

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TALISMAN DESIGNS, LLC,

Plaintiff,

v.

AHAPPYDAY, *et al.*,

Defendants.

Civil Action No.

Jury Trial Requested

FILED UNDER SEAL

**DECLARATION OF KATHERINE WAYMIRE
IN SUPPORT OF PLAINTIFF'S *EX PARTE* APPLICATION
FOR ENTRY OF A TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

I, **KATHERINE WAYMIRE**, 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 owner of TALISMAN DESIGNS, LLC, a limited liability company organized and existing under the laws of the State of Minnesota.

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. I founded Talisman Designs, LLC (“Talisman” or “Plaintiff”) in 2002 making handmade wine accessories and packaging out of my home. Since then, Talisman Designs has created and innovated all of its own products and packaging. This is a costly effort involving graphic design, industrial design and tooling. It takes time to create, design, test, redesign and retest prototypes. We spend a lot of money on photography to show how the product Work or to highlight the end result. We use this photography in our catalogs, website, send to customers, use at tradeshow. We introduce our products to retailers via tradeshow across the country. This introduction process costs a lot of money but it is a chance to show our customers the quality and use of the product. Today, Talisman is a well-known national brand in the gift and houseware industries. It is recognized for its quality, inventions, creative packaging and whimsical characters. We innovate across four main categories – Baking, Prep Tools, Wood/Collections and Fun & Funky. Each category has a different, distinct look. Our customers immediately recognize our products because of this. For instance, in the Fun & Funky line of products, most of the products have a distinct character that is personified by a face or character. The Baking line has complementary packaging, colors and quality. Our customers often immediately recognize our new products as being invented and designed by us.

6. Talisman’s product called the PIE SHIELD (“Plaintiff’s Product”) was conceived by me while baking pies in my kitchen. I wanted to invent a way to prevent the pie crust from burning while making it fool-proof to use with any pie dish. I wanted an environmentally friendly solution that was cheaper, reliable and reusable. The choices back then included tinfoil,

a shield that was one-size and only fit some pies dishes, or a multiple piece system requiring precise balancing on the pie crust. Thus, I invented the PIE SHIELD™. Using an ingenious notch and catch system to adjust the circumference of the shield, the PIE SHIELD stays in place while covering the crust. The product is reusable, washable, BPA-free, made of food safe FDA-approved material, molded in a distinct red coloring and is heat resistant to 500 degrees Fahrenheit. The PIE SHIELD is sold in online marketplaces such as Amazon.com and in brick and mortar stores.

7. Plaintiff's Product has been featured and reviewed in online videos, articles, or podcasts.

8. Genuine goods bearing at least one of Plaintiff's Mark and 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.

9. 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, tradeshow, and handing out free samples. Those strategies allow Plaintiff and its authorized retailers to fairly and legitimately educate consumers 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.

10. Additionally, Plaintiff has taken numerous steps to protect Plaintiff's Product. For instance, Plaintiff is the owner of U.S. Copyright Registration No. VA-0002159164, directed

to a photograph of Plaintiff's Product. A copy of the registration certificate and deposit copy is attached hereto as **Exhibit 3A** (the "Plaintiff's Work"). Plaintiff is also the owner of U.S. Reg. No. 3993535, TAN DON'T BURN[®] for "pie shield" in international class 21. A copy of the registration certificate is attached hereto as **Exhibit 3B** (the "Plaintiff's Mark").

11. The Plaintiff's Product utilizes an ingenious notch and catch system to adjust the circumference of the shield, the PIE SHIELD stays in place while covering the crust. The Plaintiff had to figure out how to make a product that would adjust to fit pie dishes that range in size from 8" to 11.5" and would lay flat on the pie. The resulting product is adjustable, reusable, washable, molded of distinct BPA Free, FDA approved food safe material, molded in red and is heat resistant to 500 degrees Fahrenheit. Below are images of one of Plaintiff's Products, which retails for between \$6.00 and \$8.00:



(*Id.* at ¶ 11)

12. Plaintiff is also the owner of various published photographs, videos, artwork, creative text and product instructions appearing on its web site talismandesigns.com. Screen shots of the Plaintiff's Mark, Website and Work are shown in Complaint **Exhibit 2**.

13. 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.

14. Plaintiff's Mark and Plaintiff's Work have been used in interstate commerce to identify and distinguish Plaintiff's goods. Plaintiff's Mark and Work have been used by Plaintiff prior in time to Defendants' use of the Mark and Work. Plaintiff's Mark and Work have never been assigned or licensed to any of the Defendants in this matter. The Plaintiff's Mark is a symbol of Plaintiff's quality, reputation, and goodwill and have never been abandoned.

