

43. Defendant lacks information sufficient to form a belief as to the veracity of the allegation contained in this paragraph and, therefore, denies same.

44. Defendants admit they have knowingly manufactured, advertised, offered for sale, sold and distributed their products bearing their trademarks in interstate and intrastate commerce, including commerce in the State of Missouri and in this judicial district. Defendants also admit they knowingly advertised and promoted their products using their trademarks on their website and by displaying the products at Williams Pharmacies. Defendants deny the remaining allegations contained in this paragraph.

45. Deny.

46. Admit.

47. Deny.

48. Defendants incorporate by reference their responses to the preceding allegations as if fully set forth herein.

49. Defendants admit THE NORTH FACE has become associated “in the public mind” with the products produced by Plaintiff. Defendant denies Plaintiff’s Denali Jacket is “iconic”. Defendants are without information sufficient to form a belief as to the veracity of the remaining allegations contained in this paragraph and, therefore, deny same.

50. Defendants admit they do not have (nor does The South Butt desire to have) Plaintiff’s authorization or consent to do anything, including exist. Defendants admit to having knowledge of Plaintiff’s use of THE NORTH FACE on its products. The South Butt specifically denies its trademarks are confusingly similar to the THE NORTH FACE marks noting for the Court:

- a. The only similarity in the text of the Defendant limited liability company’s logo with that of the Plaintiff is the word “The”;

- b. The font used by The South Butt is difference from that employed by the Plaintiff;
- c. The situs of the logo employed by The South Butt on its apparel is the opposite of the situs of the logo employed by North Face on its apparel;
- d. The text "The South Butt" is patently dissimilar to, in fact the non-salacious opposite of, "North Face."
- e. The "half ass" design portion of The South Butt logo is comprised of two stripes curved in a butt-like fashion upward from the left side of the "The South Butt" text while the "half dome" design mark of the North Face is comprised of three thinner lines curved downward from the right side of the text "The North Face."
- f. The South Butt products are not sold at any on-site retail location which sells North Face products.

The South Butt admits it has intentionally and knowingly advertised, manufactured, distributed, offered for sale and/or sold its products to the consuming public in or affecting interstate commerce. In fact, advertising, manufacturing, distributing, offering for sale and selling their products is Defendants' plan for generating revenue for Defendants. Defendants deny the remaining allegations contained in this paragraph, but affirmatively express gratitude for the actions of The North Face in accelerating and furthering these undertakings.

51. Deny.

52. Deny.

53. Deny.

54. Deny.

55. Deny.

56. Deny.

57. Defendants hereby incorporate by reference their responses to the preceding allegations of the Complaint as if fully set forth herein.

58. Defendants are without information sufficient to form a belief as to the veracity of the allegations contained herein and, therefore, deny same.

59. Deny.

60. Defendants admit they do not have authorization from Plaintiff to do anything at all. Defendants deny the remaining allegations contained in this paragraph.

61. Deny.

62. Deny.

63. Deny.

64. Defendants hereby incorporate by reference their responses to the preceding allegations of the Complaint as if fully set forth herein.

65. Defendants admit they produce apparel and accessories. Defendants deny the remaining allegations contained in this paragraph.

66. Deny.

67. Deny.

68. Deny.

69. Deny.

70. Deny.

71. Defendants hereby incorporate by reference their responses to the preceding allegations of the Complaint as if fully set forth herein.

72. Deny.

73. Defendants admit they supply Williams Pharmacies with their products. Defendants deny the remaining allegations contained in this paragraph.



74. Defendants admit they directly control and monitor the advertisement, distribution, offer for sale and/or sale of their products. Defendants deny the remaining allegations contained in this paragraph.

75. Deny.

76. Deny.

77. Admit.

78. Deny.

79. Defendants hereby incorporate by reference their responses to the preceding allegations of the Complaint as if fully set forth herein.

80. Defendants admit THE NORTH FACE has become associated with Plaintiff's products. Defendants are without information sufficient to form a belief as to the veracity of the remaining allegations contained in this paragraph and, therefore, deny same.

81. Deny.

82. Deny.

83. Deny.

84. Deny.

85. Defendants incorporate by reference their responses to the preceding allegations of the Complaint as if fully set forth herein.

86. Defendants admit THE NORTH FACE has become associated with Plaintiff's products. Defendants are without information sufficient to form a belief as to the veracity of the remaining allegations contained in this paragraph and, therefore, deny same.

87. Deny.

88. Deny.

89. Deny.

90. Deny.

91. Defendants incorporate by reference their responses to the preceding allegations of the Complaint as if fully set forth herein.

92. Defendants are without information sufficient to for a belief as to the veracity of the allegations contained in this paragraph and, therefore, deny.

