

**ORIGINAL****FILED**

Los Angeles Superior Court.

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10 Attorneys for Plaintiffs Octavia Spencer and  
 11 Orit Entertainment, Inc.

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
 13 **FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

BC519632

12 OCTAVIA LENORA SPENCER, a California  
 13 resident and ORIT ENTERTAINMENT, INC.,  
 14 an Alabama corporation,

Plaintiffs,

vs.

16 SENSEA PRODUCTS, LLC, a Delaware  
 17 limited liability company and DOES 1 through  
 18 50, inclusive,

Defendants.

Case No.:

COMPLAINT FOR:

1. BREACH OF WRITTEN CONTRACT
2. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING
3. FRAUD
4. ACCOUNTING

BY FAX

RECEIPT #: CCH465980016  
 DATE PAID: 08/28/13 08:46 AM  
 PAYMENT: \$435.00  
 RECEIVED:  
 CHECK: \$435.00  
 CASH: \$0.00  
 CHANGE: \$0.00  
 CARD: \$0.00

CIT/CASE: BC519632  
 LEA/DEF#:

COMPLAINT

08/28/2013

1 Plaintiffs Octavia Lenora Spencer ("Spencer"), an individual and Orit Entertainment, Inc.,  
2 an Alabama corporation ("Orit") (Spencer and Orit are collectively referred to herein as, the  
3 "Plaintiffs" or the "Spencer Parties"), complain against defendants SENSEA PRODUCTS, LLC, a  
4 Delaware limited liability company ("SENSEA" or "Defendant") and DOES 1-50, as follows:

#### 5 INTRODUCTION

6 1. SENSEA manufactures and markets a diet product designed to trick one's brain.  
7 Therefore, it's not surprising that it would manufacture allegations against its most prominent  
8 spokesperson, Octavia Spencer.

9 2. After its recent marketing and public relations campaign flopped, SENSEA looked  
10 for ways to get out of its endorsement deal with Spencer: It blamed Spencer for its own  
11 shortcomings. It "suggested" to Spencer that she walk away from approximately \$700,000  
12 remaining on her million dollar contract. And, after Spencer sent SENSEA a notice of breach for  
13 failing to make payment to her, SENSEA fabricated an after-the-fact breach of the endorsement  
14 agreement.

15 3. Despite SENSEA's shocking acts of bad faith, Spencer will not walk away.

#### 16 PRELIMINARY ALLEGATIONS

17 4. Plaintiff Spencer is, and at all times herein mentioned was, an individual who  
18 resides in Los Angeles, California and conducts business in Los Angeles County, California.  
19 Spencer is an award winning television and motion picture actress who is best known for her  
20 Academy Award winning role as Minny Jackson in the motion picture, *The Help*.

21 5. Plaintiff Orit is an Alabama corporation authorized to do business in the State of  
22 California. Orit is Spencer's loan-out company.

23 6. Upon information and belief, the Spencer Parties allege that defendant SENSEA is  
24 a Delaware limited liability company authorized to do business in the State of California. Upon  
25 information and belief, the Spencer Parties allege that SENSEA is the founder of the SENSEA®  
26 Weight Loss System as well as other health and wellness products. The *sensa.com* website states  
27 that "*SENSEA® is based on the powerful science of 3 patents and over 25 years of research. It*  
28 *has NO drugs, NO pills, NO surgery. Over 5 million people have said, 'YES' to SENSEA® the*

1 *ORIGINAL Sprinkle Diet.* Sensa.com also states that it is the "#1 weight-loss system in  
2 America."

3 7. The true names and capacities, whether individual, corporate, associate or  
4 otherwise of the defendants named herein as Does 1 through 50, inclusive, are unknown to  
5 Spencer Parties which therefore sue said defendants by such fictitious names. The Spencer  
6 Parties allege on information and belief that each of the defendants, including those designated  
7 as a Doe, are also responsible for the events alleged herein and the damages caused thereby as a  
8 principal, agent, co-conspirator or aider and abettor. The Spencer Parties will seek leave of this  
9 Court to amend this Complaint to allege the true names and capacities of such defendants when  
10 the same have been ascertained.

11 8. SENSEA and Does 1-50 will be collectively referred to herein as the "Defendants."

12 9. Upon information and belief, the Spencer Parties allege that Defendants at all  
13 times relative to this action, were the agents, servants, partners, joint venturers and employees of  
14 each of the other Defendants and, in doing the acts alleged herein, were acting with the  
15 knowledge and consent of each of the other Defendants in this action.

16 10. Venue is proper in Los Angeles County in that the obligations that are the subject  
17 of this action were to be performed in Los Angeles County. Moreover, the written contract at  
18 issue in this action specifically states that the contract is "deemed made, entered into in Los  
19 Angeles, California, and will be performed in Los Angeles, California. Each of the parties  
20 hereto hereby irrevocably consents and submits to the exclusive jurisdiction of the state and  
21 federal courts, as applicable, located within the County of Los Angeles..." As such, this Court  
22 is the proper Court for trial of this action.

23 **ALLEGATIONS COMMON TO ALL CAUSES OF ACTION**

24 A. **Spencer Discusses Entering into an Endorsement Deal with SENSEA.**

25 11. On or about January 24, 2012, SENSEA provided Spencer with the SENSEA  
26 product and asked her to try it. Spencer began losing weight and noticed that the SENSEA  
27 product also curbed her appetite.

28 12. On or about February 2, 2012, Garrett Smith ("Smith") of Starpower, Inc.

1 ("Starpower"), a marketing and public relations consultant hired by SENSE to find celebrity  
2 talent for the SENSE brand, approached Spencer's talent agent to discuss Spencer becoming a  
3 spokesperson for SENSE.

