

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

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**The Fresh Group, Ltd.,**

**Plaintiff,**

**v.**

**Case No. 2:23-cv-307**

**Elkay Plastics Co., Inc.**

**Defendant,**

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**COMPLAINT**

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Plaintiff The Fresh Group LLC (“The Fresh Group”), for its complaint against defendant Elkay Plastics Co, Inc. (“Elkay”), alleges as follows:

**PARTIES**

1. Plaintiff The Fresh Group is a Wisconsin company with its principal place of business at 4287 North Port Washington Road, Glendale, WI 53212. Among other things, The Fresh Group has developed technology to package fresh produce.

2. Defendant Elkay is a California company with a principal place of business at 6000 Sheila Street, Commerce, CA 90040.

**NATURE OF ACTION**

3. This is an action for patent infringement arising under 35 U.S.C. § 100 et seq., violations of Sections 32 and 43 of the Lanham Act, Title 15 United States Code, for common law trademark infringement, for unfair competition pursuant to the Lanham Act, 15 U.S.C. §1051 et seq., unfair competition under Wisconsin Common Law and Misappropriation of Style of Doing Business under Wisconsin Common Law.

4. The Fresh Group is the owner of all right, title and interest in U.S. Trademark Registration 4,583,053 for READYFRESH for “fresh produce, namely fruits and vegetables,” registered on August 12, 2014, a copy of which is attached as Exhibit A.

5. The Fresh Group is the owner of all right, title and interest in U.S. Trademark Application 97542990 for READYFRESH for “food processing; food preparation; food packaging in bags and containers,” filed on August 10, 2022, a copy of which is attached as Exhibit B.

6. The Fresh Group is the owner of all right, title and interest in U.S. Patent 9,650,178 (“the ‘178 patent”) entitled *Watermelon Pouch* issued on May 16, 2017, a copy of which is attached as Exhibit C.

#### **JURISDICTION AND VENUE**

7. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, 1338, and 1367.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

9. Upon information and belief Elkay has directed business to and transacted business in Wisconsin and in this judicial district by virtue of, among other things, the activities it has taken by and through its website at <https://www.lkpkg.com/s/> and by selling goods to retailers in Wisconsin.

10. Upon information and belief, Elkay has also directed its sales efforts into Wisconsin by participating in trade shows where it seeks orders for its goods, which trade shows are attended by buyers for Wisconsin businesses.

## BACKGROUND

11. Since at least 2006, The Fresh Group has been in the business of packaging and selling fresh produce such as sliced melons. Since at least 2006, The Fresh Group has used READYFRESH as a trademark and service mark in connection with the sale and provision of its packaging and selling fresh produce services. Examples of the use of the mark are below.



Readyfresh was launched in 2006, when Maglio Companies produce expert, Monty Vikse, and owner Sam Maglio, had the idea that as a produce wholesaler, they could take it one step further and prepare and package fresh-cut produce the way a customer needed it, guarantee it was "food safe", and deliver it right to the customer's doorstep.



Our Readyfresh division specializes in cutting whole produce, packaging it to specification, and delivering it daily to our customers to ensure maximum freshness. The line of products includes fresh fruit, sliced vegetables, and pico de gallo.

Readyfresh is committed to sourcing locally-grown produce from Midwestern farmers when available and from food safety-certified growers throughout the Americas.



Readyfresh was launched in 2006, when Maglio Companies produce expert Monty Vikse and owner, Sam Maglio, had the idea that as a produce wholesaler, they could take it one step further and prepare and package fresh-cut produce the way a customer needed it, guarantee it was food safe, and deliver it right to the customer's doorstep.




Our readyfresh division specializes in cutting whole produce, packaging it to specification and delivering it daily to our customers to ensure maximum freshness. The line of products includes fresh fruit, sliced vegetables and pico de gallo.

Readyfresh is committed to sourcing locally grown produce from Midwestern farmers, when available, and from food safety-certified growers throughout the Americas.

12. By virtue of the continuous and exclusive use of READYFRESH as a mark for more than 17 years, the mark has secondary meaning and has come to signify to the consuming public a source of services originating only with The Fresh Group.


