

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

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APOTHECARY PRODUCTS, INC.,)	
)	
	Plaintiff,)	Civil Action No.
)	
	v.)	
)	
REXAM PRESCRIPTION PRODUCTS, INC.,)	
)	
)	JURY TRIAL DEMANDED
	Defendant.)	
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COMPLAINT

Plaintiff, Apothecary Products, Inc. ("Apothecary"), for its Complaint against Defendant, Rexam Prescription Products, Inc. ("Rexam") states and alleges as follows:

The Parties

1. Plaintiff Apothecary is a corporation organized and existing under the laws of Minnesota, with a principal place of business located at 11750 – 12th Avenue South, Burnsville, Minnesota 55337.
2. Upon information and belief, Defendant Rexam is a corporation organized and existing under the laws of Delaware, with its principal place of business at 4201 Congress Street, Suite 340, Charlotte, North Carolina 28209.
3. On January 27, 1998, United States Patent No. 5,711,442 ("the '442 patent") entitled "Child Resistant Package" was issued to Owens-Illinois Prescription Products, Inc. as assignee of the inventor, Maximillian Kusz. A copy of the '442 patent is

attached as Exhibit A. Upon information and belief, the '442 patent is now owned by Rexam Prescription Products, Inc.

4. Apothecary is in the business of manufacturing and selling products in interstate commerce, including sales in the State of Minnesota.

5. Apothecary manufactures and sells various types of packaging, including packaging for prescription medications.

6. Upon information and belief, Rexam is in the business of manufacturing and selling products in interstate commerce, including sales in the State of Minnesota.

Jurisdiction

7. This is an action for Declaratory Judgment relating to patents, 35 U.S.C. §§ 271, 282-285, and 289, and unfair competition under the Lanham Act of the United States, 15 U.S.C. §§ 1051-1127 and the common law.

8. This Court has subject matter jurisdiction under 28 U.S.C. §§ 2201, 2202, 1338(a), and 1367.

9. An actual, justifiable controversy exists between the parties with respect to the matters asserted herein, including the '442 patent and matters associated with federal and state unfair competition laws, including 15 U.S.C. § 1125(a).

Venue

10. Venue in this District is proper under 28 U.S.C. §§ 1391(b) and (c), and 1400(b).

Background Facts

11. On February 5, 2008, John A. Creel, President and COO of Apothecary, received a letter from counsel for Rexam asserting that certain Apothecary prescription

packaging, notably Apothecary's Ezy Dose Reversible Cap Vials (Push-Tab Style), infringed the '442 patent as well as Rexam trade dress rights in the appearance of Rexam's "l-Clic® packaging system" in violation of federal and state unfair competition laws, including 15 U.S.C. § 1125(a) (letter attached hereto as Exhibit B).

12. Rexam has alleged that Apothecary's Ezy Dose Reversible Cap Vials (Push-Tab Style) infringe the '442 patent and demanded Apothecary cease manufacture, marketing, and sale of packaging accused to infringe the '442 patent. (Exhibit B.)

13. Rexam has further asserted that Apothecary Ezy Dose Reversible Cap Vials (Push-Tab Style) infringe Rexam's trade dress rights resulting in unfair competition, and demanded Apothecary cease manufacture, marketing, and sale of packaging accused to infringe Rexam's trade dress rights. (Exhibit B.)

14. Upon information and belief, Rexam's allegations of patent infringement, trade dress infringement, and unfair competition are without merit.

Count I

DECLARATION OF NON-INFRINGEMENT OF THE '442 PATENT

15. The allegations of the preceding paragraphs 1-14 are repeated and incorporated herein by reference.

16. Apothecary makes, uses, and sells prescription medication vials under various tradenames, including but not limited to "Ezy Dose Reversible Cap Vials (Push-Tab Style)". None of these products infringe the '442 patent.

17. Apothecary has not infringed, contributed to the infringement, or induced infringement of the '442 patent by reason of its manufacture, use, offers for sale, and sale of its Ezy Dose Reversible Cap Vials (Push-Tab Style) or any other business activities.

