

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

**PLAINTIFF/COUNTERCLAIM DEFENDANT VERSATILE SYSTEMS,
INC.'S ANSWER TO HOTTRIX LLC'S COUNTERCLAIMS**

Plaintiff and Counterclaim-Defendant Versatile Systems, Inc. (“Versatile”) for its reply to the Counterclaims of Defendant and Counterclaim-Plaintiff Hottrix, LLC (“Hottrix), filed on October 7, 2010, responds as follows:

ANSWER

29. Paragraph 29 of the Counterclaim contains no allegations to which a responsive pleading by Versatile is required.

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

31. Denies knowledge or information sufficient to form a belief as to the allegations of Paragraph 31 of the Counterclaims.

32. Admits 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 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 knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 44 of the Counterclaims

45. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 45 of the Counterclaims.

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 knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 51 of the Counterclaims.

52. Denies the allegations of Paragraph 52 of the Counterclaims, except denies knowledge or information sufficient to form a belief as to the truth of those allegations with respect to parties other than Versatile.

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

54. Denies the allegations of Paragraph 54 of the Counterclaims.

55. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 55 of the Counterclaims.

56. Denies the allegations of Paragraph 56 of the Counterclaims.

57. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 57 of the Counterclaims.

58. Denies knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 58 of the Counterclaims.

59. Denies that any downloads of the Hershey's application significantly impair the downloading of the iMilk App, and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 59 of the Counterclaims.

60. Denies the allegations of Paragraph 60.

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, Versatile 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, Versatile'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 Versatile.

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 or Versatile have been authorized by Hottrix or are otherwise affiliated with Hottrix.

SEVENTEENTH DEFENSE

Hottrix's trademark, trade dress, unfair competition and tortuous 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 tortuous 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, Versatile requests judgment in its favor dismissing the Counterclaims, and awarding Versatile 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

Of Counsel:

Paul C. Llewellyn
Victoria Haje
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

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

Dated: February 3, 2011