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**UNITED STATES DISTRICT COURT
 FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

THE HERSHEY COMPANY,
 Plaintiff/Counterclaim Defendant,

v.

HOTTRIX LLC,
 Defendant/Counterclaim Plaintiff.

No. 1:10-cv-1178-JEJ

JUDGE JOHN E. JONES III

FILED ELECTRONICALLY

JOINT CASE MANAGEMENT PLAN

Instructions: In many cases there will be more parties in the action than there are spaces provided in this form. Each party shall provide all requested information. If the space on this form is not sufficient, the form should be retyped or additional pages attached.

No party may submit a separate Case Management Plan. Disagreements among parties with respect to any of the matters below shall be set forth in the appropriate section.

Having complied with the meet and confer requirements set forth in the LOCAL RULES, or with any orders specifically modifying their application in the above-captioned matter, the parties hereby submit the following Joint Case Management Plan.

1.0 Principal Issues

1.1 Separately for each party, please give a statement summarizing this case:

By plaintiff(s):

This is an action for a declaratory judgment of non-infringement arising out of the attempts of Hottrix to effectively claim the exclusive right to the *idea* of an iPhone application or video depicting a virtual “glass” of milk that the user can pretend to “drink” from his or her iPhone, and to prevent Hershey from distributing its HERSHEY’S® Chocolate Milk iPhone application that expresses the unprotectable idea of a virtual “glass” of milk in a way that is not substantially similar to the protectable expression, if any, contained in Hottrix's iPhone application for a virtual “glass” of milk. Hottrix claims copyright in its “iMilk” video application for iPhone, and has asserted that Hershey’s HERSHEY’S Chocolate Milk iPhone application infringes Hottrix’s copyright, although it cannot identify any protectable expression that Hershey allegedly has copied.

Hershey, which independently developed its iPhone application, seeks a declaratory judgment that its application does not infringe any copyright of Hottrix. In addition to a counterclaim for copyright infringement, Hottrix purports to assert counterclaims for unfair competition, trade dress infringement and tortious interference with prospective business relations, all premised on the same alleged copying by Hershey of Hottrix’s “iMilk” video application.

Hershey submits that, taking Hottrix's allegations as true and viewing the two iPhone applications at issue, a fact finder could not find that there is substantial similarity between Hershey's iPhone application and the iPhone application in which Hottrix claims rights. Moreover, Hottrix's remaining counterclaims are preempted by the Copyright Act and/or otherwise fail to state a claim for relief. Accordingly, Hottrix's counterclaims can be dismissed as a matter of law without the need for the parties to engage in discovery.

By defendant(s):

This action arises from a failed attempt by Plaintiff/Counterclaim Defendant, The Hershey Company ("Hershey") to obtain a license from Defendant/Counterclaim Plaintiff, Hottrix, LLC ("Hottrix") for Hottrix' iMilk App (hereafter defined).

In 2007, Hottrix authored and published a version of an "iMilk Video" known as iMilk 1.0, which is registered with the Register of Copyrights. In 2008, Hottrix, authored and published a derivative work of iMilk 1.0 called "iMilk 2.0" for use on iPhone Devices, which it also registered with the Register of Copyrights. iMilk 1.0 and iMilk 2.0 are hereinafter collectively referred to as the "iMilk App."

The iMilk App is an interactive application that simulates milk magically rising into a glass. The iMilk App then uses the iPhone's features and user interaction to simulate a beverage (seemingly milk) being consumed. In essence, the iPhone Device user "drinks" the milk. Hottrix sells the iMilk App via the Internet (through iTunes and through its own website).

The iMilk App became so popular that Hershey contacted Hottrix to inquire about a licensing arrangement for the iMilk App. After Hottrix rejected Hershey's request, Hershey copied, created, and offered for copying and downloading, a copy and derivative work of the iMilk App, which constitutes a software application with functionality and a "look and feel" substantially similar to the iMilk App, and entitled it: "Hershey's Chocolate Milk." Hershey's infringing product similarly allows a user to pour and drink a digital glass of (chocolate) milk using a video application of a milk drink rising that is substantially similar to that of the iMilk App.

