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12
13 UNITED STATES DISTRICT COURT
14
15 CENTRAL DISTRICT OF CALIFORNIA
16

17 EISENBERG+BONEM, a California
18 partnership,

19 Plaintiff,

20 vs.

21
22 TOO FACED COSMETICS, LLC, a
23 Delaware Limited Liability
24 Corporation; JERROD BLANDINO,
25 an individual; and DOES 1 through
26 10, inclusive,

27 Defendants.
28

Case No.: 8:18-cv-2077

COMPLAINT FOR:

(1) Copyright Infringement; and

(2) Vicarious and/or Contributory
Copyright Infringement

(3) Breach of Contract.

1 Plaintiff Eisenberg+Bonem, as a California partnership, herein sets forth the
2 allegations of its Complaint by and through its undersigned attorneys, and hereby
3 prays to this honorable Court for relief based on the following:

4 **INTRODUCTION**

5 Plaintiff Eisenberg+Bonem (“E+B”) is a partnership owned and operated by
6 highly respected photographer Bruce Eisenberg and brand expert Tova Bonem, who
7 over the last thirteen years have honed their craft and built a reputation for creating
8 high quality stylized photographs. E+B’s stylized photographs are incredibly labor
9 intensive and require a lot of expensive equipment and expertise to produce.
10 Defendant Too Faced Cosmetics LLC (“Too Faced”), a cosmetics limited liability
11 company, contracted with E+B for the limited use of specific stylized photographs
12 that Plaintiff took of various cosmetic products Defendant sells. The contracts were
13 limited non-exclusive image licensing agreements and not “work-for-hire”
14 contracts. Accordingly, Plaintiff retained all ownership and copyright of the
15 images.

16 Defendant breached the terms of its contracts and infringed upon Plaintiff’s
17 copyrights by using the images outside the scope of the limited license granted to
18 Defendant. Defendant also infringed Plaintiff’s copyrights by making, displaying
19 and otherwise using unauthorized derivative works to advertise its products on its
20 own website and social media and by providing the manipulated images to major
21 retailers such as Macy’s, Ulta Beauty, Sephora, Nordstrom, HSN and other
22 participating retailers across the world including in England, Canada, Australia, and
23 the United Arab Emirates. Even after Plaintiff discovered the unauthorized use and
24 derivative works and told Defendant to cease its improper use, Defendant continues
25 to unlawfully publish and use the works.

26 **JURISDICTION AND VENUE**

1 1. This action is brought under the Copyright Act of 1976, Title 17
2 U.S.C. § 101 *et seq.*

3 2. This Court has federal question jurisdiction under 28 U.S.C. § 1331
4 and 1338(a) and (b). This Court has supplemental jurisdiction over the state law
5 claims under 28 U.S.C. § 1367(a).

6 3. Venue in this judicial district is proper under 28 U.S.C. § 1391(c) and
7 1400(a) in that this is the judicial district in which a substantial part of the acts and
8 omissions giving rise to the claims occurred.

9
10 **PARTIES**

11 4. Plaintiff EISENBERG+BONEM is a California partnership with at all
12 times relevant, its principal place of business in the County of Los Angeles, State of
13 California. Plaintiff's partners Tova Bonem and Bruce Eisenberg are and were at all
14 times relevant residents of Los Angeles in the County of Los Angeles in the State
15 of California.

16 5. Defendant TOO FACED COSMETICS LLC is, and at all relevant
17 times was, a limited liability corporation duly organized and existing under and by
18 virtue of the laws of the State of Delaware with its principal place of business at
19 18231 McDurmott West, Irvine, CA 92614. Upon information and belief,
20 Defendant TOO FACED COSMETICS LLC is a subsidiary of The Estee Lauder
21 Companies Inc., a Delaware corporation with its principal place of business in New
22 York, New York.

23 6. Defendant JERROD BLANDINO is a founder and Chief Creative
24 Officer for Defendant Too Faced Cosmetics LLC. Plaintiff is informed and believes
25 that he is and at all relevant times was a resident of Orange County, California. Mr.
26 Blandino was and is involved in and supervised all creative and advertising
27 decisions made at Too Faced Cosmetics LLC and plaintiff alleges based upon
28 information and belief that he intentionally, willfully and maliciously made the

1 decisions to infringe upon Plaintiff's copyrights as described below and/or
2 contributed to Too Faced's infringement. Plaintiff alleges that Mr. Blandino is
3 vicariously liable for all of the wrongful conduct performed by Too Faced
4 Cosmetics LLC that is described below and that he profited from such conduct.