13. The Fresh Group continues to use the READYFRESH mark in interstate commerce in connection with its packaging and selling fresh produce services.
14. The READYFRESH mark is inherently distinctive when used in connection with packaging and selling fresh produce.
15. The READYFRESH mark has also acquired distinctiveness by virtue of The Fresh Group's continued use of the READYFRESH mark since at least as early as 2006.
16. ElKay has been offering food and produce bags under the trademark #READYFRESH. Examples of the use of the mark are below.



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### 12 x 8.25 + 5.5 BG inch, 2.75 mil, #ReadyFresh "Tamales" Pouch, 250/CS

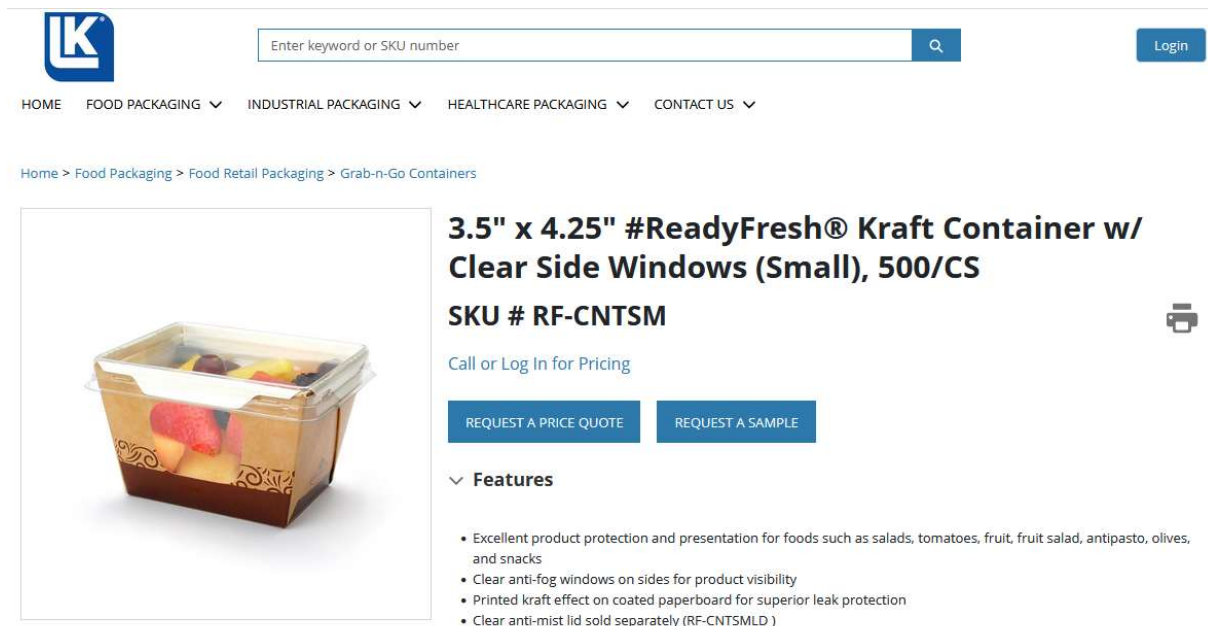
**SKU # GNG12855**

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▼ **Features**

- Printed "Tamales" Pouch
- Microwave-safe, high clarity cast polypropylene (CPP)
- Convenient die-cut handle and zipper closure
- Holds 12 tamales



17. Elkay's #READYFRESH mark is confusingly similar to The Fresh Group's READYFRESH mark.

18. The Fresh Group has requested that Elkay stop using the #READYFRESH mark in connection with its sale and offer for sale of food and produce bags, but Elkay has refused to do so.

19. Elkay's continued use of the #READYFRESH mark constitutes willful infringement.

20. Elkay's use of #READYFRESH in the manner described above is intended to and is likely to cause confusion in the marketplace in that actual and prospective customers are likely to believe that Elkay's goods are associated with, connected to, approved or endorsed by The Fresh Group.

21. Elkay's use of #READYFRESH in the manner described above is an effort to induce The Fresh Group's customers into purchasing Elkay's goods and to arrogate The Fresh Group's goodwill to Elkay.

22. By reason of Elkay's conduct, The Fresh Group has and will continue to suffer damage to its business, reputation, and goodwill, as well as the loss of sales and profits it would have made but for the action of Elkay. Unless restrained and enjoined, Elkay will continue to do the acts complained of herein, all to The Fresh Group's irreparable harm. The Fresh Group remedy at law is not adequate to compensate it for the injuries The Fresh Group has incurred and will incur.

