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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

**PLAINTIFF/COUNTERCLAIM DEFENDANT THE HERSHEY  
COMPANY'S ANSWER TO HOTTRIX LLC'S COUNTERCLAIMS**

Plaintiff and Counterclaim-Defendant The Hershey Company (“Hershey Company”) for its reply to the Counterclaims of Defendant and Counterclaim-Plaintiff Hottrix, LLC (“Hottrix), filed on October 7, 2010, respond as follows:

**ANSWER**

29. Hershey Company repeats and incorporates herein its allegations in Paragraphs 1-28 of its Complaint in this action.

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 30 of the Counterclaim, except upon information and belief admits that Hottrix creates and sells mobile device software applications.

31. Admits the allegations of Paragraph 31 of the Counterclaims except denies knowledge or information as to Hottrix’s information and beliefs.

32. Admits upon information and belief the allegations of Paragraph 32 of the Counterclaims except denies knowledge or information as to Hottrix’s information and beliefs.

**VENUE AND JURISDICTION**

33. The allegations of paragraph 33 of the Counterclaims are legal conclusions to which no response is required.

34. Denies the allegations of Paragraph 34 of the Counterclaims except admits that venue is proper in this District.

35. Admits the allegations of Paragraph 35 of the Counterclaims.

**GENERAL ALLEGATIONS**

36. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 36 of the Counterclaims and refers to the iMilk Video for the contents therein.

37. Denies the allegations of paragraph 37 of the Counterclaims and refers to the iMilk Video for the contents therein.

38. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 38 of the Counterclaims.

39. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 39 of the Counterclaims, except admits that Steve Sheraton is the listed owner of Copyright Registration No. PA 1-598-059 and refers to that copyright registration for the contents thereof.

40. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 40 of the Counterclaims, except admits that Hottrix is the listed owner of Copyright Registration No. TX 7-058-459, and refers to that copyright registration for the contents thereof.

41. Denies the allegations of paragraph 41 of the Counterclaims and except admits that the iMilk App embodies the idea of using an iPhone to simulate

drinking milk from a virtual glass, and refers to the iMilk App for the contents thereof.

42. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 42 of the Counterclaims.

43. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 43 of the Counterclaims, except admits upon information and belief that Hottrix's iMilk App is provided for sale via the Apple iTunes Store.

44. Denies the allegations of paragraph 44 of the Counterclaims except admits that on or about August 12, 2008, a Hershey employee emailed Hottrix, and refers to that email for the contents thereof.

45. Denies the allegations of paragraph 45 of the Counterclaims, except admits that on or about August 12, 2008, Hershey employee Scott Crowell emailed Hottrix, and refers to that email for the contents thereof.

46. Denies the allegations of paragraph 46 of the Counterclaims.

47. Denies the allegations of paragraph 47 of the Counterclaims.

48. Denies the allegations of paragraph 48 of the Counterclaims, except admits that Hershey's Syrup Application permits the user to "virtually" add Hershey's Syrup to a virtual glass of milk on his or her iPhone, to mix the milk and syrup so as to create chocolate milk, to blow virtual "bubbles" in the chocolate

milk (thereby making the sound of bubbling milk), and to “drink” the milk as if with a straw (creating a sound that the user hears), all on the video screen of the user’s iPhone.

49. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 49 of the Counterclaims, except admits that the online iPhone “App Store” operated by Apple makes applications available for download, some for free and some for a fee.

50. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 50 of the Counterclaims.

51. Denies the allegations of paragraph 51 of the Counterclaims, except admits that Hershey’s Syrup iPhone application is offered as a free download for iPhone users on the online Apple iPhone “App Store” further avers that the applications was first made available on the App Store on or about October 28, 2009.

52. Denies the allegations of paragraph 52 of the Counterclaims.

53. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 53 of the Counterclaims.

54. Denies the allegations of paragraph 54 of the Counterclaims.

55. Admits the allegations of paragraph 55 of the Counterclaims and further states that no license by Sheraton or Hottrix is necessary for Hershey's non-infringing Hershey's Syrup iPhone application.

