

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF WEST VIRGINIA  
MARTINSBURG DIVISION

**THE HERSHEY COMPANY**

and

**HERSHEY CHOCOLATE &  
CONFECTIONERY CORPORATION,**  
Delaware corporations,

Case No.: \_\_\_\_\_

**Plaintiffs,**

v.

**REESE'S NURSERY AND LANDSCAPING,**  
a West Virginia company, and **REESE  
CLABAUGH,**

**Defendants.**

**COMPLAINT**

For their causes of action against Defendants, Plaintiffs, THE HERSHEY COMPANY and HERSHEY CHOCOLATE & CONFECTIONERY CORPORATION (collectively, "Hershey"), by counsel, allege as follows:

**Introduction**

1. This is an action for injunction, damages and other appropriate relief arising out of Defendants' violations of the Lanham Act, 15 U.S.C. § 1114(a), 15 U.S.C. § 1125(a) and 15 U.S.C. § 1125(c), 15 U.S.C. § 1117(c), as well as Defendants' common law trademark infringement arising out of defendant's use of a logo that infringes and dilutes the well-known trade dress of Hershey's REESE'S line of products.

2. Hershey sells throughout the United States its well-known REESE'S® products. Hershey's REESE'S® products have been widely advertised and sold throughout the United States

for many years in packaging that features the REESE'S® brand name in distinctive yellow script letters outlined in brown (the REESE'S® Trade Dress). This trade dress is a prominent portion of the design protected by Reg. No. 925,609 for the mark REESE'S MILK CHOCOLATE PEANUT BUTTER CUPS and Design.

3. The REESE'S® Trade Dress has been widely advertised in the United States for decades on television, in print advertising and in other media. Packaging bearing the REESE'S® Trade Dress can be found in most retail outlets and vending machines selling food throughout the United States. Hershey sells over One Billion (1,000,000,000) Dollars' worth of products bearing the REESE'S® Trade Dress every year. As a result of Hershey's longstanding use and extensive advertising of the REESE'S® Trade Dress, the trade dress has developed strong secondary meaning and is famous among consumers, who have come to associate the trade dress exclusively with products emanating from Hershey under the REESE'S® brand.

4. Defendants have adopted the REESE'S® Trade Dress for use in connection with their nursery business. Defendants have continued to use the REESE'S® Trade Dress despite previously representing to The Hershey Company that they would cease use of the REESE'S® Trade Dress.

5. As the owner of the REESE'S® Trade Dress, Hershey seeks relief, including relief to enjoin Defendants' wrongful use of the REESE'S® Trade Dress in commerce.

#### **Parties, Jurisdiction, and Venue**

6. This Court's subject-matter jurisdiction is based on 28 U.S.C. §1338(a) and (b) (Acts of Congress pertaining to trademarks and related actions), 15 U.S.C. §1121 (Federal Lanham Act), 28 U.S.C. §1331 (Federal Question), and 28 U.S.C. §1367 (Supplemental Jurisdiction), as well as the federal and state common law and the statutory law of the state of West Virginia.

7. The Hershey Company is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 100 Crystal A Drive, Hershey, Pennsylvania 17033. The Hershey Company is a major manufacturer and seller of chocolate, confectionery and snack products, including the well-known and very successful line of REESE'S® candy products.

8. Hershey Chocolate & Confectionery Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 4860 Robb Street, Wheat Ridge, CO 80033. Hershey Chocolate and Confectionery Corporation is a wholly-owned subsidiary of The Hershey Company and owns the REESE'S® Trade Dress, which Hershey Chocolate and Confectionery Corporation has licensed The Hershey Company to use.

9. Upon information and belief, Defendant Reese's Nursery & Landscaping is a West Virginia business with a principal place of business located at 2328 N. Mildred Street, Ranson, West Virginia 25435, and Defendant Reese Clabaugh is a West Virginia resident (herein, collectively referred to as "Defendants").

10. This Court has personal jurisdiction over Defendants.

11. Venue is proper in this district under 28 U.S.C. §1391.

#### **Factual Allegations**

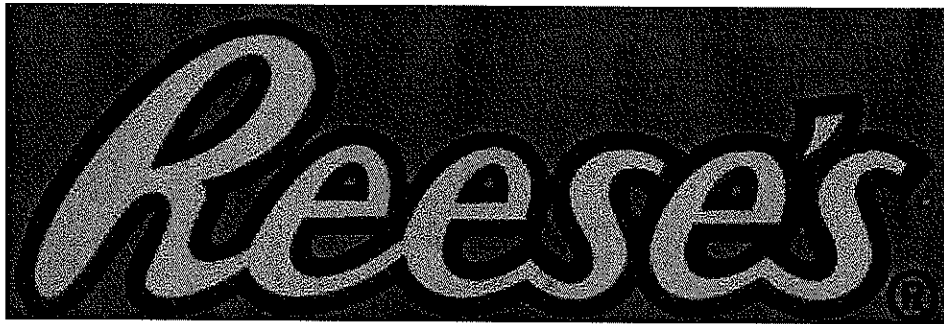
12. Hershey incorporates by reference the allegations contained in all previous paragraphs of this Complaint, as if separately repeated herein.