23. In and around 2015, Sam J. Maglio, Jr., the named inventor of the '178 patent, developed a new and novel apparatus for holding a slice of melon. Generally speaking, the novel apparatus involves a pouch with front and back panels with a lower gusset and joined at their bottom corners by attachments that form non-bonded air gaps to support the shape and weight of the melon slice.

24. The Fresh Group owns all right, title, and interest to the '178 patent.

25. Elkay has been advertising and selling the #READYFRESH melon pouch. The product is shown below.



26. Elkay's #READYFRESH melon pouch and other similarly constructed pouches infringe the '178 patent.

## COUNT I – PATENT INFRINGEMENT OF THE ‘178 PATENT

27. Elkay’s #READYFRESH melon pouch and similarly constructed pouches infringe the ‘178 patent.

### **Exemplary claim comparison of Elkay’s Melon Pouch and the ‘178 patent**

28. Upon information and belief, Elkay has been making, using, offering to sell, and selling its #READYFRESH melon pouch and produce bags, and has provided its #READYFRESH melon pouch and similarly constructed produce bags to customers, which constitutes direct infringement of at least claim 16 of the ‘178 patent, either literally or under the doctrine of equivalents.

29. Claim 16 of the ‘178 patent is for a melon pouch for holding a slice of melon having upwardly extending edible flesh cradled below by a convex rind. The melon pouch provides a construction that supports the shape and the weight of a melon slice.

30. Claim 16 requires front and back panels connected to each other at outer side edges and a floor that connects bottom portions of the front and back panels to each other and includes a gusset configured to fold inwardly when the melon pouch is not storing a melon to provide a relatively narrower floor and extend outwardly when the melon pouch is storing a melon to provide a relatively wider floor.

31. Elkay’s #READYFRESH melon pouch has front and back panels connected to each other at outer side edges and a floor that connects bottom portions of the front and back panels to each other and includes a gusset configured to fold inwardly when the melon pouch is not storing a melon to provide a relatively narrower floor and extend outwardly when the melon pouch is storing a melon to provide a relatively wider floor.

