

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION**

CASE NO:

ERNEST EVANS, an individual, THE
LAST TWIST INC., a Pennsylvania for
Profit Company and THE ERNEST EVANS
CORPORATION, a Pennsylvania for Profit
Company,

Plaintiffs,

vs.

ANDY & EVAN INDUSTRIES, INC., a
New York corporation; THE NEIMAN
MARCUS GROUP LLC, a Delaware
limited liability company; NEIMAN
MARCUS GROUP LTD LLC, a Delaware
limited liability company; and
NORDSTROM, INC., a Washington
corporation,

Defendants.

COMPLAINT

Plaintiffs, ERNEST EVANS, THE LAST TWIST INC., and THE ERNEST EVANS CORPORATION (hereinafter collectively "Plaintiffs"), bring this action by and through the undersigned attorneys against Defendants, ANDY & EVAN INDUSTRIES, INC., THE NEIMAN MARCUS GROUP LLC, NEIMAN MARCUS GROUP LTD, LLC and NORDSTROM, INC. (hereinafter collectively "Defendants"), for trademark dilution, trademark infringement, unfair competition, false endorsement and false designation of origin, under Trademark Act of 1946, as amended, 15 U.S.C. §1501, *et seq.*, trademark infringement and unfair competition under federal common law, and for violation of rights of publicity, identity

and personality and unauthorized use of name and likeness arising under the statutory laws and common laws of the State of Florida, and alternatively, under the statutory laws of the states of New York and Washington, and the common law of the State of Texas, and in support thereof allege that:

PARTIES

1. Plaintiff, ERNEST EVANS ("Mr. EVANS"), is a citizen of the Commonwealth of Pennsylvania. Mr. EVANS is more likely recognized by his stage name "Chubby Checker" and is internationally known as a popular music icon.

2. Plaintiff, THE LAST TWIST INC. ("LT"), is a corporation of the Commonwealth of Pennsylvania, with a principal place of business at 320 Fayette Street, Second Floor, Conshohocken, Pennsylvania 19428.

3. Plaintiff, THE ERNEST EVANS CORPORATION ("EEC"), is a corporation of the Commonwealth of Pennsylvania, with a principal place of business at 320 Fayette Street, Second Floor, Conshohocken, Pennsylvania 19428.

4. Upon information and belief, Defendant, ANDY & EVAN INDUSTRIES, INC. ("A&E"), is a corporation organized and existing under the laws of the State of New York with its principal place of business at 261 West 35th Street, Suite 702, New York, New York 10001.

5. Upon information and belief, Defendant, THE NEIMAN MARCUS GROUP, LLC ("NEIMAN LLC"), is a limited liability company organized under the laws of the State of Delaware with its principal place of business located at One Marcus Square, 1618 Main Street, Dallas, Texas 75201.

6. Upon information and belief, Defendant, NEIMAN MARCUS GROUP LTD LLC ("NEIMAN LTD"), is a limited liability company organized under the laws of Delaware

with its principal place of business located at One Marcus Square, 1618 Main Street, Dallas, Texas 75201.

7. Upon information and belief, Defendant, NORDSTROM, INC. ("NORDSTROM"), is a corporation organized and existing under the laws of the State of Washington, with its principal place of business located at 1617 6th Avenue, Seattle, Washington 98101.

8. Upon information and belief, A&E regularly engages in business throughout the entire United States and in this judicial district, and otherwise has sufficient presence in, and contacts with this judicial district. Said Defendant has engaged in some of the complained conduct in this judicial district, and other such conduct in its home state of New York.

9. Upon information and belief, Defendants, NEIMAN LLC and NEIMAN LTD regularly engage in business throughout the entire United States and in this judicial district, and otherwise have sufficient presence in, and contacts with this judicial district. Said Defendants have committed some of the complained conduct in this judicial district and own subsidiaries who are incorporated in Florida which have engaged in such conduct and which are located in this judicial district. Defendants NEIMAN LLC and NEIMAN LTD have also engaged in complained of conduct in their home state of Texas.

