

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AIRIGAN SOLUTIONS, LLC,

Plaintiff,

v.

RAINBOW ISLAND STORE, *et al.*,

Defendants.

Civil Action No.

Jury Trial Requested

FILED UNDER SEAL

**DECLARATION OF MARGARET B. TYLER
IN SUPPORT OF PLAINTIFF’S *EX PARTE* APPLICATION
FOR ENTRY OF A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

I, **MARGARET B. TYLER**, do hereby declare:

1. I am over eighteen (18) years of age. I have never been convicted of a felony or any criminal offense involving moral turpitude, and I am fully competent to testify to the matters stated herein. I have personal knowledge of every statement made in this Declaration and such statements are true and correct.

2. I am the President and one of the co-founders of Plaintiff, Airigan Solutions, LLC (“Airigan” or “Plaintiff”), a limited liability company organized and existing under the laws of the State of Connecticut.

3. I make this declaration in support of Plaintiff’s *Ex Parte* Application for Entry of a Temporary Restraining Order and Preliminary Injunction against Defendants, the Individuals, Partnerships, and Unincorporated Associations identified on **Schedule “A”** to the Complaint.

4. The Defendants use the interactive commercial Internet websites and Internet based e-commerce stores (“Online Marketplace Platforms” or “OMPs”) using the seller identities and store names set forth on **Schedule “A”** to the Complaint.

5. Airigan was founded in 2015 and is in the business of producing, marketing and selling the patented NEGG[®] brand egg peeler, which was launched in 2015. The genuine NEGG[®] brand egg peeler (Fig. 1, below) is designed so that by placing a standard chicken egg inside with a capful of water, tightly fastening the opposing lids, and shaking the egg peeler, the shell is punctured and cracked so that it simply peels off in one continuous motion (“Plaintiff’s Product”) (Fig. 2, below):



Fig. 1



Fig. 2

The distinctive photograph of the NEGG[®] brand egg peeler found on all the packaging and on-line sales materials was posed with parsley leaves underneath the right facing side of the egg peeler.

6. Plaintiff’s Product has become well-known among consumers and retailers and has received and continues to receive widespread publicity.¹ The NEGG[®] brand egg peeler has been featured on national television on *The Today Show* and the *Home Shopping Network*.

¹ See, e.g., <https://www.today.com/food/amazing-food-finds-gadgets-t114918>, Today, August 10, 2017; <https://whnt.com/2017/07/19/gotta-crack-open-a-hard-boiled-egg-try-the-negg/>, WHNT News 19, Huntsville, Alabama, CBS affiliate; <https://www.nytimes.com/2017/05/22/dining/egg-peeler-gadget-negg.html>, New York

7. Genuine goods bearing at least one of Plaintiff's Mark, Trade Dress, or Work (as defined below) are widely legitimately advertised and promoted by Plaintiff, its authorized distributors, and unrelated third parties via the Internet. Over the past several years, visibility on the Internet, particularly via Internet search engines such as Google, Yahoo!, and Bing has become increasingly important to Plaintiff's overall marketing.

8. Thus, Plaintiff and its authorized distributors expend significant monetary resources on Internet marketing, including search engine optimization ("SEO") strategies. Other costs include print catalog ads, tradeshows, and handing out free samples. Those strategies allow Plaintiff and its authorized retailers to educate consumers fairly and legitimately about the value associated with Plaintiff's brand and the goods sold thereunder. Similarly, Defendants' individual seller's stores are indexed on search engines and compete directly with Plaintiff for space in the search results.

9. Plaintiff is the owner of U.S. Patent No. 9,968,211 for "PERSONAL EGG PEELER," which is directed to the NEGG[®] brand egg peeler. I am a named inventor. A true and correct copy of the patent is attached to the Complaint as "Exhibit 3" ("Plaintiff's Patent"). Each of Plaintiff's products is properly marked with Plaintiff's Patent as required by the Patent Act. Plaintiff is also the owner of U.S. Trademark Registration No. 5,142,630 for NEGG for "manually operated device used for peeling eggs." A true and correct copy of the trademark registration certificate is attached to the Complaint as "Exhibit 1".