4 13. Spencer entertained the idea of becoming SENSE's next spokesperson because  
5 she realized a five (5) pound weight loss during the time she was on the product and thought that  
6 the product may help other women who had weight issues.

7 14. From approximately February 2 through February 27, 2012, Spencer's agent  
8 engaged in preliminary discussions with SENSE regarding Spencer's role as SENSE's next  
9 spokesperson.

10 15. On or about February 29, 2012, Spencer and her representatives met face-to-face  
11 with executives from SENSE and Starpower to discuss SENSE's desire to enter into an  
12 endorsement agreement with Spencer ("Initial Endorsement Meeting"). Those in attendance  
13 included, among others, Smith and Jared Weiss ("Weiss") of Starpower; Brett Brewer, SENSE's  
14 CEO ("Brewer"); Kristin Chadwick, SENSE's president ("Chadwick"); Katelyn O'Reilly,  
15 SENSE's Public Relations Director ("O'Reilly") and Don Ressler, the Founder of SENSE and  
16 Intelligent Beauty ("Ressler").

17 16. Prior to, and during the Initial Endorsement Meeting, Spencer and her  
18 representatives made it clear to SENSE that Spencer was interested in living a "healthier  
19 lifestyle" and was not interested in significant weight loss. During the Initial Endorsement  
20 Meeting, Spencer also made it clear to SENSE that she did not like SENSE's prior advertising  
21 campaigns which centered on significant weight loss and placed advertisements, advertorials and  
22 editorials in tabloid magazines and tabloid/ gossip websites. Prior to and during the Initial  
23 Endorsement Meeting, the Spencer Parties and their representatives made it clear to SENSE that  
24 the Spencer Parties would only agree to enter into an endorsement deal if SENSE agreed to the  
25 following conditions:

- 26 i. Spencer would not do a campaign focused on extreme weight transformation.  
27 Instead, the campaign's needed to focus on Spencer living a "healthier  
28 lifestyle."

- 1 ii. Spencer's weight loss goal was 20-25 lbs. only. She did not want significant  
2 weight loss.
- 3 iii. Spencer would not permit "before & after" photographs of her to be placed in  
4 any advertisement, advertorial or editorial.
- 5 iv. Spencer would not agree to any of her SENSEA advertisements, advertorials  
6 and/or editorials in tabloid/ gossip magazines and tabloid/ gossip websites.  
7 She would not do any infomercials.
- 8 v. Spencer required complete and final approval on all creative elements in the  
9 advertisements, advertorials and editorials, including what media outlets they  
10 would be placed.

11 (Paragraphs i - v are collectively referred to herein as, the "Spencer Requirements").

12 17. During the February 29, 2012 Initial Endorsement Meeting, in response to the  
13 Spencer Requirements, SENSEA executives Brewer, Chadwick and O'Reilly each assured the  
14 Spencer Parties that SENSEA would honor the Spencer Requirements (the "SENSEA Assurances").

15 18. Based on the SENSEA Assurances, the Spencer Parties and their representatives  
16 negotiated an endorsement contract and addendum to that contract from approximately February  
17 29, 2012 through January 29, 2013. During the entire negotiating process, the Spencer Parties  
18 and their representatives repeatedly reiterated the Spencer Requirements. SENSEA executives  
19 repeatedly confirmed the SENSEA Assurances.

20 19. During the negotiation process of the Agreement, from April to May 2012, the  
21 Spencer Parties informed SENSEA that Spencer had a \$3 million dollar endorsement offer from  
22 one of SENSEA's major competitors and informed SENSEA that it would pass on the \$3 million  
23 dollar endorsement offer from the SENSEA competitor based in large part on the SENSEA  
24 Assurances.

25 **B. Spencer Enters into an Endorsement Agreement with SENSEA.**

26 20. In reliance on the SENSEA Assurances, on or about September 10, 2012, an  
27 "Endorsement Agreement," dated August 17, 2012, was entered into by and between SENSEA  
28 and Falcon Enterprises, Inc. ("Falcon"), in conjunction with Sourcequest Communications

1 ("Sourcequest")<sup>1</sup>, on the one hand, and Orit, for the services of Spencer, on the other hand (the  
2 "Endorsement Agreement"). Pursuant to the Agreement, SENSEA engaged Spencer to endorse  
3 SENSEA products. A true and correct copy of the Endorsement Agreement is attached hereto as  
4 Exhibit "A" and incorporated herein by this reference.

5 21. On or about January 29, 2013, the parties entered into a "First Amendment to  
6 Endorsement Agreement (the "Amendment") (Endorsement Agreement and Amendment  
7 collectively referred to as, the "Agreement"). A true and correct copy of the Amendment is  
8 attached hereto as Exhibit "B" and incorporated herein by this reference.

9 22. SENSEA entered into the Agreement with Orit (referred to as "Lender" in the  
10 Agreement) for the direct benefit of Spencer (referred to as "Artists" in the Agreement).

11 23. Pursuant to paragraph 3.1(e) of the Agreement, entitled "Social Media Legal  
12 Compliance," Orit shall:

13 "ensure that all social media content created and/ or published by  
14 ☐[Orit] or ☐[Spencer] comply with all relevant laws, regulations  
15 and rules including, without limitation the Federal Trade  
16 Commission (FTC) Guidelines concerning the use of endorsements  
17 and testimonial in advertising (i.e., **including disclosure language**  
18 **such as #SPON**). ☐[SENSEA] shall provide ☐[Orit] and ☐[Spencer]  
19 with guidelines for such compliance and ☐[SENSEA] shall ensure  
20 that any and all social media content created and/ or published by  
21 ☐[SENSEA] complies with all relevant laws, regulations and rules,  
22 including without limitation the FTC Guidelines concerning the  
23 use of endorsements and testimonials in advertising."

