

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-02051-CMA-MEH

FIRST DESCENTS, Inc.
a Colorado non-profit corporation

Plaintiff,

v.

EDDIE BAUER LICENSING SERVICES LLC
a Delaware limited liability company
and

EDDIE BAUER LLC
a Delaware limited liability company

Defendants

FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiff First Descents, Inc. (“First Descents” or “Plaintiff”) for its First Amended Complaint against Defendants Eddie Bauer Licensing Services LLC, and Eddie Bauer LLC (collectively, “Eddie Bauer” or “Defendant”) allege as follows:

Nature of the Action

1. In this action, First Descents seeks injunctive and monetary relief for acts of trademark infringement and unfair competition under the laws of the United States, Title 15, United States Code; and trademark infringement and unfair competition under the common law of the state of Colorado.

The Parties

2. Plaintiff First Descents is a Colorado non-profit corporation having its principal place of business at 6000 Greenwood Plaza Blvd., Suite 120, Greenwood Village, Colorado 80111.

3. Upon information and belief, Defendant Eddie Bauer Licensing Services LLC is a Delaware limited liability company having a principal place of business at 10401 Northeast 8th Street, Suite 500, Bellevue, Washington 98004.

4. Upon information and belief, Defendant Eddie Bauer LLC is a Delaware limited liability company having a principal place of business at 10401 Northeast 8th Street, Suite 500, Bellevue, Washington 98004.

Jurisdiction and Venue

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1332, 1338 and 1367, and 15 U.S.C. § 1121. The amount in controversy exceeds the sum or value of \$75,000.

6. This Court has personal jurisdiction in this matter because Defendant offers for sale and sells in this District merchandise branded with the infringing marks that are the subject of this action, and has constitutionally sufficient contacts with Colorado to make personal jurisdiction proper in this District.

7. Venue is proper within this District under 28 U.S.C. §§ 1391(b) and (c).

Background Facts

Plaintiff's FIRST DESCENTS[®] Mark

8. The FIRST DESCENTS[®] camp experience was founded in 2001 as an adventure therapy whitewater kayaking camp for young adults fighting and surviving cancer. The name

“First Descents” was chosen for the camps because in kayaking and skiing, a “first descent” is the first time anyone has successfully navigated a particular river or skied a particular slope. Brad Ludden, the founder of First Descents and world class professional kayaker with over 100 kayaking first descents throughout the world, used the term with the kayaking camp experience for young adults fighting or surviving cancer because the camp provided the opportunity for the campers to experience the outdoor activity for their first time - and therefore, their own personal “first descents.” The camps have grown to include rock climbing and other outdoor adventures such as mountaineering and surfing.

9. FIRST DESCENTS[®] camps began in Colorado, and in 2011 took place in eight states and in Canada. During the FIRST DESCENTS[®] camp experience, young adult cancer survivors are empowered through conquering legitimate outdoor challenges in which they push their limits and face their fears, and by doing so, are able to gain confidence, a sense of control, a new identity outside of cancer, and the self-reliance they lost to cancer - all within a community of other young adult survivors and fighters. Each camp in the FIRST DESCENTS[®] program is limited to 15 campers, helping to ensure individualized care, medical attention and an intimate experience with fellow cancer survivors. The FIRST DESCENTS[®] programs are available to young adults with cancer regardless of their financial means; meals, accommodations and program activities are provided free of charge, including travel scholarships, when needed.



10. First Descents owns U.S. Service Mark Registration No. 2,695,260 for the mark FIRST DESCENTS[®] that issued March 11, 2003 for a motivational kayak sports camp for people with cancer. The first camp occurred in August 2001. A copy of the registration certificate for the FIRST DESCENTS[®] mark (the “FIRST DESCENTS[®] Mark”) is attached hereto as **Exhibit A**.

11. Since 2001, First Descents has been using its FIRST DESCENTS[®] Mark in providing and promoting the camp programs, and on various items of apparel that have been provided to participants, counselors and volunteers in the camp programs, worn by adventure athletes raising awareness of the organization, and sold to supporters of the non-profit to generate funds for the organization. In the ten years since the first camp program, thousands of items bearing the FIRST DESCENTS[®] Mark have been distributed to campers, counselors, volunteers and supporters. First Descents’ campers have come from all fifty states, and marketing efforts for the FIRST DESCENTS[®] programs have been directed nationwide and internationally.

12. As a result of a decade of the activities of the committed individuals associated with FIRST DESCENTS[®] camps, the FIRST DESCENTS[®] Mark has become recognized and

associated with outdoor adventure experiences made available to young adult cancer fighters and survivors to help them reclaim their lives and connect with others having the same fight against cancer.

13. First Descents has sold various items of branded FIRST DESCENTS apparel nationwide as a means of raising operational revenue for the camps. Certain apparel has been made available for sale to the public, and has been featured for sale on First Descents' website at <www.firstdescents.org>.

14. On September 23, 2008, First Descents filed U.S. serial no. 77/576914 for the mark FIRST DESCENTS for clothing items in Class 25. The first use date included in that application was July 1, 2001, the date when apparel was distributed in interstate commerce to the participants in the first camp program for adults fighting cancer.

15. However, First Descent's application for the mark FIRST DESCENTS for apparel was suspended by the U.S. Patent and Trademark Office ("USPTO") on December 22, 2008 as a result of trademark applications that had been filed by Eddie Bauer for the marks FIRST ASCENT and FIRST DESCENT for various outdoor gear and accessories, including items of apparel.

16. On July 27, 2011, the USPTO issued a refusal of registration for First Descent's application for the FIRST DESCENTS mark that had been in use for over ten years. The USPTO cited Eddie Bauer's U.S. Reg. No. 3,970,936 for the mark FIRST DESCENT on the ground of likely consumer confusion between the sources of each party's branded apparel.