Times "Gadget Makes Peeling Eggs a Tad Easier"; <http://www.kwch.com/content/news/DIW-Negg-Peeler-430038723.html>, KWCH12, Wichita, Kansas "DIW: Negg Egg Peeler"(posted June 21, 2017); <https://www.southernliving.com/dairy/eggs/easy-peel-hard-boiled-eggs-amazon>, Southern Living, (no date); <https://www.realsimple.com/food-recipes/tools-products/appliances/miracle-hard-boiled-egg-peeler>, RealSimple "This Miracle Hard-Boiled Egg Peeler Is the Gadget We Never Knew We Needed" (posted January 19, 2018); <https://06880danwoog.com/2018/03/29/egg-citing-news-for-hard-boiled-cooks/>, 06820:Where Westport meets the world "Egg-citing News for Hard-Boiled Cooks" (posted March 29, 2018).

10. The Plaintiff's Product is designed to enable the easy removal of the shell of a hard-boiled egg. The NEGG[®] trademark, the logo (pictured below), and packaging have acquired distinctiveness among consumers:



A true and correct copy of the packaging, on which the above logo appears, is attached to the Complaint as "Exhibit 2," and includes a copy of the NEGG[®] Product insert. The Plaintiff's packaging is the subject of U.S. Copyright Registration No. VA0002237199, a copy of which is included in "Exhibit 2" attached to the Complaint. Hereinafter, the NEGG[®] trademark, the NEGG[®] logo, and the packaging for the NEGG[®] are collectively referred to as the "Plaintiff's Marks". The Plaintiff's Product typically retails for between \$14.00 and \$18.00.





11. The combined distinct features of Plaintiff’s Product and Plaintiff’s Mark function as a trade dress so that consumers are certain that Plaintiff is the source of the Negg® brand egg peeler. Plaintiff is also the owner of various published photographs, videos, artwork, creative text and product instructions appearing on its web site <https://neggmaker.com/>. Screenshots of Plaintiff’s Website and Amazon Store are attached to the Complaint as “Exhibit 4.” (“Plaintiff’s Work”).

12. The unique features of Plaintiff’s Product, Plaintiff’s Mark and Plaintiff’s Work, including, the distinct photographs, the design, the instructions, the packaging, and the unique presentation of the product, all comprise Plaintiff’s valuable intellectual property (“IP”) and all have become distinct in consumer’s minds such that consumers associate all of this IP with Plaintiff’s Product.

13. Plaintiff’s Work, Mark, and Trade Dress has been used in interstate commerce to identify and distinguish Plaintiff’s goods. Plaintiff’s Work, Mark and Trade Dress has been used by Plaintiff prior in time to Defendants’ use of this mark and trade dress. Plaintiff’s Work, Mark

and Trade Dress have never been assigned or licensed to any of the Defendants in this matter. The Plaintiff's Work, Mark and Trade Dress are symbols of Plaintiff's quality, reputation, and goodwill and have never been abandoned.

14. Due to the success of Plaintiff's Product, Plaintiff had become the target of multiple infringers seeking to profit off the goodwill and reputation and fame enjoyed by Plaintiff's Mark, Trade Dress, Work, and Plaintiff's Product. Plaintiff has been forced to police the various Internet marketplaces to identify and seek takedowns of unlawful listings for the Infringing Products since allowing the unlawful listings to continue is causing damage to Plaintiff's reputation and bottom line. Some Defendants sell their fake egg peelers at a fraction of the controlled retail price, going as low as \$3.00 or \$4.00. Because of the software provided by the various Internet Marketplaces, the lowest priced items are sorted to the top and/or promoted by the software and then purchased by the consumers. Plaintiff's Product is thus ignored. Plaintiff has had varied success in identifying and requesting takedowns of the various unlawful listings and as soon as one is taken down another unlawful listing replaces it.