10. Upon information and belief, Defendant NORDSTROM regularly engages in business throughout the entire United States and in this judicial district, owns and/or controls retail stores in this judicial district, and otherwise has sufficient presence in, and contacts with this judicial district. Said Defendant has committed some of the complained conduct in this judicial district and other such conduct in its home state of Washington.

11. Defendants all own, operate, maintain or control interactive websites, accessible

from this judicial district, through which the complained of products have been advertised and sold.

JURISDICTION

12. This Court has subject matter jurisdiction over this action under 15 U.S.C. § 1121 and 28 U.S.C. § 1338 (a), because this case arises under the Trademark Act of 1946, as amended, 15 U.S.C. §§ 1051, *et seq.*

13. This Court also has subject matter jurisdiction over this action under 28 U.S.C. § 1332, as there is diversity of citizenship between Plaintiffs and Defendants. In addition, the amount in controversy, exclusive of interest and costs, exceeds the sum of seventy five thousand dollars (\$75,000.00).

14. This Court has subject matter jurisdiction over the federal and state common law claims, and the state statutory claims herein under 28 U.S.C. § 1338(b), because those claims are joined with a substantial and related claim under the Trademark Act of 1946, as amended, 15 U.S.C. §§ 1051, *et seq.*, over which this Court has original jurisdiction.

15. This Court has supplemental jurisdiction over all of the claims pled under state law herein under 28 U.S.C. § 1367, because those claims are joined with, and are so related to Plaintiffs' claims under the Trademark Act of 1946, as amended, 15 U.S.C. §§ 1051, *et seq.*, over which this Court has original jurisdiction, such that they form part of the same case or controversy under Article III of the United States Constitution.

16. This Court has *in personam* jurisdiction over the Defendants in this action because each Defendant maintains offices and/or retail establishments in this judicial district, or because the Defendants regularly engage in business in this judicial district, including, without limitation, sales on interactive websites viewable in this judicial district, and throughout the

entire United States.

17. Venue is proper in this district pursuant to 28 U.S.C. §1391(a), by consent, because Defendants maintain offices and/or retail establishments in this judicial district, and because the Defendants regularly engage in business in this judicial district, including, without limitation, on interactive websites viewable in this judicial district, and throughout the entire United States. Furthermore, some of the complained of acts occurred in this judicial district.

18. At all times material hereto, Defendants acted by and through their agents, employees, and servants.

BACKGROUND

a) General

19. Mr. EVANS is a legendary musical entertainer known by his stage name "Chubby Checker." Mr. EVANS first gained national prominence in 1960, when his recording of "The Twist" rose to #1 on the Billboard Magazine "Hot 100" singles chart, where it remained for eighteen (18) straight weeks. In the fall of 1961, Mr. EVANS's original recording of "The Twist" reentered the "Hot 100" chart and reclaimed the #1 position by January of 1962. No other record before or since has reclaimed the #1 position after spending a period of time off the charts. Combining its 1960 run with its 1961-62 return, "The Twist" spent nine (9) months total on the "Hot 100" singles charts. In 2008, Chubby Checker's recording of "The Twist" was selected by Billboard Magazine as the # 1 all-time song on its "Hot 100" chart on the occasion of the 50th anniversary of that chart.

20. Not only was "The Twist" the #1 record twice, but Mr. EVANS's performance of the song on "Dick Clark's American Bandstand" in 1960, and his continued performances of the song in other venues, including the "Ed Sullivan Show" in 1961, inspired an international dance

craze in the early 1960's. Fifty years later, Mr. EVANS's recording of "The Twist" and the associated dance remains a mainstay of dance parties hosted by DJs playing recorded music.

21. Mr. EVANS built upon his initial success with a string of hit recordings including "Let's Twist Again," for which Mr. EVANS won the first ever Grammy Award for "Best Rock Performance" in 1961, and "Pony Time," which hit #1 on the "Hot 100" chart in 1962. In the early 1960's, he was also featured in several movies, including "Twist Around The Clock" in 1961 and "Don't Knock The Twist" in 1962. More recently, he has performed "The Twist" in a 2010 episode of ABC's "Dancing on Ice," in the 2009 Rock and Roll Hall of Fame "Feelin' Alright" concert and video, in a 2007 episode of AMC's "Mad Men" and in the 2007 theatrical release "Spider-Man 3."

