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TM, 2938,416

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

12 philosophy, inc.,

13 *Plaintiff,*

Case No.

14 vs.

15 I Love Cosmetics, Limited,

16 *Defendant.*

COMPLAINT

17 Plaintiff philosophy, inc., by and through its undersigned attorneys, complains of
18 Defendant I Love Cosmetics, Limited, and alleges as follows:

19 **PARTIES**

20 1. Plaintiff philosophy, inc. ("philosophy") is a corporation incorporated under
21 the laws of the State of Arizona with its principal place of business at 3809 East Watkins
22 Street, Phoenix, Arizona 85034.

23 2. Defendant I Love Cosmetics, Limited is a limited liability company
24 organized under the laws of Great Britain with its principal place of business at 319
25 Orsdall Lane, Salford, Manchester M33FT, United Kingdom.

26 **JURISDICTION AND VENUE**

27 3. This civil action asserts a claim under Section 43(a) of the Lanham Act, 15
28 U.S.C. § 1125(a), for trade dress infringement, a claim under Section 32 of the Lanham
Act, 15 U.S.C. § 1114, for trademark infringement, and a state law claim for unfair
competition.

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1 4. This Court has subject matter jurisdiction of claims based upon violations of
2 the Lanham Act pursuant to 15 U.S.C. § 1121(a) without regard to the amount in
3 controversy or to diversity or lack of diversity of the citizenship of the parties. This Court
4 also has jurisdiction over the Lanham Act claims pursuant to 28 U.S.C. § 1331 and 28
5 U.S.C. § 1338(a). This Court has subject matter jurisdiction of the state law claim of
6 unfair competition pursuant to 28 U.S.C. § 1338(b), because the unfair competition claim
7 is joined with a substantial and related claim under the trademark laws. This Court also
8 has subject matter jurisdiction of the state law claim of unfair competition under the
9 principals of supplemental jurisdiction provided in 28 U.S.C. § 1367. In addition,
10 philosophy is a citizen of the State of Arizona, and Defendant is a citizen or subject of a
11 foreign state, and the amount in controversy exceeds the sum or value of Seventy-Five
12 Thousand Dollars (\$75,000), exclusive of interest and costs. Consequently, this Court
13 further has subject matter jurisdiction of the state law claim of unfair competition pursuant
14 to 28 U.S.C. § 1332(a)(2).

15 5. Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(d).

16 **GOODWILL ASSOCIATED WITH PLAINTIFF'S BUSINESS**

17 6. philosophy was established in about 1996. philosophy is headquartered in
18 Phoenix, Arizona, and employs more than three hundred individuals in the State of
19 Arizona. philosophy products are manufactured in Arizona at the company's facilities.

20 7. philosophy is a leading provider of bath and body products, as well as high
21 quality fragrance, skin care and cosmetic products. The company's success has been
22 attributable, in part, to the development of innovative products and the unique and original
23 trade dress associated therewith.

24 8. philosophy offers a full line of premium personal care products focused on
25 skin care, fragrance, bath and body care, and color cosmetics. philosophy's high quality
26 products, together with philosophy's substantial investment in advertising and marketing
27 its unique brand, have built considerable goodwill associated with philosophy and its
28 products.

1 9. The goodwill associated with philosophy and its trend-setting products has
2 been further enhanced as a result of philosophy's charitable endeavors. philosophy has
3 donated significant funds that support educational programs, medical research and other
4 charitable foundations and programs.

5 10. philosophy has invested tens of millions of dollars in advertising and
6 marketing to differentiate philosophy's products from those of its competitors. In doing
7 so, philosophy has focused upon an innovative and unique marketing and branding
8 strategy. Instead of following traditional approaches used by its competitors, philosophy
9 developed an overall branding strategy that focused upon simplicity, purity, and
10 innocence. In furtherance of this overall branding strategy, philosophy adopted a unique
11 combination of elements for philosophy's trade dress in order to create an overall
12 impression of simplicity and purity. philosophy's trade dress associated with the products
13 at issue in this lawsuit is depicted in Exhibit A and is defined more specifically below.

14 11. Not surprisingly, as philosophy's success has grown, its unique branding,
15 marketing, and distinctive trade dress have attracted attention from copyists who have
16 mimicked philosophy's trade dress in an effort to trade off of philosophy's goodwill.

