

McNEES WALLACE & NURICK LLC
Harvey Freedenberg
Alan R. Boynton, Jr.
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

Thomas A. Smart
Paul C. Llewellyn
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022

*Attorneys for Plaintiff / Counterclaim Defendant
The Hershey Company and Counterclaim
Defendant Versatile Systems, Inc.*

**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

**REPLY BRIEF OF THE HERSHEY COMPANY AND
VERSATILE SYSTEMS, INC. IN SUPPORT OF
MOTION TO DISMISS AMENDED COUNTERCLAIMS
AND FOR JUDGMENT ON THE PLEADINGS**

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The Hershey Company (“Hershey”) and Versatile Systems Inc. (“Versatile”) submit this reply brief in support of their motions to dismiss the amended counterclaims of Hottrix LLC (“Hottrix”) pursuant to Rule 12(b)(6), and for judgment on the pleadings pursuant to Rule 12(c) with respect to Hershey’s declaratory judgment claim.

Hottrix is flatly wrong in asserting that, so long as it pleads substantial similarity in conclusory terms, the Court cannot dismiss this case on the pleadings. It cites no case so holding, concedes (Opp. 17) that the *Curtin* decision decided substantial similarity on a motion to dismiss and ignores numerous other cases cited by Hershey (Hershey Br. 10 n.3) holding that where a jury could not find substantial similarity, dismissal on the pleadings is warranted.

Because no reasonable jury could find substantial similarity between the protectable expression in Hottrix’s work and Hershey’s, the case should be dismissed on the pleadings. Hottrix does not dispute that the videos submitted by Hershey (Haje Decl. Exs. A-1, A-2) are accurate depictions of the two works and simply ignores the myriad differences in expression between them. (Hershey Br. 13–15). Instead, Hottrix argues that the works are substantially similar because both feature such common ideas or *scenes a faire* as a glass filling with milk with the liquid rising “from the bottom to the top” (as if a glass could be filled any other way), the color brown for chocolate milk (as if chocolate milk could be shown in a

different color), bubbles in a glass of milk (which is what happens when milk is poured), and the like. If copyright were assessed at the level of generality advocated by Hottrix, then once Van Gogh painted haystacks in a field, no other artist could do the same, even if the execution of the paintings were different.

Attempting to salvage its copyright claim, Hottrix argues it alleges copying of computer code of the iMilk App, but the complaint is bereft of any such allegations, let alone allegations that Hershey or Versatile had access to the iMilk code and that the code for Hershey's App is substantially similar.

Hottrix's pleading makes clear that its trade dress and unfair competition claims assert the same vaguely described elements as its copyright claim; accordingly, those claims are preempted. Hottrix also ignores the showing that *Dastar* bars those claims, and that it has failed to allege the elements of its purported trade dress with the requisite specificity. Lastly, Hottrix fails to refute that its tortious interference claim also is preempted by the Copyright Act, and fails to allege a specific prospective business relationship that was allegedly interfered with, as required by Pennsylvania law.

I. HOTTRIX FAILS TO STATE A CLAIM FOR COPYRIGHT INFRINGEMENT.

A. Hottrix Concedes That Where No Reasonable Jury Could Find the Expressive Elements of Two Works to Be Substantially Similar, the Court Can Dismiss a Copyright Infringement Claim on the Pleadings.

As Hershey showed in its moving brief, Hottrix has no claim for copyright infringement if the allegedly infringing work is not substantially similar to the protectible expression in Hottrix's work. Hottrix argues that it is sufficient, at the pleading stage, for it to *allege* "substantial similarity," but such conclusory allegations are not accepted as true where, as here, the Court can look at the works at issue and determine whether a jury could find them substantially similar. As the Second Circuit recently explained:

The question of substantial similarity is by no means exclusively reserved for resolution by a jury, . . . and we have repeatedly recognized that, in certain circumstances, it is entirely appropriate for a district court to resolve that question as a matter of law

These same principles hold true when a defendant raises the question of substantial similarity at the pleadings stage on a motion to dismiss. It is well settled that in ruling on such a motion, a district court may consider "the facts as asserted within the four corners of the complaint" together with "the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." In copyright infringement actions, "the works themselves supersede and control contrary descriptions of them," including "any contrary allegations, conclusions or descriptions of the works contained in the pleadings." When a court is called upon to consider whether the works are substantially similar, no discovery or fact-finding is typically necessary, because "what is required is only a visual comparison of the works."