24 (See Agreement, ¶3.1(e) (emphasis added)).

25 24. Pursuant to paragraph 3.5 of Agreement entitled "Approval Rights," Spencer has  
26 approval rights for any and all uses of her persona, including without limitation, approval over  
27 all creative, as well as the right to approve all public relations outlets, public relations services,

28 <sup>1</sup> Falcon and Sourcequest are third party payroll companies.

1 director(s) photographer(s), scripts, concepts and storyboards within three (3) business days. (See  
2 Endorsement Agreement, ¶3.5(a))

3 25. Pursuant to the terms of the Agreement, SENSE, through Falcon, is required to  
4 pay Orit a total of \$1,250,000 in "service fees" over the life of the Agreement, made payable  
5 (after a \$100,000 initial payment) in monthly installments of \$95,833.33 on the 1<sup>st</sup> day of each  
6 month from February 1, 2013 through February 1, 2014. (See Amendment, ¶5.1)

7 26. Paragraph 5.3 of the Agreement is entitled "Charitable Donation." Pursuant to the  
8 terms of paragraph 5.3, SENSE is also required to make a \$100,000 donation to a foundation  
9 established by Spencer to fight childhood obesity. (See Endorsement Agreement, ¶5.3)

10 27. Paragraph 5.10 of the Agreement is entitled "Audit." Paragraph 5.10(a) states  
11 that Orit "shall have the right, upon at least five (5) days written notice and no more than once  
12 per calendar year, to inspect [][SENSE's] books and records with respect to the subject matter of  
13 this Agreement at [][SENSE's] then-current principal office or other location reasonably  
14 designated by [][SENSE]. [][Orit] shall be permitted to make copies thereof and extracts  
15 therefrom."

16 28. Paragraph 5.10(c) requires SENSE "to render to [][the Spencer Parties] semi-  
17 annual statements showing a summary of Channel Profits and permitted deductions."

18 C. **The Spencer Parties Fully Perform Their Obligations Under the Agreement.**

19 29. Spencer Timely Reviewed All Approvals. Spencer consistently used good faith  
20 efforts to cooperate with SENSE to participate in the marketing, advertising, promotion,  
21 publicity and sales of the SENSE product line. Although paragraph 3.5(a) of the Agreement  
22 gave Spencer three (3) business days to approve or deny creative advertising relating to the use  
23 of Spencer's persona, Spencer and her team approved dozens of SENSE's creative materials  
24 within a twenty-four (24) period. Many times a quick turnaround was difficult for Spencer as  
25 she was traveling, filming and attending special events. Despite her busy schedule, she always  
26 managed to provide timely approvals on the SENSE submissions. In fact, SENSE often praised  
27 Spencer and her representatives' efforts on their quick turnaround time.  
28

30. Spencer's Twitter Tweets Are Consistent with the Terms of the Agreement.

Pursuant to paragraph 3.1(c)(iv) of the Agreement, Spencer was required to provide two posts via social media every month. Spencer fully honored her posting requirements. Spencer's tweets are set forth below. These tweets clearly show that Spencer praised the SENSEA product line and that she was a fan and regular user of SENSEA.

2/21/13 In NYCw/@sensaweightloss. Lost 20 lbs. :0 SENSEA changed my life not my lifestyle. #spon

2/24/13 Having breakfast w/ the glam squad, sprinkling LOL then getting ready for the final red carpet @SensaWeightloss u rock! #spon

3/04/13 Just had the best breakfast meatless sausage, banana pancakes, sensa! @SensaWeightloss!!!! #spon

3/11/13 Now what am I having for breakfast so I can sprinkle it!!! @SensaWeightloss #spon

4/11/13 @SensaWeightloss Bowl of steel cut oatmeal. Check. Berries. Check. Smile. Check check! Sprinkle Sprinkle #spon<sup>2</sup>

4/23/13 Bet you've seen my @SensaWeightloss commercials & wondered if it's the real deal? I'm here to say it works! #spon bit.ly/osblog

5/03/13 @SensaWeightLoss Ask me how I'm getting ready 4 the red carpet at Cannes... #Sensa of course! #spon<sup>3</sup>

5/22/13 @SensaWeightloss A lot of you have asked does sensa really work for me. for more on the story check this out! #spon  
<http://blog.trysensa.com/index.php/octavia-spencer-sensas-a-life-saver-when-im-on-the-go/> ...<sup>4</sup>

6/11/13 i've gotten so many ??? about this outfit. LOL!!! blouse: DVF, jeans: Torrid, shoes: Atwood, body @SensaWeightloss

<sup>2</sup> This tweet was subsequently deleted from Spencer's Twitter feed by an unknown person.

<sup>3</sup> This tweet was subsequently deleted from Spencer's Twitter feed by an unknown person.

<sup>4</sup> This tweet was subsequently deleted from Spencer's Twitter feed by an unknown person.



1 [http://www.justjared.com/photo-gallery/2885452/kerry-washington-](http://www.justjared.com/photo-gallery/2885452/kerry-washington-octavia-spencer-sundance-institute-event-05/)  
2 [octavia-spencer-sundance-institute-event-05/](http://www.justjared.com/photo-gallery/2885452/kerry-washington-octavia-spencer-sundance-institute-event-05/) ...