13. Hershey and its affiliate companies are engaged in the business of manufacturing and selling chocolate, candy, confectionery and related products, including the well-known and very successful line of REESE'S® candy products..

14. The famous REESE'S® Trade Dress, which has been used in commerce by Hershey or its predecessors in interest for nearly 100 years in connection with REESE'S® brand candy and related products.

15. The REESE'S® Trade Dress is protected by a variety of state, federal, and common laws.

16. An example of the design included in the REESE'S® Trade Dress is depicted below:



The first use in commerce of this mark, according to the United States Patent and Trademark Office registration, serial number 73300125, was in 1919.

17. Hershey and its affiliate companies have extensively used and promoted the REESE'S® Trade Dress at considerable expense, and Hershey has acquired significant goodwill and public recognition of same.

18. Apart from chocolate-related sales, Hershey maintains a large and prosperous business of selling ancillary REESE'S® brand products and licensing to other manufacturers the right to sell products bearing the famous REESE'S® Trade Dress. Consistent with its obligations in connection with protecting the REESE'S® Trade Dress, Hershey establishes and maintains standards of high quality for these licensed products.

19. The REESE'S® Trade Dress is extremely well known and, as a result of Hershey's extensive sales and advertising, products bearing the REESE'S® Trade Dress, including licensed products, have come to mean, and are identified with Hershey and its affiliate companies only.

20. Hershey's use of the REESE'S® Trade Dress is a principal means by which consumers distinguish Hershey products from similar or identical goods and services produced or sold by others, including competitors.

21. The REESE'S® Trade Dress is distinctive and/or has developed secondary meaning and significance in the minds of the purchasing public. Furthermore, goods and services bearing the REESE'S® Trade Dress are recognized by the purchasing public nationwide and are immediately identified by the purchasing public with Hershey, its affiliate companies, and their high quality goods and services.

22. As a result of the goodwill, immediate recognition and extensive sales and advertising, the REESE'S® Trade Dress has become highly valuable.

23. Defendants have adopted and used a business logo (hereinafter, the "Infringing Advertisement"), available at <http://www.reeseslandscapenursery.com/> (last visited March 18, 2009), that is nearly identical to the Reese's Trade Dress:



24. Defendants' use of the Infringing Advertisement is a deliberate effort to trade on the REESE'S® Trade Dress. Such unauthorized use of the REESE'S® Trade Dress infringes Hershey's exclusive rights in the REESE'S® Trade Dress.

25. Defendants have not received permission to manufacture, advertise, sell or distribute any goods or services bearing the REESE'S® Trade Dress, or anything similar, from Hershey or anyone acting on Hershey's behalf.

26. Upon information and belief, Defendants willfully and intentionally engaged in the

foregoing business with the knowledge that the REESE'S® Trade Dress was registered to Hershey and that the use of the REESE'S® Trade Dress, or anything similar, in connection with the Infringing Advertisement was unauthorized.

27. Defendants' conduct of utilizing logos and advertisements bearing the REESE'S® Trade Dress, or anything similar, without permission is a deliberate attempt to trade on the valuable trademark rights and substantial goodwill established by Hershey and its affiliate companies.

28. Upon information and belief, Defendants engaged in the foregoing business with the intent that its use of the REESE'S® Trade Dress, or anything similar, would cause confusion, mistake, or deception among members of the general public.

29. Defendants have traded on and profited from the enormous goodwill and reputation established by Hershey.

#### **Count I: Federal Trademark Infringement**

30. Hershey incorporates by reference the allegations contained in all previous paragraphs of this Complaint, as if separately repeated here.

31. Defendants' conduct as described herein violates 15 U.S.C. § 1114(1) which specifically forbids Defendants to:

a. use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which use is likely to cause confusion, or to cause mistake, or to deceive, or

b. reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

32. The stylized lettering used by Defendants is identical or nearly identical and

confusingly similar to, and a colorable imitation of, the REESE'S® Trade Dress, and infringes Hershey's trademark rights and interests in the REESE'S® Trade Dress. Defendants' unauthorized use of the REESE'S® Trade Dress is likely to cause confusion and mistake and to deceive the public as to the approval, sponsorship, license, source or origin of Defendants' products.

