



3. Admitted as to its residence and established place of business; denied as to the remainder.
4. Denied.
5. BabyAge admits that this action purports to be an action for patent infringement, but denies that counterclaim plaintiff is entitled to any recovery. While BabyAge does not contest subject matter jurisdiction, the allegations of this paragraph are legal conclusions for which no answer is required or given.
6. BabyAge admits the face of the patent bears an issue date of July 13, 2004, but denies its validity.
7. BabyAge is without knowledge or information sufficient to form a belief as to the truth of the averment.
8. BabyAge is without knowledge or information sufficient to form a belief as to the truth of the averment.
9. Denied.
10. Denied.
11. Denied.
12. Denied.

13. BabyAge is without knowledge or information sufficient to form a belief as to the truth of the averment.
14. Denied.
15. Denied.
16. BabyAge is without knowledge or information sufficient to form a belief as to the truth of the averment.
17. Admitted.
18. BabyAge admits that this action purports to be an action for trademark infringement, but denies that plaintiff is entitled to any recovery. While BabyAge does not contest subject matter jurisdiction, the allegations of this paragraph are legal conclusions for which no answer is required or given.
19. BabyAge is without knowledge or information sufficient to form a belief as to the truth of the averment.
20. Admitted.
21. Admitted.
22. Admitted as to the display and description of Leachco products. Denied as to the remainder.
23. Denied.

24. Denied.
25. Denied.
26. Denied.

### **DEFENSES**

27. Upon information and belief, and as will likely be supported by evidence after a reasonable opportunity for further investigation and discovery, U.S. Patent No. 6,760,934 is invalid for failure to comply with the conditions and requirements for patentability specified in Title 35 U.S.C., including, but not limited to 35 U.S.C. §§ 101, 102, 103, and/or 112.~~U.S. Patent No. 6,760,934 is invalid under 35 U.S.C. §§ 101, 102, 103, and/or 112.~~
28. Proprietary Cozy Comfort pillow products manufactured, used, and offered for sale by BabyAge do not infringe U.S. Patent No. 6,760,934.
29. BabyAge sought legal counsel prior to selling its Cozy Comfort pillow and did not willfully infringe.
30. Upon information and belief, Leachco and Leach knew or should have known that the design and use of BabyAge's Cozy Comfort pillow does not infringe any of the claims of U.S. Patent No. 6,760,934, and nevertheless brought the counterclaim against BabyAge for the purpose of wrongfully

excluding BabyAge from the market for pillows; by initiating and maintaining the counterclaim, Leachco and Leach have engaged in patent misuse and vexatious litigation barring Leachco and Leach from any relief herein~~Leachco and Leach have misused U.S. Patent No. 6,760,934 to wrongfully engage in anticompetitive activity.~~

31. Consumer confusion does not exist.
32. No confusion or misrepresentation exists, in part, because purchase is made after careful consideration by educated and attentive consumers.
33. Leachco and Leach have cited no evidence of mistake or actual confusion.
34. Any putative confusion is merely theoretical.
35. Leachco and Leach have not established any trademark rights.
36. BabyAge's usage of Leachco products, descriptions and corporate name has been fair usage.

### **AFFIRMATIVE DEFENSES**

37. Upon information and belief, at the behest of and in conspiracy with Babies R Us, its largest customer, Leachco placed anticompetitive price controls on BabyAge as to BabyAge's pricing of Leachco's pillows covered by U.S. Patent No. 6,760,934, and is now refusing without cause to sell pillows covered by

U.S. Patent No. 6,760,934 to BabyAge, thereby wrongfully prohibiting competition in the marketplace~~Leachco and Leach have used U.S. Patent No. 6,760,934 to engage in anticompetitive behavior.~~

~~38.— Leachco and Leach have misused U.S. Patent No. 6,760,934.~~

~~39.~~38. Upon information and belief, and as will likely be supported by evidence after a reasonable opportunity for further investigation and discovery, U.S.

Patent No. 6,760,934 is unenforceable because Leachco and Leach failed to disclose all non-cumulative, material prior art of which they were aware to the Patent Office during prosecution of the patent.

~~40.~~39. BabyAge reserves all affirmative defenses under Rule 8(c) of the Federal Rules of Civil Procedure, the Patent and Trademark Laws of the United States and any other defenses, at law or in equity, that may now exist or in the future be available based on discovery and further factual investigation in this case.

**WHEREFORE, BabyAge respectfully seeks judgment against Leachco and Leach and asks the Court to:**

(A) Declare that BabyAge has not engaged in either patent or trademark infringement, confused or misled the public, or otherwise engaged in unfair competition;

(B) Find U.S. Patent No. 6,760,934 invalid;

(C) Declare that BabyAge has the right to sell its Cozy Comfort pillow free from interference by Leach and Leachco, its officers, agents, servants, employees, attorneys, privies, representatives, successors, and assigns, and any and all persons acting by, through, or under authority from Leachco, either separately or jointly;

(D) Permanently enjoin Leach and Leachco, its officers, agents, servants, employees, attorneys, privies, representatives, successors, and assigns, and any and all persons in active concert or participation with or under authority from Leachco, either separately or jointly, from:

- 1) Interfering with, or threatening to interfere with the manufacture, sale or use of the Cozy Comfort pillow by BabyAge, its related companies, successors, assigns or customers;
- 2) Instituting or prosecuting any suit or other proceeding placing in issue the right of BabyAge or its related companies, successors, assigns or customers to make, sell or use the Cozy Comfort pillow;
- 3) Instituting or prosecuting any suit or other proceeding placing in issue the right of BabyAge or its related companies, successors,

assigns or customers to fair usage of Leachco's product  
descriptions and corporate name;

(E) Order Leach and Leachco to pay BabyAge's costs, including  
reasonable attorney's fees.

(F) Such other relief as the Court deems appropriate under all the  
circumstances.

Respectfully Submitted,

s/ Mitchell A. Smolow

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