17 **DEFENDANT'S CONTACTS WITH THE FORUM**

18 12. Defendant is in the business of manufacturing, promoting and selling bath
19 and body products, such as shampoo, bubble bath, and shower gels, in direct competition
20 with philosophy. Defendant's acts alleged herein were purposefully directed at Arizona.

21 13. Defendant is a limited liability company organized under the laws of the
22 United Kingdom. Defendant's headquarters are located in the United Kingdom.

23 14. philosophy's products using philosophy's distinctive trade dress were widely
24 sold in the United States and the United Kingdom prior to Defendant's adoption of its
25 trade dress at issue in this case.

26 15. Defendant was aware of philosophy's trade dress, including the trade dress
27 defined more particularly below, before Defendant adopted and used its trade dress at
28 issue in this case.

1 16. Defendant used philosophy's trade dress in connection with the design and
2 development of Defendant's trade dress at issue in this case.

3 17. Prior to the time that Defendant began selling its products in the United
4 States, Defendant was aware that philosophy's trade dress for philosophy's "vanilla
5 birthday cake" product depicted in Exhibit A had been approved for registration in the
6 United Kingdom.

7 18. Specifically, in the United Kingdom, on November 18, 2009, philosophy
8 filed trademark application No. 2,534,064 for a UK registration of the three-dimensional
9 bottle shape of philosophy's "vanilla birthday cake" product. philosophy's "vanilla
10 birthday cake" product is one of the philosophy products depicted in Exhibit A comparing
11 Defendant's trade dress with philosophy's trade dress. philosophy's UK trademark
12 application included the three-dimensional bottle shape in combination with a recipe
13 printed on the bottle with typographical layout using a distinctive type face and style, and
14 which includes the product name "vanilla birthday cake," and the color applied to the
15 goods is visible through the transparent body of the bottle. philosophy's application was
16 approved by the UK Intellectual Property Office, and was subsequently published in the
17 UK Trade Marks Journal.

18 19. On August 9, 2010, Defendant filed a notice of opposition to philosophy's
19 UK trademark registration for the three-dimensional bottle shape of philosophy's "vanilla
20 birthday cake" product depicted in UK trademark application No. 2,534,064. Defendant
21 subsequently withdrew its opposition to philosophy's UK trademark registration. Thus, at
22 least as early as August 9, 2010, Defendant was aware of philosophy's trade dress for
23 philosophy's "vanilla birthday cake" product depicted in Exhibit A.

24 20. In addition, on November 18, 2009, philosophy filed UK trademark
25 application No. 2534067 for a UK registration of the three-dimensional bottle shape of
26 philosophy's "raspberry sorbet" product, which is one of the philosophy products depicted
27 in Exhibit A. philosophy's application was approved by the UK Intellectual Property
28 Office, and was published in the UK Trade Marks Journal.

1 21. On August 9, 2010, Defendant filed a notice of opposition to philosophy's
2 UK trademark registration for the three-dimensional bottle shape of philosophy's
3 "raspberry sorbet" product depicted in UK trademark application No. 2,534,067.
4 Defendant subsequently withdrew its opposition to philosophy's UK trademark
5 application No. 2,534,067. Thus, at least as early as August 9, 2010, Defendant was
6 aware of philosophy's trade dress for philosophy's "raspberry sorbet" product depicted in
7 Exhibit A.

8 22. Defendant was aware of philosophy, and knew that philosophy was
9 headquartered in Arizona at the time that Defendant adopted its trade dress at issue in this
10 case, which is depicted in Exhibit A.

11 23. Defendant was aware of philosophy, and knew that philosophy was
12 headquartered in Arizona at the time that Defendant began selling its products in the
13 United States.

14 24. Defendant's adoption of its trade dress at issue in this case is an intentional
15 act.

16 25. Defendant's intentional adoption of the trade dress at issue in this case was
17 expressly aimed at philosophy. Defendant adopted its trade dress shown in Exhibit A to
18 compete with philosophy.

19 26. Defendant's use of a virtually identical trade dress has caused harm to
20 philosophy in Arizona and Defendant knew such harm was likely to be suffered in the
21 forum state.

22 27. Defendant has purposely directed its actions toward Arizona, and knew that
23 the effects of such purposeful actions would be felt in Arizona where philosophy is
24 located.

25 28. philosophy's products using philosophy's "strawberry milkshake" trademark
26 were sold in the United Kingdom prior to Defendant's adoption of its "strawberries &
27 milkshake" trademark.