... If... the district court determines that the two works are “not substantially similar as a matter of law,” the district court can properly conclude that the plaintiff’s complaint, together with the works incorporated therein, do not “plausibly give rise to an entitlement to relief.”

Peter F. Gaito, 602 F.3d 57, 63–64 (2d Cir. 2010) (citations omitted); *see also*, e.g., *Boland v. Select Comfort Corp.*, 2010 WL 3083021, *2 (M.D. Pa. Aug. 6, 2010) (Jones, J.) (“factual allegations that constitute nothing more than ‘legal conclusions’ or ‘naked assertions’” are “disregarded”) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)).

Indeed, as Hershey showed (Hershey Br. 10 & n.3), courts in this Circuit and elsewhere routinely decide substantial similarity on the pleadings. In discussing *Curtin v. Star Editorial Inc.*, 2 F. Supp. 2d 670 (E.D. Pa. 1998), cited by Hershey, Hottrix *concedes* that the court reviewed the works at issue and found no substantial similarity as a matter of law. *See Opp.* 16 n.12; *Curtin*, 2 F. Supp. 2d at 673 (on motion to dismiss, examining works in detail and finding no substantial similarity). Similarly, Hottrix cannot dispute that in *Douglas v. Kimberly-Clark Corp.*, 1993 WL 9033, *2 (E.D. Pa. Jan. 11, 1993), the Court reviewed the works at issue and held, on a motion to dismiss:

it is clear that plaintiff cannot pass the intrinsic test of substantial similarity. I find that as a matter of law the two drawings are sufficiently different that no reasonable juror could find the two drawings to be substantially similar.

Misleadingly stating that Hershey “cites only two” cases for the proposition that a court can determine substantial similarity as a matter of law at the pleading stage (Opp. 16), Hottrix ignores numerous other cases cited by Hershey granting motions to dismiss for lack of substantial similarity. *See* Hershey Br. 10 n.3.

What is more, Hottrix does not cite a single case holding that a court cannot decide substantial similarity on the pleadings. It merely cites decisions that address the general elements of a copyright claim, where substantial similarity was not put in issue,¹ or cases that did not involve a motion to dismiss, and merely considered the issue of substantial similarity at the summary judgment stage.² Moreover, Hottrix concedes that a copyright claim can be dismissed as a matter of law where a reasonable jury could not find substantial similarity (Opp. 17), and, while it argues that even summary judgment is frowned upon in copyright cases, the cases it cites actually find no infringement of protectable expression as a matter of law. *See Hoelbling*, 618 F.2d 972, 977–80 (2d Cir. 1980) (copying went only to

¹ *See, e.g., Universal Steel Bldgs. v. Shore Corp.*, 2010 WL 1142039 (W.D. Pa. Mar. 24, 2010); *Key Consol. 2000, Inc. v. Troost*, 432 F. Supp. 2d 484 (M.D. Pa. 2006); *Kelly v. L.L. Cool J.*, 145 F.R.D. 32 (S.D.N.Y. 1992), *aff'd*, 23 F.3d 398 (2d Cir. 1994); *Nourison Indus. v. Virtual Studios, Inc.*, 2010 U.S. Dist. LEXIS 55545 (D.N.J. June 3, 2010).

² *See, e.g., Roginski v. Time Warner Interactive, Inc.*, 967 F. Supp. 821 (M.D. Pa. 1997); *Segal v. Paramount Pictures*, 841 F. Supp. 146 (E.D. Pa. 1993), *aff'd*, 37 F.3d 1488 (3d Cir. 1994).

the non-protectable elements); *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 37 (1st Cir. 2001) (works were not substantially similar). *Maule v. Phila. Media Holdings, LLC*, 2009 WL 229759, *4 (E.D. Pa. Jan. 30, 2009), merely holds that dismissal is not warranted where a jury *could* find substantial similarity, thereby implying that a court *can* dismiss where a jury *could not* find substantial similarity. Indeed, a contrary rule would make no sense as a matter of policy or judicial economy.

Although Hottrix asserts that there are disputes as to material facts and makes passing reference to expert testimony, it identifies no such fact disputes, and no relevant evidence that experts would bring to bear on substantial similarity. Nor would repleading save Hottrix's claim, given that the works, as a matter of law, are not substantially similar.