5 7. Plaintiff is informed and believes and thereon alleges that Defendants
6 DOES 1 through 10, inclusive, are other parties not yet identified who have
7 infringed Plaintiff's copyrights, have contributed to the infringement of Plaintiff's
8 copyrights, or have engaged in one or more of the wrongful practices alleged
9 herein. The true names, whether corporate, individual or otherwise, of Defendants 1
10 through 10, inclusive, are presently unknown to Plaintiff, which therefore sues said
11 Defendants by such fictitious names, and will seek leave to amend this Complaint
12 to show their true names and capacities when same have been ascertained.

13 8. Plaintiff is informed and believes and thereon alleges that at all times
14 relevant hereto each of the Defendants was the agent, affiliate, officer, director,
15 manager, principal, alter-ego, and/or employee of the remaining Defendants and
16 was at all times acting within the scope of such agency, affiliation, alter-ego
17 relationship and/or employment; and actively participated in or subsequently
18 ratified and/or adopted each of the acts or conduct alleged, with full knowledge of
19 all the facts and circumstances, including, but not limited to, full knowledge of each
20 violation of Plaintiff's rights and the damages to Plaintiff proximately caused
21 thereby.

22 **FACTS COMMON TO ALL CLAIMS**

23
24 9. Photographer Bruce Eisenberg and branding expert Tova Bonem
25 created and have run Plaintiff Eisenberg+Bonem ("E+B") for more than a decade.
26 E+B has its own high end and state of the art professional photography studio,
27 which creates stylized photographs with an expertise in beauty and fashion.

28 10. The stylized photographs that E+B creates are of exceptionally high

1 production value and require a significant amount of preparations, fabrication and
2 labor to accomplish. Often a shoot involving only a few photographs can take
3 weeks of preplanning to determine how the creative vision can be accomplished.
4 During these weeks, Plaintiff employs fabricators to create custom objects and sets
5 needed for the shoot and to organize other production elements including but not
6 limited to positioning, lighting, crew coordination, catering and to seek out all
7 equipment necessary that the studio does not already have. The shoots themselves
8 require an extra preparation day simply to set up the elaborate sets and lighting
9 necessary and multiple photography assistants to work during the actual multi day
10 shoots to help. E+B capture the elaborate scenes.

11 11. Part of what makes the photographs that E+B creates so elaborate is
12 that they often try to accomplish as much as possible practically without heavy use
13 of computer special effects.

14 12. When a commercial client hires E+B to create stylized photographs,
15 the process is even more time consuming. Specifically, in such scenarios B+E's
16 photographer and stylist must have multiple conference calls with their stylist, the
17 client and fabricators to satisfy the creative expectations of the client and reconcile
18 that with what is physically possible. After the three weeks of pre-production and
19 the actual photoshoots, E+B works for another three weeks on post production and
20 the retouching process. Further, E+B is often required to work long hours
21 throughout this entire process as there are, particularly in the world of cosmetics,
22 tight deadlines for creating stylized advertisements.

23 13. It is because of all of the work and precision that goes into creating
24 such works that E+B insist upon keeping the rights and ownership of the pictures
25 that they create when working with a client for a commercial shoot.

26 **A. Defendant Too Faced Cosmetics Hires E+B to Create Stylized**
27 **Photographs for Multiple Cosmetic Collections Yet E+B Retains all**
28 **Ownership Rights**

1 14. In or about early August of 2016, Defendant Too Faced Cosmetics
2 LLC (“Too Faced”), a cosmetics seller, reached out to Plaintiff E+B to create
3 stylized photographs that it could use to promote sales of its “Natural Love,”
4 “Melted Matte,” and “Chocolate Brownie” cosmetic collections.

5 15. On or about August 9, 2016, E+B provided an estimate for a non-
6 exclusive license for 14 photographs that it would create for Too Faced’s use in its
7 online store and to promote the products inside participating retailer’s physical
8 stores. The estimate was explicit in stating: “[E+B] is the sole creator and sole
9 copyright owners of the images(s). Except for rights specifically licensed or
10 transferred elsewhere in this Agreement, Licensor reserves all rights in the image(s)
11 without limitation, and including digital or electronic publishing and use rights in
12 any and all media now existing and yet unknown throughout the world.”

