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9
10 IN THE UNITED STATES DISTRICT COURT FOR THE
11 DISTRICT OF ARIZONA

12 1. philosophy, inc.,

13 *Plaintiff,*

14 vs.

15 2. Cosmetic Dermatology, Inc.,

16 *Defendant.*

Civil Action No.

**COMPLAINT FOR UNFAIR
COMPETITION AND LANHAM
ACT VIOLATIONS**

17 Plaintiff, philosophy, inc., by and through its undersigned attorney, complains of
18 Defendant and alleges as follows:

PARTIES

- 19 1. Plaintiff philosophy, inc. ("Philosophy") is a corporation incorporated under the
20 laws of the state of Arizona and has its principal place of business at 3806 East
21 Watkins Street, Phoenix, Arizona 85034.
- 22 2. Defendant Cosmetic Dermatology, Inc. ("Cosmetic Dermatology") is a
23 corporation incorporated under the laws of the state of Florida and has its
24 principal place of business in Florida. Upon information and belief, Defendant's
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1 principal place of business is at 4425 Ponce de Leon Blvd., Suite 200, Coral
2 Gables, Florida 33146.

3 **JURISDICTION AND VENUE**

- 4 3. This is a civil action for unfair competition under the laws of the State of
5 Arizona. Plaintiff is a citizen of the State of Arizona, and Defendant is a citizen
6 of the State of Florida. The amount in controversy exceeds the sum or value of
7 \$75,000, exclusive of interest and costs.
- 8 4. This Court has subject matter jurisdiction of the state law claims of unfair
9 competition pursuant to 28 U.S.C. § 1332(a).
- 10 5. This civil action includes claims for trademark infringement and false
11 designation of origin, false descriptions, and unfair competition arising under the
12 U.S. Trademark Act of 1946, 15 U.S.C. §§ 1051-1127, and specifically for
13 violations of Section 43(a) of the Lanham Act, codified at 15 U.S.C. § 1125.
- 14 6. This court has subject matter jurisdiction of claims based upon alleged violations
15 of the Lanham Act pursuant to 15 U.S.C. § 1121(a) without regard to the amount
16 in controversy or to the diversity or lack of diversity of the citizenship of the
17 parties. This court also has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C.
18 §§ 1338(a) & 1338(b), and the principles of supplemental jurisdiction pursuant to
19 28 U.S.C. § 1367.
- 20 7. Venue in this district is proper pursuant to 28 U.S.C. § 1391 (b) & (c). A
21 substantial part of the events giving rise to the claim occurred in this judicial
22 district, and/or the Defendant resides or may be found in this judicial district
23 within the meaning of the venue statute.

24 **BACKGROUND**

- 25 8. Philosophy is a leading provider of high quality cosmetics and skin care
26 products. Philosophy started in Arizona from virtually nothing, and has grown

- 1 into a significant business in the State of Arizona.
- 2 9. Over the years, Philosophy has expended large sums of money advertising its
- 3 goods and services, and promoting its products and trademarks. Philosophy has
- 4 developed considerable goodwill in its business and in its trademarks.
- 5 Philosophy is recognized as a source of quality skin care products and cosmetics.
- 6 Philosophy has, by its use and promotion, developed a nationwide reputation.
- 7 10. Philosophy uses the Internet as an important marketing channel for its goods and
- 8 services.
- 9 11. Defendant's products are available in this district via the Internet and online via
- 10 its website at www.drbrandtskincare.com.
- 11 12. On information and belief, Defendant transacts business within this district,
- 12 derives substantial revenues from interstate and intrastate commerce, and has
- 13 committed tortuous acts within this district, and outside this district with the
- 14 intent of having consequences within this district and elsewhere and otherwise is
- 15 within the jurisdiction of this court.
- 16 13. Defendant has specifically directed its complained of activities at the State of
- 17 Arizona, and specifically at Philosophy. Defendant has done so with the intent
- 18 and/or knowledge that its intentional acts would cause injury or damage that
- 19 would be suffered and/or felt in the State of Arizona.
- 20 14. Defendant has placed infringing products into the stream of commerce, and
- 21 distributed its products through retail stores like Nordstrom, Sephora, QVC, and
- 22 Bloomingdales, with the knowledge and intent that such infringing products
- 23 would be sold in the State of Arizona, and would be likely to cause confusion, or
- 24 to cause mistake, or to deceive consumers in the State of Arizona.
- 25 15. Defendant has specifically directed its conduct and activities at Arizona, and at
- 26 consumers in Arizona.