17. Defendant provided no dates of first use of the marks FIRST ASCENT and FIRST DESCENT when it initially filed its trademark applications with the USPTO. Instead, Defendant's applications for the FIRST ASCENT and FIRST DESCENT marks were filed as "intent to use" applications prior to any actual use of these marks.

18. At the time of Defendant's USPTO trademark filings in 2008, First Descents had been conducting its cancer camp programs and providing branded apparel under the FIRST DESCENTS[®] Mark in interstate commerce for over seven years.

19. Defendant's Registration for the FIRST ASCENT mark issued in March 2011 and indicates that Defendant claims first use of the mark FIRST ASCENT in April 2009 - eight years after Plaintiff provided branded FIRST DESCENTS apparel to its first campers.

20. Defendant's Registration for the FIRST DESCENT mark issued in May 2011 and indicates that Defendant claims first use of the mark FIRST DESCENT in November 2009 - eight years after Plaintiff provided branded FIRST DESCENTS apparel to its first campers.

Defendant's Activities Using the Infringing FIRST ASCENT and FIRST DESCENT Marks

21. Defendant filed on April 10, 2008, USPTO application serial no. 77/444768 for the mark FIRST ASCENT for apparel in Class 25. On January 14, 2011 Defendant submitted filings to the USPTO claiming first use of the mark with the clothing items in April 2009. This application issued as U.S. Reg. No. 3,934,798 on March 22, 2011.

22. Defendant filed on June 2, 2008, USPTO application serial no. 77/488968 for the mark FIRST DESCENT for various outdoor goods, including apparel. On July 28, 2008, the USPTO issued an office action relating to Defendant's FIRST DESCENT application in which it advised Defendant that two "intent to use" applications, serial nos. 77/452342 and 77/452349 (which application was later expressly abandoned) had been previously filed on April 18, 2008 by American Recreation Products, Inc. ("American Recreation"), a corporation located in St. Louis, Missouri, for the mark FIRST ASCENT for tents and for clothing, respectively.

23. American Recreation also owned, at the time of its two FIRST ASCENT filings on April 18, 2008, a federal trademark registration for the mark FIRST ASCENT for tote bags,

back packs and sleeping bags that had issued May 9, 1989 -- but this registration did not include clothing or items of apparel.

24. As indicated in American Recreation's U.S. Reg. No. 1,538,160 for FIRST ASCENT, the first use dates of the mark with tote bags, back packs and sleeping bags was 1988. American Recreation did not own a federal trademark registration for the mark FIRST DESCENT or FIRST DESCENTS.

25. The USPTO office action relating to Defendant's FIRST DESCENT application indicated to Defendant that "there may be a likelihood of confusion under Trademark Act Section 2(d) between applicant's mark [FIRST DESCENT] and the referenced marks [FIRST ASCENT]" in those prior filed intent to use applications.

26. Defendant, as shown in the online records of the USPTO, purports to have obtained assignment of American Recreation's application serial no. 77/452342 on or about July 28, 2008, thereby enabling Defendant to overcome rejection of its application by the USPTO based on the FIRST ASCENT applications previously filed by American Recreation. (*See* USPTO assignment records at the following link showing that a document purporting to assign rights to Eddie Bauer on or about July 28, 2008 was recorded on April 3, 2009: <http://assignments.uspto.gov/assignments/q?db=tm&qt=sno&reel=&frame=&sno=77452342>).

27. As shown in the online records of the USPTO, a document purporting to assign Reg. No. 1,538,160 for the mark FIRST ASCENT to Eddie Bauer from American Recreation on or about July 28, 2008 was also recorded on April 3, 2009. (*See* USPTO assignment records at the following link showing that a document purporting to assign rights to Eddie Bauer: <http://assignments.uspto.gov/assignments/q?db=tm&qt=sno&reel=&frame=&sno=73741412>).

28. Inexplicably, the assignment documents purporting to show that Eddie Bauer acquired American Recreation's U.S. Reg. No. 1,538,160 for the mark FIRST ASCENT dating

back to use in 1988 for tote bags, back packs and sleeping bags (but not for items of apparel) was not recorded at the USPTO until April 3, 2009, almost a year after the execution date of record of July 28, 2008.

29. Upon information and belief, Eddie Bauer's ownership of American Recreation's U.S. Reg. No. 1,538,160 for the mark FIRST ASCENT would permit Eddie Bauer to claim "tacking" onto the original registrant's first use date of 1988 for tote bags, back packs and sleeping bags provided that certain legal requirements were met.

30. Upon information and belief, Eddie Bauer purports to have complied with the legal requirements for tacking, and now asserts that it owns U.S. Reg. No. 1,538,160 for the mark FIRST ASCENT for tote bags, back packs and sleeping bags and that its trademark rights legally date back to 1988.

31. However, Defendant cannot claim that any trademark rights in apparel, or any goods unrelated to tote bags, back packs and sleeping bags, date back to 1988 even if it has complied with the legal requirements of tacking with respect to U.S. Reg. No. 1,538,160 for the mark FIRST ASCENT.

32. On October 14, 2010 Defendant submitted filings to the USPTO in serial no. 77/488968 claiming first use in November 2009 for the mark FIRST DESCENT only with items of apparel.

33. Defendant was able to overcome any future refusal of registration based on a likelihood of confusion between its use of FIRST DESCENT and the referenced American Recreation mark FIRST ASCENT by acquiring the cited American Recreation FIRST ASCENT application serial no. 77/452342. Consequently, Defendant's application for FIRST DESCENT issued as U.S. Reg. No. 3,970,936 on May 31, 2011.

