'pop-up' advertisements to appear or to be displayed upon  
9 ESA's website, located at www.extendedstay.com." Defendant demanded that Plaintiff  
10 immediately cease and desist from:

11 (1) "causing its pop-up advertisements to be displayed on any website owned  
12 by or affiliated with ESA";

13 (2) "altering or modifying . . . any part of any website owned by or affiliated  
14 with ESA, in any way, including its appearance of how it is displayed";

15 (3) "infringing, or causing any other entity to infringe ESA's copyrights";

16 (4) "making any designation of origin, descriptions, representations or  
17 suggestions that ESA is the source, sponsor or in any way affiliated with [TGC], its  
18 website, or the company or entity whose advertisements are presently appearing or being  
19 displayed on ESA's website, and from advertising on ESA's websites, services and  
20 products";

21 (5) "infringing, or causing any other entity to infringe ESA's trademark and/or  
22 other service mark rights";

23 (6) "offering goods, services or information on the internet using a domain  
24 name that contains or incorporates any words confusingly similar to the ESA marks"; and

25 (7) "acting, or causing another entity to act, in any manner likely to dilute  
26 tarnish, or blur the distinctiveness of the ESA marks."

27 10. In its letter, Defendant further asserted that Plaintiff's conduct was "unauthorized,  
28

1 illegal, tortuous, and otherwise wrongful” and threatened that, if Plaintiff failed to abide by its  
2 cease and desist notice, Defendant’s legal redress would include, among other things, “seeking an  
3 injunction, legal damages, attorneys’ fees, court costs, [and] punitive damages.”

4 11. Plaintiff has not infringed and is not infringing, directly or indirectly,  
5 contributorily, by inducement or otherwise, any of Defendant’s trademarks, copyrights, or any  
6 other propriety rights. Neither is Plaintiff engaging in any unfair or deceptive trade practices,  
7 fraudulent business practices or false advertising intended to deceive Plaintiff’s subscribers.  
8 Instead, Plaintiff merely delivers information to its subscribers in a separate pop-up window on  
9 the consumer’s computer screen. Plaintiff does not deliver any pop-up ads “on” Defendant’s  
10 website. Individual subscribers have consented to the display of GAIN-branded advertisements  
11 on their computer screens and when those subscribers have open multiple windows on their  
12 computer screens, they perceive separate, independent windows not integrated or related works.

13 12. Because of Defendant’s unfounded accusations of infringement and threat to  
14 immediately commence legal action against Plaintiff, an actual controversy exists between  
15 Defendant and Plaintiff as to the noninfringement and nondilution of Defendant’s alleged  
16 trademarks, noninfringement of Defendant’s alleged copyright, the lack of false advertising by  
17 Plaintiff and the fair, non-deceptive, non-fraudulent business and trade practices of Plaintiff and  
18 Plaintiff has formed a reasonable apprehension and believes that Defendant in the immediate  
19 future will file suit against it as indicated in its letter.

20 13. Plaintiff is entitled to a declaratory judgment that its conduct does not infringe,  
21 directly or contributorily, any trademark or copyright held by Defendant, does not dilute  
22 Defendant’s trademark, does not constitute unfair competition, a deceptive or unfair trade or sales  
23 practice, false advertising, or any other violation of either federal or state law.

#### 24 PRAYER FOR RELIEF

25 WHEREFORE, Plaintiff prays that this Court enter judgment as follows:

26 1. For a declaration of this Court that Plaintiff’s software and services do not operate  
27 in a manner that causes the infringement, either directly or contributorily, of any trademark held  
28 by Defendant;

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2. For a declaration of this Court that Plaintiff's software and services do not operate in a manner that causes the infringement, either directly or contributorily, of any copyright held by Defendant;

3. For a declaration of this Court that Plaintiff's software and services do not provide false or misleading advertising;

4. For a declaration of this Court that Plaintiff's software and services do not operate in a manner that causes the dilution, either directly or contributorily, of any trademark held by Defendant;

5. For a declaration of this Court that Plaintiff's software and services do not operate in a manner that constitutes unfair competition under federal law;

