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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

10 ELKAY PLASTICS CO., INC.,

11 a California Corporation

12 Plaintiff,

13 v.

14 THE FRESH GROUP, LTD.,

15 a Wisconsin Corporation

16 Defendant,

**COMPLAINT FOR DECLARATORY  
JUDGMENT**

**DEMAND FOR JURY TRIAL**

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1 Comes now the Plaintiff Elkay Plastics Co., Inc. (“Elkay”) who alleges and  
2 avers in support of its Complaint For Declaratory Judgment against Defendant The  
3 Fresh Group, Ltd. (“Fresh Group”) as follows:

4 **THE PARTIES**

5 1. Plaintiff Elkay Plastics Co., Inc. is a California corporation with its principal  
6 place of business in Los Angeles, California.

7 2. Defendant The Fresh Group, Ltd. is a Wisconsin corporation with its principal  
8 place of business in Glendale, Wisconsin.

9 **JURISDICTION AND VENUE**

10 3. Pursuant to the Declaratory Judgment Act 28 U.S.C. § 2201 *et. seq.*, Plaintiff  
11 Elkay files this action for declaratory judgment of invalidity of United States Patent  
12 No. 9,650,178 (“the ‘178 patent”) and non-infringement of United States Trademark  
13 Registration No. 4,583,053 (“the ‘053 Registration”). This action is brought under  
14 the patent laws of the United States, 35 U.S.C. § 101, *et seq.*, and the trademark  
15 laws of the United States, 15 U.S.C. § 1051, *et. seq.*

16 4. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338  
17 (a), 15 U.S.C. §§ 1119 and 1121 and 35 U.S.C. § 281.

18 5. Upon information and belief, this Court has jurisdiction over Fresh Group  
19 because it has purposefully availed itself of the privilege of conducting business  
20 within this State and this District.

21 6. Venue is proper in this distinction under 28 U.S.C. §§ 1391 and 1400(b) in  
22 that Plaintiff Elkay has an establish place of business and has committed acts which  
23 Defendant Fresh Group has accused of infringing the ‘178 Patent and the ‘053  
24 Registration.

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**FACTUAL ALLEGATIONS**

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7. Plaintiff Elkay has been in business since 1968 and is a manufacturer of plastic bags and pouches, film and recyclable Kraft paper packaging products for use in the food, healthcare and industrial industries. One line of Elkay products used in the food industry is marketed under the trademark #READYFRESH®. Elkay owns United States Trademark Registration No. 6,097,849 for the trademark. The products marketed under the #READYFRESH® trademark are bags and containers for take-out or “to go” food items.

8. Defendant Fresh Group is a seller of fresh produce. According to its website [www.Fresh Groupproduce.com](http://www.FreshGroupproduce.com), it markets and sells tomatoes, fresh cut produce, mangos, cold-pressed juice, bulk produce products, herbs and organics. Defendant Fresh Group owns United States Trademark Registration No. 4,583,053 for the mark READYFRESH for use in connection with “fresh produce, namely fruits and vegetables.”

9. Defendant Fresh Group is the owner of U.S. Patent No. 9,650,178 entitled WATERMELON POUCH. Fresh Group markets a Watermelon Pouch under the common law trademark READY RIPE.

10. On August 30, 2022 Defendant Fresh Group through its counsel sent Plaintiff Elkay a letter accusing Elkay of infringing U.S. Patent No. 9,650,178 and U.S. Trademark Registration No. 4,583,053. In its demand letter Fresh Group demanded that Plaintiff Elkay immediately cease all use of its #READYFRESH® trademark and cease manufacture, sale, distribution and importation of food pouches which Fresh Group accused of infringing the ‘178 Patent. Fresh Group also demanded that Elkay provide an accounting of its sales of the accused products. Defendant Fresh Group threatened to file suit if Elkay did not acquiesce to its demands by September 6, 2022.

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1 11. Between then and now Elkay and Fresh Group engaged in negotiations  
2 towards a resolution of Fresh Group’s patent and trademark infringement claims.

3 12. These negotiations failed to result in a resolution acceptable to both Elkay and  
4 Fresh Group.

5 13. On December 19, 2022 Fresh Group’s attorney sent Elkay a final demand  
6 indicating that Fresh Group was prepared to involve the Court if necessary to  
7 resolve the impasse between the Parties. Fresh Group repeated its demand on  
8 January 24, 2023.

9 14. Based upon the most recent communication from Fresh Group, Elkay has a  
10 reasonable apprehension that it will be sued for patent and trademark infringement  
11 unless it acquiesces to Fresh Group’s demands.