After receiving a cease and desist letter from Hottrix, Hershey instituted this action for declaratory judgment, seeking a declaration that its product does not infringe Hottrix' copyrights. On September 13, 2010, Hottrix filed an Answer and Counterclaims, advancing claims for Copyright Infringement, Unfair Competition, Trade Dress, and Tortious Interference with Prospective Economic Advantage, all arising from Hershey's deliberate copying of the iMilk App and creating of its infringing application.

1.2 The facts the parties dispute, are as follows:

- 1.21 The principal factual issues concerning the appearance of the parties' respective iPhone applications are not in dispute, but the parties dispute what legal conclusions are to be reached with respect to those applications.
- 1.22 Whether Hershey or its representatives sought a license from Hottrix for its iMilk App.
- 1.23 Whether Hershey or its representatives copied Hottrix' iMilk App in creating HERSHEY's Chocolate Milk iPhone application.
- 1.24 Hottrix asserts that there is a disputed fact issue whether HERSHEY's Chocolate Milk iPhone application is substantially similar to Hottrix' iMilk App. Hershey asserts that the legal test for copyright infringement is whether HERSHEY's Chocolate Milk iPhone application is substantially similar to the protected expression, if any, in Hottrix's iMilk App, and that, as a matter of law, there is no such substantial similarity.
- 1.25 Hottrix asserts that there is a disputed fact issue whether HERSHEY's Chocolate Milk iPhone application is a derivative work of Hottrix' iMilk App. Hershey asserts that whether HERSHEY's Chocolate Milk iPhone application is a derivative work of Hottrix' iMilk App is a legal issue.

agree upon are as follows:

- 1.26 None

1.3 The legal issues the parties dispute are as follows:

- 1.31 Whether the HERSHEY'S Chocolate Milk iPhone application infringes any protectable expression in the "iMilk" application of which Hottrix claims ownership.
- 1.32 Whether Hottrix's counterclaims for unfair competition, trade dress infringement and tortious interference with prospective business relations are preempted by the Copyright Act or otherwise fail to state a claim for relief.
- 1.33 Whether HERSHEY'S Chocolate Milk iPhone application infringes upon the rights of Hottrix under the Copyright Act.
- 1.34 Whether Hershey's actions constitute unfair competition.
- 1.35 Whether Hershey's actions constitute an infringement of Hottrix' trade dress.
- 1.36 Whether Hershey's actions constitute a tortious interference with Hottrix' prospective economic advantage.

agree upon are:

1.37 None.

1.4 Identify any unresolved issues as to service of process, personal jurisdiction, subject matter jurisdiction, or venue:

None.

1.5 Identify any named parties that have not yet been served:

None.

1.6 Identify any additional parties that:

plaintiff(s) intends to join: None.

defendant(s) intends to join: Hottrix has not yet determined the additional parties that it will join.

1.7 Identify any additional claims that:

plaintiff(s) intends to add: None.

defendant(s) intends to add: Hottrix has not yet determined the additional claims that will be advanced against the parties that will be joined.

2.0 Disclosures

The undersigned counsel certify that they have made the initial disclosures required by Federal Rule of Civil Procedure 26(a)(1) or that they will do so within the time provided by that rule.

2.1 Separately for each party, list by name and title/position each person whose identity has been disclosed.

Disclosed by Plaintiff/Counterclaim Defendant:

<u>Name</u>	<u>Title/Position</u>
Scott Crowell	Director of Technology, The Hershey Company

Disclosed by Defendant/Counterclaim Plaintiff:

<u>Name</u>	<u>Title/Position</u>
Maria Gara	President, Hottrix
Scott Crowell	Director of Technology, The Hershey Company

3.0 Early Motions

Identify any motion(s) whose early resolution would likely have a significant

effect either on the scope of discovery or other aspects of the litigation:

<u>Nature of Motion</u>	<u>Moving Party</u>	<u>Anticipated Filing Date</u>
Motion to Dismiss / for Judgment on the Pleadings	Hershey	On or before October 4, 2010

Hershey believes that the issues in this case are susceptible of early resolution with a motion to dismiss and for judgment on the pleadings that will demonstrate that, taking Hottrix's allegations as true and viewing the iPhone applications at issue, a fact finder could not find that there is substantial similarity between Hershey's iPhone application and the iPhone application in which Hottrix claims rights. Accordingly, Hershey will show that Hottrix's claim of copyright infringement can be dismissed as a matter of law without the need for the parties to engage in discovery, and submits that discovery should be stayed pending determination of that motion.