B. Hottrix Fails to Refute the Showing that, as a Matter of Law, the Parties' Audiovisual Works are Not Substantially Similar.

As Hershey showed (Hershey Br. 8–9), any claim of copyright infringement requires that the defendant's work be substantially similar to the protected expression of the copyrighted work. Hottrix suggests that an examination of substantial similarity is not warranted because Hottrix has alleged direct copying (Opp. 14 n.11), but it is settled that even where there is *direct* copying (and no such showing is possible here) a copyright claimant *still* must show substantial similarity. Thus, *Dam Things*, cited by Hottrix, holds that even after proving

“actual copying,” a copyright claimant must “demonstrate that the copying was improper or unlawful by showing that the second work bears ‘substantial similarity’ to *protected expression* in the earlier work.” *Dam Things* 290 F.3d 548, 562 n.21 (emphasis added); *see also* 4 *Nimmer on Copyright*, § 13.01[B], at 13-14 (“[S]ubstantial similarity remains an indispensable element of plaintiff’s proof, even in cases . . . in which the defendant does not contest factual copying.”).³ It also cannot be disputed that Hottrix cannot premise its infringement claim on the alleged copying of ideas (rather than the particular expression of those ideas) or of mere *scenes a faire* that follow from the ideas being expressed. *See* *Hershey Br.* 10–12 & n.4; *Franklin Mint Corp. v. Nat’l Wildlife Art Exch., Inc.*, 575 F.2d 62, 64–66 (3d Cir. 1978); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 908–09 (3d Cir. 1975).

Hottrix has failed to refute the showing in *Hershey’s* moving brief and *Haje Decl. Exs. A-1, A-2* that, as a matter of law, a jury could not find the works at issue to be substantially similar, due to the numerous differences in actual expression and the absence of any similarity with respect to any protectible expression in the *iMilk App.* *See Haje Decl. Exs. A-1, A-2; Hershey Br. 3–6, 12–15.*

³ Hottrix’s attempt to make an issue of *Hershey’s* alleged licensing request (*Opp. 5*) is irrelevant on this motion for the same reason.

As the Court can see by viewing the two applications, the iMilk App has none of the expressive elements of Hershey’s application that were detailed in Hershey’s opening brief at pages 3–6 and 12–15. It features milk rising up the iPhone screen from an unseen source (not poured from above), a black background, and significantly different looking bubbles (*e.g.*, there are no large bubbles as the milk fills up, and the top of iMilk’s milk is a distinct band of small bubbles, the width of which does not vary significantly). Unlike in Hershey’s application, streaks of milk (but not large bubbles) appear on the iMilk “glass” and drip down the screen when the newly-filled glass is shaken. Also unlike Hershey’s application, iMilk contains depictions of the milk turned to whipped cream and cheese. There is no chocolate syrup bottle, and no depiction of adding syrup or of milk with syrup amassed at the bottom of the glass, or of syrup being mixed into the milk. There is no spoon or straw. And, when the iMilk milk is “drunk,” it drains out the top of the tipped “glass,” rather than sinking down as if being drunk from a straw.⁴ The two applications also don’t contain the same sequences of events, or the interactivity of the user and the application, as set forth in detail Hershey’s opening brief at pages 3–6 and 12–15. There are also numerous

⁴ In addition, there are no similarities in the introduction screens of the applications, and iMilk does not contain text instructions as Hershey’s application does, as evidenced in Haje Decl. Exs. A-1 & A-2.

differences in the sounds of the applications, including when milk is added, agitated and drunk. In addition, Hershey's application contains sounds of a squeezed syrup bottle, a spoon mixing, a straw sucking and gurgling, and bubbles blown with a straw. And, iMilk begins and ends with machine-like sounds unlike anything in Hershey's application.