3 6/22/13 A lot of press this week, very little time to work out. Thank goodness for  
4 @SensaWeightloss fb.me/2MjuNrbY

5 7/17/13 walking thru the mall I hear is that her, the lady from the Help, answer:  
6 No she's too "skinny". Thanks @SensaWeightloss #mademyday #spon

7 7/23/13 thanks @SensaWeightloss! Losing weight never tasted so good!  
8 #flourlesschocolatecake #spon

9 **D. The Spencer Parties Go Above and Beyond Their Contractual Obligations.**

10 31. In an effort to be a good partner to SENSE, Spencer went above and beyond what  
11 was required of her under the Agreement. Although she vehemently opposed the use any  
12 advertisements, advertorials or editorials that contained "before & after" photographs of her  
13 weight loss, Spencer added language to Agreement by way of the January 29, 2013, Amendment  
14 that gave SENSE the right to use "before and after" photographs if Spencer approved. Although  
15 she consistently stated that she did not want to have a campaign that used such photographs,  
16 Spencer approved the use of such "before & after" photographs on two separate occasions (on or  
17 about 4/10/13 and 5/17/13).

18 32. Additionally, despite her stance against using her advertisements, advertorials and  
19 editorials in tabloid magazines and websites, Spencer approved the use of her advertisements in  
20 tabloid magazines on several occasions.

21 33. Although she stressed her reluctance to do a campaign that focused on her weight  
22 loss, after receiving constant requests from SENSE, Spencer agreed to add language to the  
23 Agreement, by way of the Amendment, that permitted SENSE to reference Spencer's weight  
24 loss in all of SENSE's creative material.

25 **E. SENSE Executives Constantly Praise Spencer's Performance Under the**  
26 **Agreement.**

27 34. Throughout the SENSE campaign, SENSE's executives praised Spencer and the  
28 Spencer Parties' team's efforts. At the conclusion of Spencer's commercial shoot on January 29,

1 2013, Chadwick told Spencer that the shoot was "wonderful" and that Spencer's "spot was  
2 amazing." On February 11, 2013, after Spencer's photo shoot, O'Reilly informed Spencer's  
3 talent agent how "amazing" Spencer looked in the photos and how easy the photo shoot went.  
4 On February 25, 2013, O'Reilly informed Spencer's agent that the February 21, 2013 "PR Day"  
5 with CNN, The View, Access Hollywood, New York Live, E, Glamour.com and Extra was  
6 "great" and that Spencer gave "amazing interviews."

7 35. It is undisputed that the Spencer Parties performed all of the duties and  
8 responsibilities required of them under the Agreement. In fact, apart from the August 6, 2013  
9 termination letter (to be discussed below), there is no written communication by SENSEA stating  
10 that the Spencer Parties are in breach of the Agreement.

11 36. Despite her hectic schedule traveling and attending events and filming movies all  
12 over the world, Spencer or one of her representatives was always available to timely approve  
13 SENSEA creative materials and/ or discuss and strategize the SENSEA campaign. Spencer Parties  
14 diligently worked hundreds of hours to schedule Spencer's non-SENSEA commitments around  
15 her SENSEA commitments: SENSEA media day, media training, production and training sessions.

16 **F. SENSEA Admits that the Campaign is Not Successful and SENSEA Requests**  
17 **Assistance from the Spencer Parties to Help Create a New Campaign**

18 37. Starting in or around April 2013, SENSEA executives and consultants admitted to  
19 the Spencer Parties and their representatives that the SENSEA campaign was not living up to  
20 expectations. On April 11, 2013, Weiss (Starpower) informed Spencer's talent agent that  
21 SENSEA did not like Spencer's April 11 tweet. During that conversation, Weiss stated that the  
22 "overall campaign has not been successful for SENSEA and they are unhappy with the results."  
23 Weiss then requested that Spencer's agent and publicist attend a meeting at SENSEA's offices to  
24 "help strategize" about ways to use Spencer better and improve the campaign. During this  
25 conversation, Weiss never mentioned that SENSEA considered Spencer in breach of the  
26 Agreement.

27 38. On April 25, 2013, O'Reilly informed Spencer's agent that sales have not been  
28 good for the brand since they started using Spencer. During this conversation, O'Reilly never

1 mentioned that SENSEA was displeased with Spencer or that it considered Spencer in breach of  
2 the Agreement.

3 39. On May 6, 2013, Weiss against asked Spencer's agent and publicist to help  
4 SENSEA come up with additional ideas about how SENSEA could utilize Spencer because the "ad  
5 campaign just didn't work." During this conversation, Weiss stated that "**SENSEA would**  
6 **probably walk away this [referring to the Agreement] if it could.**"

7 40. On May 8, 2013, Spencer's agent and publicist met with SENSEA's executives in  
8 SENSEA's offices for, what SENSEA called a "brand meeting" (the "5/8/13 Brand Meeting"). The  
9 SENSEA executives expressed their appreciation that Spencer was willing to come up with  
10 additional ideas help the campaign.

11 41. SENSEA's executives informed Spencer's agent and publicist that the campaign  
12 had not been successful for them. SENSEA admitted that overall results from the Spencer  
13 campaign were down significantly when compared to SENSEA's regular branded commercials.  
14 As a result, SENSEA stated that it decided to limit the airing of Spencer's television advertising  
15 spots. SENSEA also noted that it had placed Spencer's print advertisements in nine (9)  
16 publications but stopped because the average CPA was down significantly compared to  
17 SENSEA's direct response advertisements. In other words, SENSEA admitted the campaign was  
18 not working and, instead of keeping the advertisements out in the market to generate momentum  
19 for the SENSEA product, SENSEA withdrew the advertisements, effectively killing the campaign.