13 16. After sending the estimate, the parties began discussing the details of
14 the transaction and Too Faced sent E+B a nondisclosure agreement (“NDA”) into
15 which it wanted Plaintiff to enter before beginning any work. The NDA that the
16 parties signed on or about October 21, 2016 stated: “Intellectual property rights and
17 copyright of images belong to the photographer with usage rights granted to the
18 discloser as specified in the contract.”

19 17. On or about November 1, 2016, the Plaintiff and Defendant entered
20 into a contract (the “November 1, 2016 Contract”). Pursuant to the contract,
21 Plaintiff agreed to create 14 stylized photographs of Too Faced’s “Natural Love,”
22 “Melted Matte,” and “Chocolate Brownie” cosmetic collections.” However,
23 Plaintiff granted Too Faced only limited and non-exclusive rights to use the
24 photographs. Specifically the contract states:

25 [Plaintiff] reserves all rights to the Images except as granted to
26 [Defendant] in Section 1 above. No advertising or promotional usage
27 whatsoever may be made of any Images unless such advertising or
28 promotional usage is expressly permitted in Section 1 above.

1 18. The contract is specific in what types of rights are granted to
2 Defendant Too Faced. It provides that the images may only be used for “Internet
3 Online Sales Illustration, Promotional In Store Marketing Only” and continues by
4 explaining that “No Commercial Print Advertisement other than in store
5 promotional print” is allowed by Defendant.

6 19. Plaintiff performed all of its duties and obligations under the
7 November 1, 2016 Contract, and the actual photo shoot was completed on or about
8 November 16, 17 and 18 in 2016.

9 20. Shortly after the photoshoot, Too Faced contacted E+B and requested
10 a quote for the cost of acquiring additional use of the “Natural Love” photographs.
11 Specifically, it sought the right to publish the pictures within the United States in
12 newspapers and magazines, website advertising on third party websites, outdoor
13 poster and transit ads, billboard advertisements, mobile advertisements and other
14 rights. E+B provided an estimate on or about November 22, 2016 yet Too Faced
15 never responded to the estimate.

16 21. Happy with the images that E+B created, Too Faced reached out on or
17 about March of 2017 for E+B to create stylized photographs based upon its “Born
18 This Way” foundation line and “Glitter Bomb,” “Melted Latex,” “Unicorn Latex,”
19 “Hangover Rx,” and “Clover” collections. After a number of creative discussions
20 and back and forth conferences, the parties entered into a contract on March 16,
21 2017 (the “March 16, 2017 Contract”).

22 22. Pursuant to the contract, Plaintiff agreed to create 11 stylized
23 photographs. However, Plaintiff again only granted Too Faced limited and non-
24 exclusive rights to use the photographs. Specifically, E+B granted Too Faced the
25 right to use the images for internet sales and instore marketing only but with the
26 explicit restriction upon commercial print advertising other than in store signage.
27 Further, the contract contained the same language from the November 1, 2016
28 contract that is reproduced above concerning retention by E+B of the ownership

1 and copyrights to the images.

2 23. The March 16, 2017 Contract also states that if Too Faced uses the
3 images that are the subject of the contract without authorization then it must pay a
4 “reuse penalty” of \$10,000.00 for each and every reuse per image.

5 24. On or About March 19, 20, and 21 of 2017, E+B created the
6 photographs and then delivered them to Too Faced.

7 25. During this time, Too Faced and E+B negotiated a third contract for
8 the creation of stylized images of Too Faced’s “Peaches and Cream” cosmetic
9 collection. This is a line of cosmetics that Too Faced created for the retailer
10 Sephora and Sephora has sold and promoted the line with in-store displays and
11 events and online in Sephora’s United States, Canadian and international markets.
12 An initial draft of the contract was created on May 1, 2017 yet the original contract
13 only allowed for Too Faced’s use of the images within the United States and
14 Canada pursuant to Too Faced’s initial directions. E+B agreed to change the use to
15 a worldwide license but because of that the contract was not signed until June 5,
16 2017 (the “June 5, 2017 Contract”).

17 26. Pursuant to the contract, Plaintiff agreed to create 6 stylized
18 photographs of Too Faced’s cosmetics. However, Plaintiff again granted Too
19 Faced only limited and non-exclusive rights to use the photographs. Specifically
20 the contract described the rights as for: “Internet Usage on Too Faced Cosmetics
21 Website and Too Faced Cosmetics Social Media. Promotional In-Store Signage and
22 website of participating retailers only.”