Faced with Hershey's detailed showing that the actual expressions are different, all that Hottrix identifies are *scenes a faire*, that is, common elements that are driven by the ideas being expressed, such as the color brown for chocolate milk, clear glass which is necessitated by idea of using iPhone as a glass (otherwise one could not see contents), liquid rising "from the bottom to the top" in a glass when filled (which is how liquid fills a glass, and in fact the two applications do it differently). Indeed, upon examination, each of Hottrix's alleged points of similarity (Opp. 23) is either a general idea, a *scenes a faire* expression driven by the idea being expressed, or a mischaracterization of the actual expression of each work:

- Hottrix argues that the glass is the same size in each application, but that is driven by the idea of using the iPhone as a glass.
- Hottrix argues that the glass is clear in both applications, but the idea of a clear glass is not protectible, and is driven by the idea of using the iPhone as a glass; if the glass was not clear, one would not be able to see the contents. And, the Hershey application includes a HERSHEY'S logo on the glass. See Haje Decl. Ex. A-2.

- Hottrix argues that the parties' bubbles are the same size and shape, but bubbles in milk are round, and, as Hershey showed, the bubbles in each application are different in size and configuration. *See* Haje Decl. Exs. A-1, A-2.
- Hottrix argues that the liquid looks the same in each application as it is poured and drunk, but, as Hershey showed, the milk fills the glass differently and is drunk differently in each. *See* Haje Decl. Exs. A-1, A-2.
- Hottrix argues that the movement of bubbles forming and moving in each is the same; but the bubbles in milk is *scenes a faire*, and the actual expression of the bubbles in each application is different. *See* Haje Decl. Exs. A-1, A-2.
- Hottrix argues that both applications use a "solid colored background"; not only is the common idea of a "solid colored background" not protectible, but, in fact, the Hottrix background is black, and the Hershey background is blue, with the HERSHEY'S logo in white against it. *See* Haje Decl. Exs. A-1, A-2.
- Hottrix argues that both applications show "chocolate and/or white milk," which clearly are unprotectable ideas. Moreover, the brown color used for each application is not even the same. *See* Haje Decl. Exs. A-1, A-2.
- Hottrix asserts that the audio expressions in each "are the same" when, in fact, the actual expressions of the sound of bubbles and liquid in each are not the same. *See* Haje Decl. Exs. A-1, A-2.
- Hottrix argues that the sequence is the same in each, when, in fact, the applications have different sequences and different methods of user interaction. Although both start with the common means of a user pressing a button, the beverage is poured into the glass differently in each (indeed, Hottrix says that in iMilk, the milk is not poured, but is "magically rising," Am. Countercls. ¶ 41); the means of drinking is different in each, and, the Hershey application calls for several button presses and other interactions by the user (to add syrup, stir the syrup, blow into the straw and drink from the straw). And, although both

applications have a sound at the conclusion, the sounds are different. At most, both applications have a common, *scenes a faire* sequence that is driven by how one drinks milk – one fills the glass, drinks the milk, and often makes a sound at the end. See Haje Decl. Exs. A-1, A-2.⁵

The alleged similarities claimed by Hottrix are a far cry from those in the computer game cases upon which Hottrix relies, in which the defendants did not convey stock elements or *scenes a faire* with different expression, but, rather, closely copied the appearance of plaintiff's "wholly fanciful creations" such as "gobbler" and "ghost monsters" – "virtually identical" version of which appeared in defendant's video game. *Atari, Inc. v. N. Am. Philips Cons. Elecs. Corp.*, 672 F.2d 607, 617–18 (7th Cir. 1982) (fanciful elements of expression in plaintiff's video game, in contrast to common themes, were entitled to strong protection); see also, e.g., *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 482–83 (D. Neb. 1981) (liability premised on slavish copying of unique and fanciful video game characters). As for *Whelan Assocs. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986), that case involved a text-based inventory and sales tracking software program, not an audiovisual work, and simply did not implicate stock elements and *scenes a faire* of the type involved here. Thus, the *Whelan* court specifically held,

⁵ Hottrix also provides the Court with two cherry-picked screen shots of the applications that themselves are not even substantially similar, and which further demonstrate that the backgrounds, glasses, bubbles and other elements of expression in each application are different. See Opp. 20.

for example, that there were many different ways that the program at issue could have been structured. 797 F.2d at 1238. In contrast, Hottrix accuses Hershey of copying common, generic elements such as clear glass, the color brown for chocolate milk, the existence of bubbles in a glass of milk. There is no color glass other than clear that Hershey could use to depict a beverage in an iPhone (and permit the user to see the beverage), there is no color but brown to depict chocolate milk, and one cannot depict a realistic looking glass of milk without bubbles. Even so, as set forth above, the actual expression of Hershey's application is different than that of iMilk.

