

JUDGE COAR

MAGISTRATE JUDGE DENLOW

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS**

BAJER DESIGN & MARKETING, INC.,  
a Wisconsin corporation,  
Plaintiff

v.

BASE4 GROUP, INC.,  
a Delaware corporation,  
Defendant.

COMPLAINT

JURY TRIAL DEMANDED

Case No. \_\_\_\_\_

Plaintiff Bajer Design & Marketing, Inc., a Wisconsin Corporation, by its attorneys, Ryan Kromholz & Manion, S.C. by Joseph A. Kromholz and John M. Manion and Staes & Scallan, P.C. by Andrew Staes, Stephen Scallan and Joshua Whiteside, as and for its Amended Complaint alleges as follows:

1. This action arises under the Patent Laws of the United States, 35 U.S.C. §§ 271 et seq. and under the trademark laws of the United States, 15 U.S.C. §§ 1051 et seq and is a complaint for patent infringement and trademark infringement.

**JURISDICTION AND VENUE**

2. The Court has personal jurisdiction over Defendant BASE4 because Infringing Products have been sold in this district.
3. The Court has personal jurisdiction over Defendant BASE4 because Infringing Products have been offered for sale in this district.

4. Venue in this action is proper in this district pursuant to 28 U.S.C. § 1391(b)(1) because Defendant BASE4 resides in this district as the term “resides” is defined in 28 U.S.C. § 1391(c).
5. Venue in this action is proper in this district pursuant to 28 U.S.C. § 1400(b) and 28 U.S.C. § 1391(c) because Defendant BASE4 resides in this district as the term “resides” is defined in 28 U.S.C. § 1391(c) and because Defendant BASE4 is subject to personal jurisdiction in this district.
6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§1331, 1337, and 1338(a).
7. This Court has original federal question jurisdiction and supplemental jurisdiction over this action under 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338 & 1367(a),
8. This Court has personal jurisdiction, under one or more subsections of 735 Ill. Comp. Stat. 5/2-209, over Defendant BASE4 because, upon information and belief, Infringing Products have been offered for sale in this district.
9. This Court has personal jurisdiction, under one or more subsections of 735 Ill. Comp. Stat. 5/2-209, over Defendant BASE4 because, upon information and belief, Infringing Products have been sold in this district.

#### **THE PARTIES**

10. Plaintiff Bajer Design & Marketing, Inc. (Plaintiff Bajer Design) is a corporation organized under the laws of the State of Wisconsin.

11. Plaintiff Bajer Design has its principal place of business at 1801 Airport Road, Waukesha, Wisconsin, 53188.
12. Plaintiff Bajer Design is engaged in the business of manufacturing, marketing and selling, *inter alia*, collapsible containers including foldable hampers.
13. Defendant Base4 Group, Inc. (Defendant BASE4) is a Delaware Corporation having its headquarters at 14001 Dallas Parkway, Suite 560, Dallas, TX 75240.
14. Defendant BASE4 is engaged in the business of manufacturing, marketing, and selling, *inter alia*, collapsible containers including foldable hampers.

#### **FACTUAL BACKGROUND AND NATURE OF THE CASE**

15. Plaintiff Bajer Design is the owner by assignment of U.S. Patent No. 5,964,533 (“the ‘533 patent” attached as Exhibit 1, the assignment attached as Exhibit 2) entitled “Hamper Apparatus and Methods”
16. Plaintiff Bajer Design is the owner by assignment of U.S. Patent No. RE37,924 (“the ‘924 patent” attached as Exhibit 3, the assignment attached as Exhibit 4) entitled “Collapsible Container and Method of Making and Using Same.”
17. Plaintiff Bajer Design has the sole right to license others to manufacture, import, use, offer to sell, and sell products claimed in the ‘533 patent.
18. Plaintiff Bajer Design has the sole right to license others to manufacture, import, use, offer to sell, and sell products claimed in the ‘924 patent.