Count II

DECLARATION OF INVALIDITY OF THE '442 PATENT

18. The allegations of the preceding paragraphs 1-17 are repeated and incorporated herein by reference.

19. The '442 patent is invalid, at least for failure to comply with the provisions of 35 U.S.C. §§ 102, 103, and/or 112.

20. Any interpretation of any claim of the '442 patent to cover or include any Ezy Dose Reversible Cap Vials (Push-Tab Style) made, used, or sold by Apothecary would cause such claim, as so interpreted to be invalid under the provisions of Title 35 United States Code, § 100 et. seq.

21. Plaintiff, Apothecary, reserves the right to assert additional claims for declaratory judgment of unenforceability of the '442 patent following a reasonable opportunity for investigation.

Count III

**DECLARATION OF NO FEDERAL UNFAIR
COMPETITION (TRADE DRESS INFRINGEMENT)**

22. The allegations of the preceding paragraphs 1-21 are repeated and incorporated herein by reference.

23. Upon information and belief, the packaging design of Defendant, Rexam's, prescription container sold under the designation "I-Clic® packaging system" is functional in nature and does not constitute a protectable trade dress.

24. Upon information and belief, Rexam has no trade dress rights in the prescription packaging designated as the "I-Clic® packaging system".

25. The prescription packaging used by Rexam and designated as the "I-Clic® packaging system" is a product design incapable of inherently conveying to the public that the design serves as an indication of source or origin.

26. The Rexam prescription packaging designated as the "I-Clic® packaging system" alleged by Rexam as its trade dress has not been used by Rexam in a manner conveying to the public that the design serves as an indication of source or origin.

27. Upon information and belief, Rexam's alleged trade dress of its "I-Clic® packaging system" is diluted, nondistinct, and in common use by other third parties such that the scope of any rights held by Rexam in its alleged trade dress design are narrow and not infringed by Apothecary.

28. Any "protectable" features of Rexam's "I-Clic® packaging system" are disclosed and subject to claims of the '442 patent and thus cannot constitute a protectable nonfunctional trade dress.

29. Rexam's rights, if any, in its alleged trade dress of the "I-Clic® packaging system" are not infringed by Apothecary's Ezy Dose Reversible Cap Vials (Push-Tab Style).

30. Apothecary's Ezy Dose Reversible Cap Vials (Push-Tab Style) are not likely to cause confusion with Rexam's alleged trade dress.

31. Apothecary's Ezy Dose Reversible Cap Vials (Push-Tab Style) do not infringe any Rexam trade dress under 15 U.S.C. § 1125(a) and do not constitute unfair competition.

Count IV

DECLARATION OF NO STATE UNFAIR COMPETITION

32. The allegations of the preceding paragraphs 1-31 are incorporated herein by reference.

33. Apothecary's Ezy Dose Reversible Cap Vials (Push-Tab Style) do not infringe any Rexam trade dress under state statutory or common law of unfair competition.

Prayer for Relief

WHEREFORE, Apothecary prays for judgment against Rexam as follows:

1. A declaratory judgment that the '442 patent is not infringed, contributorily infringed, or infringed through inducement by Apothecary;

2. A declaratory judgment that the '442 patent is invalid;

3. A declaratory judgment that manufacture, use, and sale of the Apothecary Ezy Dose Reversible Cap Vials (Push-Tab Style) do not violate any Rexam trade dress rights and do not constitute unfair competition under 15 U.S.C. § 1125(a)

4. A declaratory judgment that the manufacture, use, and sale of the Apothecary Ezy Dose Reversible Cap Vials (Push-Tab Style) do not constitute unfair competition;

5. An order enjoining and restraining Rexam from further charges of infringement, or acts of enforcement based on the '442 patent against Apothecary and Apothecary's actual and prospective customers, and anyone in privity with Apothecary;
and

6. Any such other and further relief as this Court may deem just and equitable.

Demand for Jury Trial

Apothecary hereby demands a trial by jury of all issues so triable.

MERCHANT & GOULD P.C.

Dated: February 20, 2008

s/Alan W. Kowalchyk _____
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