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

THE HERSHEY COMPANY, Plaintiff/Counterclaim Defendant, v. HOTTRIX LLC, Defendant/Counterclaim Plaintiff. v. VERSATILE SYSTEMS, INC. Counterclaim Defendant,	No. 1:10-cv-1178-JEJ JUDGE JOHN E. JONES III FILED ELECTRONICALLY

AMENDED ANSWER AND AFFIRMATIVE DEFENSES WITH COUNTERCLAIMS

Defendant, Hottrix LLC, by and through its attorneys, Rhoads & Sinon LLP, files the within Amended Answer to the Plaintiff's Complaint, Affirmative Defenses, and Counterclaims as follows:

1. Admitted in part, denied in part. It is admitted only that this is an action for declaratory judgment of non-infringement. Defendant denies the remaining allegation in paragraph 1 of the Complaint.

2. Admitted in part, denied in part. It is admitted only that Defendant Hottrix claims copyright in its iMilk video application for the iPhone. Defendant denies the remaining allegations in paragraph 2 of the Complaint. By way of further response, Defendant has not "asserted" anything, rather Defendant has only alleged that Hershey's HERSHEY'S Chocolate Milk iPhone application infringes upon Hottrix' copyright.

PARTIES

3. Defendant is without sufficient information to admit or deny the allegations in paragraph 3 of the Complaint and, therefore, denies those allegations.

4. Admitted.

JURISDICTION AND VENUE

5. Admitted in part, denied in part. Defendant admits that this is an action for declaratory judgment of non-infringement of copyright under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. Defendant denies that it is an action under the Copyright Act, 17 U.S.C. §§ 101, *et seq.* Further, to the extent the allegations of paragraph 5 of the Complaint state conclusions of law, no response is required.

6. Admitted.

DECLARATORY JUDGMENT FOR NON-INFRINGEMENT

7. Defendant Hottrix LLC incorporates all paragraphs of this Answer by reference as if the same were fully set forth at length herein.

8. Denied. Defendant is without knowledge or information sufficient to form a belief as the truth or falsity of the averments contained in this paragraph and it is therefore denied with strict proof thereof demanded at the time of trial, if material.

9. Admitted in part, denied in part. It is admitted that on or about December 23, 2009, Defendant Hottrix sent a notice to Hershey. The remaining allegations contained in this paragraph are specifically denied. Further, to the extent the allegations of paragraph 9 of the Complaint state conclusions of law, no response is required.

10. Admitted in part, denied in part. Defendant Hottrix admits that Hershey has created its HERSHEY'S Chocolate Milk iPhone application after seeking to license defendant's iMilk application. The remaining averments of this paragraph are specifically denied.

11. Admitted.

12. Admitted.

13. Denied.

14. Denied.

15. Denied.

16. Denied.

17. Admitted in part, denied in part. Defendant Hottrix admits that the Hershey HERSHEY'S Chocolate Milk iPhone application includes screen images of a glass of milk being filled. Defendant is without knowledge or information sufficient to form a belief as the truth or falsity of the remaining averments contained in this paragraph and the same are therefore specifically denied.

18. Denied. By way of further response, Defendant asserts that some of the expressive elements are present in the Hottrix iMilk application.

19. Denied.

WHEREFORE, Defendant, Hottrix LLC, respectfully requests this court to DISMISS Plaintiff's Complaint in its entirety.

AFFIRMATIVE DEFENSES

For its Affirmative Defenses to Plaintiff's Complaint, Defendant states as follows:

20. The averments contained in paragraphs 1 through 19 are incorporated herein by reference.

21. Plaintiff's Complaint is barred, in whole or in part, for failure to state a claim upon which relief can be granted.

22. Plaintiff's Complaint is barred, in whole or in part, by the doctrines of waiver, estoppel, and/or laches.

23. Plaintiff's Complaint is barred, in whole or in part, by the doctrine of unclean hands.

24. Plaintiff's Complaint is barred, in whole or in part, by the applicable statutes of limitations.

25. Plaintiff's Complaint is barred, in whole or in part, as Plaintiff's claims are not ripe for disposition.

26. This Honorable Court lacks jurisdiction over this action.

27. Plaintiff is not entitled of an award of costs and attorneys' fees.

28. Defendant reserves the right to add any and all additional defenses as they become known through discovery or investigation.