15. Due to the success of Plaintiff's Product, Plaintiffs have become the target of multiple infringers seeking to profit off the goodwill and reputation and fame enjoyed by Plaintiff's Mark and Work and Plaintiff's Product.

16. Plaintiffs have been forced to police the various Internet marketplaces to identify and seek takedowns of unlawful listings for the Infringing Products¹ since allowing the unlawful listings to continue is causing damage to Plaintiff's reputation and bottom line. Some Defendants sell their products 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. Plaintiffs have 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. Another major problem with the Internet Marketplaces is that

¹ As set forth in the Complaint, Defendants (i) using Plaintiff's Copyrighted Photograph or other of plaintiff's photographs, while promoting, selling, offering for sale and distributing knock-offs of Plaintiff's Product, thus unfairly competing, and/or (ii) infringing Plaintiff's Work; and/or (iii) using Plaintiff's federally registered trademark TAN DON'T BURN[®] ("Plaintiff's Mark"), while offering to sell and selling knock-offs of Plaintiff's Product, thus counterfeiting.

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.

17. 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 Plaintiffs receive the requested restraining order and injunctive relief.

18. 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 the Infringing Product itself and the manner in which 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 Plaintiffs:

Plaintiff's Listing



Defendant 20Just For You Store Listing



Plaintiff's Listing



Defendant Aibiner Listing



Plaintiff's Listing



Defendant djnds_onlineseller Listing



Plaintiff's Listing



Defendant huaihuaxinda Listing



Additional photograph comparisons of Plaintiff's Product and the Infringing Products appear in **Exhibit 1** attached to the Complaint.

19. Defendants' actions have resulted in actual confusion in the marketplace between Defendants' Infringing Product and the genuine version of Plaintiff's Products. Numerous purchasers of Defendants' Infringing Product have written on-line reviews to complain about the quality of the Infringing Product believing same to be a genuine version of Plaintiff's Product.

Below are excerpts from some of these on-line reviews between 2018 and the present:

"This shield is only half the thickness. It is somewhat flimsy & doesn't really hold it shape"

"Worse, it got so hot it set off my smoke detector when I opened the oven door!"

"I liked the idea of silicone pie crust covers, but these arrived just in a vacuum-packed plastic bag with a sticker that simply says Made in China. No box, no manufacturer name, no product info, nothing to assure me it is food grade silicone with no added chemicals/dyes that might be harmful. So I chose not to take a chance with it on my Thanksgiving pies and tossed it in the garbage."

"Smelled like melting plastic after 10 minutes in the oven. Threw them away."

"The first time these were used they melted and broke"

20. As poorly designed and manufactured products, Defendants' Infringing Products create serious risk, as they do not appear to be oven safe, may melt ruining the food item or cause a user serious injury in the nature of burns. Plaintiff has received numerous complaints about the knock-offs failing.

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

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

23. Given Defendants' copying and use of Plaintiff's Mark, and/or Plaintiff's Work, 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 Plaintiffs. 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.

24. The infringements of Plaintiff's Work deprive Plaintiff of the ability to control the creative content protected by the copyright, it devalues the Plaintiff's PIE SHIELD 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.

25. 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, patent infringing versions of Plaintiff's Product and copying and using Plaintiff's Mark 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.

26. 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, Plaintiffs never consented or granted permission to any of the identified Defendants to use Plaintiff's Mark or Work.

27. 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 the Plaintiff's Mark 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 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 actually 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.

28. 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 Plaintiffs, when they are not.

29. 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 Plaintiffs 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.

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

31. In addition to trying to stop the injuries and damages caused to Plaintiff's business, Plaintiffs are also seeking in this lawsuit to protect consumers from being exposed to and purchasing the substandard, faulty, and potentially dangerous knock-offs and infringing products that wrongly indicate their origin as being from Plaintiffs or wrongfully use of Plaintiff's Mark and/or Work.

32. I have worked with Plaintiff's legal counsel in this case to assist them in identifying knock-off products and have provided them with various leads in order to find the various outlets for the infringing and knock-off products. If called upon by the Court, Plaintiff's legal counsel is able to explain additional differences between the genuine version of Plaintiff's Product and the knock-off products and unfairly competing products offered by the identified Defendants.

33. 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 Talisman have publicized the filing of this lawsuit.

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

Dated: December 9, 2020

Minneapolis, Minnesota

/ Katherine Waymire/
KATHERINE WAYMIRE