22. Plaintiff LT is owned by, and authorized by Mr. EVANS to use and commercially exploit his name and stage name, as well as his persona and identity, and to license and sublicense these rights, including, without limitation, in connection with food products, clothing and other merchandise.

23. Plaintiff EEC is also owned by, and authorized by Mr. EVANS to use and commercially exploit his name and stage name, as well as his persona and identity, and to license and sublicense these rights, including, without limitation, in connection with furnishing the entertainment services, musical performances and personal appearances of Mr. EVANS.

b) Trademark and Related Rights of Chubby Checker

24. On April 21, 1998, the United States Patent and Trademark Office ("USPTO") granted to Plaintiff, EEC, U.S. Trademark Registration No. 2,152,510 for the mark CHUBBY CHECKER for entertainment services, namely, the rendering of entertainment services by way of personal appearances and live musical performances by Ernest Evans in International Class

041. A copy of the Certificate of Registration for U.S. Trademark Registration No. 2,152,510 is attached as **EXHIBIT "A"**.

25. On April 12, 2005, the USPTO granted to Plaintiff, EEC, U.S. Trademark Registration No. 2,939,351 for the mark CHUBBY CHECKER for musical sound recordings; pre-recorded CDs featuring music in International Class 009; prints, namely photographs and posters; publications, namely, souvenir concert programs, books about music and the artist known as "Chubby Checker" in International Class 016; entertainment services, namely production of musical recordings, of musical performances, and of other presentations featuring musical performances rendered by a singer; entertainment services, namely providing information relating to musical performances, to Chubby Checker, and to his music via a global computer network; entertainment services, namely providing live musical performances, direction and production of personal musical performances of others; entertainment services, namely, touring productions featuring live musical performances by multiple artists in International Class 041. A copy of the Certificate of Registration for U.S. Trademark Registration No. 2,939,351 is attached as **EXHIBIT "B"**.

26. On May 16, 2006, the USPTO granted to Plaintiff, LT, U.S. Trademark Registration No. 3,093,625 for the mark CHUBBY CHECKER'S for jerky, hot dogs, steaks, lamb chops, pork chops, veal chops, hamburgers and chicken in International Class 029; popped or processed popcorn, candy and chocolate in International Class 030; and spring water in International class 032. A copy of the Certificate of Registration for U.S. Trademark Registration No. 3,093,625 is attached as **EXHIBIT "C"**.

27. On May 16, 2006, the USPTO granted to Plaintiff, LT, U.S. Trademark Registration No. 3,093,626 for the composite mark CHUBBY CHECKER'S (and design) for

jerky, hot dogs, steaks, lamb chops, pork chops, veal chops, hamburgers and chicken in International Class 029; popped or processed popcorn, candy and chocolate in International Class 030; and spring water in International Class 032. A copy of the Certificate of Registration for U.S. Trademark Registration No. 3,093,626 is attached as **EXHIBIT "D"**.

28. On October 21, 2008, the USPTO granted to Plaintiff, LT, U.S. Trademark Registration No. 3,520,994 for the composite mark CHUBBY CHECKER'S SNACKS KING OF THE TWIST FOOD PRODUCTS (and design) for jerky, hot dogs, steaks, lamb chops, pork chops, veal chops, hamburgers and chicken in International Class 029; popped or processed popcorn, candy and chocolate in International Class 030; and spring water in International Class 032. A copy of the Certificate of Registration for U.S. Trademark Registration No. 3,520,994 is attached as **EXHIBIT "E"**.

29. On October 21, 2008, the USPTO granted to Plaintiff, LT, U.S. Trademark Registration No. 3,520,993 for the composite mark CHUBBY CHECKER'S NEW YORK TWIST (and design) for hot dogs, steaks, lamb chops, pork chops, veal chops, and hamburger in International Class 029. A copy of the Certificate of Registration for U.S. Trademark Registration No. 3,520,993 is attached as **EXHIBIT "F"**.

30. On July 19, 2005, the USPTO granted to Plaintiff, LT, U.S. Trademark Registration No. 2,972,350 for the composite mark CHUBBY CHECKER'S GIRL OF THE WORLD (and design) for spring water in International Class 032. A copy of the Certificate of Registration for U.S. Trademark Registration No. 2,972,350 is attached as **EXHIBIT "G"**.