WHEREFORE, Defendant demands judgment in its favor and against the Plaintiff.

COUNTERCLAIM

Defendant, Hottrix LLC, by and through its attorneys, Rhoads & Sinon LLP, files the within Counterclaim against Plaintiff The Hershey Company, and Versatile Systems, Inc., (collectively "Counterclaim Defendants") as follows:

29. The averments contained in paragraphs 1 through 28 are incorporated herein by reference.

30. Counterplaintiff Hottrix LLC ("Hottrix") is a Nevada limited liability company, having a principal place of business at 7500 W. Lake Mead Blvd. Suite 9-478, Las Vegas, Nevada, 89128. Hottrix was formed on or about July 18, 2008, in Nevada. Steve Sheraton ("Sheraton" or "Original Author") has used the name "Hottrix" since approximately May 1, 1998, and until July 18, 2008, had done business as "Hottrix." On or about July 18, 2008, Sheraton granted all his intellectual property rights in the copyrighted works mentioned herein, which he created prior thereto, to Hottrix. Hottrix is in the business of, *inter alia*, creating content and software for use on handheld mobile devices, such as the Apple iPhone, the Apple iPad, the Apple iPod Touch (collectively "iPhone Devices"), Palm-OS devices, Windows Mobile devices, and Android OS devices.

31. Upon information and belief, Plaintiff/Counterdefendant The Hershey Company ("Hershey") is a Delaware corporation with a principal place of business at 100 Crystal A Drive, Hershey, Pennsylvania, 17033. Hottrix is informed and believes that Hershey is a confectioner, producing and selling candies, chocolates and related products.

32. Upon information and belief, Counterdefendant Versatile Systems, Inc. ("Versatile") is a Pennsylvania corporation with a principal place of business at 100 Sterling Parkway, Suite 307, Mechanicsburg, PA 17050. Hottrix is

informed and believes that Versatile provides information technology services and technology development services, such as development of iPhone applications.

VENUE AND JURISDICTION

33. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1332, 1338, and 1367.

34. Venue is proper pursuant to 28 U.S.C. §1391(b) because the counterclaims arose in this District, as Plaintiff/Counterclaim Defendant Hershey offered their product for download to residents of this District.

35. Personal jurisdiction over Counterclaim Defendant Hershey is created by Hershey's filing of the Complaint in this District. Personal jurisdiction over Counterclaim Defendant Versatile is proper as Versatile is a Pennsylvania corporation that regularly conducts business within Pennsylvania.

GENERAL ALLEGATIONS

36. On or about August 1, 2007, Sheraton authored and published a version of the "iMilk Video" which, as a whole, can be described as a video of a beverage (seemingly milk) magically rising inside a glass that constituted the full screen of the video and the eventual tipping of the beverage to an empty glass.

37. In essence, the iMilk Video imitates a glass of milk being "filled" and then "drank" shortly thereafter.

38. The iMilk Video was created by Sheraton by creating visual and sound material (including editing for new visual format, sound remixing, re-sequencing, and balancing) and the addition of new sound material and visual material ("iMilk 1.0"). iMilk 1.0 was first published on August 1, 2007 on the Internet and made available to the world as a whole and made available for sale for $2.99 per copy at Sheraton's website (www.hottrixdownload.com).

39. On or about May 9, 2008, Sheraton registered iMilk 1.0 under the title "iMilk Video" with the Register of Copyrights. The Certificate of Registration bears the number PA 1-59-8059. A true and correct copy is attached hereto as Exhibit "A" and is incorporated herein as though set forth in full.

40. During Q1 and Q2 2008, Sheraton and Hottrix, authored a derivative work of iMilk 1.0 called "iMilk 2.0" for use on iPhone Devices. iMilk 2.0 was first published on or about July 6, 2008. On or about April 8, 2009, Hottrix registered iMilk 2.0 under the title "iMilk Software" with the Register of Copyrights. The Certificate of Registration bears the number TX 7-058-459. A true and correct copy is attached hereto as Exhibit "B" and is incorporated herein as though set forth in full. iMilk 1.0 and iMilk 2.0 are hereinafter collectively referred to as the "iMilk App."