23 27. The contract also contained the following restriction: “PRINT
24 ADVERTISING, OUTDOOR ADVERTISING, WEB ADVERTISING, SOCIAL
25 MEDIA ADVERTISING, RETARGETING ADVERTISING ON FACE BOOK
26 AND OR ANY OTHER WEB SITES by TOO FACED COSMETICS AND
27 PARTICIPATING RETAILERS ARE NOT INCLUDED.” (Emphasis in original)

28 28. The contract included the same retention of rights to E+B and reuse

1 penalty provisions described above in the March 16, 2017 contract.

2 29. Plaintiff created the “Peaches and Cream” photographs on May 7, 8
3 and 9 of 2017 and delivered them to Defendant.

4 30. Shortly after the “Peaches and Cream” photoshoot the parties entered
5 into another photoshoot for Too Faced’s “Ultra Beauty Holiday Gift Set” and
6 “Kandee” collection (the “May 26, 2017 Contract”). The “Kandee” collection was
7 an exclusive collaboration with social medial influencer Kandee Johnson, a
8 celebrity in the beauty industry with over 1,800,000 followers on Instagram alone
9 and a significant following on YouTube and Facebook as well. Pursuant to the May
10 26, 2017 Contract, plaintiff agreed to create and deliver to Defendant 6 stylized
11 photographs of Defendant’s cosmetic products. However, Plaintiff again granted
12 Too Faced only limited and non-exclusive rights to use the photographs for three
13 years and in the United States only. Additionally, the contract described the rights
14 as for: “Internet Usage on Too Faced Cosmetics Website and Too Faced Cosmetics
15 Social Media and Promotional In-Store Signage in participating retailers only.”

16 31. It went on to state that: “PRINT, WEB, SOCIAL MEDIA,
17 FACEBOOK RETARGETING ADVERTISING OF TOO FACED COSMETICS
18 AND PARTICIPATING RETAILERS WEBSITES ARE NOT INCLUDED.”
19 (Emphasis in the original.)

20 32. Plaintiff created the “Ultra Beauty Holiday Gift Set” and “Kandee”
21 collection photographs on May 21, 22, and 23 of 2017 and delivered them to
22 Defendant.

23 33. Too Faced and E+B entered into their final contract on or about July
24 27, 2017. Pursuant to the material terms of the May 26, 2017 Contract, Plaintiff
25 agreed to create and deliver to Defendant 5 stylized photographs of Defendant’s
26 “Chocolate Gold” cosmetic collection. However, Plaintiff again granted Too Faced
27 only limited and non-exclusive rights to use the photographs. Specifically, the
28 contract described the rights as for: “Internet Usage on Too Faced Cosmetics

1 Website and Too Faced Cosmetics Social Media platform. Promotional In Store
2 Signage and website of participating retailers only.”

3 34. It restricted the rights further by stating: “PRINT ADVERTISING,
4 OUTDOOR ADVERTING, WEB ADVERTISING, SOCIAL MEDIA
5 ADVERTISING, RETARGETING ADVERTISING ON FACEBOOK AND OR
6 ANY OTHER SITES by TOO FACED COSMETICS AND PARTICIPATING
7 RETAILERS ARE NOT INCLUDED.” (Emphasis in original.)

8 35. Plaintiff created the “Chocolate Gold” photographs on July 31, 2017
9 and August 1 and 2 of 2017 and delivered them to Defendant.

10 36. On or about December 12, 2017, Plaintiff submitted for registration all
11 of the images that it licensed to Defendant and which are at issue in this complaint
12 with the United States Copyright Office. All submission formalities were
13 completed.

14 37. The United States Copyright Office issued the copyrights with an
15 effective date of December 12, 2017, bearing the number VA 2-121-348.

16 **B. Plaintiff Learns about Too Faced’s Breaches of Contract and**
17 **Infringement of E+B’s Copyrights**

18 38. Unbeknownst to E+B, Too Faced used the copyrighted images outside
19 of their permitted uses under the parties’ various contracts. Too Faced further
20 violated the parties’ contracts and E+B’s copyrights by manipulating E+B’s
21 photographic works into new, derivative images to promote new and existing
22 collections on their website, social media platforms and on participating retailers’
23 websites and in-store worldwide for the purpose of selling its cosmetics. Using
24 images on its website and those of participating retailers is the cornerstone of Too
25 Faced’s business growth strategy to drive audience growth, customer engagement,
26 and to build up the sales of its cosmetics.