31. The CHUBBY CHECKER name and mark also has been used and/or licensed for use by one or more of the Plaintiffs as a trademark in connection with other food and clothing products for many years.

32. Mr. EVANS earns a living through endorsements, public appearances and performances under his stage name "Chubby Checker" and through use and licensing of the various CHUBBY CHECKER marks as do the other Plaintiffs.

c) A&E Chubby Checker Clothing

33. A&E is a web-based store which manufactures, distributes and sells infant, toddler and children's clothing.

34. Defendants began offering clothing bearing the name, persona and mark CHUBBY CHECKER manufactured by Defendant A&E ("A&E Chubby Checker Clothing"), online and in interstate commerce, on or after Plaintiffs' acquisition of the right to do so, with actual knowledge that none of the Plaintiffs consented to the use of name "Chubby Checker," his persona and/or the CHUBBY CHECKER mark.

35. Upon information and belief, Defendants had full knowledge of the icon-status of Mr. EVANS and Plaintiffs' famous CHUBBY CHECKER marks when they began approving, manufacturing, marketing, advertising, distributing, selling and making provisions for the advertising and sale of the A&E Chubby Checker Clothing.

36. At all times material hereto, Defendants maintained primary control of the use of the name and mark CHUBBY CHECKER in connection with the A&E Chubby Checker Clothing, as well as the revenues generated therefrom.

37. Neither Defendant was possessed of the right to use the name and mark CHUBBY CHECKER or Mr. EVANS persona in connection with any endorsement of a product or service. In addition to Plaintiffs' other rights, they are the sole possessors of the right to employ or license rights in the use of the name and mark CHUBBY CHECKER and of Mr. EVANS persona, in connection with any endorsement of products or services.

38. None of the Plaintiffs have ever conferred upon any of the Defendants permission to use the name or mark CHUBBY CHECKER, or of Mr. EVANS persona.

39. Purchasers of A&E Chubby Checker Clothing and other products or services manufactured, licensed, advertised, marketed, or sold by the Defendants, directly or indirectly, and non-purchasing browsers of the associated webpages are being misled into believing that Plaintiffs have endorsed Defendants' products.

40. Plaintiffs have received no compensation for the unauthorized use of the CHUBBY CHECKER name, persona and related marks, or the professional and personal reputation of Mr. EVANS in connection with the A&E Chubby Checker Clothing or Defendants' other products which it directly or indirectly manufactures, licenses, advertises, markets or sells.

41. In some instances, Defendant A&E labels and otherwise advertises A&E Chubby Checker Clothing with the CHUBBY CHECKER name, persona and mark. In other instances, Defendants NEIMAN, LLC, NEIMAN LTD and NORDSTROM'S make the conscious decision to label and otherwise advertise the A&E Chubby Checker Clothing with the name, persona and mark CHUBBY CHECKER, despite any such label or marketing placed on the products by Defendant A&E.

42. Each Defendant has either directly engaged in the complained of acts, contributed to same, induced same or acted with knowledge that one or more of the other Defendants or third parties would violate one or more of the Plaintiffs' rights.

43. As a direct and proximate result of the complained of acts, Plaintiffs have suffered great and irreparable harm, including economic damage, lost profits, dilution, tarnishment, disparagement, devaluation, emotional distress and harm including, without limitation, embarrassment, shame, depression, anxiety, anger, stress, worry and disappointment. That harm

escalates each day Defendants' acts are permitted to continue.

44. The balance of the equities and harm favor preliminary and permanent injunctive relief.

45. Plaintiffs have no adequate remedy at law to prevent the complained of acts from continuing.

46. The injunctive relief requested herein is in the public interest.

47. Defendants acts alleged herein were willful, malicious, knowing, wanton, reckless, and/or grossly negligent.

48. Plaintiffs have been forced to retain the undersigned law firms and other attorneys as a direct result of the complained of acts of Defendants, and are obligated to pay them a reasonable fee for their services in connection with this action and any related actions.

COUNT I
DILUTION OF FEDERALLY REGISTERED TRADEMARKS
15 U.S.C. §1125(c)
(All Defendants)

49. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1 through 48, as if fully set forth herein.