41. The iMilk App is an interactive application that simulates milk magically rising into a glass (the size of an iPhone). 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.

42. Sheraton and Hottrix have expended substantial resources in designing, promoting, manufacturing, and selling the iMilk App, and built a valuable business based on demand for its distinctively-styled, quality iMilk App.

43. Hottrix sells the iMilk App via the Internet (through iTunes and through its own website), and also is in negotiations to license the iMilk App to advertisers for "free end-user downloads" worldwide via a cost-per-download fee. Hottrix has become identified in the minds of the public of the provider of the same.

44. The iMilk App became so popular that Plaintiff/Counterclaim Defendant Hershey contacted Hottrix to inquire about a licensing arrangement for the iMilk App.

45. Specifically, on or about August 12, 2008, Scott Crowell (scrowell@hersheys.com), the Director of Technology for The Hershey Company, sent an email to Hottrix stating, *inter alia*:

> Hi guys, I like your iMilk app. I am a Technology Director for The Hershey Company. I am curious to see if you would be interest in taking that code and modifying it to incorporate Hershey's Syrup and have it make chocolate milk, replacing the burp with a "moo."

A true and correct copy of the Crowell E-mail is attached hereto as Exhibit "C."

46. After not being granted the right to lawfully license iMilk App despite a reasonable offer from Hottrix, Hershey copied, and/or created, and offered for copying and downloading, a copy and/or derivative work of the iMilk App, which constitutes a software application with a functionality and/or "look and feel" identical and/or substantially similar to the iMilk App, and entitled it: "Hershey's Chocolate Milk" (hereinafter "Infringing App").

47. Upon information and belief, Hershey retained Counterclaim Defendant Versatile Systems, Inc. to copy the functionality and/or "look and feel" of the iMilk App and/or create a derivative work of the iMilk App.

48. The Infringing App 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. As an aside, the Infringing App has added a "chocolate milk bottle" and "straw" to further advertise its brand.

49. On or about July 11, 2008, Apple, Inc., opened its "App Store" to allow its iPhone Device users to download applications to their iPhone Devices in certain geographic markets. In the App Store, there was then and are now currently two types of downloads: (1) free downloads available at no charge to the end-user; and (2) paid downloads, available at a fixed price to the end-user.

50. The iMilk Content was made available worldwide as a paid download for $2.99 in the App Store during Summer 2008.

51. The Infringing App was made available worldwide for free ($0) in the App Store by Defendants in direct competition with iMilk on approximately October 29, 2009 (three months after being denied a license to create a derivative work or copy of the iMilk Content).

52. On information and belief, rather than directly charging for the Infringing App, Defendants made revenue for its use by using the Infringing App as a marketing tool for the Hershey brand.

53. The iMilk App became one of the most popular paid downloads in the App Store, reaching the top-100 in many international markets. The Infringing App became a popular free download in the App Store.

54. On information and belief, as the Infringing App increased in popularity, the iMilk App decreased in popularity because end-users could get ostensibly the same application without the direct cost of paying $2.99 for the iMilk App.

55. No license or any rights have been granted by Sheraton or Hottrix to Plaintiff/Counterclaim Defendant Hershey.

56. On information and belief, Hershey's actions are on behalf and at the behest of all other Counterclaim Defendants.

57. On or about December 23, 2009, Counsel for Hottrix sent Hershey a cease and desist letter regarding the alleged infringement by Defendants.

58. As of September 7, 2010, the Infringing App is still being made available by Hershey via the Apple iTunes App Store.

59. On information and belief, there have been over 4,000,000 downloads of the Infringing App worldwide and said downloads significantly impair the downloading of iMilk App.

60. The availability of the Infringing App has cost Hottrix approximately $4,000,000 in brand tarnishment and approximately $8,360,000 in lost profits, for a total loss of approximately $12,360,000.