27 39. Plaintiff learned about Too Faced’s infringement and breach of
28 contract in or about early December of 2017. Tova Bonem had just began to use

1 Instagram, a social media platform and was surprised to see an image from the
2 “Peaches and Cream” shoot that E+B created on an ice cream truck advertising Too
3 Faced’s products outside of two Sephora locations in New York City in or about
4 September of 2017. She immediately contacted Too Faced on or about December
5 13, 2017. Too Faced stated that it would look into the image’s use but represented
6 that the truck was only used for one week and only in New York City.

7 40. Too Faced responded on or about January 2, 2018 by stating that the
8 use was due to “usage confusion” and offered to pay for the use. Based on the
9 representations of Too Faced, E+B set a price for the limited one week, one city use
10 and Too Faced paid the amount.

11 41. Subsequently, E+B learned that Too Faced in fact used the image on
12 the advertising truck for a month as well as on at least one more identical truck in
13 San Francisco. Too Faced’s use of the image on outside advertising for a month in
14 New York and San Francisco constituted a breach of contract and infringement of
15 Plaintiff’s copyright.

16 42. On or about May 10, 2018, Too Faced contacted E+B in order to
17 inquire about expanding its rights to the “Born This Way” images to include use
18 outside of stores (“Out of Home” or “OOH”) and digital advertising rights. On or
19 about May 31, 2018, E+B provided a quote yet Too Faced stated that it changed its
20 mind and was not interested in expanding its use.

21 **C. Too Faced Continues to Breach its Contracts and Willfully Infringe**
22 **Upon E+B’s Copyright**

23 43. On or about July 27, 2018, E+B contacted Too Faced to explain that
24 the manipulation of the image was improper. Too Faced responded on or about
25 August 7, 2018 and apologized for the unauthorized use. Specifically, it explained:
26 “...We didn’t understand that were not allowed to alter the original imaged but **do**
27 understand that now. . . .” (Emphasis in original). It agreed to remove these images
28 and to cease their use in the future. Too Faced also again enquired about expanding

1 its use rights yet E+B declined to license use for manipulated imagery and told Too
2 Faced to remove the manipulated images from its website, social media postings, as
3 well as from participating retailer websites and in-store displays worldwide.

4 44. Despite Too Faced's promise to remove the unlawful derivative works
5 from its use, Too Faced continues to post and use these images the internet. For
6 example, it posted the manipulated "Born This Way" image, reproduced below,
7 sixty five times on its social media even after the above email exchange. It
8 reposted the unlawful derivative work every hour on the hour on its Facebook page
9 for weeks and the images continue to be on Facebook to this day. Despite Too
10 Faced's acknowledgement of its wrongful uses and manipulation of Plaintiff's
11 images, Too Faced continues its conduct.

12 45. Further, Too Faced provided the unlawful images to major retailers
13 worldwide and these stores continued to use the improperly manipulated images as
14 well. For example, Sephora continues to this day to use one of the images to
15 promote events and sales at Sephora locations worldwide.

16 46. Too Faced knows that its rights of use for the photographs are limited
17 and that it has no right to use the images outside of its limited contractual use yet it
18 has and continues to willfully breach its contracts and infringe upon Plaintiff's
19 copyrights.

20 47. Plaintiff does not believe that it has discovered all of the Defendant's
21 infringement but what follows are examples that plaintiff has been able to discover.

22 48. Below is an image that Plaintiff created for Defendant's "Born This
23 Way" product in the March 2017 shoot:

24 //

25 //

26 //

27 //

28 //



49. Defendant cut out the jar and powder on the right side of the image and altered the background to create the following three images that it then used on its website and on its Facebook page:

//

//

//

//

Too Faced Cosmetics, LLC

Get the **EXCLUSIVE** bkr Water Bottle **SHOP***Too Faced*

BORN THIS WAY

THE COMPLETE COLLECTION IS ALMOST HERE!

*We've got you covered...*

with brand new foundation shades for 35 total shades, new deeper setting powder shades and 20 never-before-seen multi-use concealer shades!

