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Plaintiff

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

AR PILLOW, INC., a Delaware corporation, and  
ELIZABETH GOUTEVENIER, an individual  
resident of New York,

Plaintiff,  
v.

ANNETTE COTTRELL, a individual resident of  
Washington,

Defendant

Case No: \_\_\_\_\_

COMPLAINT FOR  
DAMAGES AND INJUNCTION  
(Trademark Infringement, Unfair  
Competition, False Description (§§ 32 and 43  
Lanham Act), Tortious Interference with  
Business Expectancy, Defamation,)

JURY TRIAL DEMANDED

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Plaintiffs AR PILLOW, INC. and ELIZABETH GOUTEVENIER, as and for their Complaint against  
Defendant, ANNETTE COTTRELL, allege as follows:

**I. JURISDICTION AND VENUE**

1. This is a complaint for Trademark Infringement, Unfair Competition, and False Description arising under §§ 32 and 43 of the Lanham Act, 15 U.S.C. §§ 1114(1) (Trademark Infringement) and 1125(a) (Unfair Competition and False Description), for Unfair Business Practices arising under RCW 19.86.10 et seq., for tortious interference with business expectancy, and for defamation.
2. This Court has original subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1338(a) and 15 U.S.C. § 1121 (both dealing with original jurisdiction over trademark matters). This Court

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has related claim jurisdiction over the state law claim pursuant to 28 U.S.C. § 1338(b)(original jurisdiction over unfair competition matters joined with a substantial and related claim under trademark laws) and 28 U.S.C. § 1367 (supplemental jurisdiction over related claims). The Court also has diversity jurisdiction per 28 USC § 1332: Complete diversity exists between the parties – Plaintiffs are residents of New York State, Defendant is a resident of the State of Washington, and the amount in controversy exceeds \$75,000.

3. This Court has personal jurisdiction over Defendant Cottrell, who maintains her residence in the State of Washington

4. Venue is proper in this district under 28 U.S.C. §1391(b) and (c) because a substantial part of the events or omissions giving rise to the claims occurred in this district, and the defendant maintains its principal place of business in this district.

## **II. THE PARTIES**

5. Plaintiff Elizabeth Goutevenier, is and at all times mentioned herein was, the principal of Plaintiff AR Pillow, Inc., a corporation organized and existing under the laws of the State of New York.

6. Defendant Annette Cottrell is and at all relevant times has been the principal of Defendant Pollywogbaby.com, an apparent sole proprietorship based in State of Washington.

## **III. FACTUAL BACKGROUND**

7. Plaintiff Goutevenier started AR Pillow Inc. in 2003 to help prevent harm to infants from acid reflux, as well as to provide income to her family following her husband's traumatic disability that arose after the September 11, 2001 terrorist attacks in New York City. AR Pillow has invested heavily to patent its products, to develop a sophisticated internet marketing strategy, and to distribute its products through leading national and international retailers, including Amazon.com. As a result of these efforts, AR Pillow Inc. had achieved revenues of approximately 15,000 monthly in the first six months of 2009.

8. In 2008, Defendant Cottrell (by and through her business avatar Pollywogbaby.com) had been affiliated with Plaintiff in the marketing and sale of infant positioning-related products for relief of Acid Reflux, in the capacity of a distributor.

9. In 2007, the US Patent and Trademark Office issued Plaintiffs a registered trademark for the name “AR Pillow.”

10. In the late summer and fall of 2011, Plaintiffs received a call from a customer seeking to cancel an order for an AR Pillow and affiliated products. The customer informed Plaintiffs that she was doing so because she had learned unfavorable information about AR Pillow from Pollywogbaby.com.

11. Immediately after the customer’s cancelled order, Plaintiffs conducted a Google search for the term “AR Pillow”, and found that Pollywogbaby.com ranked highly (#5) in a national search for the term “AR Pillow.” Ms. Cottrell is not a licensed distributor of AR Pillow and has never had permission to use the registered mark after the termination of their business arrangement. This was still the case as of at least November 15, 2011. A screen shot of said Google search results is attached as Exhibit 1.

12. As of November 23, 2011, the Pollywogbaby.com site still uses Plaintiff’s registered trademark without permission or license, and lists “AR Pillow” as a product that Defendant had “chosen to discontinue this product.” The screen shots of the Pollywogbaby.com site from November 23, 2011 are attached as Exhibit 2.

13. On the Google search screen shot, Exhibit 1, and further detailed on the Pollywogbaby.com web site, Exhibit 3, Defendant makes untrue and damaging assertions about the AR Pillow, including the following claim:

**Baby AR Pillow - Acid Reflux Pillow for Baby**

*The AR pillow has it's harness at the base of the wedge so your baby's head and back rest on the wedge but his bottom and legs are actually on the crib mattress. Because of this he can only be on his back in the Baby AR Pillow. All three wedges are 30 degree wedges but your baby's legs will be on the same plane as his body with the Tucker Wedge and RESQ wedge as opposed to being flexed or bent on the AR Pillow. For babies with severe reflux the*

*legs should not be flexed because that can increase refluxing. Leg flexing will also decrease oxygenation so if you have a preemie or baby with aspirational concerns be sure and get a Tucker wedge or RESQ wedge. Both the Tucker Wedge and the RESQ wedge will put your baby in a secure upright position and help reduce painful night wakings.*

Defendant's statements about the AR Pillow requiring babies to bend their legs are false. A premature (preemie) baby can be moved up on the wedge with the AR Pillow such that there is no required bending of the legs or waist, and Defendant's ostensible medical rationale is both contrived and rendered without license or authority.