50. Plaintiffs used the CHUBBY CHECKER mark to identify their goods and services before Defendants began promoting and offering goods under, or otherwise using, the CHUBBY CHECKER mark. The CHUBBY CHECKER mark is inherently distinctive and has acquired distinction through Plaintiffs' extensive, continuous and exclusive use of the mark.

51. The CHUBBY CHECKER mark is famous and distinctive within the meaning of 15 U.S.C. §§ 1125(c)(1), and was famous before Defendants adopted it for the A&E Chubby Checker Clothing.

52. Defendants' use of the CHUBBY CHECKER mark are likely to dilute, disparage and tarnish the distinctive quality of Plaintiffs' CHUBBY CHECKER mark in violation of 15 U.S.C. §§ 1125(c)(1).

53. Defendants' acts complained of herein are likely to damage Plaintiffs irreparably.

54. Because of the willful nature of Defendants' actions, Plaintiffs are entitled to all remedies available under 15 U.S.C. §§ 1117 and 1118, including, but not limited to, treble damages.

COUNT II
INFRINGEMENT OF FEDERALLY REGISTERED TRADEMARKS
15 U.S.C. § 1114
(All Defendants)

55. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1 through 48, as if fully set forth herein.

56. Defendants directly, contribute to, and/or induce, and/or sell the A&E Chubby Checker Clothing with knowledge it will be used to engage in the unauthorized use of the name and mark CHUBBY CHECKER in connection with the A&E Chubby Checker Clothing which is likely to cause confusion, deception, or mistake as to the source of various goods and services and as to a connection, affiliation, relation, sponsorship or endorsement by one or more of the Plaintiffs, all of which to the damage of Plaintiffs.

57. Such acts directly and indirectly constitute, willful, malicious and intentional infringement of Plaintiffs' above-identified federally registered trademarks in violation of 15 U.S.C. § 1114(1), §32(1) of the Trademark Act of 1946, as amended.

58. Defendants' infringing acts, if allowed to continue, will cause serious damage to Plaintiffs' business, goodwill and profit and will permit Defendants to enjoy profits to which it

otherwise is not entitled.

COUNT III
**FEDERAL UNFAIR COMPETITION, FALSE ENDORSEMENT AND
FALSE DESIGNATION OF ORIGIN**
15 U.S.C. § 1125(a)
(All Defendants)

59. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1 through 48, as if fully set forth herein.

60. Plaintiffs' CHUBBY CHECKER marks have become uniquely associated with, and thus identify, only Plaintiffs. Defendants have knowingly caused the A&E Chubby Checker Clothing to enter into interstate commerce with the designation "Chubby Checker" connected therewith. This use of "Chubby Checker" by the Defendants is a false designation of origin which is likely to cause confusion, to cause mistake and to deceive as to the affiliation, connection or association of Defendants with Plaintiffs, and as to the origin, sponsorship or approval of such goods by Plaintiffs.

61. The aforesaid acts, are in violation of §43(a) of the Trademark Act of 1946, as amended, 15 U.S.C. § 1125(a), in that Defendants have used in connection with their goods and services a false designation of origin, a false or misleading description and representation of fact which is likely to cause confusion, and to cause mistake, and to deceive as to the affiliation, connection, or association of Defendants with Plaintiffs and as to the origin, sponsorship, and approval of Defendants' goods and commercial activities by Plaintiffs.

COUNT IV
UNFAIR COMPETITION
Federal Common Law
(All Defendants)

62. Plaintiff repeats and re-alleges each of the allegations contained in paragraphs 1

through 48, as if fully set forth herein.

63. By virtue of Defendants' acts, hereinabove pleaded, Defendants have engaged in unfair competition with Plaintiffs, in violation of the common law of Pennsylvania.

64. Defendants' offering of goods under the name "Chubby Checker" was calculated to deceive consumers and to cause consumers to believe that Defendants' goods are connected with, or sponsored by Plaintiffs.

65. Defendants' acts are being committed with the intent, purpose and effect of procuring an unfair competitive advantage by misappropriating the valuable goodwill developed by Plaintiffs at substantial effort and expense, and represented by the distinctiveness of Plaintiffs' name and marks employing CHUBBY CHECKER.