34. Defendant filed on August 15, 2008, USPTO application serial no. 77/548031 for the mark FIRST ASCENT (with design letter A) for various outdoor goods, including apparel. On April 25, 2011, Defendant submitted filings to the USPTO claiming first use of the mark only with the items of apparel and water bottles in April 2009, and April 2011, respectively. This application issued as U.S. Reg. No. 3,974,941 on June 7, 2011.

35. Upon information and belief, Defendant was aware of the FIRST DESCENTS[®] outdoor camp experience for young adults fighting cancer when Defendant filed its trademark applications in 2008 for FIRST ASCENT and FIRST DESCENT.

36. Upon information and belief, Defendant was aware of Plaintiff's 2001 use of its FIRST DESCENTS[®] Mark on its apparel when Defendant filed its trademark applications in 2008 for FIRST ASCENT and FIRST DESCENT.

37. Defendant launched promotion and sales of outdoor clothing and other items under the FIRST ASCENT mark sometime in 2009, well after the time that First Descents began operating its adventure therapy cancer camps and providing FIRST DESCENTS branded clothing items to camp participants, camp counselors, volunteers and supporters. Defendant conducted its promotional activities at many of the same industry events and venues where First Descents had maintained a presence for years prior to Defendant's participation at those same venues.

38. Defendant is not a corporate sponsor or a corporate partner of First Descents.

39. Although First Descents had prior discussions with Eddie Bauer about an arrangement between the companies to create revenue to benefit the FIRST DESCENTS[®] programs, no agreement was reached.

40. None of the proceeds from sales of Defendant's line of FIRST DESCENT or FIRST ASCENT apparel or other outdoor-related items benefits First Descents.

41. On or about October 2010, First Descents became aware that Defendant had launched a line of “ski gear” using the mark FIRST DESCENT. An advertisement for FIRST ASCENT goods featured text stating that “the obvious next step was our new First Descent™ ski gear.” **Exhibit B** hereto (SKI magazine ad with emphasis to show Defendant’s use).

42. Despite the prior discussions with Eddie Bauer in September and October 2010 about a potential partnership in which Plaintiff expressed the need to differentiate its brand from Eddie Bauer due to ongoing consumer confusion, Defendant made no mention of its decision to launch apparel under the virtually identical FIRST DESCENT brand.

43. On October 26, 2010, a member of the board of directors of First Descents contacted Defendant to express its concern about Defendant’s use of the FIRST DESCENT mark on its product lines, and reminded Defendant that Plaintiff had been using its FIRST DESCENTS® Mark with its camps and on its apparel since 2001.

44. The First Descents board member also advised Defendant that there had already been actual confusion about a relationship between Defendant and First Descents. The board member advised Defendant in that same email communication that it had been planning an expansion of its FIRST DESCENTS apparel sales to benefit First Descents and the young adult cancer community that its serves.

45. Indeed, press coverage of FIRST DESCENTS and its founder, pro kayaker Brad Ludden, at times appears in the very same page or paragraph as references to the pro athletes sponsored by Eddie Bauer under FIRST ASCENT, creating immediate consumer confusion as to an affiliation or sponsorship between First Descents and Eddie Bauer. See **Exhibit C** hereto (where First Descents and Eddie Bauer both appear on the website and schedule of events for Outside in Aspen, a joint project of Outside Magazine and Aspen Chamber Resort Association, noting both entities as sponsors and participants).

46. In June 2010 and 2011 at the Teva Mountain Games in Vail, Colorado, numerous attendees and participants made comments to First Descents' teams who were wearing "Team FIRST DESCENTS" tee shirts indicating their beliefs of a connection or affiliation between First Descent's team wearing the Team FIRST DESCENTS shirts and Eddie Bauer.

47. Actual confusion among consumers who believe that Eddie Bauer is a sponsor of or affiliated with First Descents has been on going. Despite First Descents' protestations to Defendants, Eddie Bauer has continued to free-ride on the goodwill that First Descents has built in its charitable activities and outdoor adventure community through its FIRST DESCENTS® camps. Indeed, consumers have contacted First Descents and asked why Eddie Bauer has put "your name" on "their apparel."

48. As another example of consumer confusion, on August 3, 2011, Brad Ludden and a First Descents board member had finished a training ride in Leadville, Colorado for the Leadville 100 bike race. Several fellow riders, one of whom was a cancer survivor familiar with the First Descents organization, were in the same parking lot with the team FIRST DESCENTS riders and noticed their FIRST DESCENTS bike jerseys. Another rider mistakenly associated the team FIRST DESCENTS riders as running those "climbing camps with the clothing company" rather than First Descents' outdoor adventure camps for young adult cancer survivors.

49. The parties advertise and promote their respective goods and services in the same publications, at the same venues, and at the same industry events. The parties' respective sponsored teams compete under the marks FIRST ASCENT and FIRST DESCENTS at the same outdoor events. For example, advertising contained in recent 2010 and 2011 issues of Outside Magazine, a leading national publication, demonstrates that both Eddie Bauer and First Descents both engage in advertising and promotion using the marks FIRST ASCENT, FIRST DESCENT

and FIRST DESCENTS and that they often appear on the very same page as sponsors of events. See **Exhibit D** hereto (OUTSIDE magazine June 2011 “Weekend-Warrior Alert” and December 2010 ads).

50. Defendant’s conduct as described herein, including its infringing use in interstate commerce and registration of the confusingly similar FIRST DESCENT and FIRST ASCENT marks (“Defendant’s Conduct”) is subsequent to First Descents’ use of its FIRST DESCENTS[®] Mark.

51. Defendant’s Conduct has caused consumer confusion and continues to cause consumer confusion, in violation of First Descents’ prior and valuable trademark rights.

