

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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DESSERT BEAUTY, INC., :  
 :  
Plaintiff, :  
 :  
-against- : [Case No.]  
MARA FOX and LOVE POTION LLC :  
 :  
Defendants. :  
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**JUDGE CHIN**

[Case No.]

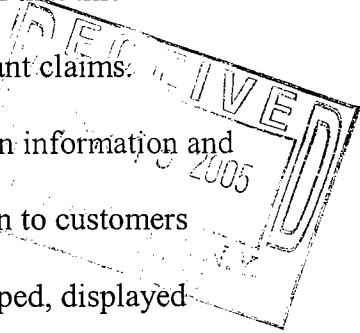
**COMPLAINT**

**05 CV 3872**

**Nature of the Action**

1. This is an action for declaratory judgment under the Federal Declaratory Judgment Act, Title 28 U.S.C. § § 2201 and 2202. This Court has subject matter jurisdiction pursuant to 15 U.S.C. § 1121, and 28 U.S.C. § § 1331, 1338, and 1367(a) in that this Complaint raises federal questions under the Lanham Act and related pendant claims.

2. Venue is proper in this district under 28 U.S.C. § 1391. Upon information and belief, the defendants have sold products which are the subject of this action to customers with the purposeful intent and knowledge that their products would be shipped, displayed and sold to customers within this district and through an interactive website, solicited business within this judicial district. Therefore, defendants are subject to personal jurisdiction in this district.



**The Parties**

3. Plaintiff, Dessert Beauty, Inc., is a corporation organized and existing under the laws of the Country of Barbados, and has a place of business at Second Street, Holetown, St. James, Barbados (“Dessert Beauty”).

4. Upon information and belief, defendant Love Potion, LLC is a limited liability company with a principal place of business at 520 Washington Boulevard #199, Marina Del Rey, CA, and does business and transacts business in this district (“Love Potion”).

5. Upon information and belief, Defendant Mara Fox is an individual residing in the State of California and is a principal of Love Potion and does business and transacts business in this District (“Fox”).

**Facts Applicable to All Causes of Action**

6. Dessert Beauty is among the leading sellers in the United States of fragrance and beauty products.

7. In or about September 2003, Dessert Beauty launched a new highly successful line of fragrance and beauty products under the name and trademark “DESSERT.” Within such product line are fragrance and beauty products of various scents.

8. One unique aspect of plaintiff’s products is that they are edible and such fragrances have not only scents, but differing tastes.

9. On all of its original packaging and advertising materials Dessert Beauty used its trademark “DESSERT” prominently usually within a black circle. Some packaging also displayed the slogan “Sexy Girls Have Dessert,” under which were written the words “deliciously kissable love potion fragrance” in small letters. Photocopies showing such packaging and advertising are annexed as **Exhibit A**. Other original packaging bore the

phrase “deliciously kissable belly button love potion fragrance” in small letters. *See*, **Exhibit B**.

10. Notwithstanding the long prior use of the phrase “love potion” by others and the generic nature and usage thereof by others, including defendants themselves, Dessert Beauty received from defendants a cease and desist letter dated April 16, 2004 claiming exclusive rights in the words “love potion.”

11. Defendants claimed *inter alia* that any use of “love potion” by Dessert Beauty would constitute trademark infringement, notwithstanding the fact Dessert Beauty’s usage of the words were not as a brand name for its product, which is DESSERT, but in their common English language sense as part of descriptive slogans or a tag lines. *See*, attached as **Exhibit C** articles from defendants’ website showing such descriptive usage.

12. The phrase “love potion” has been used as a common descriptor and a generic term, dating back over 1000 years. To this day, the word “love potion” is commonly used in the fragrance and cosmetics trade and industry to describe and refer to “potions” which arouse sexual passions.