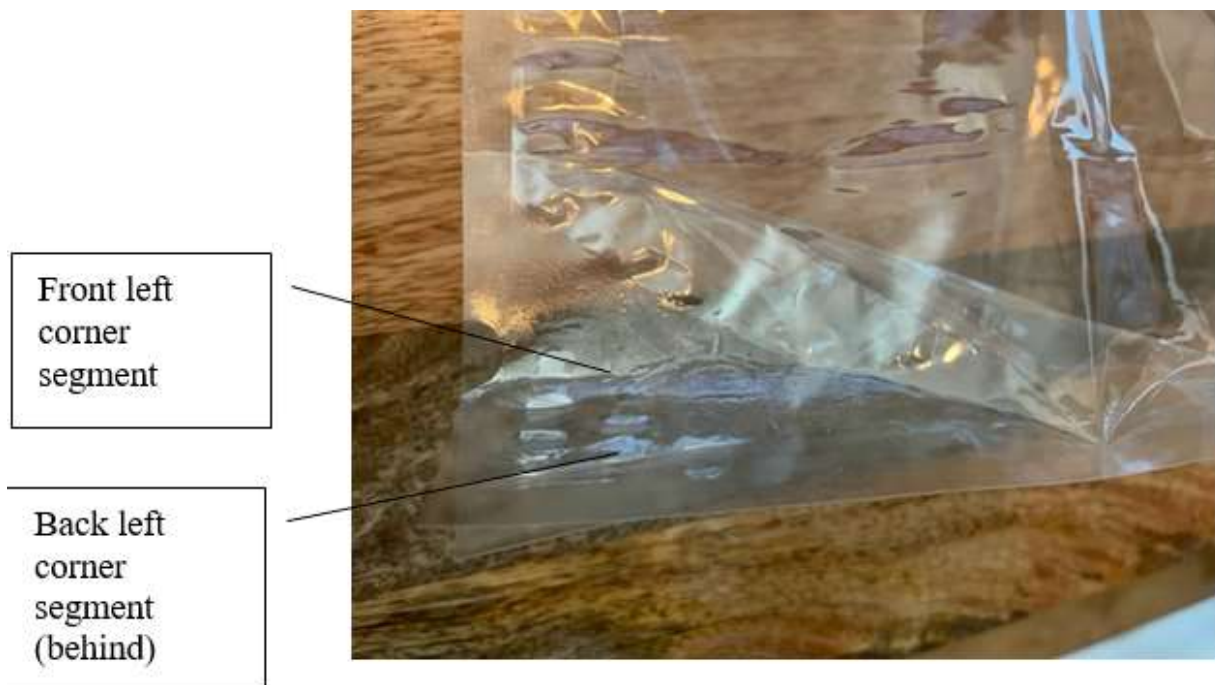




32. Claim 16 requires a lower left corner including, a front left corner segment defined by a generally triangular area of bonding between a left portion of the front panel and a corresponding front portion of the gusset; a back left corner segment defined by a generally triangular area of bonding between a left portion of the back panel and a corresponding back portion of the gusset.

33. Elkay's #READYFRESH melon pouch has a lower left corner including, a front left corner segment defined by a generally triangular area of bonding between a left portion of the front panel and a corresponding front portion of the gusset; a back left corner segment defined by a generally triangular area of bonding between a left portion of the back panel and a corresponding back portion of the gusset.





34. Claim 16 requires a lower right corner including, a front right corner segment defined by a generally triangular area of bonding between a right portion of the front panel and a corresponding front portion of the gusset; a back right corner segment defined by a generally triangular area of bonding between a right portion of the back panel and a corresponding back portion of the gusset.

35. Elkay's #READYFRESH melon pouch has a lower right corner including, a front right corner segment defined by a generally triangular area of bonding between a right portion of the front panel and a corresponding front portion of the gusset; a back right corner segment defined by a generally triangular area of bonding between a right portion of the back panel and a corresponding back portion of the gusset.



Second bonded  
triangle  
segment

Fourth bonded  
triangle segment  
(behind)

36. Claims 16 requires a left attachment that attaches the front left corner segment and the back left corner segment to each other; and a right attachment that attaches the front right corner segment and the back right corner segment to each other.

37. Elkay's #READYFRESH melon pouch has a left attachment that attaches the front left corner segment and the back left corner segment to each other; and a right attachment that attaches the front right corner segment and the back right corner segment to each other.

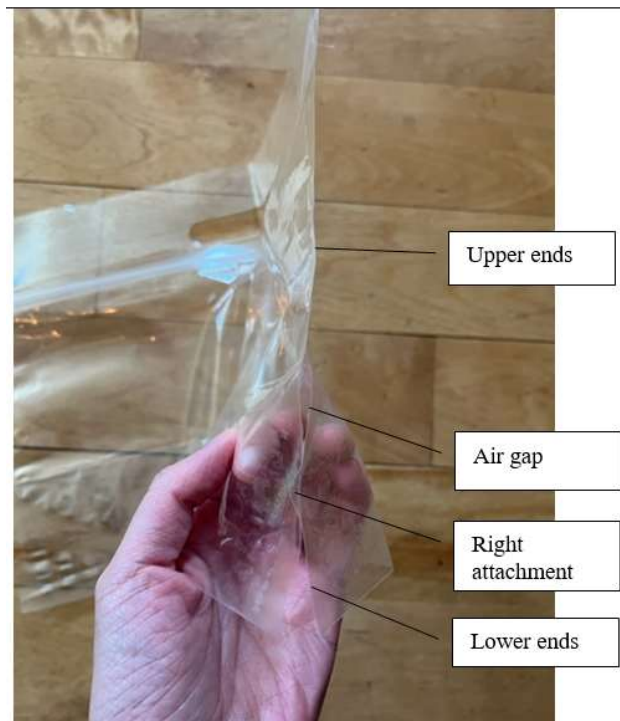
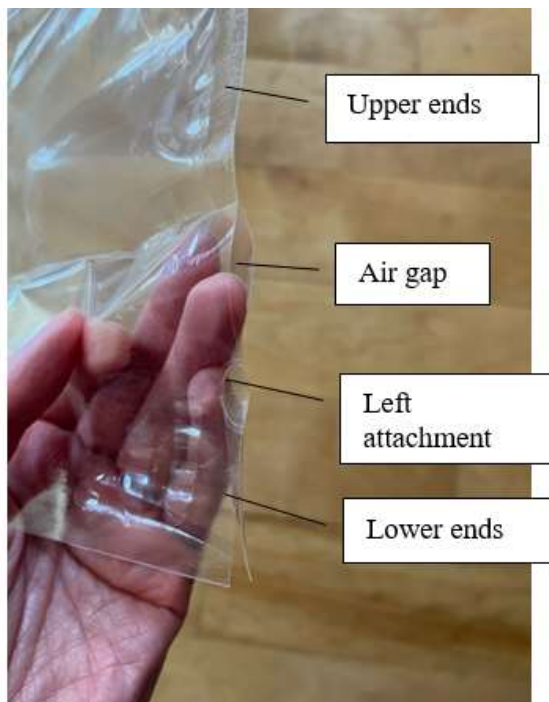
Left  
attachment