19. Defendant BASE4 is not licensed to manufacture, import, use, offer to sell, or sell products claimed in the '533 patent.
20. Defendant BASE4 is not licensed to manufacture, import, use, offer to sell, or sell products claimed in the '924 patent.
21. Defendant BASE4 is a corporation that sells and offers for sale, foldable hampers and collapsible containers ("the Infringing Products").
22. The Infringing Products include a "1 Pop-Up Hamper" (attached as Exhibit 5).
23. The Infringing Product identified in Exhibit 5 is marked with the Notice: "© 2007 Distributed by Defendant BASE4 Dallas, TX 75240 All Rights Reserved Made in China".
24. The Infringing Product identified in Exhibit 5 has no patent marking.
25. The Infringing Product identified in Exhibit 5 includes four flexible tension loops.
26. The four flexible tension loops identified in Exhibit 5 are spring form steel.
27. The Infringing Product identified in Exhibit 5 includes four flexible panels arranged in a substantially rectangular configuration.
28. The Infringing Product identified in Exhibit 5 includes four flexible panels of mesh fabric through which light passes.

29. The Infringing Product identified in Exhibit 5 includes each of the panels coupled to and substantially encircled by one of the flexible tension loops.
30. The Infringing Product identified in Exhibit 5 includes a rectangularly shaped flexible bottom coupled to each of the panels.
31. The Infringing Product identified in Exhibit 5 includes a first flexible handle coupled to one of the panels and a second flexible handle coupled to another of the panels, so that, the handles are on non-adjacent sides of the substantially rectangular configuration of panels.
32. The Infringing Product identified in Exhibit 5 is a collapsible container having an open top.
33. The Infringing Product identified in Exhibit 5 includes a plurality of adjacent side panels.
34. The Infringing Product identified in Exhibit 5 includes a plurality of adjacent side panels wherein each of the side panels includes a continuous, non-interrupted, planar web having a perimeter.
35. The Infringing Product identified in Exhibit 5 including an edging attached to substantially the entire perimeter of the web and forming a continuous peripheral pocket and a continuous loop frame.
36. The Infringing Product identified in Exhibit 5 includes a frame being positioned within the continuous pocket.

37. The Infringing Product identified in Exhibit 5 includes side panels having a bottom side, a top side and two lateral sides.
38. The Infringing Product identified in Exhibit 5 includes a floor panel having a plurality of sides, each of said floor panel sides being attached to at least one of said side panel bottom sides.
39. The Infringing Product identified in Exhibit 5 includes the lateral sides of each side panel being attached to the lateral side of an adjacent side panel.
40. Plaintiff Bajer Design owns a federal trademark registration POP OPEN®. Since approximately 1997, Plaintiff Bajer Design has used and promoted the POP OPEN® mark in connection with collapsible containers for household use.
41. Plaintiff Bajer Design brings this action to stop Defendant BASE4 from the unauthorized and infringing use of Plaintiff Bajer Design's registered POP OPEN® mark. Defendant BASE4's use of the POP UP® mark on identical goods is likely to cause confusion, mistake or to deceive the public as to the source of the Defendant BASE4's goods, and as to the existence of a connection, affiliation or sponsorship between the Defendant BASE4 and Plaintiff Bajer Design, when no such connection or affiliation exists.
42. This action seeks permanent injunctive relief, monetary relief, and attorneys' fees (for any acts of infringement determined to be willful) based on Defendant BASE4's violation of: (1) the Patent Laws of the United States; (2) Section 32 of the Lanham Trademark Act of 1946, as amended (the "Lanham Act"), 15 U.S.C. § 1114 (federal trademark infringement); (3) Section 43 of the Lanham Act, 15 U.S.C. § 1125(a)

(federal unfair competition and false designation of origin); (4) The Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1, et seq. ILCS, and the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/2(a)(2) and (3).

43. Plaintiff Bajer Design owns a federal trademark registration for its POP OPEN® mark, Fed. Reg. No. 2,276,917 for use on a “collapsible containers first use anywhere at least as early as 1997 and use in commerce at least as early as 1997. *See* Certificate of Registration No. 2,276,917(attached hereto as “Exhibit 6”).
44. At all times material hereto, Plaintiff Bajer Design’ federal trademark registration has been, and continues to be, valid and subsisting.
45. Plaintiff Bajer Design began using the POP OPEN® mark in commerce over one decade ago. Since that time, Plaintiff Bajer Design has continuously and extensively used the POP OPEN® mark across the United States in connection with distribution of its collapsible containers for household uses.
46. Plaintiff Bajer Design has invested substantial amounts of time and effort in advertising and promotion to develop the widespread goodwill associated with its POP OPEN® mark.
47. The POP OPEN® mark and associated trade names are recognized by consumers as representing Plaintiff Bajer Design’ high-quality goods.
48. Defendant BASE4 sells virtually identical collapsible containers for household uses that, upon information and belief, Defendant BASE4 caused to be imported from China (hereinafter “the Defendant BASE4 Chinese product”).

49. The Chinese collapsible containers for household uses imported by Defendant BASE4 are depicted in Exhibit 5.
50. An actual Plaintiff Bajer Design POP OPEN® collapsible containers for household use looks as depicted in Exhibit 7.
51. The Defendant BASE4 Chinese product and the actual POP OPEN® collapsible containers for household uses are substantially identical in appearance (attached hereto as “Exhibit 8”).
52. Defendant BASE4 refers to the Defendant BASE4 Chinese product as a “1 POP-UP HAMPER.” *See* Exhibit 9.
53. The Defendant BASE4 Chinese product is not an actual POP OPEN® collapsible container for household use that is manufactured or sold by Plaintiff Bajer Design.
54. Defendant BASE4 has used the term “POP-UP” to identify the Defendant BASE4 Chinese product.
55. Defendant BASE4’s “POP-UP” designation is confusingly similar to Plaintiff Bajer Design’s POP OPEN® registration.
56. The Defendant BASE4 Chinese product is a collapsible container for household use.
57. An actual POP OPEN® product is a collapsible container for household use.



58. The Defendant BASE4 Chinese product and actual POP OPEN® collapsible containers for household uses are identical in function.
59. Defendant BASE4 competes with Plaintiff Bajer Design.
60. Actual POP OPEN® collapsible containers for household uses are sold through the same channels of trade as the Defendant BASE4 Chinese product.
61. Upon information and belief, consumers who purchase the Defendant BASE4 Chinese product consumers who purchase actual POP OPEN® collapsible containers for household uses would be the typical customers of retailers such as Target and/or Wal-Mart.
62. Upon information and belief, the conditions under which sales are made of the Defendant BASE4 Chinese products, are identical or nearly identical to, the conditions under which sales are made of actual POP OPEN® collapsible containers for household uses.
63. Upon information and belief, typical buyers to whom sales are made of the Defendant BASE4 Chinese products, are identical or nearly identical to, typical buyers to whom sales are made of actual POP OPEN® collapsible containers for household uses.
64. Upon information and belief, the degree of care likely to be used by consumers of the Defendant BASE4 Chinese products, is identical or nearly identical to, the degree of care likely to be used by consumers of actual POP OPEN® collapsible containers for household uses.

65. The Defendant BASE4 Chinese product is closely related, if not identical, to actual POP OPEN® collapsible containers for household use.
66. Defendant BASE4's use of the POP OPEN® mark is likely to cause confusion or mistake or deceive the public into believing that the Defendant BASE4 is affiliated with, connected to or associated with Plaintiff Bajer Design.
67. Defendant BASE4's use of the POP OPEN® mark is likely to cause confusion or mistake or to deceive the public as to the origin, sponsorship or approval of Defendant BASE4's goods by Plaintiff Bajer Design.
68. Unless enjoined, the Defendant BASE4 will continue to infringe and violate Plaintiff Bajer Design's rights in its POP OPEN® mark, which will irreparably harm Plaintiff Bajer Design and cause Plaintiff Bajer Design to suffer damage, including but not limited to, damage to its goodwill and business reputation.

#### **COUNT I- PATENT INFRINGEMENT**

69. Plaintiff Bajer Design re-alleges and incorporates by reference paragraphs 1-68 of the Complaint.
70. Defendant BASE4's manufacture, use, offer for sale, and sale of the Infringing Products including the Infringing Product identified in Exhibit 5 is an infringement of Plaintiff Bajer Design's rights under the '533 patent.

71. Defendant BASE4's manufacture, use, offer for sale, and sale of the Infringing Product identified in Exhibit 5 is an infringement of at least one claim of the '533 patent.
72. Defendant BASE4's manufacture, use, offer for sale, and sale of the Infringing Products including the Infringing Product identified in Exhibit 5 is an infringement of Plaintiff Bajer Design's rights under the '924 patent.
73. Defendant BASE4's manufacture, use, offer for sale, and sale of the Infringing Product identified in Exhibit 5 is an infringement of at least one claim of the '924 patent.

**Count II (Trademark Infringement – 15 U.S.C. § 1114)**

74. Plaintiff Bajer Design re-alleges and incorporates by reference paragraphs 1-68 of the Complaint.
75. Defendant BASE4 has used words, terms, names and colorable imitations of Plaintiff Bajer Design' POP OPEN® mark in connection with the sale, offering for sale or advertising of goods.
76. Upon information and belief, Defendant BASE4's use of Plaintiff Bajer Design' POP OPEN® mark is likely to cause confusion, mistake or deceive an appreciable number of ordinary buyers as to the source of or association of those goods with Plaintiff Bajer Design.

77. Defendant BASE4's conduct constitutes trademark infringement in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114.
78. By reason of the foregoing acts of the Defendant BASE4, Plaintiff Bajer Design has sustained, and unless enjoined will continue to sustain, substantial injury and damage.
79. Defendant BASE4's acts have caused Plaintiff Bajer Design irreparable harm and, unless enjoined, will continue to cause Plaintiff Bajer Design continuing irreparable harm.
80. Plaintiff Bajer Design has no adequate remedy at law.

**Count III (Unfair Competition/False Designation of Origin**

**- 15 U.S.C. § 1125(a))**

81. Plaintiff Bajer Design re-alleges and incorporates by reference paragraphs 1-68 and 75-80 of the Complaint.
82. Upon information and belief, Defendant BASE4's use of its 'POP-UP' mark for identical goods (e.g. collapsible containers for household uses) is likely to cause confusion, or to cause mistake, or to deceive an appreciable number of ordinary buyers as to the source of or association of those goods with Plaintiff Bajer Design.
83. The foregoing acts of the Defendant BASE4 constitute unfair competition and false designation of origin in violation of Section 43 of the Lanham Act, 15 U.S.C. § 1125(a).

84. By reason of the foregoing acts of Defendant BASE4, Plaintiff Bajer Design has sustained, and unless enjoined will continue to sustain, substantial injury and damage. Defendant BASE4's acts, unless enjoined, will cause Bajer Design continuing irreparable harm.
85. Plaintiff Bajer Design has no adequate remedy at law.

**Count IV (COMMON LAW TRADEMARK INFRINGEMENT)**

86. Plaintiff Bajer Design re-alleges and incorporates by reference paragraphs 1-68 and 75-85 of the Complaint.
87. Defendant BASE4's use of Plaintiff Bajer Design' POP OPEN® mark for both related and identical goods is likely to cause confusion, or to cause mistake, or to deceive an appreciable number of ordinary buyers as to the source of or association of those goods with Plaintiff Bajer Design.
88. Defendant BASE4's use of Plaintiff Bajer Design' POP OPEN® mark has caused and, unless enjoined, will continue to cause irreparable harm to Plaintiff Bajer Design.
89. Plaintiff Bajer Design has no adequate remedy at law.
90. Defendant BASE4's activities as stated herein constitute an infringement of Plaintiff Bajer Design' common law trademark rights in the name POP OPEN® within the state of Illinois and in violation of Illinois law.