13. Upon information and belief, defendant Mara Fox owns U.S. Trademark Registration No. 1,902,312, dated July 4, 1995.

14. Upon information and belief, defendants and/or their agents or representatives misrepresented to and/or concealed from the United States Patent and Trademark Office the fact that the words “love potion” are commonly used in the industry and trade as descriptors and are generic terms. Upon information and belief, defendants and/or their agents or representatives also misrepresented to and/or concealed from the United States Patent and

Trademark Office the fact that other persons have used the words “love potion” on and in connection with fragrances prior to defendants’ first use of the words.

15. Since these words were common and unimportant to Dessert Beauty’s marketing approach, and since Dessert Beauty did not use or claim rights in these words as its “brand,” but simply used them to describe the product and/or its function or purpose, Dessert Beauty unilaterally decided, without waiving any rights or remedies, to comply with defendants’ demand that Dessert Beauty discontinue use of these words as soon as practicable. This caused Dessert Beauty great expense for ordering revised bottles and packaging and for new photographs thereof to be displayed on their website. Copies of photographs of such amended packaging is annexed as **Exhibit D**.

16. Notwithstanding the decision which was communicated to defendants over six months ago, defendants’ attorneys have now threatened to file an action for trademark infringement against plaintiff in the Central District of California seeking tens of millions of dollars worth of damages. There exists an actual case and controversy.

## COUNT I

### **(Declaratory Relief – Non Infringement)**

17. Plaintiff repeats and incorporates herein its allegations in paragraphs 1 through 16 above as if fully set forth herein.

18. This is an action for a declaratory judgment under the provisions of the Federal Declaratory Judgment Act, Title 28, U.S.C. § § 2201 and 2202. An actual controversy exists between the parties.

19. Dessert Beauty seeks a declaration that its use of the words “love potion” do not and did not infringe any valid rights of Fox or her company, Love Potion, for the reasons

that, *inter alia*, its use of the words “love potion” was fair use, there is no likelihood of confusion between plaintiff’s DESSERT brand product and defendants’ product, and that defendants’ trademark is invalid.

## COUNT II

### **(For Cancellation of Defendants’ Registered Trademark “Love Potion”)**

20. Dessert Beauty repeats and incorporates herein its allegations in paragraphs 1 through 19 above as if fully set forth herein.

21. In view of the generic nature of “love potion” mark for reasons set forth above, such registration and the underlying mark is invalid and void and the registration should be canceled.

## COUNT III

### **(For Cancellation of Defendants’ Registered Trademark “Love Potion”)**

22. Dessert Beauty repeats and incorporates herein its allegations in paragraphs 1 through 21 above as if fully set forth herein.

23. Upon information and belief, defendants’ have committed fraud on the United States Patent and Trademark Office; and therefore, defendants’ registration of the “love potion” mark, and the underlying mark, is invalid and void ab initio and the registration should be canceled.

## COUNT IV

### **(Intentional Interference With Business Relations)**

24. Dessert Beauty repeats and incorporates herein its allegations in paragraphs 1 through 23 above as if fully set forth herein.

25. Notwithstanding its flawed claims, Dessert Beauty's vigorous protestations as to the lack of validity of such claims and its voluntary cessation of use of the phrase "love potion," defendants contacted Dessert Beauty's customers, namely QVC, Inc. and Sephora, Inc., claiming that their sale of Dessert Beauty's products constituted infringement of defendants' alleged rights.

26. These contacts caused damage to and interfered with Dessert Beauty's business relations in violation of New York law, all to Dessert Beauty's damage, in an amount which is currently unknown.

**Prayers for Relief**

WHEREFORE, Dessert Beauty requests:

1. That this Court issue a declaratory judgment that its use of the phrase "love potion" did not infringe any valid rights of Fox or her company Love Potion, LLC;
2. That this Court declare that defendants' so-called "love potion" mark is invalid and unenforceable and accordingly order the United States Patent and Trademark Office to cancel the registration thereof;
3. That defendants be ordered to pay plaintiff such damages as may be proven by plaintiff due to defendants' intentional interference with business relations; and
4. That plaintiff be awarded its attorney's fees and costs and interest according to law.

5. All such other relief as this Court deems just and proper.

Dated: New York, New York  
April 15, 2005

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.

By:  \_\_\_\_\_

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