C. Hottrix Fails to Allege a Claim for Copying of Code.

Hottrix now claims to also allege copyright infringement of the iMilk computer code. However, there is simply no reference to computer code in its amended counterclaims, nor any allegation that Hershey or Versatile had access to the iMilk code, or that the Hershey applications code is substantially similar to that of iMilk. *See Dam Things*, 290 F.3d at 561 (copying requires showing defendant "had access to a copyrighted work" and "substantial similarities between the two works"). As the Supreme Court made clear in *Iqbal* and *Twombly*, a plaintiff cannot rely on vague conclusions and implications to state a claim for relief; sufficient facts have to be plead that give a claim "facial plausibility." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,

555, 557 (2007) (“a formulaic recitation of a cause of action’s element will not do”).

II. HOTTRIX’S TRADE DRESS AND UNFAIR COMPETITION CLAIMS ARE PREEMPTED AND INADEQUATELY PLEADED.

A. Hottrix’s Trade Dress and Unfair Competition Claims Allege the Same Infringing Acts as its Copyright Claim, and Are Therefore Preempted.

Hottrix argues that the claims are not preempted because, according to Hottrix, the trade dress “look and feel” for which it seeks protection under the Lanham Act and common law unfair competition is somehow different from the “copying of the protected elements” alleged in connection with its copyright claim. Opp. 24. As Hottrix attempts to explain, “Unlike the Copyright Act claim, this claim does not rely on the copying of protected elements of the iMilk App, but rather the overall ‘look and feel’ of the App.” Opp. 25. However, a plain reading of the Amended Counterclaims confirms that the “look and feel” of iMilk is exactly what the copyright claim is about. Thus, in its general allegations that are incorporated into its copyright infringement counterclaim, Hottrix alleges that Hershey copied the “look and feel” of the iMilk App for its own application. Am. Countercls. ¶¶ 46, 47.⁶ What is more, Hottrix itself alleges that the visual

⁶ Indeed, in its initial copyright counterclaim, Hottrix alleged that Hershey’s application “exud[es] the same ‘look and feel’ as Hottrix’s copyrighted material.” After Hershey filed its initial motion to dismiss, Hottrix – in a transparent effort to
(continued...)

appearance of iMilk is protected by a copyright registration. Am. Countercls. ¶¶ 36–39.

When Hottrix does attempt to identify elements of its claimed trade dress, they are the same vague, general elements that it argues are infringed under copyright, as the following comparison shows:

Claimed Trade Dress Elements (Am. Countercls. ¶ 81)	Claimed Copyright Elements (Opp. 22–23)
“the shape and design of the App”	“the shape of the expressions in the App[] . . . [including] a clear glass the size of an iPhone”
“the shape and design of the beverage as it is ‘poured’ into the iPhone ‘glass’”	the shape of “the liquid as it is ‘poured’ . . . in . . . the container”
“the shape and design of the beverage as the iPhone user ‘drinks’ the beverage”	the shape of “the liquid as it is . . . ‘drunk’”
“the shape, design, and placement of the iMilk video”	“the shape of the expressions in the Apps is the same”
“the overall configuration and appearance of these features combined on the App”	“[t]he colors of the expressions in the Apps are the same” “[t]he artistic and copyrightable expressions are how this idea is manifested in color, shape, layout, sequence and sound”

create a purported distinction between its copyright and trade dress claims – deleted that allegation, and deleted its allegations in Counterclaim II that Hershey misappropriated Hottrix’s “copyrighted works.” Compare Countercls. ¶¶ 62, 71, with Am. Countercls. ¶¶ 63, 71.

	“[t]he sequence of movement of the expression are the most similar”
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Indeed, nowhere in its pleading does Hottrix purport to identify any elements of the iMilk App’s appearance that are allegedly protected by copyright but not part of its claimed trade dress, or vice-versa. In both instances, it claims rights to the same vague, general ideas. As in *Daley v. Firetree, Ltd.*, 2006 WL 148879, *2–6 (M.D. Pa. Jan. 19, 2006), the alleged wrongful act in Counterclaims II and III is the same as in a copyright claim – namely, the copying of a copyrighted work. *See also Scranton Times, L.P. v. Wilkes-Barre Publ’g Co.*, 2009 WL 585502, *5 (M.D. Pa. Mar. 6, 2009) (unfair competition claim preempted).