33. Upon information and belief, these wrongful acts were committed with knowledge that such imitation, as described was intended to be used to cause confusion, or to cause mistake, or to deceive, and Defendants have profited and been unjustly enriched by sales that they would not otherwise have made but for the unlawful conduct.

34. As a result of Defendants' conduct, Hershey has been damaged and is entitled to damages, including but not limited to, Defendants' profits made while using the Infringing Advertisement and related advertisements, statutory damages, treble damages, costs of litigation, and attorney's fees.

35. Defendants' willful and deliberate acts described above have caused irreparable injury to Hershey's goodwill and reputation, and, unless enjoined, will cause further irreparable injury, whereby Hershey has no adequate remedy at law.

#### **Count II: Federal False Designation of Origin**

36. Hershey incorporates by reference the allegations contained in all previous paragraphs of this Complaint, as if separately repeated here.

37. Defendants' conduct as described herein violates 15 U.S.C. § 1125(a) (1) (A) which specifically prohibits Defendants from making:

in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which:

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to

the original, sponsorship, or approval of his or her goods, services of commercial activities by another person . . . .

38. Hershey has been damaged and/or is likely to be damaged by the wrongful conduct of Defendants.

39. Upon information and belief, Defendants' acts of false designation of origin and unfair competition have been done willfully and deliberately and Defendants have profited and been unjustly enriched by sales that it would not otherwise have made but for its unlawful conduct.

40. Defendants' violations of 15 U.S.C. § 1125(a) entitle Hershey to recover damages, including but not limited to, Defendants' profits made while using the Infringing Advertisement and related advertisements, actual damages, treble damages, litigation costs, and attorney's fees.

### **Count III: Federal Trademark Dilution**

41. Hershey incorporates by reference the allegations contained in all previous paragraphs of this Complaint, as if separately repeated herein.

42. Defendants' conduct as set forth above violates 15 U.S.C. § 1125(c), in that Defendants willfully and in bad faith intended to profit from the REESE'S® Trade Dress by trading on the valuable reputation of Hershey and caused dilution of the distinctive quality of this famous trade dress.

43. The REESE'S® Trade Dress is distinctive and famous within the meaning of 15 U.S.C. § 1125(c), and was distinctive and famous prior to the date of Defendants' conduct challenged herein.

44. Defendants' conduct as set forth above violates 15 U.S.C. § 1125(c), as amended by the Trademark Dilution Revision Act of 2006, in that it is likely to dilute, or is diluting, the distinctive quality of the REESE'S® Trade Dress. Defendants' use of the REESE'S® Trade Dress is likely to create, or has created, an association between Defendants' products and services with the

REESE'S® Trade Dress, which impairs the distinctiveness of the REESE'S® Trade Dress and lessens the capacity of the REESE'S® Trade Dress to identify and distinguish products marketed and sold by Hershey and/or its licensees.

45. To the extent that Defendants' services are viewed as being less than satisfactory to consumers, something which Hershey has no ability to control, Hershey's business reputation and goodwill and the reputation and goodwill associated with the REESE'S® Trade Dress are likely to be tarnished and injured.

46. Upon information and belief, Defendants willfully and in bad faith intended to profit from the REESE'S® Trade Dress by trading on the valuable reputation of Hershey and causing dilution of the distinctive quality of and tarnishing Hershey's famous trade dress.

47. Defendants' violations of 15 U.S.C. § 1125(c) entitle Hershey to recover damages, including but not limited to, Defendants' profits made while using the Infringing Advertisement and related advertisements, actual damages, treble damages, , costs of suit, and attorney's fees.

48. Defendants' willful and deliberate acts described above have caused irreparable injury to Hershey's goodwill and reputation, and, unless enjoined, will cause further irreparable injury, whereby Hershey has no adequate remedy at law.

#### **Count IV: Unfair Competition**

49. Hershey incorporates by reference the allegations in all previous paragraphs of this Complaint.

50. Hershey has existing contractual relationships which involve granting licenses to various manufacturers and distributors authorizing their manufacture and sale of various items that use or incorporate the REESE'S® Trade Dress in their products.

51. Defendants' unlawful and unauthorized use of the REESE'S® Trade Dress

constitutes unfair competition with Hershey and its licensees. Defendants' conduct was designed to cause confusion in the public mind as to the source and origin of its products and services. Defendants' conduct was calculated to cause damage to Hershey in its lawful business and done with the unlawful purpose of causing such damage without right or justifiable cause.