14. Fully aware that she did not have permission to do so, Defendant has been using the term AR Pillow without permission in the marketing of her products since at least January 2009, as Plaintiffs discovered in the late Summer/ early Fall of 2011. This is apparent from Exhibit 3, a comparison chart still present on Defendant's site as of November 23, 2011, that notes the option of delivery via DHL. AR Pillow stopped using DHL for shipping in January 2009.

15. Plaintiffs are pioneers in the invention, sale and marketing of products for reducing the risk of acid reflux injury in infants. Plaintiffs came to their position of innovative and market leadership by hard work, and substantial investment in research and development, under very challenging circumstances. As a result of their endeavors, Plaintiffs have created and own valuable intellectual property in the form of patents, trademarks, copyrights and trade secrets.

16. Defendant's use of "AR Pillow" in her product promotion and advertising constitutes the use in commerce of a colorable imitation, copy and reproduction of Plaintiffs' AR Pillow mark. Defendant's use of "AR Pillow" for the promotion of products to help avoid acid reflux in children is deceptively and confusingly similar to AR Pillow's long-standing trademark for its products.

17. Defendant is a participant in the same market as AR Pillow (infant acid reflux market).

18. Defendant's use of AR Pillow's mark is likely to cause confusion, mistake, or deception in the minds of the public.

19. Defendant's infringement constitutes a willful and malicious violation of Cisco's trademark rights, aimed at preventing Cisco from continuing to build a business around a mark that it has long possessed.

20. Defendant's unpermitted use of the Trademarked term AR Pillow, which Plaintiffs have invested heavily to develop, perfect their interests in, and market, has diverted a substantial portion of web traffic that would otherwise go to the AR Pillow site.

21. This diversion of web impressions, together with Defendant's untrue and harmful statements about AR Pillow, have substantially diminished Plaintiff's revenues and profits. Such conduct on Defendant's part has also substantially deprived Plaintiffs of their investment, including but not limited to Plaintiff Goutevenier's forsaking profitable employment as a network engineer to pursue opportunities through AR Pillow. Plaintiffs' economic damages alone exceed \$150,000, in an exact amount to be proven at trial. Defendant's conduct has also caused Plaintiff Goutevenier considerable damages to her quality of life, in an amount to be proven at trial.

**FIRST CLAIM FOR RELIEF:**

**TRADEMARK INFRINGEMENT UNDER LANHAM ACT § 3231.**

22. Plaintiffs repeat and hereby incorporate herein by reference, as though specifically pleaded herein, the allegations of paragraphs 1 through 21.

23. Defendant's use of the AR Pillow brand name comprises an infringement of AR Pillow's registered trademark "AR Pillow" and is likely to cause confusion, mistake and deception of the public as to the identity and origin of AR Pillow's goods, causing irreparable harm to AR Pillow for which there is no adequate remedy at law. Defendant acted with knowledge that such unpermitted use of "AR Pillow" was intended to be used to create confusion, or to cause mistake, or to deceive.

24. By reason of the foregoing acts, Defendant is liable to Plaintiff AR Pillow Inc. for trademark infringement under 15 U.S.C. § 1114.

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25. Defendant's conduct has substantially contributed to the causation of Plaintiffs' damages, as more fully set forth in the prayer below.

**SECOND CLAIM: UNFAIR COMPETITION UNDER LANHAM ACT § 4334.**

26. Plaintiffs repeat and hereby incorporate herein by reference, as though specifically pleaded herein, the allegations of paragraphs 1 through 25.

27. Defendant's use of the AR Pillow mark to promote, market, or sell products in direct competition with AR Pillow's products and services constitutes Unfair Competition pursuant to 15 U.S.C. § 1125(a).

28. Defendant's use of Plaintiff's AR Pillow mark is likely to cause confusion, mistake, and deception among consumers.

29. Defendant's unfair competition has caused and will continue to cause damage to AR Pillow and Ms. Goutevenier, and is causing irreparable harm to Plaintiffs for which there is no adequate remedy at law.

30. Defendant's conduct has substantially contributed to the causation of Plaintiffs' damages, as more fully set forth in the prayer below.

**THIRD CLAIM: UNFAIR COMPETITION UNDER RCW 19.86.10 et seq.**

31. Plaintiffs repeat and hereby incorporate herein by reference, as though specifically pleaded herein, the allegations of paragraphs 1 through 30.

32. Defendant's actions discussed herein constitute unfair competition within the meaning of RCW 19.86.20. Defendant's methods of competition and/or her conduct of trade at all relevant times have been unfair and/or deceptive, and they have been against the public interest because they have caused injury to others. *See* RCW 19.86.093.