The cases on which Hottrix relies confirm that preemption is warranted here. *Conference Archives, Inc. v. Sound Images, Inc.*, 2010 U.S. Dist. LEXIS 46955 (W.D. Pa. March 31, 2010), holds that the Copyright Act preempts Lanham Act claims for the copying of matter protected under the Copyright Act. *Id.* at *37–38 (“Claims for copyright infringement under the Copyright Act, and claims for Trade Dress Infringement under the Lanham Act are mutually exclusive.”). Moreover, *Conference Archives* holds, “[i]f a work was granted copyright registration, *this*

*serves as strong evidence that the subject matter falls within the Copyright Act, and cannot be protected by trade dress.” Id. at *38 (emphasis added).⁷*

In *Conference Archives*, there is no indication that the plaintiff’s work (a web site) was protected by a copyright registration, and it was unclear whether copyright could protect the “look and feel” of a website, thus, plaintiff’s trade dress claim survived preemption at the pleadings stage. Here, in stark contrast, the appearance of the iMilk App is covered by a copyright registration, *see Am. Countercls.* ¶¶ 36–39, and Hottrix specifically alleges copying of the “look and feel” of iMilk in allegations that are incorporated in its copyright count, *see id.* ¶¶ 46, 47, 61. And, as set forth above, Hottrix alleges the same vague elements of iMilk in connection with both its copyright and its trade dress claims.

⁷ *Sleep Science Partners v. Lieberman*, 2010 U.S. Dist. LEXIS 45385, *11–13 (N.D. Cal. May 10, 2010), another website case, similarly holds that trade dress cannot be used to protect expression covered by copyright, and, like *Conference Archives*, holds that a trade dress claimant must clearly articulate the claimed trade dress features to ensure they do not fall under the purview of copyright. In *Blue Nile v. Ice.com*, 478 F. Supp. 2d 1240 (W.D. Wash. 2007), another website case, only portions of plaintiff’s work were covered by copyright registrations, and the court (prior to *Twombly* and *Iqbal*) did not require plaintiff to define its claimed trade dress with any specificity. More recent cases cited by both parties, however, require great precision in alleging claimed trade dress. *See* *Hershey Br.* 18–19; *infra*, p. __; *Conference Archives*, 2010 U.S. Dist. LEXIS 46955, at *52–53; *Sleep Science*, 2010 U.S. Dist. LEXIS 45385, at *6–9.

B. Hottrix Does Not Dispute That its Trade Dress and Unfair Competition Claims Are Barred by the Supreme Court’s *Dastar* Decision.

Even apart from copyright preemption, Hottrix’s unfair competition and trade dress counterclaims are barred by *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) (no Lanham Act unfair competition claim for copying of work ordinarily subject to copyright protection). These same principles apply to Pennsylvania unfair competition law (under which Counterclaim II is pleaded), which applies the Lanham Act’s standards. *See, e.g., First Keystone Fed. Sav. Bank v. First Keystone Mortg., Inc.*, 923 F.Supp. 693, 700 n.1, 707 n.2 (E.D. Pa. 1996). *See* Hershey Br. 17 & n.6. Hottrix simply ignores *Dastar* and its preclusive effect.

C. Hottrix Has Failed as a Matter of Law to Allege its Claimed Trade Dress With the Requisite Specificity.

In addition, Hottrix ignores Hershey’s showing that the alleged trade dress claimed by Hottrix is so vague, general and incomplete as to fail as a matter of law. *See* Hershey Br. 18–20; *Liko AB v. Rise Lifts, Inc.*, 2008 WL 2977869, *6–7 (E.D. Pa. July 31, 2008) (trade dress description was “incomplete,” “vague” and failed to provide definitions of some design elements); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 114–18 (2d Cir. 2001) (failure to identify specific elements of trade dress in jewelry line required dismissal); *see also, Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 381–82 (2d Cir. 1997); *In re Ingle Co.*,

1997 WL 8495, *5–7 (9th Cir. Jan. 7, 1997); *Score, Inc v. Cap Cities/ABC, Inc.*, 724 F.Supp. 194, 199–201 (S.D.N.Y. 1989). Even *Conference Archives*, cited by Hottrix, holds that any trade dress claim “will . . . need to identify and select protectible trade dress elements, and plead them with particularity to avoid any overlapping trade dress and copyright claims.” 2010 U.S. Dist. LEXIS 46955, at *52. To the extent that Hottrix does attempt to describe its trade dress (Opp 28), it does so with vague generalities – a “beverage being poured, followed by the ‘drinking’ of the beverage, . . . a sound effect upon complete” and the “high quality of the graphic display” – again confirming that Hottrix seeks to protect ideas rather than actual expression. Particularly in light of *Iqbal* and *Twombly*, these vague allegations do not begin to approach the requisite specificity.