Hottrix disputes that this case is appropriate for dismissal under Rule 12, as there are disputed fact issues which cannot be resolved except by a trier of fact. Hottrix also opposes any attempt by Hershey to prevent Hottrix from undertaking discovery of Hershey's conduct.

4.0 Discovery

4.1 Briefly describe any discovery that has been completed or is in progress:

By plaintiff(s): None to date.

By defendant(s): None to date.

4.200 Describe any discovery that all parties agree should be conducted, indicating for each discovery undertaking its purpose or what kinds of information will be developed through it (e.g., "plaintiff will depose Mr. Jones, defendant's controller, to learn what defendant's revenue recognition policies were and how they were applied to the kinds of contracts in this case"):

The parties will serve Rule 26(a) initial disclosures no later than October 13, 2010.

Hottrix will serve interrogatories, requests for production, and requests for admission upon Hershey, and will notice the deposition of various Hershey representatives. In addition, Hottrix anticipates the service of subpoenas upon third parties who are yet to be identified.

As set forth in Sections 3.0 and 4.3 herein, Hershey submits that discovery (apart from Rule 26(a) initial disclosures) should be stayed pending resolution of Hershey's anticipated motion to dismiss and for judgment on the pleadings. In the event that discovery is not stayed or commences, Hershey intends to serve interrogatories, requests for production, and requests for admission upon Hottrix, and will notice the deposition of various Hottrix representatives. In addition, Hershey may serve of subpoenas upon third parties who are yet to be identified.

As noted above, Hottrix opposes any attempt by Hershey to stay discovery and asserts that discovery should proceed pending any motion.

- 4.3 Describe any discovery that one or more parties want(s) to conduct but to which another party objects, indicating for each such discovery undertaking its purpose or what kinds of information would be developed through it:

Hershey submits that discovery (apart from Rule 26(a) initial disclosures) should be stayed pending resolution of Hershey's anticipated motion to dismiss and for judgment on the pleadings. Hottrix disputes that discovery should be stayed and contends that discovery should continue pending disposition of any pending motions in accordance with the Local Rules.

- 4.4 Identify any subject area limitations on discovery that one or more parties would like imposed, at the first stage of or throughout the litigation:

The parties have not yet identified any subject area limitations to be imposed on discovery.

- 4.5 For each of the following discovery tools, recommend the per-party or

per-side limitation (specify a number) that should be fixed, subject to later modification by stipulation or court order on an appropriate showing (where the parties cannot agree, set forth separately the limits recommended by plaintiff(s) and by defendant(s)):

4.51 depositions (excluding experts) to be taken by:

plaintiff(s): 5 defendant(s): 5

4.52 interrogatories to be served by:

plaintiff(s): 25 defendant(s): 25

4.53 document production requests to be served by:

plaintiff(s): 25 defendant(s): 25

4.54 requests for admission to be served by:

plaintiff(s): 25 defendant(s): 25

4.6 Discovery of Electronically Stored Information

Counsel certify that they have conferred about the matters addressed in M.D. Pa LR 26.1 and that they are in agreement about how those matters will be addressed in discovery.

Counsel certify that they have conferred about the matters addressed in M.D. Pa LR 26.1 and that they are in agreement about how those matters will be addressed in discovery with the following exceptions:

5.0 Protective Order

5.1 If entry of a protective order is sought, attach to this statement a copy of the proposed order. Include a statement justifying the propriety of such a protective order under existing Third Circuit precedent.

A proposed Stipulated Protective Order is submitted herewith.