28

1 29. Defendant was aware of philosophy's "strawberry milkshake" trademark
2 before Defendant adopted and used its "strawberries & milkshake" trademark.

3 30. Defendant was aware of philosophy and knew that philosophy was
4 headquartered in Arizona at the time that Defendant adopted its "strawberries &
5 milkshake" trademark.

6 31. Defendant's adoption of the "strawberries & milkshake" trademark is an
7 intentional act.

8 32. Defendant intentionally adopted the "strawberries & milkshake" trademark
9 for a product that Defendant knew would be sold in competition with products bearing
10 philosophy's "strawberry milkshake" trademark.

11 33. Defendant's intentional adoption of the "strawberries & milkshake"
12 trademark was expressly aimed at philosophy. Defendant knew that its products would be
13 sold in direct competition with philosophy.

14 34. Defendant's adoption of a confusingly similar trademark has caused harm to
15 philosophy in Arizona that the Defendant knew was likely to be suffered in the forum
16 state.

17 35. Defendant has purposely availed itself of the privilege of conducting sales of
18 its products at issue in this case in the State of Arizona and elsewhere in the United States.
19 In doing so, Defendant has invoked the benefits and protections of the laws of the State of
20 Arizona and of the United States. Defendant has invoked the benefits and protections of
21 the uniform commercial code enacted in the State of Arizona, and the benefits and
22 protections of Arizona's laws governing contracts. Defendant has invoked the benefits
23 and protections of the laws in the United States and the State of Arizona governing credit
24 card transactions and banking regulations.

25 36. Defendant's infringing products are sold in the United States in Walmart
26 stores and in DUANEreade drugstores. Upon information and belief, Defendant has
27 entered into agreements with Walmart to use Walmart as a distribution outlet for
28 Defendant's infringing products, and to serve the Arizona market indirectly through

1 Defendant's distributor Walmart. The products from which philosophy's claims arise
2 have been sold in the State of Arizona. Defendant has purposely shipped its products into
3 Arizona through an established distribution channel so that the products have been found
4 and have been available for sale in Arizona.

5 37. Defendant's infringing products are distributed through Walmart, who is one
6 of the nation's largest retailers. Defendant's products at issue in this case have been sold
7 in Arizona at Walmart's stores. Walmart has more than twenty stores in the Phoenix
8 metropolitan area selling Defendant's infringing products. Additional Walmart stores
9 selling Defendant's infringing products are located throughout Arizona. Defendant knew
10 or reasonably could have foreseen, when Defendant purposely contracted with Walmart to
11 distribute the infringing products, that a termination point of Defendant's distribution
12 channel was Arizona.

13 38. In addition, Defendant has benefited economically from the ultimate retail
14 sale of its products in Arizona, and has indirectly benefited from Arizona's laws over
15 commerce. Defendant could reasonably anticipate being haled into court in Arizona to
16 answer for its imitation of philosophy's trade dress and its use of the "strawberries &
17 milkshake" trademark.

18 39. The sale of Defendant's products at issue in this case in Arizona have not
19 been an isolated occurrence, but instead arise from the efforts of Defendant to serve,
20 directly or indirectly, the market for its products in Arizona. Defendant has introduced its
21 products into the stream of commerce with the expectation that the products would be
22 purchased by consumers in Arizona via the regular and established distribution network
23 provided to Defendant by Walmart. The regular and anticipated flow of Defendant's
24 products from manufacture to distribution to retail sale resulted in the sale of Defendant's
25 products in Arizona, including at retail stores in Arizona operated by Defendant's
26 distributor Walmart.

**COUNT ONE – FALSE DESIGNATION OF ORIGIN
AND UNFAIR COMPETITION UNDER 15 U.S.C. § 1125(a)
(Trade Dress Infringement)**

1
2
3 40. philosophy incorporates by reference the allegations contained in Paragraphs
4 1 through 39 above.

5 41. At least as early as 1996, philosophy adopted an overall trade dress for its
6 products that uses a minimalistic approach to evoke an overall visual impression and
7 theme of simplicity and pureness. philosophy's "real purity" product, which is not at
8 issue in this case, used a trade dress at least as early as 1996 that is very similar to the
9 trade dress for philosophy's bath and body care products at issue in this case, and that
10 trade dress has been in continuous use by philosophy since then. The trade dress used for
11 philosophy's "real purity" product, the name of which was later changed to "purity made
12 simple," included all lowercase lettering on the primary display panel, a distinct and easily
13 recognizable font, a prominent product name with the placement and arrangement of a
14 smaller block of text centered below the product name, a bottle size and design featuring a
15 cylindrical shape with a rounded shoulder, a transparent plastic container allowing the
16 color of the product to be visible through the container, and a black cap. This trade dress
17 was exclusively used by philosophy prior to the time that imitators and copycats such as
18 Defendant began to adopt and use confusingly similar trade dress for their products.