66. By copying the distinctiveness of Plaintiffs' CHUBBY CHECKER name and marks, the public and consumers will be deceived as to the source and sponsorship of Defendants' goods and Defendants will obtain business they could not otherwise obtain fairly on the open market.

67. Defendants' copying the distinctiveness of Plaintiffs' CHUBBY CHECKER name and the marks employing same will adversely affect Plaintiffs' ability to control their good and valuable reputation.

COUNT V
TRADEMARK INFRINGEMENT
Federal Common Law
(All Defendants)

68. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1 through 48, as if fully set forth herein.

69. Defendants' use of the name and mark "Chubby Checker" constitutes trademark

infringement of Plaintiffs' CHUBBY CHECKER marks and causes likelihood of confusion, deception and mistake, and causes the purchasing public and the trade to think that Defendants' goods are in some way sponsored, connected, owned or otherwise associated with Plaintiffs.

70. As a result of Defendants' use of the name and mark CHUBBY CHECKER Plaintiffs' reputation and goodwill have been and will be damaged, and Defendants have wrongfully profited from their imitation and infringement of Plaintiffs' CHUBBY CHECKER marks.

COUNT VI
UNAUTHORIZED USE OF NAME OR LIKENESS
§540.008., Fla. Stat.
(All Defendants)

71. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1 through 48, as if fully set forth herein.

72. The distinctive and famous name and stage name CHUBBY CHECKER and Mr. EVANS's persona and identity have significant commercial value, which has been developed by over fifty (50) years of continuous use and advertisement.

73. Defendants have unlawfully misappropriated and used the CHUBBY CHECKER name and stage name and Mr. EVANS's persona and identity, in the State of Florida, in connection with the above-identified A&E Chubby Checker Clothing being offered for sale and sold, in Florida, by Defendants without the consent of any of the Plaintiffs, for commercial and advertising purposes, in violation of section 540.008 of the Florida Statutes.

74. Additionally, Defendants had actual knowledge that they were using the CHUBBY CHECKER name and stage name, and the persona and identity of Mr. EVANS without any right, license or permission in connection with the A&E Chubby Checker Clothing

being offered for sale in stores and online. Accordingly, Defendants knowingly used and misappropriated the CHUBBY CHECKER name in disregard for the rights and interests of Plaintiffs in the CHUBBY CHECKER name.

75. Defendants knowing misappropriation of the CHUBBY CHECKER name demonstrates flagrant disregard for Plaintiffs interests therein and warrants the imposition of punitive damages against Defendants.

COUNT VII
VIOLATION OF RIGHT OF PUBLICITY
Florida Common Law
(All Defendants)

76. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1 through 48, as if fully set forth herein.

77. The distinctive and famous name and stage name CHUBBY CHECKER and Mr. EVANS's persona and identity have significant commercial value, which has been developed by over fifty (50) years of continuous use and advertisement.

78. Defendants have unlawfully exploited, misappropriated and used the CHUBBY CHECKER name, stage name and Mr. EVANS's persona and identity, in the State of Florida, for its value and for commercial purposes, in connection with the above-identified A&E Chubby Checker Clothing being offered for sale and sold, in Florida, by Defendants without the consent of any of the Plaintiffs.

79. Defendants' violations, misappropriation and use conferred an unfair benefit and advantage upon the Defendants.

80. Additionally, Defendants had actual knowledge that they were using the CHUBBY CHECKER name, stage name, and the persona and identity of Mr. Evan's without

any right, license or permission in connection with the A&E Chubby Checker Clothing being offered for sale in stores and online. Accordingly, Defendants knowingly used and misappropriated the CHUBBY CHECKER name, stage name, and Mr. EVAN's persona and identity in disregard for the rights and interests of Plaintiffs therein.

81. Defendants' knowing misappropriation of the CHUBBY CHECKER name and Mr. EVAN's name, stage name, persona and identity demonstrates flagrant disregard for Plaintiffs interests therein, or was deliberate and intentional, and warrants the imposition of punitive damages against Defendants.

