

FILED

MAY 02 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CLERK U.S. DISTRICT COURT
WEST. DIST. OF PENNSYLVANIA

AIRIGAN SOLUTIONS, LLC,

Plaintiff,

Civil Action No. 19-503

v.

ABAGAIL, *et al.*,

Defendants.

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"), 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”, hereafter “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.

6. 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 NEGG[®] Product”) (Fig. 2, below):



Fig. 1



Fig. 2

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

7. Airigan 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”.

8. Airigan is 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”.

9. 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.

10. Hereinafter, the NEGG[®] trademark, the NEGG[®] logo, and the packaging for the NEGG[®] are collectively referred to as the “Negg Marks”). The NEGG[®] brand egg peeler and the Negg Marks have become well-known amongst consumers and retailers and have and continue to receive widespread publicity.¹ The NEGG[®] brand egg peeler has been featured on national television in *The Today Show* and the *Home Shopping Network*.

11. The NEGG[®] brand egg peeler typically retails for between \$16.00 and \$18.00.

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 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).

12. The product has been successful though sales have suffered drastically in the past nine or more months due to the infringing and counterfeit products offered for sale and sold by the Defendants.

13. The NEGG[®] brand egg peeler is sold through its own merchant storefront on Amazon.com, through its website at www.peelaneegg.com and by a few authorized re-sellers entitled to purchase wholesale and then sell the product at retail. Several of the authorized re-sellers are located in Pennsylvania, including, but not limited to, Pittsburgh, Allegheny County.

14. The patented features of the NEGG[®] brand egg peeler, the registered trademark of NEGG[®], the distinct photographs, the distinct NEGG[®] logo and design, the instructions, the packaging, and the unique presentation of the product, all comprise Airigan's valuable intellectual property ("IP") and all have become distinct in consumer's minds such that consumers associates all of this IP with Airigan's genuine NEGG[®] brand egg peeler.

15. Airigan only manufactures the genuine NEGG[®] brand egg peeler in the United States and closely controls the quality of the product. Thus, if a product that purports to be a NEGG[®] brand egg peeler is manufactured in China or oversees it is a counterfeit.

16. Likewise an egg peeler that through visual inspection and analysis infringes on one or more of the claims in the U.S. patent owned by the Plaintiff but is offered for sale as new on an OMP at below market price it is also a counterfeit.

17. Due to the success of Airigan and its NEGG[®] brand egg peeler, they have become the target of multiple counterfeiters seeking to profit off the goodwill and reputation and fame enjoyed by Airigan and its NEGG[®] brand egg peeler.

18. The counterfeiting activities have driven sales and prices down. Indeed, wholesale orders from Airigan's re-sellers have precipitously dropped over the last six months due the pervasive activities of the counterfeiters.

19. Moreover, my business partner and I have been forced to police the various OMPs to identify and seek takedowns of the counterfeit products since allowing them to continue causes damage to Airigan's reputation and bottom line. Some of these counterfeiters 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 OMPs, the lowest priced items are sorted to the top and/or promoted by the software and then purchased by the consumers and the genuine NEGG[®] brand egg peeler is ignored. I have had varied success in identifying and requesting takedowns of the various counterfeit listings and as soon as I get one taken down another counterfeit is listed to replace it.

20. Another major problem with the OMPs is that there is a direct and convenient connection between various Chinese and overseas manufactures to the counterfeiters. In essence, a counterfeiter in Vietnam or Russia, for example, may order a crate of counterfeit products from a Chinese manufacturer, have them drop shipped to a fulfillment center in the US, for example, Amazon fulfillment, and then sell the counterfeit product to a US consumer through Amazon or eBay Marketplace storefronts. The ease of this system encourages counterfeiting to flourish.

21. For these reasons, Airigan retained the legal counsel of Ference & Associates LLC ("the Ference Firm") to perform the policing of various OMPs, including Amazon.com. During the process, the Ference Firm uncovered many sellers of Counterfeit Product on Amazon.com. Chinese Manufacturers were supplying many of the identified Defendants with counterfeit products flooding the OMPs and damaging Airigan's business. This damage to

Airigan's business will continue unless Airigan receives the sought after restraining order and injunctive relief.

22. I have reviewed **Composite Exhibit 1** and the pictured Counterfeit Products and upon my information and belief, the Defendants identified in **Schedule "A"** of the Complaint, were and/are currently manufacturing, importing, exporting, advertising, marketing, promoting, distributing, displaying, offering for sale and or/selling patent infringing and counterfeit products with Airigan's NEGG[®] trademark and/or logo and using marking, packaging and trade dress that are confusingly similar and/or identical to those of Airigan to U.S. consumers, including those consumers in Pennsylvania, through their OMP storefronts.