12 15. In view of its reasonable apprehension, Elkay has filed the instant action for  
13 Declaratory Judgment.

14 **COUNT I**

15 **INVALIDITY OF U.S. PATENT NO. 9,650,178**

16 16. Plaintiff Elkay hereby repeats and realleges as though fully set forth herein its  
17 allegations in paragraphs 1 through 15.

18 17. The ‘178 Patent is directed to a Watermelon Pouch. The patent claims a  
19 specific structure for the base or bottom of the pouch. The structure claimed in the  
20 ‘178 Patent has been known in the art since as early as 1968. The structure is  
21 commonly referred to as a “DOYEN SEAL.” This seal is the subject of U.S. Patent  
22 No. 3,380,646.

23 18. Upon information and belief food and/or beverage pouches incorporating a  
24 “DOYEN SEAL” or an obvious modification thereof have been marketed for  
25 decades before the filing date of the application for the ‘178 Patent.

26 19. Accordingly, Plaintiff Elkay is entitled to a Declaratory Judgement that the  
27 ‘178 Patent is invalid under 35 U.S.C. § 102 and/or 103, as being anticipated or  
28 obvious.

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**COUNT II**  
**NON-INFRINGEMENT OF**  
**U.S. TRADEMARK REGISTRATION NO. 4,583,053**

20. Plaintiff Elkay hereby repeats and realleges as though fully set forth herein its allegations in paragraphs 1 through 15.

21. Defendant Fresh Group owns U.S. Trademark Registration No. 4,583,053 for the mark READYFRESH®. The mark is registered for use in connection with “fresh produce, namely, fruits and vegetables.”

22. Defendant Fresh Group also owns pending service mark application Serial No. 97/542,990 (“the ‘990 Application”) for READYFRESH™ for use in connection with “food processing, food preparation; food packaging in bags and containers.” The application was filed on August 10, 2022.

23. Upon information and belief the services covered by the ‘990 Application are provided to the customers who purchase Defendant Fresh Group’s fresh fruit and vegetables.

24. Plaintiff Elkay uses its #READYFRESH® mark in connection with pouches and containers marketed to the “food-to-go” or “take-out” market. It’s #READYFRESH® products are designed and marketed for use in take-out chicken pieces; whole roasted chickens, ribs, chicken wings, bakery goods, sandwiches, wraps and pizza slices.

25. Plaintiff Elkay does not market or sell produce packaging under its #READYFRESH® trademark.

26. There is no likelihood of confusion between Plaintiff Elkay’s use of #READYFRESH® on its products and Defendant Fresh Group’s use of READYFRESH® on its products or in connection with its services. The respective products and services are not related and the respective customer bases and marketing channels are different.

1 27. Plaintiff Elkay is entitled to a Declaratory Judgment that its  
2 #READYFRESH® trademark does not infringe U.S. Registration No. 4,583,053 or  
3 Defendant Fresh Group’s READYFRESH trademark.

4 **PRAYER FOR RELIEF**

5 Plaintiff Elkay Plastics Co., Inc. hereby prays for relief against Defendant The  
6 Fresh Group, Ltd. as follows:

7 a. That the Court finds U.S. Patent No. 9,650,178 that is anticipated  
8 and/or rendered obvious by the prior art and is thereafter invalid under 35 U.S.C. §§  
9 102 and/or 103.

10 b. That the Court find that Plaintiff Elkay’s #READYFRESH® does not  
11 infringe U.S. Trademark Registration No. 4,583,053 for the mark READYFRESH.

12 c. That the Court find that Plaintiff Elkay’s #READYFRESH® mark does  
13 not infringe Defendant’s READYFRESH mark as used in connection with the  
14 services listed in U.S. Application No. 97/542,990.

15 d. For an award of Plaintiff Elkay’s reasonable attorney’s fees and costs.

16 e. For such other and further relief as the Court deems just and proper.

17 DATED: January 24, 2023 FULWIDER PATTON LLP

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By: /s/ Gary M. Anderson  
Gary M. Anderson, Esq.  
Attorneys for Plaintiff

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**DEMAND FOR JURY TRIAL**

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff  
Elkay Plastics Co., Ltd. hereby requests a trial by jury in this matter.

DATED: January 24, 2023                      FULWIDER PATTON LLP

By: /s/ Gary M. Anderson  
Gary M. Anderson, Esq.  
Attorneys for Plaintiff