38. Claim 16 requires that the left attachment is at a location that is spaced from upper and lower ends of the front left corner segment and the back left corner segment to form non-bonded air gaps therebetween, and the right attachment is at a location that is spaced from upper and lower ends of the front right corner segment and the back right corner segment to form non-bonded air gaps therebetween.

39. Elkay's #READYFRESH melon pouch has the left attachment is at a location that is spaced from upper and lower ends of the front left corner segment and the back left corner segment to form non-bonded air gaps therebetween, and the right attachment is at a location that is spaced from upper and lower ends of the front right corner segment and the back right corner segment to form non-bonded air gaps therebetween.



40. Elkay's #READYFRESH melon pouch and similarly constructed pouches have the same construction as the claimed melon pouch and infringe at least claim 16 of the '178 patent.

41. Elkay's infringement of the '178 patent has been willful, as The Fresh Group notified Elkay of its infringement on September 2, 2022.

42. Elkay's willful infringement renders this an exceptional case under 35 U.S.C. § 285, entitling The Fresh Group to treble damages and an award of its fees and costs.

## **COUNT II – TRADEMARK INFRINGEMENT OF THE READYFRESH TRADEMARK**

43. Elkay's use of #READYFRESH in connection with the promotion, advertising, provision, sale, and offering for sale melon bags and produce bags is likely to confuse, mislead, or deceive consumers, the public, and the trade as to the origin, source, sponsorship, or affiliation of said services, and are intended and are likely to cause such parties to believe in error that

Elkay's services are provided by or have been authorized, sponsored, approved, endorsed, or licensed by The Fresh Group, or that The Fresh Group is in some way affiliated with Elkay.

44. Elkay's activities, as described herein, constitute infringement of The Fresh Group's READYFRESH mark in violation of the Lanham Act, including, but not limited to, 15 U.S.C. § 1114.

45. Elkay's use of the #READYFRESH mark has been and continues to be willful, deliberate, unfair, false, deceptive, and intended to trade upon the goodwill and reputation appurtenant to the READYFRESH mark.

46. Elkay's acts have damaged and will continue to damage The Fresh Group which has no adequate remedy at law.

47. The Fresh Group is entitled to injunctive relief prohibiting Elkay from using the #READYFRESH mark, or any marks confusingly similar to The Fresh Group's READYFRESH mark, in accordance with 15 U.S.C. § 1116, and to recover all damages, including attorneys' fees, that The Fresh Group has sustained and will sustain, and all gains, profits, and advantages obtained by Elkay as a result of its infringing acts alleged above in an amount not yet known, as well as the costs of this action, pursuant to 15 U.S.C. § 1117(a).

### **COUNT III – FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION**

48. Elkay's conduct complained of herein constitutes federal unfair competition, false designation of origin, and false advertising pursuant to 15 U.S.C. § 1125(a).

49. Elkay's intentional, unlawful, and unauthorized use in commerce of the #READYFRESH mark confusingly similar to The Fresh Group's READYFRESH, and Elkay's false advertising in commerce as described herein, are likely to cause confusion, mistake, or deception as to origin, sponsorship, or approval of Elkay's services, and therefore constitutes



false designation of origin and false advertising, in violation of 15 U.S.C. § 1125(a). Elkay's acts have damaged and will continue to damage The Fresh Group, and The Fresh Group has no adequate remedy at law.

50. The Fresh Group is entitled to injunctive relief prohibiting Elkay from using the #READYFRESH mark, or any marks confusingly similar thereto, in accordance with 15 U.S.C. § 1116, and to recover all damages, including attorneys' fees, that The Fresh Group has sustained and will sustain, and all gains, profits, and advantages obtained by Elkay as a result of the infringing acts alleged above in an amount not yet known, as well as the costs of this action, pursuant to 15 U.S.C. § 1117(a).