19 42. philosophy purposefully created its unique trade dress for its products and
20 packaging to be easily distinguished from its competitors. philosophy's distinctive trade
21 dress allowed its products to be readily recognized as coming from the same source, and
22 as a result, new product introductions achieved consumer acceptance and success more
23 quickly. The substantial investment that philosophy has made in promoting and
24 advertising its distinctive trade dress has resulted in a reputation-related advantage based
25 upon the association of the trade dress with philosophy as the source of the goods.

26 43. The Trade Dress adopted by philosophy for its bath and body products is
27 shown in Exhibit A, which compares the overall appearance of Defendant's product
28

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1 packaging to the Trade Dress for philosophy's bath and body products at issue in this
2 case.

3 44. The possible varieties of advertising display, packaging, and labeling of bath
4 and beauty products, such as those at issue in this case, are virtually endless. The choices
5 that both philosophy and Defendant had for packaging and labeling their respective
6 products were almost unlimited. Prior to Defendant's use of its trade dress shown in
7 Exhibit A, philosophy adopted an arbitrary combination of elements for the Trade Dress
8 used on philosophy's bath and body products that is unique and distinctive. The Trade
9 Dress used on philosophy's bath and body products is defined more particularly below.
10 To date, philosophy has sold bath and body products in the United States, using
11 philosophy's Trade Dress at issue in this case, securing sales well in excess of
12 \$200,000,000.

13 45. The overall combination adopted for philosophy's Trade Dress used on its
14 bath and body products is unique and differentiates philosophy's products from those of
15 its competitors.

16 46. The unique combination of features and elements that form the Trade Dress
17 used on philosophy's bath and body products identifies philosophy as the particular source
18 of its bath and body products.

19 47. The overall Trade Dress adopted by philosophy for philosophy's bath and
20 body products is nonfunctional.

21 48. The overall Trade Dress adopted by philosophy for philosophy's bath and
22 body products has been extensively advertised and promoted, and has been the subject of
23 unsolicited media coverage.

24 49. philosophy's unique combination of elements forming the Trade Dress used
25 on philosophy's bath and body products has acquired secondary meaning.

26 50. philosophy claims a protectable Trade Dress in a combination of discrete
27 elements that make up the total image of its bath and body products, and the overall visual
28 impression created by that combination of elements; in other words, the *tout ensemble* of

1 the goods as they appear to the average buyer. The elements of the Trade Dress for
2 philosophy bath and body products at issue in this case is shown in Exhibit A, and
3 includes the combination of (i) all lowercase lettering on the primary display panel of each
4 product, (ii) a distinct and easily recognizable font, (iii) a prominent product name
5 featuring a unique and arbitrary food or flavor for a shampoo, shower gel & bubble bath
6 product that is not intended to be tasted or eaten, (iv) the placement and arrangement of a
7 smaller block of text centered below the product name, (v) a bottle size and design
8 featuring a cylindrical shape with a rounded shoulder, (vi) a transparent plastic container
9 allowing the color of the product to be visible through the container, (vii) a black cap,
10 together with a package shape, size, texture, and color scheme that, in combination,
11 evokes an overall impression and theme of simplicity and purity.

12 51. Defendant intentionally adopted a confusingly similar trade dress for
13 Defendant's products that blatantly rips off philosophy's Trade Dress for its bath and
14 body products. As shown in Exhibit A, Defendant adopted a confusingly similar trade
15 dress using multiple elements of philosophy's Trade Dress, including (i) all lowercase
16 lettering on the primary display panel of Defendant's products, (ii) the same distinct font,
17 (iii) a similar prominent product name featuring a unique and arbitrary food or flavor for
18 the same bath and body products that are not intended to be tasted or eaten, (iv) the
19 placement and arrangement of a similar smaller block of text centered below the product
20 name, (v) the same bottle size and design featuring a cylindrical shape with a rounded
21 shoulder, (vi) a similar transparent plastic container allowing the color of the product to be
22 visible through the container, (vii) the same black cap, together with a similar package
23 shape, size, texture, and color scheme, that taken together, are confusingly similar to
24 philosophy's Trade Dress. In addition, Defendant used similar names for its products,
25 such as "vanilla & ice cream" instead of "vanilla birthday cake." Defendant used
26 "strawberries & milkshake" instead of "strawberry milkshake." Defendant used "coconut
27 & cream" instead of "coconut frosting." Defendant used "raspberry & blackberry"
28