20 42. SENSEA admitted that Spencer's social media posts generally received less likes  
21 than the brand saw with their normal posts. Although the reactions to Spencer's posts were all  
22 positive, SENSEA felt that her use of "#spon" at the end of her tweets, which is a requirement  
23 under the Agreement and by the FTC, did not benefit her performance. SENSEA spent no more  
24 than ten minutes on the topic of social media and Spencer's tweets. At no time did anyone from  
25 SENSEA ever mention that it considered the frequency of Spencer's tweets to be a breach of the  
26 Agreement.

27 43. During the 5/8/13 Brand Meeting, SENSEA stated that its research showed that  
28 Spencer was only relevant to its target audience when her awareness in the media was high.

1 SENSEA further admitted that its research indicated that while some consumers recognized  
2 Spencer's weight loss success, many did not recognize who she was or that she had lost weight.  
3 As a result the campaign in general was not performing up to their expectations.

4 44. Towards the end of the 5/8/13 Brand Meeting, the SENSEA executives asked  
5 Spencer's agent and publicist for "advice" and to help think of ways to leverage Spencer's story  
6 and personality over the coming nine months through the expiration of the Agreement. The  
7 parties then brainstormed new approaches. At the conclusion of the meeting, SENSEA expressed  
8 that it was happy to have new ideas to push forward. SENSEA never mentioned that it considered  
9 the Spencer Parties in breach of the Agreement. In fact, SENSEA admitted throughout the 5/8/13  
10 Brand Meeting that the campaign simply failed.

11 **G. SENSEA Refuses to Operate in Good Faith Under the Agreement.**

12 **1. SENSEA Continually Demands that Spencer Remove the "#spon" from**  
13 **Her Tweets in Breach of the Agreement.**

14 45. Paragraph 3.1(e) is entitled "Social Media Legal Compliance." It states the  
15 following:

16 "[[Orit] shall ensure that all social media content created and/ or  
17 published by[] [Orit] or [][Spencer] comply with all relevant laws,  
18 regulations and rules including, without limitation the Federal  
19 Trade Commission (FTC) Guidelines concerning the use of  
20 endorsements and testimonial in advertising (i.e., including  
21 disclosure language such as #SPON). [][SENSEA] shall provide  
22 [][Orit] and [][Spencer] with guidelines for such compliance and  
23 [][SENSEA] shall ensure that any and all social media content  
24 created and/ or published by[] [SENSEA] complies with all relevant  
25 laws, regulations and rules, including without limitation the FTC  
26 Guidelines concerning the use of endorsements and testimonials in  
27 advertising.

28 (See Agreement, ¶ 3.1(e) (emphasis added)).

1 46. Throughout the parties' relationship, and in five (5) documented occasions  
2 between April 11 to May 17, 2013, SENSEA executives and representatives requested that  
3 Spencer remove the "#spon" at the end of her tweets, in clear violation of the Agreement and  
4 FTC regulations. Moreover, when SENSEA provided copy for Spencer's tweets for April and  
5 May, the language omitted the "#spon." Not wanting to breach her Agreement, FTC regulations  
6 or her talent agency's custom and practice, Spencer's re-tweets contained the "#spon" language.

7 47. In a clear showing of bad faith, SENSEA later attempted to blame the Spencer  
8 campaign's failure on Spencer's tweets which, it claimed, were rendered ineffective as a result of  
9 the "#spon" language contained at the end of them. SENSEA's reasoning for Spencer to remove  
10 the "#spon" from its tweets was simply that its past celebrities never used the "#spon" language.

11 **2. SENSEA Continually Tries to Place Advertisements, Advertorials and**  
12 **Editorials in Tabloid Magazines, Against Spencer's Wishes.**

13 48. The Spencer Parties and their team made it clear from the Initial Endorsement  
14 Meeting and all during the contract negotiations that Spencer did not want to run any  
15 advertisements, articles or advertorials in tabloid magazines and websites. Despite these clear  
16 instructions and SENSEA's assurances that it would honor Spencer's wishes, SENSEA personnel  
17 continually hounded and demanded that the Spencer Parties approve advertisements, editorials  
18 and advertorials in numerous tabloid magazines.

19 49. The content, layout and overall presentation for the tabloid magazine  
20 advertisements, advertorials and editorials suggested by SENSEA was not high caliber and the  
21 campaigns were rejected by the Spencer Parties in good faith. However, SENSEA continued to  
22 push for a presence in the tabloid arena. As a show of good faith and in the spirit of being a  
23 good partner, the Spencer Parties approved a one-time "advertorial" in Star and OK.

24 50. Unfortunately, no good deed goes unpunished. On or about June 7, 2013, SENSEA  
25 sought the Spencer Parties' approval of another editorial in various AMI publications in OK and  
26 Star magazines. Reluctantly, the Spencer's representatives agreed to review the article. As  
27 predicted, the article was replete with misinformation, including a claim that Spencer lost 30  
28 pounds, which SENSEA knew to be untrue. The article also contained a sensationalized headline

1 entitled "OCTAVIA SPENCER'S THIRTY POUND SLIM DOWN!" The article also contained  
2 "before & after" photographs which SENSEA knew Spencer did not approve. The Spencer  
3 Parties rejected the entire article in good faith. In response to outright rejection of the editorial,  
4 and in another clear showing of bad faith, SENSEA argued that OK and Star magazines were  
5 "preapproved" media outlets, suggesting that the Spencer Parties had to approve some form of  
6 the article.