15. Another major problem with the Internet Marketplaces is that there is a direct and convenient connection between various Chinese and other unidentified manufactures to the Infringing Products. In essence, a counterfeiter in Vietnam or Russia, for example, may order a crate of Infringing Products from a Chinese manufacturer, have them drop shipped to a fulfillment center in the United States, and then sell the Infringing Products to a US consumer through a Third Party Service Provider. The ease of this system encourages knock-offs to flourish.²

² As set forth in the Complaint, and demonstrated in **Composite Exhibit 1**, all of the Defendants are offering for sale and selling products that infringe on at least one claim of the Plaintiff's Patent and are using Plaintiff's

16. For these reasons, Plaintiff retained the legal counsel of Ference & Associates LLC (“the Ference firm”) to perform the policing of various Internet marketplaces. During the process, the Ference firm identified many Chinese manufacturers operating on Marketplace Storefronts hosted by the Internet marketplaces. These manufacturers were supplying many of the other identified Defendants with infringing products flooding the Internet marketplaces and damaging Plaintiff’s business. This damage to Plaintiff’s business will continue unless Plaintiff receives the sought-after restraining order and injunctive relief.

17. Defendants’ sale, distribution, and advertising of the Infringing Product are highly likely to cause consumers to believe that Defendants are offering genuine versions of Plaintiff’s Products when in fact they are not. To illustrate, below are several examples which vividly show that the Infringing Product itself and the way it is marketed is designed to confuse and mislead consumers into believing that they are purchasing Plaintiff’s Product or that the Infringing Product is otherwise approved by or sourced from Plaintiff:

Plaintiff’s Patented Egg Peeler



**Infringing Listing of Defendant
Rainbow Island Store**



copyrighted images or substantially similar images and some of the Defendants are also using Plaintiff’s registered trademark NEGG[®], thus counterfeiting. All the Defendants are unfairly competing.

Plaintiff's Patented Egg Peeler



Infringing Listing of Defendant Vinnat us



Plaintiff's Patented Egg Peeler



Infringing Listing of Defendant JEK MOS



18. Defendants' actions have resulted in actual confusion in the marketplace between Defendants' Infringing Product and the genuine version of Plaintiff's Products.

19. The Infringing Products do not appear to be the same quality as the Plaintiff's Product, and may disappoint a customer who may give the product a bad review.

20. The Infringing Products threaten to destroy the reputation of high quality that Plaintiff's Products have earned.

21. Defendants do not have, nor have they ever had, the right or authority to use Plaintiff's Patent, Plaintiff's Mark, Trade Dress, or Work, for any purpose. Defendants' unlawful activities have deprived and continue to deprive Plaintiff of its rights to fair competition. By their activities, Defendants are defrauding Plaintiff and the consuming public for Defendants' benefit. Defendants should not be permitted to continue their unlawful activities, which are causing Plaintiff ongoing irreparable harm. Accordingly, Plaintiff is seeking entry of a temporary restraining order prohibiting Defendants' infringement of the Plaintiff.

22. Given Defendants' copying and therefore infringing on Plaintiff's Work in violation of 17 U.S.C. § 501 (a), the Infringing Products are indistinguishable to consumers, both at the point of sale and post-sale. By using Plaintiff's intellectual property, Defendants have created a false association between their Infringing Products, their Internet e-commerce stores, and Plaintiff. Such false association is in violation of 15 U.S.C. § 1125(a), constitutes unfair competition, infringes on Plaintiff's Mark, and is causing and will continue to cause Plaintiff's irreparable harm and damage.