52. Defendant’s Conduct has damaged First Descents by creating an erroneous impression of an affiliation or sponsorship between Eddie Bauer and First Descents, and has impaired its ability to attract actual corporate sponsors and partners that is necessary to raise funding for the outdoor adventure cancer camp experiences and increase the awareness of the FIRST DESCENTS[®] programs.

53. Defendant’s Conduct, despite First Descents’ objections, continues to damage First Descents by impairing its fund raising ability by creating the erroneous impression that the FIRST DESCENTS fund raising sport teams are sponsored by Eddie Bauer, and not independent teams that seek to raise funds for the camps from members of the public whose financial support of the cancer camp efforts is critical to its continued success. [FIRST DESCENTS team fund raising efforts are shown on its website at <http://teamfd.firstdescents.org/teamdirectory.aspx>].

54. Defendant’s Conduct, despite First Descents’ objections, continues to damage First Descents by creating the potential for reverse confusion in that consumers would believe that Eddie Bauer is the senior user of the FIRST DESCENTS[®] Mark and that First Descents is a junior user, an infringer, and a competing commercial entity rather than the long time founder

and operator of outdoor camps that provide young adult cancer survivors with challenging and therapeutic outdoor experiences.

55. Defendant's Conduct, despite First Descents' objections, continues to damage First Descents by impairing the ability of First Descents to raise funds for use in its charitable programs by sales of branded FIRST DESCENTS apparel.

COUNT I
(Infringement of Registered Trademark Under 15 U.S.C. § 1114(1))

56. First Descents hereby re-alleges and incorporates by this reference the preceding paragraphs as if fully set forth herein.

57. This is a claim for infringement of the federally registered FIRST DESCENTS[®] Mark, as depicted in the attached Exhibit A. Defendant's Conduct as alleged herein constitutes a willful and knowing attempt to trade on the goodwill which First Descents owns and has developed in the FIRST DESCENTS[®] Mark.

58. Defendant's Conduct is likely to cause confusion, or to cause mistake, or to deceive the purchasing public and others, leading them to mistakenly believe that Defendant's good and services are authorized by Plaintiff or that Plaintiff's goods and services are authorized by Eddie Bauer.

59. Defendant's Conduct is likely to cause confusion, or to cause mistake, or to deceive the purchasing public and others, leading them to mistakenly believe that Defendant's goods are those of First Descents, or vice versa, in violation of 15 U.S.C. § 1114(1).

60. Defendant's Conduct has caused and, unless restrained and enjoined by this Court, will continue to cause irreparable harm, damage, and injury to First Descents as described herein.

61. First Descents has no adequate remedy at law.

COUNT II
(Unfair Competition Under 15 U.S.C. § 1125 (a))

62. First Descents hereby re-alleges and incorporates by this reference the preceding paragraphs as if fully set forth herein.

63. Defendant's Conduct as alleged herein is likely to cause confusion, mistake, or deception as to origin, sponsorship, or approval of its goods sold and services provided under the infringing FIRST ASCENT and FIRST DESCENT marks, and create consumer confusion as to the source of such goods and services, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Defendant's Conduct constitutes a willful and knowing attempt to trade on the goodwill which First Descents has developed in its FIRST DESCENTS[®] Mark, and violates First Descents trademark rights in its FIRST DESCENTS mark.

64. As a result of Defendant's Conduct, Defendant has caused First Descents irreparable harm and injury and will continue to do so unless Defendant is restrained and enjoined by this Court from further violation of First Descents' rights.

65. First Descents has no adequate remedy at law.

COUNT III
(Trademark Infringement Under the Common Law)

66. First Descents hereby re-alleges and incorporates by this reference the preceding paragraphs as if fully set forth herein.

67. Defendant's Conduct as alleged herein is likely to cause confusion, or to cause mistake, or to deceive the purchasing public and others, whereby they would be led to mistakenly believe that Defendant is affiliated with, related to, sponsored by, or connected with First Descents, in violation of the common law of the state of Colorado

68. Defendant's Conduct is thereby likely to confuse and deceive members of the purchasing public as to the source of the First Descents' branded apparel as a result of Defendant's use of the infringing FIRST ASCENT and FIRST DESCENT marks with similar apparel.

69. Defendant's Conduct also constitutes intentional, willful, and reckless disregard of First Descents' rights by Defendant and an attempt to trade on the goodwill which First Descents has developed, all to the damage of First Descents.

70. As a result of Defendant's Conduct, Defendant has caused and, unless restrained and enjoined by this Court, will continue to cause irreparable harm, damage, and injury to First Descents.

71. First Descents has no adequate remedy at law.

COUNT IV
(Unfair Competition Under the Common Law)

72. First Descents hereby re-alleges and incorporates by this reference the preceding paragraphs as if fully set forth herein.

73. Defendant's Conduct as alleged herein constitutes misappropriation of valuable property rights of First Descents and trading on the goodwill symbolized by FIRST DESCENTS[®] Mark, and is thereby likely to confuse and deceive members of the purchasing public as to the source of the First Descents' goods and services as a result of Defendant's use of the infringing FIRST ASCENT and FIRST DESCENT marks. By virtue of Defendant's Conduct, Defendant has engaged in unfair competition in violation of the common law of the state of Colorado.

74. Defendant's Conduct also constitutes intentional, willful, and reckless disregard of First Descents' rights by Defendant and an attempt to trade on the goodwill which First Descents has developed, all to the damage of First Descents.

75. As a result of Defendant's Conduct, Defendant has caused and, unless restrained and enjoined by this Court, will continue to cause irreparable harm, damage, and injury to First Descents.

76. First Descents has no adequate remedy at law.

COUNT V

(Claim for Cancellation of U.S. Reg. Nos. 3,934,798 3,970,936 and 3,974,941)

77. First Descents hereby re-alleges and incorporates by this reference the preceding paragraphs as if fully set forth herein.