- 1 16. Defendant was aware of and knew about Philosophy, and specifically directed its
2 intentional conduct at the State of Arizona knowing that injuries caused by its
3 unfair competition would be felt in the State of Arizona. Defendant knew or
4 should have known that it would cause injury to Philosophy and that injury
5 would be suffered by Philosophy in the State of Arizona as a result of its unfair
6 competition with Philosophy.
- 7 17. Philosophy is the owner of United States Trademark Registration No. 2,006,904
8 for the trademark HOPE IN A JAR for creams, lotions, moisturizers, cleansers,
9 washes, masks and toners.
- 10 18. Philosophy's HOPE IN A JAR products have been highly successful. The
11 product has been featured nationwide on Oprah's television show three times in
12 the last nine years. Philosophy has spent large sums advertising and promoting
13 its HOPE IN A JAR trademark.
- 14 19. Philosophy's HOPE IN A JAR mark has become famous in the marketplace for
15 creams, lotions, moisturizers, cleansers, washes, masks and toners.
- 16 20. Philosophy's use of trademarks having the "... IN A JAR" formative was unique
17 in the marketplace for cosmetics and skin care products.
- 18 21. Trademarks having the "... IN A JAR" formative have become associated with
19 Philosophy as the source of the identified goods and services.
- 20 22. Defendant had knowledge of Philosophy's unique and distinctive mark HOPE IN
21 A JAR, and sought to capitalize upon the goodwill associated with that mark by
22 adopting the confusingly similar trademark MICRODERMABRASION IN A
23 JAR for a skin care product marketed and sold by Defendant. Defendant's
24 adoption of the MICRODERMABRASION IN A JAR mark was intentional and
25 in bad faith.
- 26 23. Defendant's use of the mark MICRODERMABRASION IN A JAR for skin care

- 1 products sold in the same channels of trade as Philosophy's products is likely to
2 cause confusion, or to cause mistake, or to deceive as to the affiliation,
3 connection, or association of Defendant's business with Philosophy.
- 4 24. Defendant's use of the mark MICRODERMABRASION IN A JAR for skin care
5 products sold in the same channels of trade as Philosophy's products is likely to
6 cause confusion, or to cause mistake, or to deceive as to the origin, sponsorship,
7 or approval of Defendant's goods, services, or commercial activities by
8 Philosophy.
- 9 25. Defendant's use of marks having the "...IN A JAR" formative has caused and
10 will cause dilution of the distinctive quality of Philosophy's famous HOPE IN A
11 JAR mark.
- 12 26. Philosophy is the owner of United States Trademark Registration No. 2,112,760
13 for the trademark HOPE IN A BOTTLE for creams, lotions, moisturizers,
14 washes, scrubs, masks and toners.
- 15 27. Philosophy is the owner of United States Trademark Registration No. 2,272,559
16 for the trademark MESSAGE IN A BOTTLE for skin cleanser and moisturizers.
- 17 28. Philosophy's use of trademarks having the "... IN A BOTTLE" formative was
18 unique in the marketplace for cosmetics and skin care products.
- 19 29. Trademarks having the "... IN A BOTTLE" formative have become associated
20 with Philosophy as the source of the identified goods and services.
- 21 30. Defendant has admitted that its products are sold in the same channels of trade
22 and stores, including, but not limited to Sephora, Bloomingdales, Nordstrom, and
23 QVC.
- 24 31. Defendant had knowledge of Philosophy's unique and distinctive marks HOPE
25 IN A BOTTLE and MESSAGE IN A BOTTLE, and sought to capitalize upon
26 the goodwill associated with such marks by adopting the confusingly similar

- 1 trademark LASER IN A BOTTLE for at least two skin care products or skin
2 creams marketed and sold by Defendant. Defendant's adoption of the LASER IN
3 A BOTTLE mark was intentional and in bad faith.
- 4 32. Defendant's use of the mark LASER IN A BOTTLE for skin care products sold
5 in the same channels of trade as Philosophy's products is likely to cause
6 confusion, or to cause mistake, or to deceive as to the affiliation, connection, or
7 association of Defendant's business with Philosophy.
- 8 33. Defendant's use of the mark LASER IN A BOTTLE for skin care products sold
9 in the same channels of trade as Philosophy's products is likely to cause
10 confusion, or to cause mistake, or to deceive as to the origin, sponsorship, or
11 approval of Defendant's goods, services, or commercial activities by Philosophy.
- 12 34. Philosophy owned the trademark PHYSICAL THERAPY. After Philosophy had
13 adopted and used the mark, Defendant adopted an identical mark PHYSICAL
14 THERAPY for similar products sold by Defendant.
- 15 35. In the past, Defendant adopted the mark THE SPECIALISTS after one of
16 Philosophy's affiliates had acquired trademark rights in the mark THE
17 SPECIALISTS.
- 18 36. Philosophy uses a distinctive trade dress that includes all lower case letters and
19 slogans or poetic lines on the package, including the top of the box used for
20 packaging Philosophy's products. The use of such features has acquired
21 secondary meaning and has become associated with Philosophy as a quality
22 source of goods and services. Subsequent to Philosophy becoming famous for
23 the use of such trade dress features, Defendant adopted similar trade dress
24 features, including the use of all lower case letters and calling out slogans on the
25 top of the box used for packaging the Defendant's products.
- 26 37. Defendant's collective actions in adopting multiple marks that are close or