1 instead of “raspberry sorbet.” Defendant used “blueberry & smoothie” instead of
2 “blueberry pie,” and “mango & papaya” instead of “papaya passion punch.”

3 52. Even though Defendant had an infinite number of package shapes, sizes,
4 fonts, lettering, names, color schemes, and designs that could have been used in
5 connection with Defendant’s products, Defendant elected to copy philosophy’s Trade
6 Dress instead of creating its own original trade dress.

7 53. The products sold by philosophy and by the Defendant are the same or
8 similar; namely, both product lines include shampoos, shower gels, and/or bubble baths.

9 54. Defendant’s use of the overall trade dress shown in Exhibit A has caused
10 confusion in the marketplace and will continue to cause confusion, or to cause mistake, or
11 to deceive as to the origin, sponsorship, or approval of Defendant’s goods by philosophy,
12 in violation of 15 U.S.C. § 1125(a).

13 55. Defendant’s products are sold in the State of Arizona.

14 56. By reasons of Defendant’s acts, philosophy has suffered, and will continue to
15 suffer irreparable harm for which there is no adequate remedy in law. Unless Defendant
16 is restrained, the irreparable harm to philosophy will continue and will increase.

17 57. Defendant’s usurpation of philosophy’s Trade Dress is willful. This is an
18 exceptional case, and philosophy should be awarded enhanced damages and profits as
19 well as its reasonable attorneys’ fees pursuant to 15 U.S.C. § 1117(a).

20 **COUNT TWO – TRADEMARK INFRINGEMENT**
21 **UNDER 15 U.S.C. § 1114**

22 58. philosophy incorporates by reference the allegations contained in Paragraphs
23 1-57 above.

24 59. philosophy is the owner of United States Trademark Registration No.
25 2,938,416 for the mark “strawberry milkshake” for scented and/or fragranced 3-in-1 hair
26 shampoo, hair conditioner and body wash. A copy of philosophy’s federal trademark
27 registration is included as Exhibit B, and is incorporated by reference herein.
28

1 60. philosophy's "strawberry milkshake" trademark is an arbitrary mark as
2 applied to shampoo, bubble bath and body wash. The mark has been registered since
3 2005 and is incontestable, with use by philosophy dating back to 1998.

4 61. Defendant has recently commenced the use of the mark "strawberries &
5 milkshake" in commerce, or intends to use the mark in commerce, in connection with a
6 bubble bath and shower product. Defendant's "strawberries & milkshake" trademark is
7 similar in sight, sound, and meaning to philosophy's trademark. Defendant uses the mark
8 "strawberries & milkshake" in connection with products that are the same as or are very
9 similar to philosophy's "strawberry milkshake" products. Defendant's infringing products
10 are sold in direct competition with philosophy's "strawberry milkshake" products.

11 62. The manner in which consumers encounter Defendant's infringing products
12 increases the likelihood of confusion. Defendant presents the "strawberries & milkshake"
13 mark in all lowercase letters, in a manner that is confusingly similar to philosophy's
14 distinctive all lowercase font used on philosophy's "strawberry milkshake" products. In
15 addition, Defendant uses the infringing "strawberries & milkshake" mark on packaging
16 that imitates philosophy's Trade Dress for the philosophy "strawberry milkshake"
17 products.

18 63. Defendant's use of the "strawberries & milkshake" trademark is likely to
19 cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or
20 association of Defendant with philosophy, or as to origin, sponsorship, or approval of
21 Defendant's goods or commercial activities by philosophy.

22 64. Defendant's acts of infringement were committed with actual knowledge
23 and/or constructive knowledge of philosophy's registered "strawberry milkshake"
24 trademark.

25 65. Defendant's acts of trademark infringement are intentional and willful.

26 66. By reason of Defendant's acts alleged herein, philosophy has suffered, and
27 will continue to suffer irreparable damage. Unless Defendant is restrained, the damage
28

1 and irreparable harm to philosophy will increase. philosophy has no adequate remedy at
2 law.