78. This is a claim for cancellation of U.S. Reg. Nos. 3,934,798 3,970,936 and 3,974,941.

79. First Descents owns U.S. Reg. No. 2,695,260 for the mark FIRST DESCENTS® and U.S. trademark application serial no. 77/576914 for the mark FIRST DESCENTS.

80. First Descents began using its mark FIRST DESCENTS with apparel as early as 2001.

81. Defendant Eddie Bauer Licensing Services, LLC is listed as the owner of U.S. Reg. Nos. 3,934,798 3,970,936 3,974,941 on the records of the USPTO.

82. Defendant's use of the FIRST ASCENT and FIRST DESCENT marks was at least seven years after First Descent's use of FIRST DESCENTS.

83. As alleged herein, Defendant's use of the FIRST ASCENT and FIRST DESCENT marks create consumer confusion and a false connection, association or affiliation with First Descents, in violation of 15 U.S.C. §§ 1114(1) and 1125(a).

84. As alleged herein, the FIRST DESCENT and FIRST ASCENT marks used by Defendant are confusingly similar to Plaintiff's FIRST DESCENTS Mark, and the continued registration of U.S. Reg. Nos. 3,934,798 3,970,936 and 3,974,941 is inconsistent with First Descents' federal and common law rights in its FIRST DESCENTS Mark, and is damaging to First Descents.

85. First Descents seeks cancellation of U.S. Reg. Nos. 3,934,798 3,970,936 and 3,974,941 under 15 U.S.C. § 1119.

Relief Sought

WHEREFORE, First Descents asks this Honorable Court to:

A. Grant permanent injunctive relief enjoining Eddie Bauer and any principals, agents, servants, employees, successors, and assigns of Defendant and all those in privity, concert, or participation with such Defendant from:

(i) imitating, copying, duplicating, or otherwise making any use of the FIRST DESCENTS mark or any mark confusingly similar to the FIRST DESCENTS mark;

(ii) manufacturing, producing, distributing, circulating, selling, or otherwise creating goods which bears any copy or colorable imitation of the FIRST DESCENTS mark;

(iii) using any unauthorized copy or colorable imitation of the FIRST DESCENTS mark in such fashion as is likely to relate or connect Eddie Bauer with First Descents;

(iv) using any false designation of origin or false description which can or is likely to lead the trade or public, or individual members thereof, to believe mistakenly that any

goods or service advertised, promoted, offered, or sold by Defendant is sponsored, endorsed, connected with, approved, or authorized by First Descents;

(v) causing likelihood of confusion or injury to First Descents' business reputation and to the distinctiveness of the FIRST DESCENTS mark by unauthorized use of a confusingly similar mark;

(vi) engaging in any other activity constituting unfair competition or infringement of the FIRST DESCENTS mark or First Descents' rights in, or to use, or to exploit the same;

(vii) assisting, aiding or abetting another person or business entity in engaging or performing any of the activities enumerated in subparagraphs (i) through (vi) above.

B. Find that Defendant has infringed Plaintiff's FIRST DESCENTS mark in violation of federal law and has damaged First Descents' goodwill by its conduct.

C. Find that Defendant has unfairly competed with First Descents by the acts complained of herein in violation of federal law.

D. Find that the acts of Defendant constitute trademark infringement in violation of the common law of the state of Colorado.

E. Find that the acts of Defendant constitute unfair competition in violation of the common law of the state of Colorado.

F. Find each Defendant jointly and severally liable, and award to First Descents monetary damages in an amount to be fixed by the Court in its discretion as just, including all of each Defendant's profits or gains of any kind resulting from its willful infringement and/or acts of unfair competition, said amount to be trebled, and exemplary damages in view of the intentional nature of the acts complained of herein, pursuant to 15 U.S.C. § 1117.

G. Order the cancellation of U.S. Reg. Nos. 3,934,798 3,970,936 and 3,974,941 pursuant to 15 U.S.C. § 1119.

H. Award Plaintiff its attorneys' fees and costs, and award such fees under 15 U.S.C. § 1117 due to the exceptional nature of this case.

I. Award to First Descents exemplary damages in view of the intentional, willful, wanton and reckless disregard of its rights by Defendant.

J. Grant to First Descents such other and further relief as the Court may deem just, proper, and equitable under the circumstances.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

Respectfully submitted this 10th day of August, 2011.

By: s/ Gayle L. Strong
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ATTORNEYS FOR PLAINTIFF

EXHIBIT A

Int. Cl.: 41

Prior U.S. Cls.: 100, 101 and 107

United States Patent and Trademark Office

Reg. No. 2,695,260

Registered Mar. 11, 2003

**SERVICE MARK
PRINCIPAL REGISTER**

First Descents

HEATH, JOEL W. (UNITED STATES INDIVIDUAL)
POST OFFICE BOX 1430
VAIL, CO 81658

FIRST USE 8-5-2001; IN COMMERCE 8-5-2001.

SER. NO. 76-379,426, FILED 3-6-2002.

FOR: SPORT CAMP, NAMELY, A MOTIVATIONAL KAYAK CAMP FOR PEOPLE WITH CANCER, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

GWEN STOKOLS, EXAMINING ATTORNEY



United States Patent and Trademark Office

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Trademark Assignment Abstract of Title

Total Assignments: 1**Serial #:** [76379426](#)**Filing Dt:** 03/06/2002**Reg #:** [2695260](#)**Reg. Dt:** 03/11/2003**Registrant:** Heath, Joel W.**Mark:** FIRST DESCENTS**Assignment: 1****Reel/Frame:** [3851/0321](#)**Received:** 09/11/2008**Recorded:** 09/11/2008**Pages:** 4**Conveyance:** ASSIGNS THE ENTIRE INTEREST**Assignor:** [HEATH, JOEL](#)**Exec Dt:** 09/04/2008**Entity Type:** INDIVIDUAL**Citizenship:** UNITED STATES**Entity Type:** CORPORATION**Citizenship:** COLORADO**Assignee:** [FIRST DESCENTS, INC.](#)POST OFFICE BOX 2193
VAIL, COLORADO 81658**Correspondent:** LEIGH AUGUSTINE
633 SEVENTEENTH STREET, STE 3000
DENVER, CO 80202

Search Results as of: 08/05/2011 04:12 PM

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EXHIBIT B

PHOTO: WILL WISSMANN

FIRSTASCENT
EDDIE BAUER

First Descent™

NOWHERE TO GO BUT DOWN.

FIRSTASCENT.com

WITH OUR FIRST ASCENT LINE OF GUIDE-BUILT MOUNTAIN SKIING GEAR, EDDIE BAUER RETURNED TO THE TOP OF THE WORLD. So the obvious next step was our new First Descent™ ski gear. Built by some of the best ski guides in the world—like Reggie Crist. For dropping lines down the highest peaks. Through the most technical terrain. Because no one knows better than guides that real gear is more than a fashion statement. It's life support. First Ascent. Guide Built. Guide Trusted.™

EDDIE BAUER STORES AND EDDIEBAUER.COM
COLLECTION NOW AVAILABLE AT MOOSEJAW.COM



REGGIE CRIST'S FIRST DESCENT IN SPITSBERGEN, NORWAY
SEE IT IN THE TRAILER FROM WARREN MILLER'S WINTERIZATION AT FIRSTASCENT.COM/REGGIE6

EDDIE BAUER **Moosejaw**

EXHIBIT C-1



- Home
- Schedule
- Activities »
- Aspen/Lodging
 - Register
 - Partners

Activities//Parties//Workshops//Base Camp

Learn a new sport or take your passion to a new level

We have enlisted Aspen's top outfitters and brought in elite athletes in every area to guide you to the top of your game. Activities include rafting, kayaking, stand-up paddling, road biking, mountain biking, trail running, and rock climbing.

»For details on all outfitter-led activities, click here.

Pro adventure athletes and personalities

Mountaineering with **Ryan Sutter**, Bachelorette celebrity, model, TV personality, and **First Descents athlete**.

Cycling with **Tyler Hamilton**, three-time world champion and Tour de France team member.

Hiking and Climbing with **Melissa Arnot**, first Western woman to summit Everest three times and **Jake Norton**, famed Everest Guide

Adventure Filmmaking with **Michael Brown** who has summited Everest five times and won three Emmys, including for *Farther Than The Eye Can See*, the story of blind climber Eric Weihenmayer's Everest climb. **Adventure Photography** with photographer, storyteller, and filmmaker **Pete McBride**. Pete shoots all over the world for Outside and National Geographic. For details and to register, [click here](#).

Stand-up river paddling with **Charlie MacArthur** who is a pioneer in the sport as well as an award-winning kayaker with numerous first descents to his credit.

Kayaking with pro kayaker **Brad Ludden**, founder of **First Descents**, a non-profit dedicated to helping cancer victims through outdoor activity, Mark "Snowy" Robertson, Dagger's head designer, and **Ben Stookesberry**, **First Ascent pro athlete**.

»For details on all outfitter-led activities, click here.

Aspen Triathlon, Saturday June 11.

For details [click here](#).

Adventure Base Camp is the heart of Outside In Aspen

Meet here to sign in, meet up with your outfitter, or just to hang out. You'll find great gear, exhibits, and demos from our exhibitors and partners; free adventure dog workshops and refreshments throughout the weekend. And meet here on Sunday at 3 for the Adventure Symposium, featuring top athletes in a candid conversation about the world of adventure sports. [Map of Adventure Base Camp](#).

Outside's Great Gear Experience. Check out all the top gear for 2011, selected and tested by Outside's editors and gear testers and featured in the spring 2011 Outside Buyers Guide. From bikes and tents and to bags and boats, this is your chance to preview Outside's Gear of the Year.

The Great Gear Giveaway. We'll be holding a drawing for all the Gear of the Year on display. Just make a suggested donation of \$10 or more to First Descents and your name will be entered into the drawing. The winners will be announced after the Adventure Symposium at 4pm on Sunday. You must be present to win, no

Quick Links

- Go With a Pro
- Ryan Sutter Bio
- Tyler Hamilton Bio
- Chris Davenport Bio
- Michael Brown Bio
- Peter McBride Bio
- Brad Ludden Bio
- Charlie MacArthur Bio
- Megan Lund Bio
- Aspen Triathlon
- Adventure Base Camp
- Great Gear Experience and Giveaway
- Kid's Camp
- Music Stage
- Exhibits and Demos
- Epic Parties
- Adventure Symposium
- Base Camp Map

- Outside In Aspen Site Map
- Register for Outside In Aspen

Adventure Symposium. FREE. Meet at Adventure Base Camp at 3 on Sunday for a lively and riveting discussion among elite athletes on the current state of adventure sports, moderated by Outside editors Elizabeth Hightower, Abe Streep, and Ryan Krogh.

Topic: The Outer Limits: the Risks and Rewards of Extreme Adventure. † Melissa Arnot, Michael Brown, Nick DeVore, Brad Ludden, and Ben Stooksberry (see athlete bios).

Doors open at 2:30. Seating is limited. Symposium starts promptly at 3.

Kid's Nature Corner. We will have great kids and family nature activities, provided by ACES (Aspen Center for Environmental Studies).

Music Stage. Free. Colorado favorite, "Salem," 2-5 pm on Saturday, June 11th. www.salem-music.com

Adventure Dog Demonstration. Led by trainer **Mike Stewart of Wild Rose Kennels.** Throughout the day, Saturday, June 11th.

Star Gazing. Free. Provided by **Celestron.** See **Schedule.**

Outward Bound Ute Trail Volunteer Restoration Project. Sunday, June 12th 10 am- 2 pm. Meet at the Outward Bound Tent in Basecamp at 9:30 am. Advance registration required at the Outward Bound booth at Basecamp. Parents must sign waiver for any participants under 18. www.outwardbound.org. Contact: Katic Loughran 415-994-2178.

Free yoga classes at 8 and 11 am with Aspen Yoga Society.

Birkenstock Recovery Lounge. Relax and soothe tired muscles at the Birkenstock Recovery Lounge, where Birkenstock will be showcasing the latest styles and offering personal footwear fittings, oxygen bar sessions, complimentary sports massage and energy boosting smoothies.

Epic Parties

Welcome Party presented by Eddie Bauer/First Ascent. **Friday 8-midnight:** Join elite athletes, Outside personalities and a top DJ at the upstairs deck at the Sky Hotel for music, drinks, and appetizers.

Après Pool Party presented by Birkenstock. **Saturday 5-8:** Soothe those tired muscles with a swim and a soak and a sip at the Apres Party, poolside at the Sky Hotel. Music, drinks, appetizers, elite athletes and Outside personalities.

Belly up After Party, 10-1: The Belly Up is the ultimate Aspen music venue. Grab a friend and join the fun. Additional cost. To purchase tickets, [click here.](#)

Parties, except Belly Up After Party, are free with registration for at least one activity. Check back often for updates.

- Home
- Schedule
- Activities »
- Aspen/Lodging
- Register
- Partners

Partners



Quick Links

- [Outside In Aspen Site Map](#)
- [Register for Outside In Aspen](#)

Outside
ADVENTURE
FILM SCHOOL



Blazing
ADVENTURES



aspen yoga society



EXHIBIT C-2

**OUTSIDE IN ASPEN
SCHEDULE OF EVENTS**

Friday, June 10, 2011

Welcome Party

8 pm

The Sky Hotel

709 East Durant Ave

Colorado non-profit, First Descents,

Join event hosts Outside Magazine and Aspen Chamber Resort Association at Aspen's legendary Sky Hotel for the "Outside in Aspen" kick off party starting at 8 pm. Enjoy complimentary cocktails and hors d'oeuvres, welcome gift bags, DJ entertainment, prize giveaways and more. Event participants who make a donation to Colorado non-profit, First Descents, <http://www.firstdescents.org/> will be entered into a prize drawing for great gear from Outside in Aspen sponsors.

Saturday, June 11, 2010

Adventure Base Camp

8 am – 5 pm

Aspen Mountain Gondola Plaza

685 East Durant Ave

Eddie Bauer First Ascent,

It's all happening at Base Camp, adventure headquarters for "Outside in Aspen". Meet your guides for outdoor adventures from 9 am – 2 pm in Rafting, Kayaking, Stand Up Paddling, Rock Climbing, Mountain Biking, Road Biking and Fly Fishing. Check out Outside Magazine's Gear of the Year along with all the latest from Eddie Bauer First Ascent, Celestron and other sponsors. Take out Eddie Bauer First Ascent gear for a test drive on your activities, star gaze with Celestron and mingle with pro adventure athletes, photographers and filmmakers. Check out the all-new Demo Village with interactive displays from outdoor product manufacturers. Also new this year is the "Kid's Camp", "Adventure Dog Clinics", Live Music Stage and locally grown Colorado Food Concessions.

Saturday, June 11, 2011

Après Pool Party

5 pm – 8 pm

The Sky Hotel

330 East Main Street

After a day of outdoor fun and adventure, head to the Sky Hotels happening pool scene for the Après Pool Party. Kick back and enjoy DJ music, specialty drinks and snacks, a dip in the pool or hot tub, or just chill on the lounge furniture and fire pit areas. More Sponsor gear will be given away in support of First Descents and plenty of swag will abound.

First Descents

Saturday, June 11, 2011

After Party and Concert

Doors open at 8:30 pm, Show starts at 9:30 pm

Belly Up Aspen

450 South Galena Street

Check back for more information!

Sunday, June 13, 2010

Adventure Base Camp

8 am – 4 pm

Aspen Mountain Gondola Plaza

685 East Durant Ave

Eddie Bauer First Ascent,

It's all happening at Base Camp, adventure headquarters for "Outside in Aspen". Meet your guides for outdoor adventures from 9 am – 2 pm in Rafting, Kayaking, Stand Up Paddling, Rock Climbing, Mountain Biking, Road Biking and Fly Fishing. Check out Outside Magazine's Gear of the Year along with all the latest from Eddie Bauer First Ascent, Celestron and other sponsors. Take out Eddie Bauer First Ascent gear for a test drive on your activities, star gaze with Celestron and mingle with pro adventure athletes, photographers and filmmakers. Check out the all-new Demo Village with interactive displays from outdoor product manufacturers. Also new this year is the "Kid's Camp", "Adventure Dog Clinics", Live Music Stage and locally grown Colorado Food Concessions.

Sunday, June 12, 2011

Adventure Panel Discussion – Base Camp

2 pm – 4 pm

Aspen Mountain Gondola Plaza

685 East Durant Ave

Outside in Aspen presents a panel of adventure athletes discussing inspirational topics from their adventures in Big Mountain and Rock Climbing, Kayaking, Mountain Biking, Adventure Filmmaking and Photography, and more. Outside Magazine editors will moderate the discussions and questions from the audience. Afterwards participants can enjoy autograph signings with the pro athletes and more Base Camp fun and giveaways.

Check back for topics and athlete bios soon!

EXHIBIT D

PROMOTION

WEEKEND-WARRIOR ALERT:

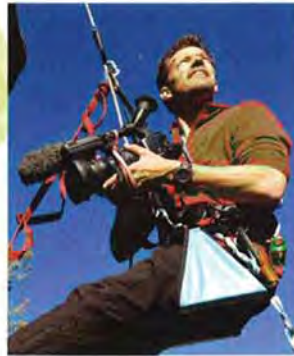
SPEND THE WEEKEND IN **ASPEN** WITH **OUTSIDE**

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JUNE 10-12, 2011



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BRAD LUDDEN



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EMMY AWARD-WINNER
MICHAEL BROWN



CLIMB A FOURTEENER WITH
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RYAN SUTTER



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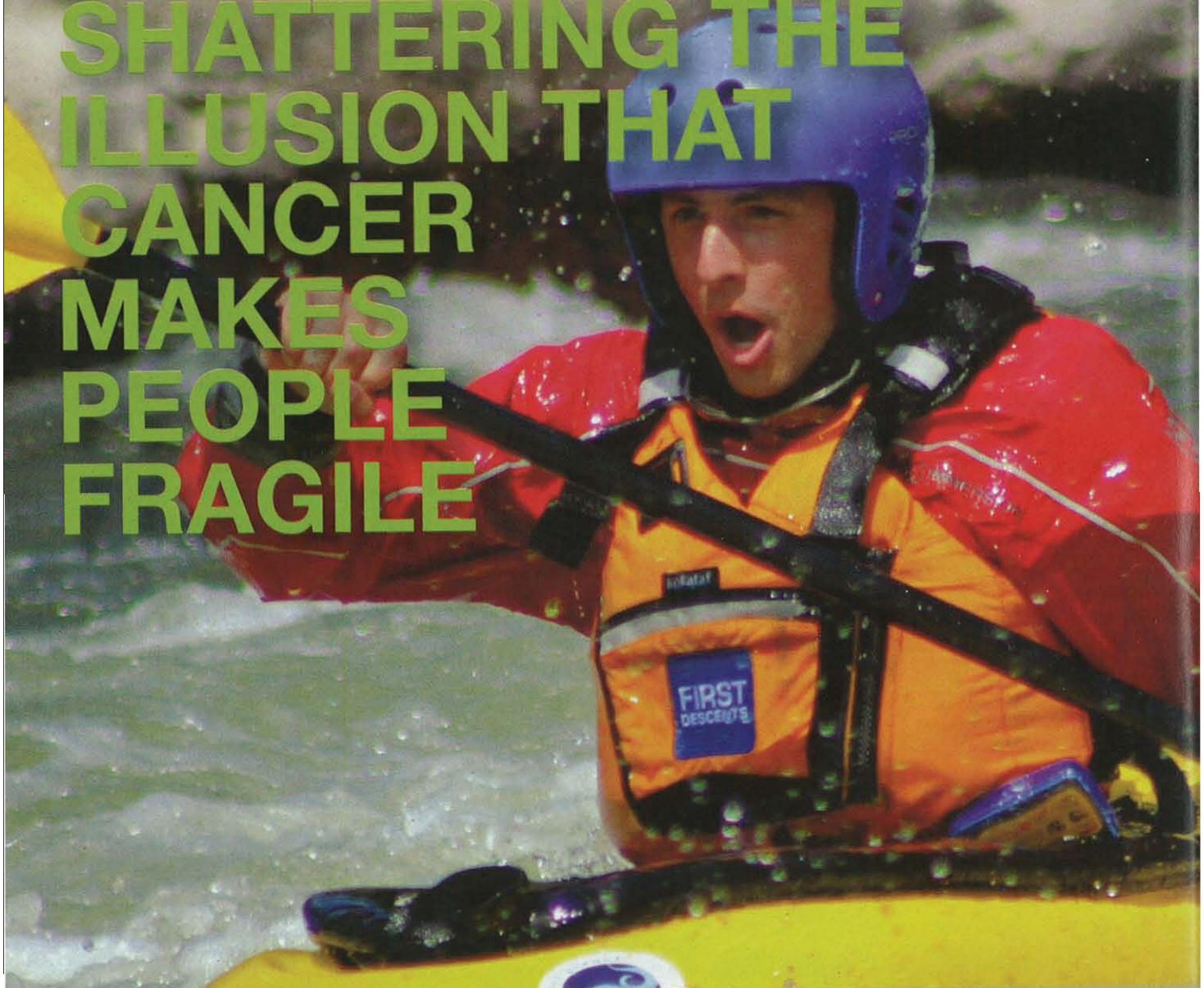


*INCLUDES TWO PARTIES AND AN INSPIRING ADVENTURE-ATHLETE SYMPOSIUM AND PANEL DISCUSSION. FLY-FISHING HAS A SURCHARGE; ASPEN ADVENTURE FILMMAKERS WORKSHOP RUNS JUNE 9-12 AND HAS ADDITIONAL COSTS. ADVENTUREFILMSCHOOL.COM/ASPEN_2011. MICHAEL BROWN PHOTO: PETER MCBRIDE.



FIRST DESCENTS

SHATTERING THE
ILLUSION THAT
CANCER
MAKES
PEOPLE
FRAGILE



Founded by professional kayaker, Brad Ludden, First Descents offers young adults with cancer a FREE week-long outdoor adventure as a form of therapy to heal the psychosocial scarring left behind after their diagnosis. In one week on the water or on the rock, participants transcend their diagnosis and reclaim their lives from cancer.

volunteer, donate, participate, attend: FirstDescents.org

PHOTO: WILL WISSMAN



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SUBSTITUTE FOR
EXPERIENCE IN THE
BIG MOUNTAINS."

Reggie Crist

— REGGIE CRIST

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