(In the alternative to Counts VI and VII)
COUNT VIII
VIOLATION OF RIGHT OF PUBLICITY
New York Civil Rights Law § 51
(Defendant A&E Only)

82. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1 through 48, as if fully set forth herein.

83. The distinctive and famous name and stage name CHUBBY CHECKER and Mr. EVANS's persona and identity have significant commercial value, which has been developed by over fifty (50) years of continuous use and advertisement.

84. Defendant A&E has exploited, misappropriated and used the CHUBBY CHECKER name, stage name and Mr. EVANS's persona and identity, in the State of New York for advertising and commercial purposes and/or for the purpose of trade, without Plaintiffs' written consent.

85. Such activities by Defendant A&E are forbidden and/or unlawful pursuant to section 51 of the New York Civil Rights Law and violate Plaintiffs' rights of publicity.

86. Additionally, Defendant A&E had actual knowledge that it was using and

commercially exploiting the CHUBBY CHECKER name, stage name, and the persona and identity of Mr. Evan's without any right, license or permission in connection with the A&E Chubby Checker Clothing being offered for sale in stores and online. Accordingly, Defendant A&E knowingly used and misappropriated the CHUBBY CHECKER name, stage name, and Mr. EVAN's persona and identity in disregard for the rights and interests of Plaintiffs therein.

87. Defendant A&E's knowing misappropriation of the CHUBBY CHECKER name, and of Mr. EVAN's name, stage name, persona and identity demonstrates flagrant disregard for Plaintiffs interests therein, or was deliberate and intentional, and warrants the imposition of punitive damages against Defendant A&E.

(In the alternative to Counts VI and VII)

COUNT IX

**VIOLATION OF RIGHT OF PUBLICITY AND
MISAPPROPRIATION OF IDENTITY**

Texas Common Law

(Defendants NEIMAN LLC and NEIMAN LTD Only)

88. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1 through 48, as if fully set forth herein.

89. Defendants NEIMAN LLC and NEIMAN LTD appropriated the Plaintiffs' name, stage name, persona and identity for its value and for commercial purposes, rather than incidentally or for newsworthy purposes.

90. Plaintiffs, and specifically, Mr. EVANS can be readily identified from Defendants NEIMAN LLC and NEIMAN LTD's publication and use of his name, stage name, persona and identity.

91. Defendants NEIMAN LLC and NEIMAN LTD received an unfair advantage and benefit as a result of their appropriation of Plaintiffs' name, stage name, persona and identity that

they otherwise would not have received.

92. Defendants NEIMAN LLC and NEIMAN LTD's knowing misappropriation of the CHUBBY CHECKER name and Mr. EVAN's name, stage name, persona and identity demonstrates flagrant disregard for Plaintiffs interests therein, or was deliberate and intentional, and warrants the imposition of punitive damages against Defendants NEIMAN LLC and NEIMAN LTD.

(In the alternative to Counts VI and VII)

COUNT X

**VIOLATION AND INFRINGEMENT OF RIGHT OF PUBLICITY
Wash. Rev. Code Ann § 63.60.050, Washington Personality Rights Act ("WPRA")
(Defendant NORDSTROM Only)**

93. Plaintiffs repeat and re-allege each of the allegations contained in paragraphs 1 through 48, as if fully set forth herein.

94. The distinctive and famous name and stage name CHUBBY CHECKER and Mr. EVANS's persona and identity have significant commercial value, which has been developed by over fifty (50) years of continuous use and advertisement.

95. Defendant NORDSTROM has exploited, misappropriated and used the CHUBBY CHECKER name, stage name and Mr. EVANS's persona and identity, in the State of Washington for advertising and commercial purposes and/or for fundraising purposes, and has sold and/or offered the A&E Chubby Checker Clothing for sale, in the State of Washington, all without Plaintiffs' written consent. Such acts constitute a violation of section 63.60.050 of the State of Washington's Personality Rights Act, Wash. Rev. Code Ann.

96. Additionally, Defendant NORDSTROM had actual knowledge that it was using and commercially exploiting the CHUBBY CHECKER name, stage name, and the persona and identity of Mr. Evan's without any right, license or permission in connection with the A&E

Chubby Checker Clothing being offered for sale in stores and online. Accordingly, Defendant NORDSTROM knowingly used and misappropriated the CHUBBY CHECKER name, stage name, and Mr. EVAN's persona and identity in disregard for the rights and interests of Plaintiffs therein, and in violation of their rights of publicity.

