

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

BABYAGE.COM, INC.,

Plaintiff-Counterclaim Defendant

v.

LEACHCO, INC.,

Defendant-Counterclaim Plaintiff/
Third Party Plaintiff

and

JAMIE S. LEACH,

Counterclaim Plaintiff/
Third Party Plaintiff

v.

JOHN M. KIEFER, JR.,

Third Party Defendant

CIVIL ACTION NO. 3:07-CV-01600-ARC

Judge A. Richard Caputo

Filed Electronically

BRIEF OF BABYAGE.COM, INC. AND JOHN M. KIEFER, JR.
IN OPPOSITION TO MOTION OF LEACHCO, INC. AND
JAMIE S. LEACH FOR LEAVE TO FILE
SECOND AMENDED ANSWER

BabyAge.com, Inc. and John M. Kiefer, Jr. hereby file this Brief in Opposition to the Motion of Leachco, Inc. and Jamie S. Leach for Leave to File a Second Amended Answer to the Complaint filed by BabyAge.com, Inc.

On May 20, 2008, a case management conference was conducted in the above-captioned matter. On May 21, 2008, the Court entered a Case Management Order (Document 61). Paragraph 5 of said Case Management Order provides that motions to amend pleadings shall be filed no later than July 31, 2008.

On August 15, 2008, Leachco, Inc. and Jamie S. Leach filed a Motion for Leave to File Second Amended Answer (Document 73). Said Motion was filed fifteen (15) days after the deadline imposed by the Court in its Case Management Order.

In their Brief in Support of Motion for Leave to File Second Amended Answer, Leachco, Inc. and Jamie S. Leach state that they did not receive discovery from BabyAge.com, Inc. until July 30, 2008. Counsel for Leachco, Inc. and Jamie S. Leach argue that it took several days to review the several thousand e-mail printouts produced by BabyAge.com, Inc. and John M. Kiefer, Jr. As a result of the time it took counsel to review the discovery, he was unable to file his Motion for Leave to File Second Amended Answer in a timely manner and he, therefore, breached the filing deadline imposed by the Case Management Order.

Unfortunately for Leachco, Inc. and Jamie S. Leach, their counsel's argument really does not explain why he could not have filed a motion to extend the amended pleadings deadline imposed in the Case Management Order. The Motion of Leachco, Inc. and Jamie S. Leach for Leave to File Second Amended Answer has been filed because they wish to assert a Counterclaim based upon BabyAge.com, Inc.'s alleged violation of 35 U.S.C. § 292, entitled False Marking.

Attached to the Brief in Support of Motion for Leave to File Second Amended Answer of Leachco, Inc. and Jamie S. Leach, are three (3) exhibits, to wit: Exhibit 1 is a webpage describing BabyAge's Cozy Comfort Pregnancy Pillow indicating "patent pending"; Exhibit 2 is a webpage about BabyAge's Cozy Comfort Pregnancy Pillow indicating "patent pending"; and Exhibit 3 is BabyAge's Answers to First Interrogatories by Jamie S. Leach to BabyAge.com. The first two (2) exhibits were in the possession of Leachco, Inc. prior to BabyAge.com, Inc. producing their documents in response to Leachco's discovery. In other words, Leachco, Inc. already had these webpages in its possession indicating "patent pending" for BabyAge's Cozy Comfort Pregnancy Pillow. Further, BabyAge's Answers to First Interrogatories, indicating no

patent application filed, consists of only three (3) pages. Upon receiving BabyAge's Answers to First Interrogatories, Leachco's counsel certainly could have discovered the no patent application filed answer in a matter of minutes. The appropriate procedural measure Leachco's counsel should have taken would have been to file a simple motion to extend the amended pleadings deadline in the Case Management Order. Instead, he breached the filing deadline imposed in the Case Management Order and now moves for leave to file a second amended answer, fifteen (15) days after the deadline.

Furthermore, BabyAge.com, Inc. and John M. Kiefer, Jr. believe that if the Motion of Leachco, Inc. and Jamie S. Leach for Leave to File Second Amended Answer is granted, the litigation of this case will be delayed. BabyAge.com, Inc. would have to file a response to Leachco's asserted Counterclaim and the discovery deadline of the case may have to be extended due to the new cause of action alleged by Leachco, Inc. and Jamie S. Leach. The whole purpose for the Court ordering the early filing of Markman briefs was to streamline the litigation going forward. Leachco's counsel now asks the Court to delay the litigation, which is a measure the Court should not be so prone to do.

Accordingly, BabyAge.com, Inc. and John M. Kiefer, Jr., respectfully request that this Honorable Court deny the Motion of Leachco, Inc. and Jamie S. Leach for Leave to File Second Amended Answer.

Respectfully submitted,

Date: August 27, 2008

/s/ Andrew J. Katsock, III, Esquire
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