**COUNT V (COMMON LAW UNFAIR COMPETITION)**

91. Plaintiff Bajer Design re-alleges and incorporates by reference paragraphs 1-68 and 75-90 of the Complaint.
92. Plaintiff Bajer Design' POP OPEN® mark is distinctive and has acquired secondary meaning and is thereby a valid common law trademark.
93. Plaintiff Bajer Design is the rightful owner of all common law rights in the POP OPEN® mark.
94. Defendant BASE4's use of Plaintiff Bajer Design' POP OPEN® mark for both related and identical goods is likely to cause confusion, or to cause mistake, or to deceive an appreciable number of ordinary buyers as to the source of or association of those goods with Plaintiff Bajer Design.
95. Defendant BASE4 could have chosen any number of alternative non-infringing marks, but instead chose to use "POP OPEN™" to describe the Defendant BASE4 Chinese product, which is confusingly similar to Plaintiff Bajer Design' POP OPEN® mark and blemishes the distinctiveness of Plaintiff Bajer Design' POP OPEN® mark..
96. Defendant BASE4's acts constitute unfair competition, unfair trade practice and infringement of Plaintiff Bajer Design' common law rights and are in violation of the common law of the State of Illinois.

97. Defendant BASE4's use of Plaintiff Bajer Design' POP OPEN® mark is done with willful intent, harmful motive and reckless indifference to Plaintiff Bajer Design' rights.
98. Defendant BASE4 has been unjustly enriched by their acts.
99. Defendant BASE4's use of Plaintiff Bajer Design' POP OPEN® mark has caused and, unless enjoined, will continue to cause irreparable harm to Plaintiff Bajer Design.
100. Plaintiff Bajer Design has no adequate remedy at law.
101. Plaintiff, as a direct and proximate result of aforesaid acts of infringement and has suffered both past, present, and on-going monetary damages in an amount to be determined at trial.

**COUNT VI (VIOLATION OF ILLINOIS CONSUMER FRAUD ACT)**

102. Plaintiff Bajer Design realleges and incorporates by reference paragraphs 1 - 101 of the Complaint.
103. Defendant BASE4's conduct implicates consumer concerns.
104. Defendant BASE4's conduct, as alleged above, causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services and causes likelihood of confusion or of misunderstanding as to the

affiliation, connection or association with or certification by another, in violation of 815 ILCS 510/2(a)(2) and (3).

105. The foregoing violation of the Uniform Deceptive Trade Practices Act violates the Illinois Consumer Fraud and Deceptive Practices Act. 815 ILCS 505/1, et seq.

WHEREFORE, Plaintiff Bajer Design prays for relief as follows:

- A. For a decree adjudging that United States Letters Patent No. 5,964,533 has been infringed by Defendant BASE4 and that Plaintiff Bajer Design has been damaged by said infringement.
- B. For an injunction permanently enjoining the Defendant BASE4, its officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of the decree of this Court by personal service or otherwise, from directly or indirectly infringing the claims of United States Letters Patent No. 5,964,533.
- C. For an accounting and damages against Defendant BASE4, according to proof at the time of trial, for all damages suffered by Plaintiff Bajer Design by reason of the infringement by Defendant BASE4 of United States Letters Patent No. 5,964,533 in an amount not less than a reasonable royalty, together with interest and costs, pursuant to 35 USC § 284.