SHOP > COLLECTIONS > BORN THIS WAY

6 ITEMS TOTAL

Too Faced BORN THIS WAY

*We've Got You Covered!***SHOP NOW**



50. Below is another original image that Plaintiff created and which Too Faced improperly used. This image was created for the “Peaches and Cream” collection’s blush in the first May 2017 photoshoot:



1 51. Defendant manipulated this image to create unlawful derivative works.
2 Specifically, in the following images Too Faced added additional products in the
3 milk splashes in various places:









52. Too Faced used these images on its own website and social media and provided them to retailers who used them on their website to promote sales of Too Faced Cosmetics products.

53. Too Faced also impermissibly adapted the original Peaches and Cream image to create an outdoor ice cream truck advertisement for its products, as seen here:



54. Defendant again added an additional lipstick container and cosmetic tube to the original image in creating the truck design.

55. Plaintiff also created the following image for the “Peaches and Cream” photoshoot:



56. Defendant Too Faced manipulated this image by adding elements such as the palette to the back of the first image that follows:



57. Too Faced created another variant of the original by adding peaches:



58. In the following image, Defendant Too Faced removed the milk surface in the original and improperly combined two images created by E+B to create an unlawful derivative image:



59. Following is another example of Defendant's infringement. This image is another that Plaintiff created for the "Peaches and Cream" photoshoot:

//
//
//
//



60. Defendant changed the color palette, manipulated the background, and added sparkle effects to create the image below without authorization:



61. Too Faced also used the above unlawful derivative image to create in-store displays that it provided to its retailers.

62. Defendant also improperly manipulated and used images from the “Chocolate Gold” photoshoot. The following is an original image that E+B created at the July and August of 2017 photoshoot:



63. Defendant removed the background and modified the chocolate bar counter to create the following image:



1 64. The following is another original stylized image created by E+B in the
2 “Chocolate Gold” photoshoot:



18 65. Defendant manipulated this image by changing the colors of the lip
19 gloss and compact on the right and altering the base's color to create the following
20 advertisement:

21 //

22 //

23 //

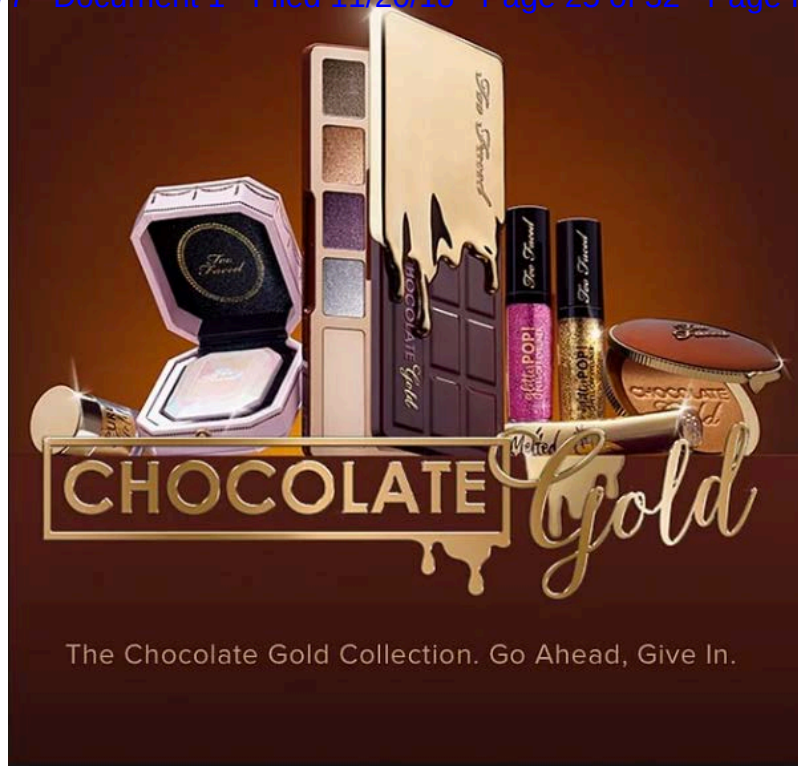
24 //

25 //

26 //

27 //

28 //



66. Below is a third original stylized photograph created by E+B in the “Chocolate Gold” photoshoot:



1 67. Too Faced manipulated this image by blurring the background to
2 create a different image without authorization:



9 68. Too Faced used the following manipulated image on its Instagram
10 account in which it similarly blurred the background of the original to create a
11 different image:



69. Upon information and belief, all of the altered images above were provided to retailers worldwide and were published by companies such as Macy's, Home Shopping Network ("HSN"), Mecca, Sephora, Debenhams, Ulta Beauty, among others. Defendant also unlawfully used the altered images on its own Facebook page and other social media platforms such as Instagram and Twitter.