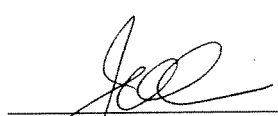
6. For a declaration of this Court that Plaintiff's software and services do not interfere with a prospective economic advantage of Defendant's;

7. Plaintiff's attorneys fees and costs of suit incurred herein; and

8. For such other and further relief as this Court deems just and proper.

Dated: October 24, 2002

COOLEY GODWARD LLP  
JANET L. CULLUM (104336)  
THOMAS J. FRIEL, JR. (80065)  
BRIAN E. MITCHELL (190095)

  
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Janet L. Cullum  
Attorneys for Plaintiff  
THE GATOR CORPORATION

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**JURY DEMAND**

Plaintiff respectfully requests a jury trial on all issues triable thereby.

Dated: October 28, 2002

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Attorneys for Plaintiff  
THE GATOR CORPORATION

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

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 CLERK, U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

GATOR CORPORATION )  
 Plaintiff(s) )  
 -v- )  
 EXTENDED STAY AMERICA )  
 Defendant(s) )

C 02-05226 CRB

ORDER SETTING INITIAL CASE MANAGEMENT  
 CONFERENCE

IT IS HEREBY ORDERED that this action is assigned to the Honorable Charles R. Breyer. When serving the complaint or notice of removal, the plaintiff or removing defendant must serve on all other parties a copy of this order, the handbook entitled "Dispute Resolution Procedures in the Northern District of California" and all other documents specified in Civil Local Rule 4-2. Counsel must comply with the case schedule listed below unless the Court otherwise orders.

IT IS FURTHER ORDERED that this action is assigned to the Alternative Dispute Resolution (ADR) Multi-Option Program governed by ADR Local Rule 3. Counsel and clients must familiarize themselves with that rule and with the handbook entitled "Dispute Resolution Procedures in the Northern District of California."

CASE SCHEDULE [ADR MULTI-OPTION PROGRAM]

Date	Event	Governing Rule
10/29/2002	Complaint filed	
01/10/2003	Last day to meet and confer re initial disclosures, early settlement, ADR process selection, and discovery plan	FRCivP 26(f) & ADR LR 3-5
01/10/2003	Last day to file Joint ADR Certification with Stipulation to ADR process or Notice of Need for ADR Phone Conference	Civil L.R. 16-8
01/24/2003	Last day to complete initial disclosures or state objection in Rule 26(f) Report, file/serve Case Management Statement, and file/serve Rule 26(f) Report	FRCivP 26(a)(1) Civil L.R.16-9
01/31/2003	Case Management Conference in Ctrm 8, 19th Flr, SF at 8:30 AM	Civil L.R. 16-10

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

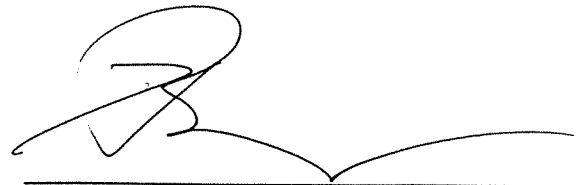
**NOTICE**

Judge Breyer conducts a criminal law and motion calendar on Wednesdays at 2:15 p.m. Civil law and motion calendar is conducted on Fridays at 10:00 a.m. Case management conferences are conducted on Fridays at 8:30 a.m. **ORDER OF CALL IS DETERMINED BY THE COURT.** Counsel need not reserve a hearing date for civil motions, however, counsel are advised to check the legal papers for unavailable dates. A proposed form of order shall be submitted with all motion and opposition papers.

**ALL DISCOVERY MOTIONS** in cases assigned to Judge Breyer are hereby referred to the Magistrate Judge to be heard and considered at the convenience of his/her calendar. All such matters shall be noticed by the moving party for hearing on the assigned Magistrate Judge's regular law and motion calendar, or pursuant to that Judge's procedures.

**IT IS SO ORDERED.**

Dated: October 22, 1999

  
\_\_\_\_\_  
CHARLES R. BREYER  
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT