

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANAPOLIS BOULDERING, LLC,

Plaintiff,

v.

BP HOLDINGS COMPANY, LLC,
SEATTLE BOULDERING PROJECT, LLC,
MINNEAPOLIS BOULDERING PROJECT,
LLC, and AUSTIN BOULDERING
PROJECT, LLC,

Defendants.



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Case No. _____

**COMPLAINT FOR DECLARATORY JUDGMENT
OF NON-INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS**

Plaintiff, Indianapolis Boulderling, LLC, for its Complaint against BP Holdings Company, LLC, Seattle Boulderling Project, LLC, Minneapolis Boulderling Project, LLC, and Austin Boulderling Project, LLC (“Defendants”), states:

The Parties

1. Plaintiff is an Indiana limited liability corporation with its principal place of business at 1411 Roosevelt Avenue, Indianapolis, IN 46201. Its members are located in Indianapolis, Indiana, Alexandria, Indiana, and Seattle, Washington.

2. Defendants include:

A. BP Holdings Company, LLC, a Washington limited liability company, with its principal place of business at 4018 89th Avenue SE, Mercer Island, WA, 98040-4102. Upon information and belief, BP Holdings Company, LLC’s two members, Chris Potts and Andy Wyatt, are citizens of Washington.

B. Seattle Bouldering Project, LLC, a Washington limited liability company, with its principal place of business at 900 Poplar Pl. S., Ste. F, Seattle, WA, 98144-2855. Upon information and belief, Seattle Bouldering Project, LLC's two members, Chris Potts and Andy Wyatt, are citizens of Washington.

C. Minneapolis Bouldering Project, LLC, a Washington limited liability company with its principal place of business at 1401 West River Road North, Minneapolis, MN 5541. Upon information and belief, Minneapolis Bouldering Project, LLC's two members, Chris Potts and Andy Wyatt, are citizens of Washington.

D. Austin Bouldering Project, LLC, a limited liability company with its principal place of business at 979 Springdale Rd #150, Austin, TX 78702. Upon information and belief, Austin Bouldering Project, LLC's two members, Chris Potts and Andy Wyatt, are citizens of Washington.

3. All Defendants are engaged in the business of providing athletic climbing facilities to customers. Specifically, Defendants provide a venue for "bouldering," a type of climbing low enough to the ground to be done without the need for safety ropes. Plaintiff plans to provide bouldering facilities as part of its fitness facility.

Jurisdiction and Venue

4. This is an action for declaratory judgment arising under (i) the United States Copyright Act of 1976, 17 USC § 101 *et seq.* (the "Copyright Act"); (ii) the Trademark Laws of the United States, 15 USC § 1051 *et seq.* (the "Trademark Act"); (iii) 15 USC § 1125, *et seq.* (the "Lanham Act"); and 28 USC §§ 2201 and 2202 (the Declaratory Judgments Act). This Court has original jurisdiction over the subject matter of this action pursuant to 28 USC §§ 1331 and 1338.

5. Venue is proper in this Court under 28 USC § 1391(b)(2), as Defendants have alleged damages due to Plaintiff's actions in Indianapolis, Indiana, by emails, telephone calls, and letters to counsel for Plaintiff, asserting infringement and misappropriation. These contacts create an actual controversy between the parties and cause harm in this District by way of these threats of intellectual property infringement.

Factual Background

6. Plaintiff incorporates and re-alleges the matters of paragraphs 1-5, above.

7. Plaintiff is in the process of opening a 52,000 square foot fitness facility ("North Mass Boulder") at 1411 Roosevelt Ave, Indianapolis, Indiana 46201. Plaintiff anticipates opening in May 2021.

8. North Mass Boulder will offer a number of amenities to its members:

- a. Boulderling walls in a 1930s-era warehouse space, with weekly rotating "problems" for climbers on argil, Baltic birch walls;
- b. a yoga studio with daily classes;
- c. a group fitness class area;
- d. three climbing training walls with adjustable difficulty;
- e. shower and sauna facilities;
- f. two co-working spaces;
- g. a café area with health-oriented foods, espresso, and juice;
- h. a bar with fourteen, rotating taps;
- i. a 6,000 square foot, private, outdoor courtyard;
- j. a playground for children; and
- k. retail space for members to purchase athletic apparel and gear.

9. Plaintiff's fitness facility is the result of months of planning, collaboration (both with Indianapolis-area artists and vendors and industry-leading vendors), and work.

10. For a brief period of time in late 2020, one of Plaintiff's members used content from one of Defendant's websites (the "Website Content") as placeholder text during the website design process. This text was removed after two weeks of being publically available, and has been replaced by Plaintiff's current website: <https://www.northmassboulder.com/>.

11. Plaintiff's branding is organic in nature and uses images of rocks and natural surfaces to create an organic, outdoors aesthetic.

12. Plaintiff will operate a fitness facility in Indianapolis. As of this filing, all of its registered customers are Indiana residents, and none have yet paid membership dues (as the facility has not yet opened).

13. Defendants operate climbing gyms in Washington, Texas, and Minneapolis. Defendants' branding is colorful and geometric. Defendants' branding and facilities are distinct from Plaintiff's.