5.2 If there is a dispute about whether a protective order should be entered,

or about certain terms of the proposed order, briefly summarize each party's position below:

6.0 Scheduling

6.1 Final date for joining additional parties:

Plaintiff(s): October 15, 2010

Defendants(s): October 15, 2010

6.2 Final date for amending pleadings:

Plaintiff(s): October 15, 2010

Defendants(s): October 15, 2010

6.3 All fact discovery commenced in time to be completed by:

June 15, 2011

6.4 All potentially dispositive motions should be filed by:

July 1, 2011

6.5 Reports from retained experts due:

from plaintiff(s) by April 15, 2011

from defendant(s) by April 15, 2011

6.6 Supplementation due May 16, 2011

6.7 All expert discovery commenced in time to be completed by

June 15, 2011

6.8 This case may be appropriate for trial in approximately:

___ 240 Days from the filing of the action in this court

___ 365 Days from the filing of the action in this court

450 Days from the filing of the action in this court

6.9 Suggested Date for the final Pretrial Conference:

September 1, 2011 (month/year)

6.10 Suggested Date for Trial:

October 2011 (month/year)

7.0 Certification of Settlement Authority (All Parties Shall Complete the Certification)

I hereby certify that the following individual(s) have settlement authority.

Lois B. Duquette, Esq.
Senior Counsel (The Hershey Company) and
Assistant Corporate Secretary (HCCC)
100 Crystal A Drive, P.O. Box 810
Hershey, PA 17033-0810
(717) 534 7911

Maria Gara, President
c/o Jason H. Fisher, Esq.
FISHER LAW GROUP
1015 Gayley Ave. #1100
Los Angeles, CA 90024
(310) 746-3053
jfisher@fisherlg.com

8.0 Alternative Dispute Resolution (“ADR”)

8.1 Identify any ADR procedure to which this case already has been assigned or which the parties have agreed to use.

ADR procedure: None.

Date ADR to be commenced: N/A

Date ADR to be completed: N/A

8.2 If the parties have been unable to agree on an ADR procedure, but one or more parties believes that the case is appropriate for such a

procedure, identify the party or parties that recommend ADR and the specific ADR process recommended:

The parties believe that ADR may be appropriate but cannot be considered until all parties are added and the pleadings are closed.

8.3 If all parties share the view that no ADR procedure should be used in this case, set forth the basis for that view:

9.0 Consent to Jurisdiction by a Magistrate Judge

Indicate whether all parties agree, pursuant to 28 U.S.C. § 636(c)(1), to have a magistrate judge preside as the judge of the case with appeal lying to the United States Court of Appeals for the Third Circuit:

All parties agree to jurisdiction by a magistrate judge of this court: Y N.

If parties agree to proceed before a magistrate judge, please indicate below which location is desired for the proceedings:

Scranton/Wilkes-Barre

Harrisburg

10.0 Other Matters

Make any other suggestions for the case development process, settlement, or trial that may be useful or necessary to the efficient and just resolution of the dispute.

11.0 Identification of Counsel

Counsel shall be registered users of the court's Electronic Case Files System (ECF) and shall file documents electronically in accordance with the Local Rules of Court and the Standing Order RE: Electronic Case Filing Policies and Procedures. Electronic filing is required unless good cause is shown to the Chief Judge why counsel cannot comply with this policy. Any request for waiver of electronic filing must be filed with the Clerk's Office prior to the case management conference. The Chief Judge may grant or deny such request.

Identify by name, address, and telephone number counsel for each party.

Also please indicate ECF User status below.

Dated: September 22, 2010

Paul C. Llewellyn
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022
(212) 836-7828
Attorneys for Plaintiff

- ECF User(s)
 Waiver requested (as separate document)
 Fed.R.Civ.P. 7.1 (statement filed if
necessary)*

Dated: September 22, 2010

Robert J. Tribeck, Esquire
Rhoads & Sinon LLP
P.O. Box 1146
Harrisburg, PA 17108-1146
(717) 233-5731
Attorneys for Defendant

- ECF User(s)
 Waiver requested (as separate document)
 Fed.R.Civ.P. 7.1 (statement filed if
necessary)*

*Fed.R.Civ.P.7.1. requires a nongovernmental corporate party to file a statement with the initial pleading, first entry of appearance, etc. that identifies any parent corporation any publicly held corporation that owns 10% or more of its stock, or state there is no such corporation.