70. Defendant did not only manipulate E+B's images by adding or removing elements. It also animated one and posted it to social media without the rights to do so. Specifically, below is an original stylized image that E+B created for the "Kandee" collection photoshoot:



71. Too Faced made an animation using this photo so that the cupcake hot air balloon flew down to in-between the frosting mountains. Too Faced then posted the image to its social media account.

72. Too Faced's breaches and violations were done knowing and willfully

1 as seen by its refusal to cease even after acknowledging that it was violating
2 Plaintiff's copyrights. In or about July of 2018, E+B first discovered that Too
3 Faced manipulated the "Born This Way" image produced above to create a new
4 advertisement.

5 **C. Millions Have Viewed the Manipulated Images**

6 73. Upon information and belief, over 100,000,000 people have viewed
7 the images that Too Faced infringed and manipulated.

8 74. In just the past six months, millions have viewed Too Faced's website
9 and the websites of its preferred sellers which posted the manipulated images.
10 Specifically, over 1,400,000 people have viewed Toofaced.com, 22,130,000 have
11 viewed Sephora.com, 938,050 have viewed Sephora.com.au (Australian version),
12 3,900,000 have viewed Sephora.fr (French version), 17,080,000 have viewed
13 Ulta.com, 29,410,000 have viewed Macys.com, and 29,410,000 have viewed
14 Nordstrom.com.

15 75. Additionally, the reach of Too Faced's social media and the websites
16 of its preferred sellers is vast. Specifically, Too Faced has over 11,500,000
17 individuals subscribing to the account and following its posts ("followers") and Mr.
18 Blandino has over 275,000 followers on Instagram. Among Too Faced's preferred
19 sellers, UltaBeauty has over 5,200,000 followers, Sephora has over 15,600,000
20 followers, Macy's has over 1,400,000 followers and Nordstrom has over 2,800,000
21 followers on Instagram.

22 76. Millions have also viewed the postings on Too Faced's Facebook page
23 and the Facebook pages of its preferred sellers who used the manipulated images.
24 Specifically, Too Faced's Facebook account reaches 3,000,000 people, Sephora
25 USA's account reaches 18,000,000, Ulta Beauty's account reaches 3,100,000,
26 Macy's account reaches 14,000,000, and Nordstrom's account reaches 5,000,000.

27 77. The scope and impact of Too Faced's improper use and infringement
28

1 of the Plaintiff's works is substantial.

2
3 **FIRST CAUSE OF ACTION**

4 **(Copyright Infringement)**

5 78. Plaintiff incorporates by reference each and every of the foregoing
6 paragraphs as though set forth in full in this cause of action.

7 79. As alleged above, Eisenberg+Bonem created numerous photographic
8 images during 2016 and 2017 photoshoots for Defendant Too Faced. Plaintiff
9 owns the copyrights in all such works.

10 80. Plaintiff has registered the photographs and images that it took for Too
11 Faced with the United States Copyright Office. The works are copyrighted under
12 the registration number VA 2-121-348.

13 81. By using the Plaintiff's copyrighted works in the manner described
14 herein including, but not limited to, exceeding the permissible usage of the images
15 by publicly displaying them on advertising trucks, by displaying the photos and
16 images beyond the permissible scope of the limited licenses, by displaying
17 unauthorized derivative works without authorization or right, and by the intentional
18 continued exploitation of the copyrighted images and photos beyond the scope of
19 any licenses and without Plaintiff's necessary permission, Defendant has infringed
20 its copyrights in those works.

21 82. By reason of Defendant's past and continuing infringement, Plaintiff
22 has sustained and will continue to sustain substantial injury, loss and damage.

23 83. Plaintiff is entitled to recover from Too Faced the damages sustained
24 by Plaintiff as a result of Too Faced's acts of copyright infringement. Plaintiff is at
25 present unable to ascertain the full extent of the monetary damage it has suffered by
26 reason of Defendant's acts of copyright infringement but will prove the full extent
27 of its damages at the time of trial.