- D. For a decree adjudging that United States Letters Patent No. RE37,924 has been infringed by Defendant BASE4 and that Plaintiff Bajer Design has been damaged by said infringement.
- E. For an injunction permanently enjoining the Defendant BASE4, its officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice of the decree of this Court by personal service or otherwise, from directly or indirectly infringing the claims of United States Letters Patent No. RE37,924.
- F. For an accounting and damages against Defendant BASE4, according to proof at the time of trial, for all damages suffered by Plaintiff Bajer Design by reason of the infringement by Defendant BASE4 of United States Letters Patent No. RE37,924 in an amount not less than a reasonable royalty, together with interest and costs, pursuant to 35 USC § 284.
- G. For damages in an amount equal to three times the amount of damages found or assessed to compensate Plaintiff Bajer Design for any act of infringement by a Defendant BASE4 that is determined to be a willful, deliberate and intentional act, pursuant to 35 USC § 284.
- H. For an award of reasonable attorney fees against the Defendant BASE4, pursuant to 35 USC § 285 and 815 ILCS 50/10A.

- I. Enjoining the Defendant BASE4, their servants, agents and employees, and all other persons in active concert or participation with the Defendant BASE4, and their successors and assigns, from directly or indirectly:
  1. using any of Plaintiff Bajer Design' marks or names including the POP OPEN® mark or any colorable imitation of the POP OPEN® mark in advertising (including signage and on the Internet) or promotions;
  2. expressly or impliedly representing themselves to customers, potential customers, suppliers, potential suppliers or the public to be affiliated in any way with Plaintiff Bajer Design;
  3. representing by words or conduct that any product or service provided, offered for sale, sold, advertised, or rendered by the Defendant BASE4 is supplied, authorized, sponsored, or endorsed by or otherwise connected Plaintiff Bajer Design; otherwise infringing the POP OPEN® mark and trade names; or
  4. competing unfairly with Plaintiff Bajer Design in any manner by improperly using the POP OPEN® mark and trade names, or any mark that is likely to cause confusion with Plaintiff Bajer Design' POP OPEN® marks;
- J. Ordering the Defendant BASE4 to deliver up for destruction all labels, signs, prints, insignia, letterhead, brochures, business cards, invoices and any other written or recorded material or advertisements in its possession

or control containing the POP-UP mark and trade names, or any colorable imitation of the POP OPEN® mark;

K. Ordering the Defendant BASE4 to file with this Court and serve on Plaintiff Bajer Design within thirty (30) days from the date of entry of any restraining order and/or injunction, a report in writing, under oath, setting forth in detail the manner and form in which the Defendant BASE4 have complied with the terms of the injunction;

L. Ordering the Defendant BASE4 to pay Plaintiff Bajer Design: (1) all profits, gains and advantages obtained from the Defendant BASE4's unlawful conduct, including lost profits and corrective advertising damages in an amount to be determined at trial; (2) all monetary damages sustained and to be sustained by Plaintiff Bajer Design as a consequence of the Defendant BASE4's unlawful conduct, including lost profits, in an amount to be determined at trial; and (3) Plaintiff Bajer Design' costs and disbursements of this action, including reasonable attorneys' fees; or, at Plaintiff Bajer Design' election, statutory damages, of which nothing plead herein shall constitute an election of remedies.

M. For any finding that Defendant BASE4's actions were willful order that the Defendant BASE4's profits or Plaintiff Bajer Design' damages (whichever is greater) be trebled as provided under 15 U.S.C. § 1117(b).

N. Awarding interest on the above damages awards, including prejudgment interest.

O. That the Defendant BASE4 be directed to pay the Plaintiff Bajer Design costs and interest incurred herein.

P. That the Plaintiff Bajer Design has such other and further relief as the circumstances of the case may require or as this Court deems just and proper.

DEMAND FOR JURY TRIAL - Plaintiff Bajer Design hereby demands a jury trial on all issues so triable.

Date: April 22, 2008

RYAN KROMHOLZ & MANION, S.C.

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