7 **3. SENSEA Continually Tries to Place "Before & After" Photographs in**  
8 **Spencer's Advertisements, Despite Spencer's Constant Objections.**

9 51. The Spencer Parties and their representatives made it clear from the Initial  
10 Endorsement Meeting and during the contract negotiations that Spencer would not agree to  
11 running advertisements, editorials or advertorials that included "before & after" photographs.  
12 Despite SENSEA agreeing to this condition, SENSEA constantly requested the use of "before &  
13 after" photographs. SENSEA made it a habit to try and push "before & after" photographs into  
14 the advertisements, editorials or advertorials that it was seeking approval to use from the Spencer  
15 Parties with the hopes that Spencer would feel beat down and would just approve the "before &  
16 after" photographs. Finally, as a show of good faith, the Spencer Parties agreed to consider  
17 "before and after" photographs months after entering into the initial agreement. SENSEA used this  
18 to continually bombard the Spencer Parties with requests to use "before and after" photographs.

19 **H. Spencer Meets Her Weigh-In Requirement to SENSEA's Disappointment;**  
20 **SENSEA Begins to Manufacture a Way Out of the Agreement.**

21 52. Pursuant to the Agreement, Spencer had a mandatory weigh-in on June 28, 2013,  
22 to determine if she kept the 20 pound weight loss per the terms of the Agreement. She passed.  
23 Had Spencer failed to keep the weight off, SENSEA could have terminated the Agreement. On  
24 information and belief, the Spencer Parties allege that SENSEA wanted Spencer to fail the weigh-  
25 in so it could terminate the Agreement. On information and belief, the Spencer Parties alleges  
26 that after her successful weigh-in, SENSEA began a series of events and schemes designed to  
27 separate SENSEA from the Agreement.  
28

00/00/2013

1                   **1. SENSEA Decides in Late June 2013, Possibly Before Spencer's Successful**  
2                   **Weigh-In, to Stop Paying Orit the Monthly Service Fees and Never Tells**  
3                   **the Spencer Parties.**

4           53.       On August 2, 2013, O'Reilly sent an email to Tom Allamon of Falcon which  
5       stated "can you please explain why I'm receiving invoices from you when I've stated numerous  
6       times that you should not be providing Octavia with payments **since July 1, 2013?**"

7           54.       Pursuant to the terms of the Agreement, SENSEA is required to pay Orit  
8       \$95,833.33 on the 1<sup>st</sup> day of each month from February 1, 2013 through February 1, 2014.  
9       Therefore, if SENSEA made a decision to breach the Agreement and not pay Orit its service fees  
10      for July, 2013, it would have had to have made that decision before July 1, 2013. Despite its  
11      refusal to pay Orit the \$95,833.33 service fees for July, SENSEA never informed the Spencer  
12      *Parties of its decision or that it considered the Spencer Parties in breach of the Agreement.*

13          55.       The Spencer Parties were unaware of SENSEA's decision not to pay the Spencer  
14      Parties' July service fees because Falcon paid the service fees to Orit for July - so that it would  
15      not be in breach of its agreement to pay the service fees to Orit. Falcon later sought  
16      reimbursement of the fees it paid in July from SENSEA who refused.

17                   **2. SENSEA Meets with the Spencer Parties on July 12, 2013 and Never**  
18                   **Informs Them of Its Decision to Not Make the July Service Fee Payment.**

19          56.       On July 9, 2013, SENSEA's general counsel Keith Klein ("Klein") asked to meet  
20      Spencer's agent to discuss the Spencer Parties' relationship with SENSEA. At the time, SENSEA  
21      still had not informed the Spencer Parties of SENSEA's decision to not pay the July service fees.

22          57.       At Klein's suggestion, Spencer's agent and attorney met with Klein on or about  
23      July 12, 2013 to discuss the Spencer Parties' relationship with SENSEA. At the conclusion of the  
24      meeting, Klein suggested that the parties postpone the Agreement. The Spencer Parties'  
25      representatives responded that they would get back to him but that they considered the  
26      Agreement to be active and in full force. *Klein never informed the Spencer Parties' lawyer and*  
27      *agent of SENSEA's decision to not pay the July service fees or that it considered the Spencer*  
28      *Parties in breach of the Agreement!*

I. SENSA Fails to Make the August 2013 Monthly Service Fee Installment to the Spencer Parties in Breach of the Agreement.

58. SENSA failed to make the August 1, 2013 monthly service fee payment to the Spencer Parties in material breach of the Agreement. As of August 1, 2013, SENSA still had not informed the Spencer Parties of SENSA's decision to not pay any more service fees as of June 2013 or that it considered the Spencer Parties in breach of the Agreement!

59. When the Spencer Parties' representatives contacted Falcon about the missed August 1, 2013 service fee payment, Falcon stated that SENSA had informed them that the Spencer Parties and SENSA agreed to postpone the Agreement. Falcon also informed the Spencer Parties' representatives that SENSA never made the July 1, 2013 service fee payment either.

60. Upon learning this information from Falcon, the Spencer Parties instantly realized that SENSA was scheming to terminate the agreement. The first time SENSA ever suggested that the parties postpone the Agreement was at Klein's suggestion on or about July 12, 2013, weeks after SENSA had already informed Falcon that it was not going to make the July 1, 2013 service fee payment.

J. SENSA Fails to Make a Charitable Donation and Fails to Issue Semi-Annual Accounting Statements in Breach of the Agreement.

61. To date, SENSA has failed to make the \$100,000 charitable donation in breach of paragraph 5.3 of the Agreement.

62. To date, SENSA has also failed to render any semi-annual statements in breach of paragraph 5.10(c) of the Agreement.

K. The Spencer Parties Send a Notice of Anticipatory Breach to SENSA and Demand that SENSA Make the August Service Fee Payment.

63. On August 2, 2013, the Spencer Parties' counsel sent SENSA a notification of SENSA's anticipatory breach of the Agreement and demanded that SENSA make the August service fee payment to Orit.