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confusingly similar to Philosophy's registered trademarks and common law trademarks, and the Defendant's adoption of similar trade dress features, has synergistically increased the likelihood of confusion over what it might otherwise be if Defendant's actions were viewed in isolation. By repeatedly knocking off Philosophy's valuable trademarks with similar marks for similar products, and by intentionally using the distinctive "... IN A JAR" and "... IN A BOTTLE" formatives for Defendant's own marks, and by changing its trade dress to use lower case lettering and slogans on the boxes, Defendant has increased the likelihood of confusion between Defendant's products and Philosophy's products.

- 38. Defendant has engaged in concerted actions designed to capitalize upon the goodwill in Philosophy's distinctive trademarks and to unfairly compete with Philosophy.
- 39. Defendant's actions described above have been committed intentionally and willfully with knowledge of Philosophy's prior rights.

COUNT I - UNFAIR COMPETITION

- 40. Philosophy incorporates by reference the allegations of paragraphs 1 through 39.
- 41. Defendant's intentional actions in adopting multiple marks that are close or confusingly similar to Philosophy's registered trademarks and adoption of trade dress using lower case letters and adding slogans to the packaging has synergistically increased the likelihood of confusion over what it might otherwise be if Defendant's acts were viewed in isolation. By repeatedly using the distinctive "... IN A JAR" and "... IN A BOTTLE" formatives for Defendant's own marks for similar products, Defendant has increased the likelihood of confusion between Defendant's similar products and Philosophy's products, and has diluted the distinctive quality of Philosophy's trademarks.
- 42. The concerted actions by Defendant to capitalize upon the goodwill in

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Philosophy's distinctive trademarks and trade dress constitutes unfair competition.

- 43. By reason of the acts of Defendant alleged herein, Philosophy has suffered, and will continue to suffer irreparable damage; and unless Defendant are restrained, the damage and irreparable harm to Philosophy will increase.
- 44. Philosophy has no adequate remedy at law.

COUNT II - FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION UNDER 15 U.S.C. § 1125(a)

- 45. Philosophy incorporates by reference the allegations of paragraphs 1 through 44.
- 46. Defendant's use of the distinctive "... IN A JAR" and "... IN A BOTTLE" formatives for Defendant's own marks for skin care products sold in the same channels of trade as Philosophy's products, is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Defendant's business with Philosophy, or as to the origin, sponsorship, or approval of Defendant's goods, services, or commercial activities by Philosophy, in violation of 15 U.S.C. § 1125(a).
- 47. Defendant's use of the mark LASER IN A BOTTLE for skin care products sold in the same channels of trade as Philosophy's products, is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Defendant's business with Philosophy, or as to the origin, sponsorship, or approval of Defendant's goods, services, or commercial activities by Philosophy, in violation of 15 U.S.C. § 1125(a).
- 48. Defendant's use of the mark MICRODERMABRASION IN A JAR for skin care products sold in the same channels of trade as Philosophy's products, is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Defendant's business with Philosophy, or as to the

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origin, sponsorship, or approval of Defendant's goods, services, or commercial activities by Philosophy, in violation of 15 U.S.C. § 1125(a).

49. The acts of Defendant described above were, and are deliberately calculated to confuse, and/or deceive the public, and said acts, constitute willful and deliberate violations of 15 U.S.C. § 1125(a).

50. By reason of the acts of Defendant alleged herein, Philosophy has suffered, and will continue to suffer irreparable damage; and unless Defendant are restrained, the damage and irreparable harm to Philosophy will increase.

51. Philosophy has no adequate remedy at law.

**COUNT III - TRADEMARK INFRINGEMENT
UNDER 15 U.S.C. § 1114 AND STATE LAW**

52. Plaintiff incorporates by reference the allegations of paragraphs 1 through 51.

53. Plaintiff's use of the "... IN A JAR" and "... IN A BOTTLE" formatives has become distinctive of Plaintiff as a source of quality goods and services, and has acquired secondary meaning.