#### **COUNT IV - COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION**

51. Elkay has knowingly and willfully infringed The Fresh Group's READYFRESH mark with an intent to deceive the consuming public by using, without permission or authority, in commerce, the confusingly similar #READYFRESH mark in connection with the sale, offering for sale, distribution, and advertising of Elkay's goods. Such use is likely to cause confusion, mistake, or deception as to the source or origin of Elkay's goods.

52. Elkay has knowingly and willfully used the brand name #READYFRESH with an intent to deceive the consuming public in connection with the sale, offering for sale, distribution, and advertising of goods that are the same or similar to those sold by The Fresh Group under the name READYFRESH. Such use is likely to cause confusion, mistake, or deception as to the source or origin of Elkay's goods and/or the identity of the provider of such goods.

53. The Fresh Group's reputation and goodwill have been and are likely to continue to be damaged by reason of the deception and confusion associated with Elkay's activities including the use of the #READYFRESH mark.

54. The aforementioned acts are willful and intentional and have caused and are likely to continue to cause The Fresh Group to suffer pecuniary damage and irreparable injury.

55. Elkay's activities are in violation of the common law of the State of Wisconsin.

56. The Fresh Group has no adequate remedy at law and is entitled to a permanent injunction enjoining the Elkay from further violation of The Fresh Group's trademark rights.

### **REQUEST FOR RELIEF**

WHEREFORE, Plaintiff The Fresh Group LLC demands that judgment be entered in its favor and against Defendant Elkay Plastics Co., Inc. as follows:

- A. Adjudging that Elkay has violated 15 U.S.C. §§ 1114 and 1125(a) and the common law, and engaged in unfair competition;
- B. Permanently enjoining Elkay and its officers, agents, servants, employees, directors, representatives, successors, assigns, related companies, and those in privity with them or in active concert or participation with them from:
  - a. using the #READYFRESH mark, or any confusingly similar phrases, trademarks, or trade names, in connection with the advertising, promotion, provision, and marketing of its services in a way that is likely to cause confusion among consumers, including as incorporated in domain names, LinkedIn affinity group titles, social media accounts, and other online platforms;
  - b. representing by words or conduct that Elkay or its services are authorized, sponsored, endorsed, or otherwise connected with The Fresh Group;



- c. filing with any governmental entity, in the United States or abroad, an application or request to register a business name, d/b/a or trademark that includes the mark #READYFRESH and
  - d. any other conduct which causes or is likely to cause confusion, mistake, deception, or misunderstanding as to the source, affiliation, connection, or association between Elkay and The Fresh Group;
- C. Adjudging that Defendant have infringed the '178 patent;
- D. Permanently enjoining Elkay and its officers, agents, servants, employees, directors, representatives, successors, assigns, related companies, and those in privity with them or in active concert or participation with them from:
  - a. making, using, offering to sell, and selling its #READYFRESH melon pouch and produce bags;
- E. Awarding The Fresh Group its damages, together with prejudgment interest, caused by Elkay's infringement;
- F. That pursuant to 15 U.S.C. § 1117, The Fresh Group be awarded multiple damages for Elkay's willful and wanton violation of The Fresh Group's rights;
- G. That pursuant to 15 U.S.C. § 1117, Elkay be required to pay to The Fresh Group all of its litigation expenses including reasonable attorneys' fees and costs for this action;
- H. Finding this to be an exceptional case under 35 U.S.C. § 285 due to Elkay's willful infringement and awarding The Fresh Group treble damages and its fees and costs;
- I. Granting such other and further relief as the Court may deem appropriate.

## **JURY DEMAND**

Plaintiff The Fresh Group LLC hereby demands a jury trial of all issues of fact not admitted by the Defendant Elkay Plastics Co., Inc.

Dated: March 7, 2023

s/Michael T. Griggs

Michael T. Griggs

Sarah M. Wong

Geoffrey J. Behr

BOYLE FREDRICKSON, S.C.

840 N. Plankinton Ave.

Milwaukee, WI 53203

Telephone: 414-225-9755

Facsimile: 414-225-9753

*Attorneys for Plaintiff The Fresh Group LLC*