1 L. After the Spencer Parties Refuse to Terminate the Agreement, SENSEA  
2 Terminates the Agreement by Fabricating a Contract Breach by the Spencer  
3 Parties.

4 64. On August 8, 2013, the parties' representatives met to discuss the parties'  
5 differences regarding the Agreement. At the beginning of the meeting, Klein handed copies of a  
6 termination letter, dated August 6, 2013 (the "Termination Letter") to the Spencer Parties.

7 65. The Termination Letter was replete with misinformation and downright lies about  
8 the Spencer Parties. Shockingly, the Termination Letter blamed the Spencer Parties' alleged  
9 breaches of the Agreement for the failed advertising campaign. In sum, SENSEA alleged that  
10 Spencer's failure to get a half dozen tweets pre-approved by SENSEA, and Spencer's insistence to  
11 add "#spon" at the end of her tweets, as required by the Agreement and the FTC, constituted a  
12 material breach of the Agreement, was bad faith and led to a significant loss in sales for SENSEA.  
13 Finally, the letter stated that SENSEA continually operated in good faith under the Agreement.  
14 This statement is contradicted by the allegations set forth herein. Moreover, SENSEA cannot hide  
15 from the fact that it made a decision to stop making service payments to Orit in June 2013 and  
16 never informed the Spencer Parties of this until August.

17 66. During the August 8, 2013 meeting, Klein offered no explanation why SENSEA  
18 never informed the Spencer Parties of SENSEA's decision to not pay the July service fees or that  
19 it considered the Spencer Parties in breach of the Agreement since as early as June 2013. He  
20 did, however, insinuate that the Spencer Parties may wish to terminate the Agreement on their  
21 own. It seemed clear that he was looking for a way have the Spencer Parties walk away from  
22 their contractual obligations to SENSEA. The August 8 meeting ended with no resolution.

23 67. After the Spencer Parties demanded that SENSEA honor the Agreement, on or  
24 about August 12, 2013, SENSEA emailed the Termination Letter to the Spencer Parties' counsel.

25 68. As of the date of the filing of the complaint, SPENSEA has not honored the terms  
26 of the Agreement, in complete violation thereof.

**FIRST CAUSE OF ACTION****(For Breach of Written Contract: Spencer Parties against SENSEA and Does 1-50)**

69. The Spencer Parties re-allege herein by this reference each and every allegation contained in paragraphs numbers 1 through 68 of this Complaint as if set forth fully herein.

70. As evidenced by Exhibits "A" and "B", the Spencer Parties and SENSEA entered into a valid and enforceable written endorsement agreement. The Agreement was entered into between SENSEA and Orit for the direct benefit of Spencer.

71. SENSEA and Does 1-50 have breached the Agreement by failing to make the July 1 and August 1, 2013, monthly service fee payments pursuant to paragraph 5.1 of the Agreement (as specifically set forth in paragraph 5.1 of the Amendment).

72. SENSEA and Does 1-50 have breached the Agreement by failing to make the \$100,000 donation to support a foundation set up by Spencer to help fight childhood obesity as required in paragraph 5.3 of the Agreement.

73. SENSEA and DOES 1 – 50 have further breached the Agreement by failing to render any semi-annual statements to the Spencer Parties in breach of paragraph 5.10(c) of the Agreement.

74. The Spencer Parties have duly performed all the conditions, covenants and promises on their part to be performed under the Agreement, except those obligations that they were prevented or excused from performing and those obligations waived by SENSEA and Does 1 through 50 as a result of SENSEA's and Does 1 through 50's breach of the Agreement.

75. As a direct and proximate result of SENSEA's and Does 1 through 50's breach of the Agreement, the Spencer Parties have suffered damages in an amount subject to proof at trial, but that is no less than an amount in excess of the jurisdictional minimum of this Court.

**SECOND CAUSE OF ACTION****(Breach of the Covenant of Good Faith and Fair Dealing: Spencer Parties against SENSEA and Does 1-50)**

76. The Spencer Parties re-allege herein by this reference each and every allegation contained in paragraphs numbers 1 through 75 of this Complaint as if set forth fully herein.

1           77. The Spencer Parties allege that California implies in all contracts a covenant that  
2 the parties will act in good faith and deal fairly with each other. *See* Restatement Second of  
3 Contracts, section 205; *see also* *Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 658  
4 (1958). The covenant of good faith exists to prevent one party from unfairly frustrating the other  
5 party's right to receive the benefits of the agreement actually made. *Guz v. Bechtel National,*  
6 *Inc.*, 24 Cal.4<sup>th</sup> 317, 349-350 (2000). This means that each party will not do anything to unfairly  
7 interfere with the right of any other party to receive the benefits of the contract.

8           78. The Spencer Parties are further informed and believe and thereupon allege that the  
9 facts alleged in the Complaint establish that SENSE and Does 1 through 50 breached the implied  
10 covenant of good faith and fair dealing that is implied in the Agreement by their actions  
11 previously stated herein. Evidence of SENSE's breach of the Covenant of Good Faith and Fair  
12 Dealing is both numerous and compelling.

13           79. Specifically, SENSE's (1) repeated efforts to force Spencer to agree to tabloid  
14 advertisements, advertorials and editorials; (2) repeated requests that Spencer agree to "before &  
15 after" photographs in SENSE advertisements, advertorials and editorials; and (3) repeated  
16 attempts to slip "before & after" photographs by Spencer's publicity team, while knowing full  
17 well that Spencer did not approve tabloids and "before & after" photographs, is a clear breach of  
18 the covenant of good faith and fair dealing. Indeed, this conduct frustrated the spirit, intent and  
19 direct language of the Agreement and was the cause of a great deal of stress between the parties.