56. Denies the allegations of paragraph 56 of the Counterclaims.

57. Denies the allegations of paragraph 57 of the Counterclaims, except admits that on December 23, 2009, Hottrix sent a letter to Hershey, and refers to the letter for the contents thereof.

58. Denies the allegations of paragraph 58 of the Counterclaims, except admits that Hershey's Syrup iPhone application was for available for download from the Apple iPhone App Store as of September 7, 2010.

59. Denies the allegations of paragraph 59 of the Counterclaims, and specifically denies that there have been over 4,000,000 downloads of Hershey's Syrup iPhone application, and further avers that as of January 23, 2011, there were less than 400,000 downloads of Hershey's Syrup iPhone application – approximately one-tenth the number alleged by Hottrix.

60. Denies the allegations of Paragraph 60 of the Counterclaims.

**COUNTERCLAIM I**  
**COPYRIGHT INFRINGEMENT**  
**(Against All Defendants)**

61. Repeats and realleges each response in paragraphs 29-60 above as if fully set forth herein.

62. Denies the allegations of paragraph 62 of the Counterclaims.
63. Denies the allegations of paragraph 63 of the Counterclaims.
64. Denies the allegations of paragraph 64 of the Counterclaims.
65. Denies the allegations of paragraph 65 of the Counterclaims.
66. Denies the allegations of paragraph 66 of the Counterclaims.
67. Denies the allegations of paragraph 67 of the Counterclaims.
68. Denies the allegations of paragraph 68 of the Counterclaims.
69. Denies the allegations of paragraph 69 of the Counterclaims.

**COUNTERCLAIM II**  
**UNFAIR COMPETITION**  
**Pennsylvania Law**  
**(Against All Defendants)**

70. Repeats and realleges each response in paragraphs 29-60 above as if fully set forth herein.

71. Denies the allegations of paragraph 71 of the Counterclaims.
72. Denies the allegations of paragraph 72 of the Counterclaims.
73. Denies the allegations of Paragraph 73 of the Counterclaims.
74. Denies the allegations of paragraph 74 of the Counterclaims.
75. Denies the allegations of paragraph 75 of the Counterclaims.
76. Denies the allegations of paragraph 76 of the Counterclaims.
77. Denies the allegations of paragraph 77 of the Counterclaims.

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

78. Repeats and realleges each response in paragraphs 29-60 above as if fully set forth herein.

79. Denies the allegations of Paragraph 79 of the Counterclaims.

80. Denies the allegations of Paragraph 80 of the Counterclaims.

81. Denies the allegations of Paragraph 81 of the Counterclaims.

82. Denies the allegations of paragraph 82 of the Counterclaims.

83. Denies the allegations of paragraph 83 of the Counterclaims.

84. Denies the allegations of paragraph 84 of the Counterclaims.

85. Denies the allegations of paragraph 85 of the Counterclaims.

86. Denies the allegations of paragraph 86 of the Counterclaims.

87. Denies the allegations of paragraph 87 of the Counterclaims.

88. Denies the allegations of paragraph 88 of the Counterclaims.

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

89. Repeats and realleges each response in paragraphs 29-60 above as if fully set forth herein.



90. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 90 of the Counterclaims.

91. Denies the allegations of paragraph 91 of the Counterclaims.

92. Denies the allegations of paragraph 92 of the Counterclaims.

93. Denies the allegations of paragraph 93 of the Counterclaims.

94. Denies the allegations of paragraph 94 of the Counterclaims.

95. Denies the allegations of paragraph 95 of the Counterclaims.

### **AFFIRMATIVE DEFENSES**

By alleging the matters set forth below, Hershey does not allege or admit that it has the burden of proof and/or the burden of persuasion with respect to any of these matters.

#### **FIRST DEFENSE**

The Counterclaims fail, in whole or in part, to state a claim upon which relief can be granted.

#### **SECOND DEFENSE**

Any arguable similarity that may exist between Hottrix's allegedly infringed works and the accused work consists of similarity on the level of ideas only and is therefore not copyright infringement.