93. Deny.

94. Deny.

95. Deny.

96. Deny.

WHEREFORE, with the punctilio of appreciation for the benefit received by The South Butt by virtue of the initiation of this Complaint by North Face, and with a significant amount of marketing rue, Defendants respectfully request this Honorable Court enter judgment in favor of Defendants and against Plaintiff as follows:

1. Deny Plaintiff's request for a preliminary and permanent injunction;
2. Enter a judgment finding that Defendants have not infringed Plaintiff's Trademarks;
3. Enter a judgment finding that Defendants have not diluted Plaintiff's Trademarks;
4. Enter a judgment finding that Defendants' use of Defendants' Trademarks have not caused and/or are not likely to cause confusion among the general purchasing public as to the source of origin of Defendants' products.
5. Enter a judgment finding that Defendants' use of Defendants' Trademarks have not cause and/or are not likely to cause initial interest and post-sale confusion among the general purchasing public as to the source of origin of Defendants' products.
6. Enter a judgment finding that the use or proposed use of the Pending South Butt Trademark Application does not cause confusion or is not likely to cause confusion

with THE NORTH FACE Trademarks, does not dilute the THE NORTH FACE Trademarks and is not likely to cause dilution of the THE NORTH FACE Trademarks.

7. Certify the above orders to the Director of the U.S. Patent and Trademark Office so the Director may make the appropriate entry upon the records of the Patent and Trademark Office.
8. Deny Plaintiff's prayer for monetary damages.
9. Award Defendants' their reasonable attorneys' fees and costs incurred in connection with this action.
10. Grant such other and further relief as the Court may deem just, proper and equitable under the circumstances.

#### **AFFIRMATIVE DEFENSES**

##### **I. LACHES – ALL COUNTS**

1. Plaintiff claims it will suffer irreparable injury if not granted a preliminary injunction during the pendency of this matter.
2. Plaintiff alleges in its Complaint that it became aware of Defendants' allegedly injurious conduct on or about August 4, 2009.
3. Plaintiff alleges in its Complaint that it became aware that Defendants' have no intention of permitting Plaintiff to bully them out of business on or about September 10, 2009.
4. Plaintiff did not file its Complaint until December 10, 2009.
5. When filing their Complaint, Plaintiff failed to file an application, verified or otherwise, for injunctive relief.



6. When filing their Complaint, and to date, Plaintiff has not yet procured a hearing date on which a hearing of Plaintiff's requested Preliminary Injunction would take place.

7. It is apparent from Plaintiff's conduct that time is not of the essence and that irreparable harm will not immediately inure to the detriment of Plaintiff absent equitable relief of the nature sought herein by Plaintiff.

8. Plaintiff is barred by the doctrine of Laches from seeking a preliminary injunction in connection with this matter.

## **II. 1<sup>st</sup> AMENDMENT – FREEDOM OF EXPRESSION – ALL COUNTS**

1. The invocation of a state or federal statute to muzzle Defendants' right to express themselves is restricted by the 1<sup>st</sup> Amendment to the U.S. Constitution.
2. Defendants' Trademarks are a parody of Plaintiff's products.
3. Plaintiff's products are marketed as products that are to be used in furtherance of an adventurous lifestyle full of exploring, climbing, hiking, skiing and other outdoor activities.
4. Plaintiff's products are generally perceived and actively marketed to be expensive items for the "exploring" consumer.
5. Despite Paragraph 3 and because of Paragraph 4, Plaintiff's products are perceived as being largely consumed by those who have little to no interest in living an adventurous lifestyle, but, rather, are interested in acquiring Plaintiff's products for the status and/or notoriety they receive from being seen in Plaintiff's expensive apparel and accessories.
6. Defendants recognized this bizarre phenomenon.

7. Defendants, utilizing parody, are making a bona fide social commentary on the pervasive banality, frivolity, absurdity and comedic nature of the consumer culture and those who participate therein.
8. Defendants' speech is noncommercial speech entitled to the fullest protection afforded under the First Amendment, that protection being labeled "strict scrutiny".
9. The government's interest in protecting the integrity of Plaintiff's Trademark from parody is not compelling and does not warrant placing restriction upon Defendants pure noncommercial speech.

### **III. UNCLEAN HANDS - ALL COUNTS**

1. Further answering, and by way of affirmative defense, Plaintiff comes to this Honorable Court seeking equitable relief with unclean hands.
2. Although Plaintiff has not likely been damaged, any damage which may have inured to the detriment of North Face by virtue of the marketplace presence of The South Butt is a direct and proximate result of the socially irresponsible, consumer backlash inducing, bully-like and erroneously premised demands and actions of North Face designed to do nothing more than rid the consuming public of freedom of choice and stifle pursuit of the American Dream.

### **IV. FAILURE TO STATE A CLAIM – ALL COUNTS**

1. Further answering, and by way of affirmative defense, Plaintiff has failed to state a cause of action upon which any relief being sought by Plaintiff herein can be granted by virtue of the fact that on its face, (north, south or otherwise), the Complaint is, in a *res ipsa loquitor* sense, premised on the patently lawful, permissible activity and actions of The South Butt.



2. Further answering, and by way of affirmative defense, Plaintiff has failed to state a cause of action upon which any relief being sought by Plaintiff herein can be granted by virtue of the fact that The South Butt and North Face are serving different market functions, namely: the target marketing of explorers versus the relaxers.

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**CERTIFICATE OF SERVICE**

Signature above is also certification that on January 4, 2010 a true and correct copy of the foregoing was electronically filed with the Clerk of the Court utilizing the CM/ECF system which will send notification of such filing to:

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