20           80. Additionally, SENSE's insinuation that the Spencer Parties should terminate the  
21 Agreement on their own also evinces bad faith.

22           81. Moreover, SENSE's futile attempt to manufacture a material contract breach by  
23 the Spencer Parties and then blaming its failed advertising campaign on the Spencer Parties'  
24 purported contract breach also demonstrates bad faith.

25           82. Additionally, SENSE's statement to Falcon to hold off on the service payments  
26 under the Agreement because the Spencer Parties and SENSE agreed to put the Agreement on  
27 hold, when SENSE knew that no such agreement was reached, is further evidence of SENSE's  
28 bad faith conduct.

1 83. Additionally, SENSE's decision to stop paying the service fees to the Spencer  
2 Parties in June, while *never informing* the Spencer Parties of its decision, despite its face-to-face  
3 meetings with the Spencer Parties in July, is proof positive of SENSE's bad faith and its attempt  
4 to create a contract breach where one does not exist.

5 84. As a direct and proximate result of SENSE's and Does 1 through 50's breach of  
6 the Agreement, the Spencer Parties have suffered damages in an amount subject to proof at trial,  
7 but that is no less than an amount in excess of the jurisdictional minimum of this Court.

8 **THIRD CAUSE OF ACTION**

9 **(For Fraud: The Spencer Parties against SENSE and Does 1-50)**

10 85. The Spencer Parties re-allege herein by this reference each and every allegation  
11 contained in paragraphs numbers 1 through 84 of this Complaint as if set forth fully herein.

12 86. The SENSE Assurances to the Spencer Parties that SENSE would honor and  
13 abide by the Spencer Requirements were relied on by the Spencer Parties and the reason that the  
14 Spencer Parties agreed to enter into the Agreement and to forego a \$3 million dollar endorsement  
15 offer from one of SENSE's competitors.

16 87. On information and belief, each time that SENSE executive made the SENSE  
17 Assurances without any intention of honoring the SENSE Assurances. Thus, the SENSE  
18 Assurances were in fact false and were known by the SENSE executives to be false at all times  
19 they were made.

20 88. To the extent any of the SENSE Assurances were promissory in nature, SENSE  
21 made the representations without the intention of performing same. All of said representations  
22 were made with the intent that the Spencer Parties rely upon the same.

23 89. The Spencer Parties justifiably relied on the SENSE Assurances and, in doing so,  
24 changed their position to their detriment by doing each and all of the things alleged above,  
25 including entering into the Agreement. If not for the SENSE Assurances, the Spencer Parties  
26 would not have entered into the Agreement herein described, incurred the aforementioned  
27 expenses, fees and costs, or otherwise performed as alleged hereinabove. To the contrary, the  
28 Spencer Parties would have ended any discussion with SENSE about entering into the

1 Agreement.

2 90. As a direct and proximate result of the aforementioned misrepresentations,  
3 concealments and/or failures to disclose, the Spencer Parties have been damaged in an amount in  
4 excess of the jurisdictional minimum of this Court.

5 91. The conduct of SENSE and Does 1-50, and each of them, was wanton, willful,  
6 deliberate, and in conscience disregard of the rights and feelings of the Spencer Parties, and/or  
7 undertaken with the intent to cause the Spencer Parties injury, and constitutes fraud and malice,  
8 express and implied. The Spencer Parties are entitled to an award of damages by way of  
9 punishment and example against SENSE and Does 1-50, in an amount as the trier of fact deems  
10 just and proper.

11 **FOURTH CAUSE OF ACTION**

12 **(For an Accounting: Orit against SENSE and Does 1-50)**

13 92. Orit re-allege herein by this reference each and every allegation contained in  
14 paragraphs numbers 1 through 91 of this Complaint as if set forth fully herein.

15 93. Pursuant to paragraph 5.2 of Agreement, Orit is entitled to a contribution bonus  
16 based on SENSE profits. However, the Spencer Parties are unaware of SENSE's profits because  
17 SENSE has failed to provide the Spencer Parties with semi-annual accounting documents as  
18 required under the Agreement.

19 94. SENSE has access to information concerning its profits, but this information has  
20 not been provided to the Spencer Parties. The Spencer Parties do not have access to this  
21 information.

22 95. An order from the Court is required for SENSE to provided full accounting to the  
23 Spencer Parties.

24 WHEREFORE, the Spencer Parties pray for judgment in its favor against the Defendants,  
25 and each of them, as follows:

26 **ON THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT**

- 27 1. For compensatory damages according to proof;  
28 2. For pre-judgment interest at the maximum rate permitted by law on all;

3. For the costs of suit incurred herein; and
4. For such other and further relief as this Court may deem just and proper.

**ON THE SECOND CAUSE OF ACTION FOR BREACH OF THE COVENANT OF  
GOOD FAITH AND FAIR DEALING**

1. For compensatory damages according to proof;
2. For pre-judgment interest at the maximum rate permitted by law on all;
3. For the costs of suit incurred herein; and
4. For such other and further relief as this Court may deem just and proper.

**ON THE THIRD CAUSE OF ACTION FOR FRAUD**

1. For compensatory damages according to proof;
2. For pre-judgment interest at the maximum rate permitted by law on all;
3. For the costs of suit incurred herein;
4. For punitive damages against Defendants in an amount that the trier of fact deems just and proper; and
5. For such other and further relief as this Court may deem just and proper.

**ON THE FOURTH CAUSE OF ACTION FOR AN ACCOUNTING**

1. For compensatory damages according to proof;
2. For an accounting.

Dated: August 27, 2013

FREEDMAN & TAITELMAN, LLP

By

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08/28/2013