3 67. This is an exceptional case, and philosophy should be awarded its reasonable
4 attorneys' fees pursuant to 15 U.S.C. § 1117(a).

5 **COUNT THREE – UNFAIR COMPETITION**

6 68. philosophy incorporates by reference the allegations contained in Paragraphs
7 1 through 67 above.

8 69. Defendant's acts alleged herein constitute unfair competition under state law.
9 Defendant is unfairly competing with philosophy by taking a free ride on the goodwill that
10 philosophy developed and established with consumers. Defendant is unfairly competing
11 with philosophy by creating a likelihood of confusion in Arizona and elsewhere between
12 Defendant's products and the products sold by philosophy. Defendant is attempting to
13 pass off its products as philosophy products. Defendant's acts of unfair competition are
14 likely to create confusion in Arizona and elsewhere as to the affiliation, connection, or
15 association of Defendant's business with philosophy. Defendant's acts of unfair
16 competition are likely to create confusion in Arizona and elsewhere as to the origin,
17 sponsorship, or approval of Defendant's goods by philosophy

18 70. philosophy adopted and used a distinctive and non-functional trade dress in
19 Arizona, and in the United States, that became associated with and identified philosophy
20 as the source of its goods long before Defendant commenced sales of its products in the
21 United States, and for that matter, before Defendant commenced sales of its products
22 anywhere in the world. philosophy is the owner of common law rights in its trade dress.

23 71. philosophy adopted and used the distinctive "strawberry milkshake"
24 trademark in Arizona, and in the United States, long before Defendant commenced sales
25 of its products in the United States, and for that matter, before Defendant commenced
26 sales of its products anywhere in the world. philosophy is the owner of common law
27 rights in its "strawberry milkshake" trademark.

28

1 Defendant's violations of the Lanham Act are unprofitable and/or based upon a
2 theory of unjust enrichment, including entry of judgment for a sum above the
3 amount found as actual damages up to a maximum of three times the amount of
4 actual damages, and an award of profits in an additional amount as the court shall
5 find to be just, all in accordance with 15 U.S.C. § 1117(a).

6 E. A determination that this is an exceptional case and an award of
7 philosophy's reasonable attorneys' fees pursuant to 15 U.S.C. § 1117(a).

8 F. An award of compensatory damages at common law.

9 G. An award of punitive damages.

10 H. An award of costs.

11 I. An injunction enjoining Defendant, its agents, servants, employees,
12 and those persons in active concert or participation with them from:

13 (1) Using in connection with any bath and beauty products any
14 promotional materials, advertisements, fliers, brochures, labels, packaging or other
15 materials electronic or otherwise that include any mark or symbol that is
16 confusingly similar to philosophy's "strawberry milkshake" trademark;