III. HOTTRIX’S TORTIOUS INTERFERENCE CLAIM IS PREEMPTED AND FAILS TO ALLEGE ESSENTIAL ELEMENTS.

Hottrix does not dispute that a tortious interference claim premised on copyright infringement is preempted. *See* Hershey Br. 20 (citing cases). Hottrix’s tortious interference claim is based on the same copying of visual elements as its copyright claim. Hottrix’s argument (Opp. 30) that the claim is based on “copying the look and feel” rather than “the alleged copying behavior” is mere semantics, and cannot avoid the preemption mandated by 17 U.S.C. § 301. *See* Hershey Br. 20; *Scranton Times, L.P. v. Wilkes-Barre Publ’g Co.*, 2009 WL 585502, *7 (M.D. Pa. Mar. 6, 2009); *Daley v. Firetree, Ltd.*, 2006 WL 148879, *6 (M.D. Pa. Jan. 19,

2006); *MCS Servs., Inc. v. Johnsen*, 2002 WL 32348500, *7 (E.D. Pa. Aug. 13, 2002)).

Nor does Hottrix dispute that it doesn't identify any prospective relationship allegedly interfered with, as Pennsylvania law requires. *See* Hershey Br. 21; *Monroeville Chrysler, LLC v. DaimlerChrysler Motors Co.*, 2007 WL 4150344, *7 (W.D. Pa. Nov. 19, 2007) (tortious interference with prospective economic advantage claim "must allege that a *particular* contract or express offer was being contemplated . . . which was improperly impeded by the defendant's action"; granting motion to dismiss) (emphasis added); *Meissner Chevrolet Geo-Oldsmobile, Inc. v. Rothrock Chevrolet, Inc.*, 2007 WL 3103114, *2–3 (E.D. Pa. Oct. 23, 2007). Ignoring *Monroeville* and *Meissner*, Hottrix argues that future contracts are "necessarily uncertain" (Opp. 30), misleadingly citing a 1971 case in which a specific prospective business partner *was identified* by plaintiff in its claim, and the court merely held that the plaintiff did not need to allege that a deal would definitely have been consummated. *See Glenn v. Point Park College*, 272 A.2d 895, 898–99 (Pa. 1971). Here, Hottrix does not identify any potential business partner or any particular potential transaction.

Finally, Hottrix does not dispute that the failure of its other claims means there is no wrongful conduct to support a tortious interference claim. *See Acumed LLC v. Advanced Surgical Servs., Inc.*, 561 F.3d 199, 214–17 (3d Cir. 2009) (no

tortious interference “as a matter of law” where conduct was not “independently actionable”; privilege to “sell similar products to prospective purchasers”). For this additional reason, Hottrix’s tortious interference claim fails.

CONCLUSION

For the foregoing reasons, Hottrix’s counterclaims should be dismissed as to both counterclaim defendants, and judgment on the pleadings should be entered on Hershey’s claim for declaratory judgment.

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McNEES WALLACE & NURICK LLC

Of Counsel:

Thomas A. Smart
Paul C. Llewellyn
KAYE SCHOLER LLP
425 Park Avenue
New York, New York 10022
Telephone: (212) 836-8000
Facsimile: (212) 836-6463

/s/ Harvey Freedenberg
Harvey Freedenberg
Alan R. Boynton, Jr.
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
Telephone: (717) 237-5267
Facsimile: (717) 237-5300
*Attorneys for Plaintiff / Counterclaim
Defendant The Hershey Company and
Counterclaim Defendant Versatile
Systems, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of Court using CM/ECF and that the document is being served electronically upon counsel of record through the Court's electronic transmission facilities.

/s/ Harvey Freedenberg
Harvey Freedenberg

Of Counsel for Plaintiff/Counterclaim
Defendant The Hershey Company

Dated: November 18, 2010