WHEREFORE, Plaintiffs pray for relief against Defendants as follows:

1. An order immediately and preliminarily enjoining and restraining during the pendency of this action, and thereafter permanently enjoining and restraining Defendants, their agents, servants, employees, attorneys, parents and subsidiaries, related companies, and all persons acting for, with, by, through or under them, and each of them from:

a. Using the name and mark CHUBBY CHECKER or any name, term or mark similar thereto or any confusingly similar designation alone or in combination with other terms, as a trademark, slogan, tag line, trade name component or otherwise, as a domain name, sub-domain, directory name, email address or other such computer addresses, as the name of Defendants' websites, as part of a URL, metatag, hashtag, Ad Words, or, in any other way to market, advertise, sell, offer for sale or identify Defendants' goods, services or advertisements;

b. Otherwise infringing Plaintiffs' marks employing the name, terms or phrase CHUBBY CHECKER therein;

c. Unfairly competing with Plaintiffs in any manner whatsoever;

d. Causing a likelihood of confusion, or other injury to Plaintiffs' business reputation, or dilution of the distinctive quality, of Plaintiffs' family of trademarks by any unauthorized use, dilution, blurring, devaluing or tarnishment of the same; and

e. Using the name, likeness, persona or identity of Mr. EVANS or his professional and stage name "Chubby Checker" or any similar name which directly or indirectly refers, portrays,

characterizes, conjures up images of, associates with or relates to any of the Plaintiffs.

2. An order requiring Defendants to deliver and destroy all devices, websites, computer hardware and software, files, menus, hard drives, servers, diskettes and backups, literature, advertisements, packages, labels, signs, prints, wrappers, receptacles, and all other materials and products in the possession of Defendants or under control, bearing the name and/or mark CHUBBY CHECKER in or on them, and all plates, molds, matrices and other means of making the same.

3. An order requiring Defendants to notify, in writing, and direct to their internet service provider(s), web host(s) and all publishers of directories or lists, including Internet search engines, in which the Defendants' use of the names and marks employing CHUBBY CHECKER appear, to delete all references to said names and marks from their public databases, search engine directories, directory assistance and from all future directories in which said names and marks are to appear, and to delete all forwarding or "cache memory" or storage mechanisms referencing names and marks employing the mark and name CHUBBY CHECKER, or the persona of Mr. EVANS.

4. An order requiring Defendants to file with the Court, and serve upon Plaintiffs' counsel, within thirty (30) days after entry of judgment, a report, in writing, and under oath, setting forth, in detail, the manner and form in which Defendants have complied with the requirements of the injunction and order.

5. An order requiring Defendants to account for and pay over to Plaintiffs all damages sustained by Plaintiffs including damages related to Mr. EVANS' emotional distress, by reason of Defendants' unlawful acts alleged herein, plus pre-judgment and post-judgment interest thereon, and that such damages be trebled, as provided by law.

6. An order requiring Defendants to pay over to Plaintiffs all profits realized directly or indirectly by Defendants, directly or indirectly related to the A&E Chubby Checker Clothing, and to other products and services, the sales of which have been enhanced directly or indirectly from the A&E Chubby Checker Clothing, or advertising of same, or otherwise by reason of Defendants' unlawful acts alleged herein, and that such amounts be trebled pursuant to 15 U.S.C. § 1117(a)(3) or as otherwise provided by law.

7. An enhancement of any monetary award based on profits which this Court, in its discretion, finds just pursuant to 15 U.S.C. §§ 1117, 1118, or as otherwise provided by law.

8. Punitive and exemplary damages.

9. Plaintiffs have and recover their reasonable attorneys' fees incurred in this litigation.

10. Plaintiffs have and recover their taxable costs and other costs, expenses and disbursements incurred herein.

11. Prejudgment and post-judgment interest on all monetary awards.

12. Plaintiffs have such other and further relief as the Court may deem just and appropriate.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury for all issues so triable.

DATED: May 14, 2015

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