COUNTERCLAIM I
COPYRIGHT INFRINGEMENT
(Against All Defendants)

61. The averments contained in the preceding paragraphs are incorporated herein by reference as though set forth in their entirety.

62. Defendants unlawfully and willfully copied all or part of the iMilk App, in violation of Hottrix' copyright.

63. Defendants' Infringing App is not only substantially similar, but is strikingly similar, to Hottrix' iMilk App,.

64. Defendants' actions, in copying all or part of the iMilk App, constitute copyright infringement arising under the Copyright Act, as amended, 17 U.S.C. § 101 et seq. and particularly § 501(a) thereof.

65. Defendants' actions, as stated above, constitute a direct infringement of Hottrix' exclusive right under copyright to prepare derivative works based upon the copyrighted works, as defined under 17 U.S.C. § 106(2).

66. Hottrix has lost substantial revenue from Defendants' unlawful and willful copying of the Hottrix' copyrighted material, and Defendants have been unjustly enriched by increasing brand awareness and sales of the Hershey brand.

67. Defendants' Infringing App dilutes the market and serves to destroy the distinctiveness of Hottrix' copyrighted works.

68. Defendants' copying and creation of derivative works of the iMilk App destroys the public's identification of the iMilk App to Hottrix as Hottrix' exclusive property, thereby confusing the public and cause Hottrix to suffer irreparable damages and lost profits.

69. Hottrix' sales and licensing of its own copyrighted works and derivative works are prejudiced by Defendants' alleged copyright infringement.

COUNTERCLAIM II
UNFAIR COMPETITION
Pennsylvania Law
(Against All Defendants)

70. The averments contained in paragraphs 29-60 are incorporated herein by reference as though set forth in their entirety.

71. Defendants, by their unauthorized appropriation and use of the "look and feel" of Hottrix' iMilk App, have in the past and are currently engaging in acts of unfair competition, unlawful appropriation, unjust enrichment, wrongful deception of the downloading and purchasing public, and unlawful trading on Hottrix' goodwill and the public's acceptance of Hottrix' iMilk App, all to Hottrix' irreparable damage.

72. Defendants, in unlawfully and willfully copying and mimicking the "look and feel" of Hottrix' iMilk App and offering the Infringing App for download, have created a likelihood of confusion among the public as to the original source of Hottrix' iMilk App and have contributed to the dilution of the distinctive quality of Hottrix' work in the marketplace.

73. In the sale of iPhone Device applications, Hottrix is universally known for producing applications where the purchaser "drinks" a beverage.

74. Indeed Hottrix is so synonymous with iPhone drinking applications that any reasonable consumer would conclude that a drinking application, such as the Infringing App, was created and developed by Hottrix.

75. Defendants, by unlawfully copying the look and feel of the iMilk App, have wrongfully deceived the public as to the origination of the Infringing App.

76. Defendants' actions are willful, intentional and unprivileged and have caused, and are causing, irreparable harm as well as imminent monetary damages to Hottrix.

77. As a result of Defendants' actions, Hottrix is entitled to injunctive relief and specific performance as set forth in below and damages in an amount yet to be determined.

COUNTERCLAIM III
TRADE DRESS
Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1),
(Against All Defendants)

78. The averments contained in paragraphs 29-60 are incorporated herein by reference as though set forth in their entirety.

79. Hottrix' product line, which includes the iMilk App, an iSoda App, and iBeer App, is comprised of non-functional designs and aesthetic features, which together are arbitrary embellishments that create a particular visual appearance to Hottrix' products that is non-functional and unique to Hottrix, adopted for the purpose of identifying Hottrix as the source of its goods that are sold in commerce ("Hottrix' Trade Dress").

80. Indeed, the Hottrix Trade Dress is so well known in the iPhone Application industry that consumers and developers alike can easily identify Hottrix as the creator of its works.

81. Hottrix' Trade Dress in the overall appearance of its products, including the iMilk App, is created by the combination and configuration of the non-functional designs and aesthetic features comprising: the shape and design of the App; the shape and design of the beverage as it is "poured" into the iPhone "glass"; the shape and design of the beverage as the iPhone user "drinks" the beverage; the shape, design, and placement of the iMilk Video; and the overall configuration and appearance of these features combined on the App.