23. The infringements of Plaintiff's Work deprive Plaintiff of the ability to control the creative content protected by the Copyright Act, it devalues Plaintiff's NEGG[®] egg peeler brand by associating it with inferior quality goods, and it undermines the value of the Plaintiff's IP by creating the impression that infringement may be undertaken with impunity which threatens Plaintiff's ability to attract investors and markets for the Plaintiff's Products.

24. I have reviewed **Composite Exhibit 1** and the pictured web listings and upon my information and belief, the Defendants identified in **Schedule "A"** of the Complaint were and/or are currently manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and or/selling non genuine, infringing versions of

Plaintiff's Product and copying and using Plaintiff's Patent, Plaintiff's Mark, Trade Dress, and/or Plaintiff's Work, or using substantially similar copies of Plaintiff's Work, with the non-genuine, copies of Plaintiff's Product directed to U.S. consumers, including those consumers in Pennsylvania, through their e-commerce stores.

25. None of the identified Defendants are authorized re-sellers of genuine version of Plaintiff's Product. Moreover, none of the identified Defendants are authorized to manufacture, import, export, advertise, offer for sale, or sell Plaintiff's Products. Further, Plaintiff never consented or granted permission to any of the identified Defendants to use Plaintiff's Patent, Mark, Trade Dress, or Work.

26. I have confirmed that all of the identified products pictured in **Composite Exhibit 1** are infringements of Plaintiff's Product and upon information and belief, the Defendants set forth in **Schedule "A" of the Complaint** were and/or are currently manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and/or selling patent infringing and unfairly competing products with at least one of the Plaintiff's Mark, an/or Trade Dress and/or using Plaintiff's Work, or substantially similar copies of Plaintiff's Work, to sell to U.S. consumers, including those consumers in Pennsylvania, through their Online Marketplace Storefronts. Through visual inspection of Defendants' listings for Infringing Products, it was confirmed that each Defendant is featuring, displaying, and/or using at least one of Plaintiff's Mark, Trade Dress, and/or Work without authorization and that the products that each Defendant is offering infringing versions of the Plaintiff's Product. The checkout pages or order forms for the Infringing Products confirm that each Defendant was and/or is still currently offering for sale and/or selling Infringing Products through their respective Merchant Storefronts and User Accounts and that each Defendant provides shipping

and/or has shipped Infringing products to the United States, including to customers located in Pennsylvania. At checkout, a shipping address located in the Pittsburgh area (“the Pennsylvania Address”) in the Western District of Pennsylvania verified that each Defendant provides shipping to the Pennsylvania Address. I inspected the detailed web listings describing the Infringing Products Defendants are offering for sale through the Internet based e-commerce stores operating under each of their respective Seller IDs, and determined the products were not genuine versions of Plaintiff’s Products. Further, each of the Defendant’s web listing infringes on the Plaintiff’s Work. Finally, each individual Defendant’s product that was received was physically examined and confirmed not to be authentic and infringing on at least one claim of the Plaintiff’s Patent.

27. Defendants’ actions have caused and will continue to cause, in the event the requested relief is not granted, irreparable harm to Plaintiff’s goodwill and reputation as well as to the unassuming consumers who will continue to believe that the Defendants’ cheaply produced, inferior, and typically faulty infringing products and knock-offs are produced, authorized, approved, endorsed or licensed by Plaintiff, when they are not.

28. Defendants’ intentional and illegal conduct, including offering for sale and selling inferior infringing and knock-offs into the U.S. and the Commonwealth of Pennsylvania has caused lost profits to Plaintiff and damaged the inherent value of Plaintiff’s business and the Plaintiff’s Mark, and, by diluting the brand and goodwill, damaging Plaintiff’s reputation for providing high quality products, and interfering with Plaintiff’s relationships with its customers and authorized resellers, as well as impeding Plaintiff’s ability to attract new customers and business. Defendants are willfully and in bad faith infringing on Plaintiff’s Work, thereby unjustly profiting from such activities at Plaintiff’s expense.