### **THIRD DEFENSE**

Any arguable similarity that may exist between Hottrix's allegedly infringed works and the accused work consists solely of stock elements and/or *scenes à faire*, and is therefore not protectable expression under the copyright laws.

### **FOURTH DEFENSE**

Any arguable similarity that may exist between Hottrix's allegedly infringed works and the accused work consists solely of functional elements and is therefore not protectable expression under the copyright laws.

### **FIFTH DEFENSE**

The accused work is not substantially similar in protectable expression to Hottrix's works.

### **SIXTH DEFENSE**

Assuming *arguendo* some similarity in protectable expression in Hottrix's works and the accused work, any such similarity is de minimis and therefore non-actionable.

### **SEVENTH DEFENSE**

Assuming *arguendo* that Hottrix could state a claim for copyright infringement with respect to the parties' respective works based upon a compilation theory, the selection, order and arrangement of the elements in Hottrix's works is not substantially similar to the selection, order and arrangement of any overlapping elements in the accused work.

### **EIGHTH DEFENSE**

The Counterclaims are barred, in whole or in part, by the doctrine of fair use.

### **NINTH DEFENSE**

Assuming *arguendo* that Hottrix has stated a valid claim for copyright infringement, Hershey's actions were not intentional or willful.

### **TENTH DEFENSE**

The Counterclaims are barred, in whole or in part, because Hottrix has not sustained any injury or damage by reason of any alleged unlawful actions of Hershey.

### **ELEVENTH DEFENSE**

If and to the extent Hottrix can show copyright infringement and entitlement to infringing profits, the amount of any such infringing profits allocable to the accused work would be de minimis.

### **TWELFTH DEFENSE**

Hottrix has failed to set forth the elements of its alleged trade dress with the requisite particularity.

### **THIRTEENTH DEFENSE**

The constituent elements of Hottrix's works, as a whole, individually, or as some subset of the whole, do not constitute protectable trade dress.

#### **FOURTEENTH DEFENSE**

The elements of Hottrix's works, as a whole, individually, or as some subset of the whole, are not inherently distinctive, have no acquired distinctiveness, and/or had no acquired distinctiveness at the time the accused work was first offered.

#### **FIFTEENTH DEFENSE**

Some of the elements of Hottrix's allegedly infringed trade dress are functional and therefore not protectable under the trademark and unfair competition laws.

#### **SIXTEENTH DEFENSE**

The public is not likely to be confused into believing that the accused work is the product of Hottrix, and/or that Hershey has been authorized by Hottrix or is otherwise affiliated with Hottrix.

#### **SEVENTEENTH DEFENSE**

Hottrix's trademark, trade dress, unfair competition and tortious interference claims are barred, in whole or part, because they merely repeat allegations that with the sole purview of the Copyright Act.

### **EIGHTEENTH DEFENSE**

Hottrix's trademark, trade dress, unfair competition and tortious interference claims are barred, in whole or part, because they assert rights on Hottrix's behalf in unprotectable images, designs and ideas.

### **NINETEENTH DEFENSE**

Hottrix's claims fail to the extent that Hershey has priority of use with respect to the elements of the accused works that are claimed to infringe Hottrix's rights.

### **TWENTIETH DEFENSE**

The Counterclaims are barred, in whole or in part, because Hottrix has unclean hands.

### **TWENTY-FIRST DEFENSE**

The Tortious Interference with Prospective Economic Advantage Counterclaim is barred, in whole or in part, because Hershey's actions were reasonable, justified, privileged and in good faith.

WHEREFORE, Hershey requests judgment in its favor dismissing the Counterclaims, and awarding Hershey its costs and attorneys' fees in this action and such other and further relief as the Court deems appropriate.

Dated: February 3, 2011

McNEES WALLACE & NURICK LLC

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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

*Attorneys for Plaintiff/Counterclaim  
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Counterclaim Defendant Versatile  
Systems, Inc.*

Dated: February 3, 2011