82. The design of Hottrix' apps, such as iMilk, is inherently distinctive and/or has acquired a secondary meaning.

83. Indeed, the Hottrix Trade Dress is so ingrained in the iPhone Application industry that Hottrix, by and through its distinctive Trade Dress in all its products, has become synonymous with "drinking" applications.

84. Defendants have attempted to imitate Hottrix' Trade Dress, design, and combination of features, as they pertain to the iMilk App, in such a way as to mislead the public.

85. Specifically, Defendants have created the Infringing App that has a substantially similar "look and feel" of Hottrix' iMilk App.

86. The multiplicity of similarities between Hottrix' iMilk App and the Infringing App produced by Defendants evidence a conscious intent by Defendants

to imitate and copy Hottrix' Trade Dress and capitalize on Hottrix' consumer goodwill and product recognition.

87. Defendants' imitation of the iMilk App are intended and/or operate to confuse the public as to the source of the product.

88. Hottrix' sale of its own works and derivative works are prejudiced by Defendants' imitation and copying of the look and feel of the iMilk App, all to Hottrix' irreparable damage.

COUNTERCLAIM IV
TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE
(Against All Defendants)

89. The averments contained in paragraphs 29-60, 78-88 are incorporated herein by reference as though set forth in their entirety.

90. Hottrix has and had an expectancy in continuing and advancing economic relationships with current and prospective purchasers and licensees of Hottrix' iMilk App and related copyrighted material.

91. These relationships contained the probability of future economic benefit in the form of profitable purchases of the iMilk App and profitable licenses of the iMilk App and related copyrighted material. Had Defendants refrained from copying the "look and feel" of the iMilk App, there is a substantial probability that

purchasers of the Infringing App would have purchased the iMilk App from Hottrix.

92. The Defendants took these actions with the intent to prevent future contracts between Hottrix and Hottrix' customers. The Defendants' actions were not privileged or justified.

93. Defendants actions constitute tortious interference with Hottrix' prospective contractual and business relationships.

94. As a direct and proximate cause of Defendants unlawful actions, Hottrix has suffered, and continues to suffer, economic harm, including but not limited to loss of profits or licensees to current and/or potential Hottrix customers for the iMilk App.

95. As a result of the actions of Defendants, Hottrix is entitled to injunctive relief as set forth below, for damages, punitive damages, attorneys' fees, costs and such other legal or equitable relief to which Hottrix may be entitled.

RELIEF

WHEREFORE, Plaintiff Hottrix prays as follows on all the claims:

a. For a temporary restraining order, preliminary and permanent injunction enjoining and restraining Defendants and all persons acting in concert with them from producing or allowing for download the Infringing App or any content substantially similar to or a derivative

work of Hottrix' copyrighted work, and to deliver to the Court for destruction or other reasonable disposition any such materials.

b. For actual damages calculated as Defendants' profits, ill-gotten gain and/or Plaintiff Hottrix' lost profits, in an amount in excess of $12,360,000, to be determined at trial plus interest, or in the alternative statutory damages plus interest, or in the alternative, restitution, whichever is higher.

c. Because some or all of Defendants' acts were carried out willfully, wantonly, maliciously, and in continuous disregard for the rights of Hottrix, Hottrix is entitled to an award of punitive damages in a substantial amount.

d. For its reasonable attorneys' fees and costs.

e. For such other and further relief as the Court deems just and proper.

DEMAND FOR A JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Hottrix LLC hereby demands a trial by jury in this action of any issues triable by jury.

Respectfully submitted,
RHOADS & SINON LLP

By: /s/ Robert J. Tribeck

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2010 in accordance with the Rules of the United States District Court for the Middle District of Pennsylvania, a true and correct copy of the foregoing document was electronically filed and served via the Court's ECF system on the following:

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and served on the following in accordance with Fed. R. Civ. P. 4:

Versatile Systems, Inc.
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/s/ *Robert J. Tribeck*