

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

TOMAS, L.L.C.,	)	
an Oklahoma Limited Liability Company,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.
	)	
BARE ESCENTUALS, INC.	)	
	)	
Defendant.	)	

**COMPLAINT**

Plaintiff, Tomas, L.L.C., complains and alleges as follows:

**THE PARTIES**

1. Plaintiff Tomas, L.L.C., is an Oklahoma Limited Liability Company (herein referred to as “Toma’s” or “Plaintiff”) with its principal place of business located at 6516 North Olie, Suite G, Oklahoma City, Oklahoma. All of the members of Toma’s are individual residents and citizens of the State of Oklahoma.

2. Defendant Bare Escentuals, Inc. (hereinafter referred to as “BE” or “Defendant”) is a Delaware corporation with its principal place of business located at 71 Stevenson Street, 22<sup>nd</sup> Floor, San Francisco, CA 94105.

**JURISDICTION AND VENUE**

3. This Court has subject matter jurisdiction over the claims herein pursuant to 15 U.S.C. §1125, 28 U.S.C. § 1332 and 28 U.S.C. §1338(a). There is complete diversity of citizenship between the parties and the amount in controversy is in excess of \$75,000.00, exclusive of interests and costs.

4. This Court also has supplemental jurisdiction over the Oklahoma state law claims pleaded herein pursuant to 28 U.S.C. §1367 because these claims are so related to the claims in the action within the Court's original jurisdiction that they form the same case or controversy.

5. Venue is proper in this district pursuant to 28 U.S.C. §1391(b)and (c) because a substantial part of the events giving rise to the claims asserted herein occurred in this district.

#### **THE ACTIVITIES AND RIGHTS OF PLAINTIFF**

6. Since 2002, Plaintiff has continuously used "BRONZY BABE" in commerce as a trademark in conjunction with the sale of non-medicated skin care preparations and makeup.

7. Plaintiff currently holds the following trademark registrations for its "BRONZY BABE" mark; United States Trademark Registration No. 2,829,221 issued April 6, 2004, and United States Trademark Registration No. 2,976,992 issued July 26, 2005.

8. Since it began using the "BRONZY BABE" mark to identify and promote its business, Plaintiff has expended substantial resources to advertise to the public the availability of its products under the mark "BRONZY BABE."

9. The "BRONZY BABE" mark has a distinctive quality and also has acquired special and special significance and extremely valuable goodwill for Plaintiff.

10. Through such usage and recognition, Plaintiff has acquired (in addition to its statutory rights arising from its United States Trademark Registrations) common-law rights in the "BRONZY BABE" as a trademark, which rights extend, without limitation, to the exclusive right to use "BRONZY BABE" for its products.

**DEFENDANT AND ITS UNLAWFUL ACTIONS**

11. The Defendant began to produce and market products which are substantially similar to those sold by the Plaintiff under its “BRONZY BABE” mark by using the term “BRONZED BABE” and/or “BRONZED BABE COLLECTION.”

12. The Defendant by use of its market power was able to place its products, using the term “BRONZED BABE” and/or “BRONZED BABE COLLECTION” with QVC, a television and sales outlet, notwithstanding the fact that the Plaintiff was also seeking to market its mark under its “BRONZY BABE” through QVC.

**COUNT I**

**Violation of the Lanham Act**

**15 U.S.C. §1125(a)**

13. The allegations set forth in paragraphs 1 through 12 are incorporated herein by reference.

14. Defendant’s unauthorized use in commerce of the term “BRONZED BABE” and/or “BRONZED BABE COLLECTION” is likely to cause confusion, mistake and deception that the Defendant’s products sold under the “BRONZED BABE” and/or “BRONZED BABE COLLECTION” are affiliated with, sponsored by, or approved by Plaintiff, thereby harming Plaintiff’s reputation and diverting Plaintiff’s goodwill to Defendant through a false designation of origin, a false or misleading description of fact and/or a false misrepresentation of fact, all in violation of 15 U.S.C. §1125(a) of the Lanham Act.

15. Defendant’s acts of unfair competition as alleged herein are causing and are likely to continue to cause substantial harm to Plaintiff and the public. Therefore Plaintiff is entitled to injunctive relief as a remedy to Defendant’s actions.

**COUNT II**

**Trademark Violation**

16. The allegations set forth in paragraphs 1 through 15 are incorporated herein by reference.

17. The Defendant's unauthorized use in commerce of "BRONZED BABE" and/or "BRONZED BABE COLLECTION" creates an likelihood of confusion, mistake or deception as to the affiliation, connection or association of the Defendant or the Defendant's goods relating to the origins, sponsorship or approval of those goods by the Plaintiff. By reason of the foregoing, the Plaintiff has suffered and has continued to suffer damages and injuries to its business, goodwill, profits to be determined at trial and the Plaintiff is entitled to all those remedies set forth in 15 U.S.C. §1116.

18. Defendant's aforesaid actions constitute unfair methods of competition and unfair or deceptive acts or practices and create and/or threaten to cause a likelihood of confusion or mistake in the public's mind as to the parties' respective products and services, all in violation of the common law of Oklahoma.

19. Defendant's unlawful actions have caused Plaintiff to suffer irreparable injury, have resulted in unjust enrichment to Defendant, and have caused and will continue to cause, unless enjoined by this Court, substantial and irreparable harm to Plaintiff for which it has no adequate remedy at law.