23. None of the identified Defendants are authorized re-sellers of genuine NEGG[®] brand egg peelers. Moreover, none of the identified Defendants are authorized to manufacture, import, export, advertise, offer for sale or sell any NEGG[®] branded egg peelers or any egg peelers that purport to be NEGG[®] egg peelers or any egg peelers that are counterfeits of the NEGG[®] brand egg peelers. Further, Airigan never consented or granted permission to any of the identified Defendants to use Airigan's artwork, photographs, or any of Airigan's other IP.

24. I have confirmed that all of the egg peelers in **Composite Exhibit 1** are counterfeit. These counterfeit egg peelers were ordered, received, and inspected as part of the investigation leading up to the current filing of this lawsuit. Comparison of the genuine NEGG[®] brand egg peeler to the counterfeits in this exhibit reveals that the counterfeit egg peelers, their packaging and their presentation are cheaply produced poor copies of Airigan's IP. These clearly indicate that they were manufactured in China. Yet, the writing on the packaging is in English. So, they were intentionally manufactured and packaged to be shipped to English speaking countries, like the US. Predictably, Airigan has received multiple consumer complaints

from purchasers actually confused that the substandard, faulty, and leaking counterfeit products were those of Airigan when they were not.

25. Defendants actions have caused and will continue to cause, in the event the requested relief is not granted, irreparable harm to Airigan'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 counterfeit products are produced, authorized, approved, endorsed or licensed by Airigan, when they are not.

26. Defendants' intentional and illegal conduct, including selling inferior counterfeit egg peelers using Airigan's various IP into the U.S. and the Commonwealth of Pennsylvania has caused lost profits to Airigan and damaged the inherent value of Airigan's business and NEGG[®] brand, by diluting the brand and goodwill, damaging Airigan's reputation for providing high quality fully functioning egg peelers, and interfering with Airigan's relationships with its customers and authorized resellers, as well as impeding Airigan's ability to attract new customers and business.

27. All of the injuries and damages described above are taking place in the United States, including in Pittsburgh, Allegheny County, Pennsylvania.

28. In addition to trying to stop the injuries and damages caused to Airigan's business, Airigan also is seeking in this lawsuit to protect consumers from being exposed to and purchasing the substandard, faulty, and leaking counterfeits that wrongly indicate their origin as being from Airigan or wrongly bear Airigan's NEGG[®] trademark or are a poor and cheaply made imitation of the patented NEGG[®] brand egg peeler.

29. I have worked with Airigan's legal counsel in this case to assist them in identifying counterfeit products and have provided them with various leads in order to find the various outlets for the counterfeit products. If called upon by the Court, Airigan's legal counsel is able to explain additional differences between the genuine NEGG[®] brand egg peeler and the counterfeit products offered by the identified Defendants.

30. To be sure that none of the Defendants receive advance notice of the relief and remedies requested in Plaintiff's Complaint, or the *Ex Parte* Application for Entry of a Temporary Restraining Order and Preliminary Injunction in this case, neither I nor anybody else at Airigan have publicized the filing of this lawsuit.

31. Products on Amazon are assigned specific codes. These codes are referred to as Amazon Standard Identification Numbers (ASINs).

32. Airigan controls seven ASINs -- B01N7SXX0W (black NEGG[®]), B01MT9U0HK (red NEGG[®]), B01NATZUY2 (white NEGG[®]), B01N235WK4 (yellow NEGG[®]), B079P5N8Q6 (pink NEGG[®]), B079P6QVNR (fuschia NEGG[®]), and B079P4HPVM (green NEGG[®]).

33. Amazon has recognized the problem facing Airigan (and other brand owners) with unauthorized re-sellers listing product under the brand's ASINs. Amazon has introduced a program referred to as "brand gating" which permits a brand owner to control which sellers are permitted to list product under the brand's ASINs.

34. Any product currently listed under an ASIN other than one of the seven ASINs controlled by Airigan is not authorized product (i.e., counterfeit and/or infringing).

35. Preventing unauthorized sellers from selling under Airigan's ASINs will prevent counterfeiters from selling their unauthorized, illegal copies as genuine product.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 2, 2019

Southport, Connecticut

/s/ Margaret B. Tyler
Margaret B. Tyler