Defendants' Acts Comprising Actual Controversy

14. On December 23, 2020, and again on January 11, 2021, Defendants threatened litigation against Plaintiff, asserting that Plaintiff was "infringing and misappropriating Bouldering Projects' intellectual property." True and correct copies of these letters are attached hereto as Exhibits A and B.

15. On January 11, 2021, Plaintiff responded to Defendants' threat of litigation with correspondence that denied the validity of the claims, but confirmed that the Website Content had been removed and that it considered the matter resolved.

16. Apparently the matter was not resolved, at least for Defendants. Chris Potts, a member of Defendants, demanded a conversation with Plaintiff to continue the discussions regarding Plaintiff's potential liability. That conversation was held on January 28, 2021, during which Mr. Potts made it unambiguously clear that Defendants would sue Plaintiff.

17. During subsequent conversations between counsel for the parties, Defendants clearly and unambiguously articulated Defendants' intent to commence litigation to enforce their purported intellectual property rights.

18. In conversations with counsel for Defendants, Defendants assert a nebulous claim to Plaintiff's revenue because of Plaintiff's anticipated bouldering facilities. Upon information and belief, Defendants' alleged rights are asserted under trademark, copyright, trade dress, and/or trade secret theories.

19. Defendants, through their executives and attorneys, have made it clear that suit by them against Plaintiff is imminent.

20. Defendants have no registered copyrights in connection with the Website Content, and the Website Content was removed quickly and without issue. Defendants have no enforceable copyright claim against Plaintiff. An actual controversy exists between the parties as to whether Defendants own valid copyrights against Plaintiff, whether Plaintiff violated those copyrights and whether Defendants are entitled to damages.

21. Defendants allege trade dress rights in and to their gyms, although they have never been able to identify protectable trade dress elements despite multiple requests. Additionally, notwithstanding Defendants' claims, there are no confusing similarities between Defendants' gyms and the anticipated design of Plaintiff's facility. For example, the color schemes are different, the facility layout is different, and the boulders are different. Plaintiff

offers a wider range of fitness services than Defendants. Plaintiff uses more organic and naturalistic design and branding than Defendants. No one coming to Plaintiff's facility would ever be confused that Defendants' gyms are associated with Plaintiff. An actual controversy exists between the parties as to whether Defendants own a valid trade dress in their gyms, whether Plaintiff has infringed that trade dress, and whether Defendants are entitled to damages from that alleged infringement.

22. Defendants have alleged that Plaintiff "hacked" into their computer system to obtain "secret" bouldering designs. That is wholly unfounded. Plaintiff has not taken any "secret" materials or information from Defendants. An actual controversy exists between the parties as to whether Defendants own any protectable trade secrets that were accessed by Plaintiff, and whether Defendants are entitled to any damages arising from the use of those alleged trade secrets.

COUNT 1: Invalidity or Unenforceability of Intellectual Property Rights

23. Plaintiff incorporates the prior paragraphs as if fully stated here.

24. This is a declaratory judgment action under federal intellectual property law and 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act). An actual, justiciable controversy exists by way of the credible threat of immediate litigation and demands to cease and desist business operations.

25. Plaintiff requests an order declaring that the intellectual property interests asserted by Defendants are invalid and/or unenforceable, as the asserted interests lack the requisite legal requirements to be protectable interests.

COUNT 2: Non-Infringement of Intellectual Property Rights

26. Plaintiff incorporates the prior paragraphs as if fully stated here.

27. This is a declaratory judgment action under federal intellectual property law and 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act). An actual, justiciable controversy exists by way of the credible threat of immediate litigation and demands to cease and desist business operations.

28. Plaintiff is entitled to declaratory judgment that it is not infringing, has not infringed, and is not liable for infringing any allegedly enforceable intellectual property interest owned by Defendants—either directly, by inducing others to infringe, or by contributing to infringement by others.

COUNT 3: Non-Violation of Alleged Trade Secrets of Defendants

29. Plaintiff incorporates the prior paragraphs as if fully stated here.

30. This is a declaratory judgment action on federal and state trade secret law and 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act). An actual, justiciable controversy exists by way of the credible threat of immediate litigation and demands to cease and desist business operations.

31. Plaintiff is entitled to declaratory judgment that it is not infringing, has not infringed, and is not liable for infringing any allegedly enforceable intellectual property interest owned by Defendants—either directly, by inducing others to infringe, or by contributing to infringement by others.

WHEREFORE, Plaintiff seeks judgment awarding the following relief:

(a) A Judgment declaring that the intellectual property interest(s) asserted by Defendants regarding bouldering facilities lack the requisite legal requirements to be protectable against Plaintiff;

(b) A Judgment declaring that Plaintiff has not infringed any valid intellectual property right owned by Defendants;

(c) A Judgment declaring that Plaintiff has not unlawfully used any alleged trade secret owned by Defendants;

(c) A Judgment awarding Plaintiff's attorneys' fees, costs, and expenses incurred in connection with this action;

(d) A Judgment awarding such other and further relief as this Court deems just and proper.

Respectfully Submitted,

/s/ Jonathan G. Polak

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