**COUNT III**

**Unfair Competition Under the Common Law of Oklahoma**

20. The allegations set forth in paragraphs 1 through 19 are incorporated herein by reference.

21. Defendant, with full knowledge of Plaintiff's superior rights, adopted and its using the trademark "BRONZED BABE" and/or "BRONZED BABE COLLECTION" in connection with its goods with the deliberate and express purpose of obtaining the benefit of the goodwill and reputation of Plaintiff.

22. Defendant's aforesaid actions constitute unfair methods of competition and unfair or deceptive acts or practices and create and/or threaten to cause a likelihood of confusion or mistake in the public's mind as to the parties' respective products, all in violation of the common law of Oklahoma.

23. Defendant's unlawful actions have caused Plaintiff to suffer irreparable injury, have resulted in unjust enrichment to Defendant, and have caused and will continue to cause, unless enjoined by this Court, substantial and irreparable harm to Plaintiff for which it has no adequate remedy at law.

#### **COUNT IV**

##### **Common Law Trademark Infringement**

24. The allegations set forth in paragraphs 1 through 23 are incorporated herein by reference.

25. Defendant's aforesaid actions constitute an infringement of Plaintiff's exclusive rights in the "BRONZE BABE" and/or "BRONZED BABE" mark, and create and/or threaten to cause a likelihood of confusion or mistake in the public's mind as to the parties' respective products, all in violation of the common law of Oklahoma.

26. Defendant's unlawful actions have caused Plaintiff to suffer irreparable injury, have resulted in unjust enrichment to Defendant, and have caused and will continue to cause, unless

enjoined by this Court, substantial and irreparable harm to Plaintiff for which it has no adequate remedy at law.

**COUNT V**

**Violation of the Oklahoma Deceptive Trade Practices Act,  
78 O.S. §51, *et seq.***

27. The allegations set forth in paragraphs 1 through 26 are incorporated herein by reference.

28. Defendant's conduct as described herein constitutes unfair, unconscionable or deceptive methods, acts or practices in the conduct of a trade or commerce as provided under the Oklahoma Deceptive Trade Practices Act, 78 O.S. §51, *et seq.*

29. Defendant's unlawful actions have caused Plaintiff to suffer irreparable injury, have resulted in unjust enrichment to Defendant, and have caused and will continue to cause, unless enjoined by this Court, substantial and irreparable harm to Plaintiff for which it has no adequate remedy at law.

**PRAAYER FOR RELIEF**

WHEREFORE, by virtue of Defendant's unlawful acts as alleged in this Complaint, Plaintiff respectfully prays that:

1. The Court enter judgment that the "BRONZY BABE" mark is valid and enforceable for use in conjunction with Plaintiff's products; that Plaintiff owns all right, title and interest in and to said mark in conjunction with Plaintiff's products; and that Defendant, as a result of its unauthorized use of the trademark "BRONZED BABE" and/or "BRONZED BABE COLLECTION," has used and/or threatens to use false designations of origins, false descriptions and false representations and committed acts of trademark infringement in violation of 15 U.S.C.

§1125(a); has committed trademark infringement and unfair competition in violation of the common law of Oklahoma, has committed trademark infringement in violation of Federal Law, and has committed deceptive trade practices in violation of the Oklahoma Deceptive Trade Practices Act.

2. The Court enjoin Defendant, its agents, servants, employees, and attorneys, and all those persons in active concert or participation with them from continuing the acts complained of herein and, more particularly, that such person or entities be enjoined and restrained from:

(a) adopting or using as a trade name, trademark, service mark, domain name, metatag or otherwise in conjunction with any name, mark or other designation which incorporates the confusingly similar designation, to Plaintiff's mark "BRONZY BABE;"

(b) otherwise infringing Plaintiff's "BRONZY BABE" mark, otherwise unfairly competing with, injuring the business reputation of, or damaging the goodwill of Plaintiff in any manner, otherwise falsely representing itself as being connected with, sponsored by, or associated with Plaintiff, otherwise engaging in deceptive or unfair trade practices, or otherwise engaging in unfair competition which in any way injures Plaintiff.

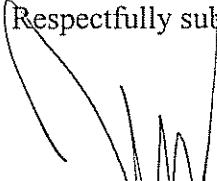
3. Defendant be required to pay Plaintiff the costs of this action and the reasonable attorneys' fees Plaintiff incurs in connection with this action;

4. Defendant be required to pay any applicable statutory damages and/or Plaintiff's actual, enhanced and punitive damages in light of the willful and predatory nature of Defendant's actions;

5. An accounting be had and Defendant be required to disgorge to Plaintiff the profits it has earned as a result of its unlawful conduct as described herein; and

6. Plaintiff be granted such other, different and additional relief as the Court deems just and proper.

Respectfully submitted,



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James M. Chaney, OBA #1606  
Cheryl P. Hunter, OBA #4499  
KIRK & CHANEY  
101 Park Avenue, Suite 800  
Oklahoma City, OK 73102  
(405) 235-1333 Telephone  
(405) 235-5914 Facsimile

***ATTORNEYS FOR PLAINTIFF***

***JURY TRIAL DEMANDED***