54. Philosophy's registered trademark HOPE IN A BOTTLE, registered trademark MESSAGE IN A BOTTLE, and registered trademark HOPE IN A JAR have become distinctive of Plaintiff as a source of quality goods and services.

55. Defendant's use of the "... IN A JAR" and "... IN A BOTTLE" formatives, and Defendant's use of the marks MICRODERMABRASION IN A JAR and LASER IN A BOTTLE on similar products in competition with Plaintiff in the same channels of trade, is likely to cause confusion, or to cause mistake, or to deceive.

56. Defendant's actions constitute trademark infringement in violation of 28 U.S.C. § 1114.

57. Defendant's acts of trademark infringement were undertaken with knowledge of Plaintiff's mark, and have been willful and deliberate, and in bad faith.

- 1 58. Defendant's acts of trademark infringement have caused damage to Plaintiff.
2 59. Philosophy has suffered irreparable harm, and has no adequate remedy at law.

3 **COUNT IV - TRADEMARK DILUTION**
4 **UNDER 15 U.S.C. § 1125(c)**

- 5 60. Plaintiff incorporates by reference the allegations of paragraphs 1 through 59.
6 61. Philosophy's HOPE IN A JAR mark has become famous in the niche
7 marketplace for creams, lotions, moisturizers, cleansers, washes, masks and
8 toners.
9 62. Defendant's use of marks having the "...IN A JAR" formative has caused and
10 will cause dilution of the distinctive quality of Philosophy's famous HOPE IN A
11 JAR mark.
12 63. Defendant's use of MICRODERMABRASION IN A JAR has caused and will
13 cause dilution of the distinctive quality of Philosophy's famous HOPE IN A JAR
14 mark.

15 WHEREFORE, Plaintiff Philosophy hereby prays for:

- 16 I. Judgment that Defendant's conduct violates 15 U.S.C. §§ 1114 & 1125(a) & (c),
17 and that Defendant's actions have been willful and in bad faith.
18 II. A temporary and permanent injunction enjoining Defendant, its agents, servants,
19 employees, attorneys and those persons in active concert or participation with them from:
20 A. advertising, offering for sale, marketing, distributing, selling or promoting
21 any skincare related products or services using any false designation of
22 origin, false or misleading description of fact, or any false or misleading
23 representation of fact;
24 B. using in connection with any skincare related products or services, any
25 promotional materials, advertisements, fliers, brochures, proposals, labels,
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1 signs, contacts, invoices, or other materials printed, electronic or otherwise,
2 or Internet or on-line website, the trademarks LASER IN A BOTTLE and
3 MICRODERMABRASION IN A JAR; and

4 C. an order enjoining Defendant's acts of trademark infringement, and
5 prohibiting Defendant from using any mark that is confusingly similar to
6 Philosophy's HOPE IN A JAR, HOPE IN A BOTTLE, or MESSAGE IN A
7 BOTTLE trademarks.

8 III. A temporary and permanent injunction directing Defendant to recall all
9 advertising and Internet web pages bearing either of the trademarks LASER IN A
10 BOTTLE or MICRODERMABRASION IN A JAR, and to deliver up under oath for
11 destruction, all Internet web pages, promotional materials, advertisements, fliers,
12 brochures, labels, signs, contracts, proposals, invoices, T-shirts, or other materials in its
13 possession, custody or control which bear either of the trademarks LASER IN A BOTTLE
14 or MICRODERMABRASION IN A JAR, and to file with this court in writing, under
15 oath, setting-forth in detail the manner in which Defendant have complied with this
16 injunction.

17 IV. A temporary and permanent injunction directing Defendant to conduct remedial
18 advertising to dispel any confusion as to the affiliation, connection, or association of
19 Defendant's business with Philosophy, or as to the origin, sponsorship, or approval of
20 Defendant's goods, services, or commercial activities by Philosophy.

21 V. An award of Defendant's profits, and in addition an award of all damages suffered
22 by Philosophy.

23 VI. Trebling the amount awarded to Plaintiff in view of Defendant's knowing and
24 willful infringement and deliberate violations and bad faith in connection therewith.

25 VII. An award of punitive damages.

26 VIII. An award of all of Philosophy's attorneys' fees incurred in this action.

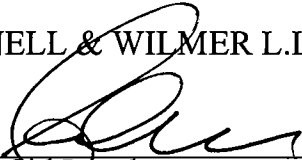
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IX. An award of costs to Philosophy.

X. That Philosophy have such other and further relief as the court may deem appropriate to ensure that Defendant's unlawful acts are unprofitable, and to prevent further violations of law and acts of unfair competition.

DATED this 10th day of January, 2006.

SNELL & WILMER L.L.P.

By 
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