52. Defendants' conduct as described herein has directly and proximately caused Hershey and its licensees to incur substantial monetary damages.

53. Defendants acted willfully and maliciously and with full knowledge of the adverse effect of this wrongful conduct upon Hershey and its licensees and with the conscious disregard for the rights of those parties.

54. Defendants' unfair competition entitles Hershey to recover damages including, but not limited to, Defendants' profits made while using the Infringing Advertisement and related advertisements, actual damages, costs of suit and attorney's fees.

#### **Prayer for Relief**

**WHEREFORE**, Hershey seeks the following relief:

- a. A judgment that Defendants have:
  - (i) Violated 15 U.S.C. § 1114 and other statutory and common law authority by selling unauthorized and counterfeit goods and thus infringing upon the REESE'S® Trade Dress;
  - (ii) Violated 15 U.S.C. § 1125(a) and other statutory and common law authority by falsely designating the origin of goods or engaging in false or misleading descriptions or representations of fact with respect to the origin of goods in a manner likely to cause confusion, mistake or deception among consumers as to the affiliation, connection or association of Defendants and Defendants' goods and services with Hershey;
  - (iii) Violated 15 U.S.C. § 1125(c) and other statutory and common law authority

by willfully and in bad faith intending to profit from the REESE'S® Trade Dress by trading on the reputation of Hershey and also caused dilution of the distinctive quality of the famous REESE'S® Trade Dress;

(iv) Engaged in trademark misuse, and unfair competition by the acts aforesaid, by misusing the REESE'S® Trade Dress and by causing confusion in the minds of consumers and general public as to the source, sponsorship, and/or approval of goods sold by Defendants; and

(v) Exercised unlawful use of the REESE'S® Trade Dress without the permission of Hershey;

b. That, pursuant to 15 U.S.C. § 1116, Defendants and its owners, partners, officers, directors, agents, servants, employees, representatives, licensees, subsidiaries, manufacturers and distributors, jointly and severally, are enjoined during the pendency of this action, and permanently thereafter, from:

(i) Infringing on the REESE'S® Trade Dress in any manner;

(ii) Manufacturing, marketing, advertising, distributing, selling, promoting, licensing, exhibiting or displaying any product or service using the REESE'S® Trade Dress or any copies or counterfeits thereof or anything confusingly similar thereto;

(iii) Otherwise infringing on the REESE'S® Trade Dress;

(iv) Using any false description, representation, or designation, or otherwise engaging in conduct that is likely to create an erroneous impression that Defendants' products and services are endorsed by Hershey or any related company, sponsored by Hershey or any related company, or are connected in any way with Hershey or any related company;

(v) Using the REESE'S® Trade Dress in any manner whatsoever;

(vi) Holding themselves out as licensees or otherwise authorized users of the

REESE'S® Trade Dress; and

(vii) Using the REESE'S® Trade Dress in promotional literature or materials, such as product advertisements, including those posted on the Internet.

c. That, pursuant to 15 U.S.C. § 1117, Hershey be awarded such damages available under the Lanham Act and common law, including but not limited to, actual damages, Defendants' profits, treble damages, statutory damages, costs of suit and attorney's fees;

d. That, pursuant to 15 U.S.C. § 1118, Defendants be required to deliver to the Court, or to some other person that the Court may designate, for ultimate destruction, any and all articles of merchandise or other items in the possession or control of Defendants which might, if sold or distributed for sale or used in advertising Defendants' services, violate the injunction granted herein;

e. An accounting of all gains, profits, savings and advantages realized by Defendants from their aforesaid acts of trademark infringement, counterfeiting and dilution, false designation of origin, unfair competition and injury to business reputation;

f. That Hershey be awarded its reasonable attorney's fees and costs;

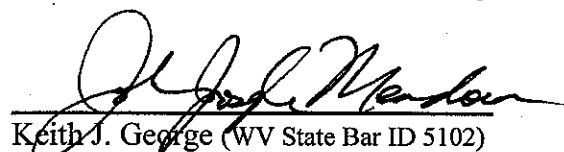
g. That Hershey is awarded such other damages, including but not limited to, punitive damages, to which may show itself entitled to recover; and

h. All other just and proper relief.

**THE HERSHEY COMPANY and  
HERSHEY CHOCOLATE & CONFECTIONERY  
CORPORATION**

**By counsel**

**ROBINSON & MCELWEE PLLC**



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