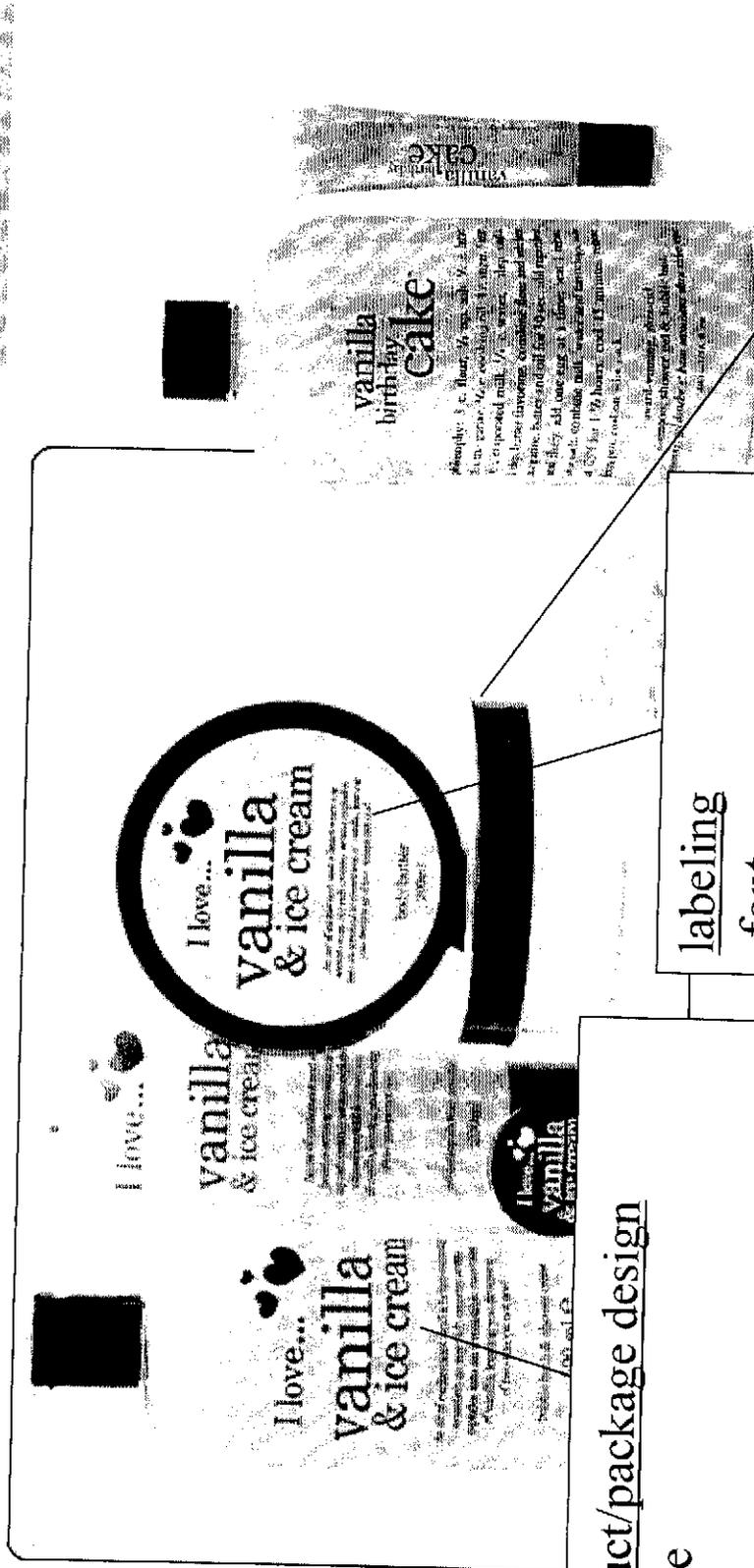
17 (2) Using in connection with any bath and beauty products any
18 promotional materials, advertisements, fliers, brochures, labels, packaging or other
19 materials electronic or otherwise any trade dress that is confusingly similar to
20 philosophy's Trade Dress; and

21 (3) Advertising, offering for sale, marketing, distributing, selling
22 or promoting any products using any trade dress that is confusingly similar to
23 philosophy's Trade Dress.

24 J. An injunction requiring Defendant to recall all products and
25 advertising bearing any trademark that is confusingly similar to philosophy's
26 "strawberry milkshake" trademark or that is confusingly similar to philosophy's
27 Trade Dress, and to deliver up for destruction, all products, promotional materials,
28 advertisements, fliers, brochures, labels, signs, contracts, proposals, invoices, or

Exhibit A

vanilla



product/package design

- shape
- size
- texture
- color scheme
- scent combos evoking similar concepts (e.g., cake/ice cream)

labeling

- font
- lowercase stylization
- composition of text
- color scheme
- “abstract idea” name

product line
consistent similarity
throughout

raspberry



papaya



blueberry



strawberry



Exhibit B

Int. Cl.: 3

Prior U.S. Cls.: 1, 4, 6, 50, 51, and 52

United States Patent and Trademark Office

Reg. No. 2,938,416

Registered Apr. 5, 2005

**TRADEMARK
PRINCIPAL REGISTER**

STRAWBERRY MILKSHAKE

PHILOSOPHY, INC. (ARIZONA CORPORATION)
4602 EAST HAMMOND LANE
PHOENIX, AZ 85034

FOR: SCENTED AND/OR FRAGRANCED 3-IN-1
HAIR SHAMPOO, HAIR CONDITIONER AND
BODY WASH, IN CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51
AND 52).

NO CLAIM IS MADE TO THE EXCLUSIVE
RIGHT TO USE "STRAWBERRY", APART FROM
THE MARK AS SHOWN.

SN 75-579,243, FILED 10-29-1998.

FIRST USE 6-1-2001; IN COMMERCE 6-1-2001.

DARRYL SPRUILL, EXAMINING ATTORNEY