33. Pursuant to RCW 19.86.140 Plaintiffs are entitled to preliminary and permanent injunctive relief ordering Defendant to cease this unfair competition.

**FOURTH CLAIM - FALSE DESCRIPTION**

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34. Plaintiffs repeat and hereby incorporate herein by reference, as though specifically pleaded herein, the allegations of paragraphs 1 through 33.

35. Defendant's use of AR Pillow's mark is such a colorable imitation and copy of Plaintiff's trademark established in the market for acid-reflux related products for infants that Defendant's use thereof, in the context presented, is likely to create confusion, or to cause mistake, or to deceive consumers as to the affiliation, connection or association of AR Pillow's products, or to deceive consumers as to the origin, sponsorship or approval of AR Pillow's products.

36. AR Pillow avers that Defendant's use of the term AR Pillow comprises a false description or representation of such business or products under 15 U.S.C. § 1125(a) (Section 43(a) of the Lanham Act).

37. Defendant's conduct has substantially contributed to the causation of Plaintiffs' damages, as more fully set forth in the prayer below.

**FIFTH CLAIM: TORTIOUS INTERFERENCE WITH ECONOMIC EXPECTANCY**

38. Plaintiffs repeat and hereby incorporate herein by reference, as though specifically pleaded herein, the allegations of paragraphs 1 through 37.

39. At the time of Defendant's conduct about which AR Pillow complains, AR Pillow had a business expectancy with its prospective clients, which AR Pillow recruited at significant expense through an organized web campaign, with the probability of future economic benefit.

40. At all relevant times, Defendant knew of the existence of that expectancy.

41. Defendant intentionally induced or caused the interruption, partial termination, and/or diminution of that expectancy.

42. Defendant's interference was for an improper purpose (Defendant's unjust enrichment and/or the conversion of Plaintiffs' intellectual property to Defendant's advantage), and/or by improper means [the publication of falsehood to third parties, *infra*, and/or the infringement of Plaintiffs' trademarks

and related wrongful means, as alleged above].

43. Defendant's conduct proximately caused AR Pillow's damages, as more fully set forth in the prayer below.

#### **SIXTH CLAIM: DEFAMATION**

44. Plaintiffs repeat and hereby incorporate herein by reference, as though specifically pleaded herein, the allegations of paragraphs 1 through 43.

45. Defendant's statements regarding AR Pillow, as published on the Pollywogbaby.com website and its affiliated Google listing, are false and unprivileged.

46. Defendant is at fault for publishing said falsehoods about Plaintiffs' products.

47. Defendant's conduct proximately caused AR Pillow's damages, as more fully set forth in the prayer below.

#### **PRAYER**

##### **WHEREFORE, Plaintiffs pray:**

1. That Defendant and her agents, officers, employees, representatives, successors, assigns, attorneys and all other persons acting for, with, by, through or under authority from Defendant, and each of them, be preliminarily and permanently enjoined from:

(a) using Plaintiff's trademark "AR Pillow", or any colorable imitation thereof;

(b) using any trademark that imitates or is confusingly similar to or in anyway similar to AR Pillow's trademarked name, or that is likely to cause confusion, mistake, deception, or public misunderstanding as to the origin of AR Pillow's products or their apparent but false connectedness to Defendant.

2. That Defendant be required to file with the Court and serve on Plaintiffs within thirty (30) days after entry of the Injunction, a report in writing under oath setting forth in detail the manner and form in which Defendant has complied with the Injunction;

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3. That, pursuant to 15 U.S.C. § 1117, Defendant be held liable for all damages suffered by Plaintiffs resulting from the acts alleged herein;
4. That, pursuant to 15 U.S.C. § 1117, Defendant be compelled to account to Plaintiffs for any and all profits Defendant derived from the illegal acts complained of herein;
5. That the Defendant be ordered pursuant to 15 U.S.C. § 1118 to deliver up for destruction any and all containers, labels, signs, prints, packages, wrappers, receptacles, advertising, promotional material or the like in possession, custody or under the control of Defendant bearing a trademark found to infringe AR Pillow's trademark rights, as well as all plates, matrices, and other means of making the same;
6. That the Court declare this to be an exceptional case and award AR Pillow its full costs and reasonable attorneys' fees pursuant to 15 U.S.C. § 1117;
7. That the Court grant Plaintiffs any other remedy to which it they are entitled as provided for in 15 U.S.C. §§ 1116 and 1117 or under state law; and,
8. That the Court award Plaintiffs their reasonable attorney fees and costs under their third claim for relief, per RCW § 19.86.090,
9. That the Court award Plaintiffs an additional damages award not to exceed \$25,000, per Plaintiffs' third claim for relief and under RCW § 19.86.090's limited provision for an award of treble damages,
10. For combined statutory penalties in the amount of \$2,000 per violation of RCW § 19.86.020, per RCW § 19.86.140, in an amount to be proven at trial,
11. For non-economic damages to account for damage to Plaintiff Elizabeth Goutevenier's quality of life, in the amount of not less than \$2 million,
12. For such and other further relief that the court deems just and proper.

DATED this 23th day of November, 2011.

ELIZABETH GOUTEVENIER  
Plaintiff