28 84. Plaintiff is further entitled to recover from Defendant the gains, profits

1 and advantages Defendant has obtained as a result of its acts of copyright
2 infringement. Alternatively, Plaintiff is entitled to recover an award of statutory
3 damages for Defendant's acts of copyright infringement.

4 85. Further irreparable harm to Plaintiff is imminent as a result of
5 Defendant's conduct, and Plaintiff is without an adequate remedy at law. Plaintiff
6 is entitled to an injunction restraining Defendant, its officers, directors, agents,
7 employees, representatives and all persons acting in concert with them from
8 engaging in further such acts of copyright infringement.

9 86. Plaintiff is further entitled to recover from Defendant an award of its
10 attorneys' fees and costs.

11 **SECOND CAUSE OF ACTION**

12 **(Vicarious and/or Contributory Copyright Infringement)**

13 87. Plaintiff incorporates by reference each and every of the foregoing
14 paragraphs as though set forth in full in this cause of action.

15 88. Plaintiff is informed and believes and thereon alleges that Defendants
16 knowingly induced, participated in, aided and abetted in and profited from the
17 impermissible use of E+B's copyrighted images as alleged hereinabove.

18 89. Defendants, and each of them, are vicariously liable for the
19 infringement alleged herein because they had the right and ability to supervise the
20 infringing conduct and because they had a direct financial interest in the infringing
21 conduct.

22 90. By reason of the Defendants', and each of their, acts of contributory
23 and vicarious infringement as alleged above, Plaintiff has suffered and will
24 continue to suffer substantial damages in an amount to be established at trial, as
25 well as additional general and special damages in an amount to be established at
26 trial.

27 91. Plaintiff is informed and believes and thereon alleges that Defendants,
28 and each of them, have committed acts of copyright infringement, as alleged above,

1 which were willful, intentional and malicious, which further subjects Defendants,
2 and each of them, to liability for statutory damages under Section 504(c)(2) of the
3 Copyright Act in the sum of up to one hundred fifty thousand dollars (\$150,000.00)
4 per infringement. Within the time permitted by law, Plaintiff will make its election
5 between actual damages and statutory damages.

6
7 **THIRD CAUSE OF ACTION**

8 **(Breach of Contract)**

9 PLAINTIFF, FOR A SECOND CAUSE OF ACTION AGAINST
10 DEFENDANT TOO FACED AND DOES 1 THROUGH 10, INCLUSIVE, AND
11 EACH OF THEM, FOR BREACH OF CONTRACT, ALLEGES:

12 92. Plaintiff incorporates by reference each and every of the foregoing
13 paragraphs as though set forth in full in this cause of action.

14 93. As alleged hereinabove, Plaintiff entered into a series of written
15 license agreements with Defendant for its non-exclusive use of specific photos and
16 images.

17 94. Plaintiff has performed all conditions, covenants and promises
18 required on its part to be performed in accordance with the terms and conditions of
19 its agreements with Defendant.

20 95. By using Plaintiff's works in the manner described herein, beyond the
21 scope of the license agreements, Defendant has breached those agreements.

22 96. As a result of Defendant's breaches of the agreements, Plaintiff been
23 damaged in an amount that is not yet fully ascertainable but, when Plaintiff has
24 ascertained the full amount of its damages, it will seek leave of court to amend this
25 Complaint accordingly.

26 97. Plaintiff is further entitled to recover from Defendant an award of its
27 attorneys' fees and costs pursuant to the contractual attorneys' fees provisions in the
28 subject contracts.

1
2 WHEREFORE, Plaintiff prays for judgment against defendants, and each of
3 them, as follows:

4 1. For actual damages and Defendant's profits in an amount to be
5 determined at trial;

6 2. For statutory damages in an amount at the discretion of the Court;

7 3. For a permanent injunction enjoining Defendant and its agents, servants,
8 and employees and all persons acting under, in concert with, or for it from
9 continuing to infringe Plaintiff's copyright;

10 4. For attorneys' fees and costs of suit herein incurred;

11 5. For Interest at the maximum legal rate; and/or

12 6. For such other and further relief as the Court may deem proper.

13
14 Dated this 20th day of November 2018, at Claremont, California.

15
16 LAW OFFICES OF SCOTT GLOVSKY, APC

17
18 By: /S/Scott Glovsky
19 SCOTT C. GLOVSKY
20 ARI DYBNIS
21 Attorneys for Plaintiff
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