

TTAB

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

---X  
LIMCO, INC. and TOO, INC.,

Petitioners,

Cancellation No. 92041556

v.

AMERICAN MARKETING ENTERPRISES,  
INC.,

Respondent.

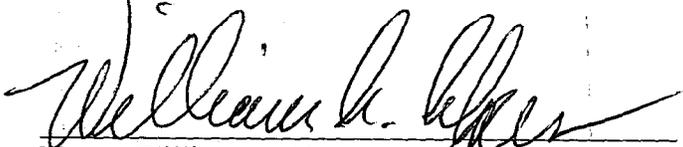
02-20-2003  
U.S. Patent & TMO/c/TM Mail Rcpt Dt. #7C

Box TTAB  
Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202

**CERTIFICATE OF EXPRESS MAILING UNDER 37 CFR 1.10**

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Date of Deposit: 20 February, 2003

I hereby certify that this correspondence, APPLICANT'S MOTION TO SUSPEND CANCELLATION PROCEEDING is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR §1.10, in an envelope, postage prepaid, on the date indicated above, and is addressed to Box TTAB, Assistant Commissioner for Trademarks, Arlington, VA 22202-3513.

  
Name: William A. Alper  
Date of Signature: 20 February, 2003

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**DEFENDANT'S MOTION TO SUSPEND CANCELLATION PROCEEDING**

Pursuant to 37 C.F.R. § 2.117(a), Defendant American Marketing Enterprises, Inc. ("AME") hereby moves to suspend this Cancellation proceeding until the adjudication of a related civil action entitled *Too, Inc., et al. v. American Marketing Enterprises, Inc., et al.*, Case No. C2 03 046, pending in the United States District Court for the Southern District of Ohio, Eastern Division (hereinafter "the Ohio Action").

**FACTS**

Defendant is the owner of United States Registration No. 2,585,720 for the mark TOO NITE for clothing for children, including, among other things, slippers, pajamas, nightshirts and nightgowns in International Class 25 (the "'720 Registration"). AME filed its application to register its TOO NITE mark on November 25, 1998 and the '720 Registration issued to AME on June 25, 2002.

On December 6, 2002 Petitioners filed the instant Petition for Cancellation of the '720 Registration. The relief requested in the Petition is that "Registration 2,585,720 be cancelled." (Petition, following ¶ 15). On January 10, 2003 Petitioners and Too Brands Investments, LLC., filed their complaint in the Ohio action alleging, among other things, that AME's use of its registered TOO NITE mark had infringed various marks allegedly owned by Petitioners, some of which are registered on the Principal Register. (Petitioners filed a corrected Complaint in the Ohio action on January 31, 2003, Exhibit A, attached). Among the relief sought by Petitioners in the Ohio action is a demand that "Defendant AME's Registration No. 2,585,270 of TOO NITE be cancelled" (Corrected Complaint, p. 21, ¶ E), precisely the relief sought by Petitioners in this proceeding.

The first use date for all of the marks Petitioners assert AME has infringed is later than November 28, 1998, the date AME filed its application for the '720 Registration, except for two marks which are not registered for children's clothing. Accordingly, AME alleged in its Answer in the Ohio action that "AME has priority over plaintiffs for its TOO NITE® mark for clothing for children" (¶73); that "AME's TOO NITE® mark does not infringe [Petitioners'] rights, if any, in any of [Petitioners'] marks (¶76); and that Petitioners have infringed AME's TOO NITE ® mark, (¶¶ 78-84). Among the relief requested by AME in the Ohio action is an injunction permanently enjoining Petitioners "from using ay mark including the word 'TOO' for, on or in connection with children's clothing." (Answer, p. 10, ¶ B).

## ARGUMENT

Title 37 C.F.R. § 2.117(a) provides:

Whenever it shall come to the attention of the Trademark Trial and Appeal Board that parties to a pending case are engaged in a civil action which may be dispositive of the case, proceedings before the Board may be suspended until termination of the civil action.

The gravamen of Petitioner's federal trademark infringement claim in the Ohio Action and of the claim in its Petition for Cancellation are identical. Adjudication of Petitioner's federal trademark infringement claim in the Ohio Action will resolve the same issue presented in this Cancellation proceeding, namely, whether AME is entitled to the '720 Registration.

To the extent that a civil action in a Federal district court involves issues in common with those in a proceeding before the Board, the decision of the Federal district court is binding upon the Board, but the decision of the Board is not binding upon the court. *See, e.g., Goya Foods Inc. v. Tropicana Products Inc.*, 846 F.2d 848, 6 U.S.P.Q.2d 1950 (2d Cir.1988); *American Bakeries Co. v. Pan-O-Gold Baking Co.*, 650 F.Supp. 563, 2 U.S.P.Q.2d 1208 (D.Minn. 1986); *Toro Co. v. Hardigg Industries, Inc.*, 187 U.S.P.Q. 689 (TTAB 1975), *rev'd on other grounds*, 549 F.2d 785, 193 U.S.P.Q. 149 (CCPA 1977); *Other Telephone Co. v. Connecticut National Telephone Co.*, 181 U.S.P.Q. 125 (TTAB 1974), *petition denied*, 181 U.S.P.Q. 779 (Comm'r 1974); *Tokaido v. Honda Associates Inc.*, 179 U.S.P.Q. 861 (TTAB 1973).

The adjudication of Petitioners' federal trademark infringement claim in the Ohio Action will be binding on and likely dispositive of this Cancellation proceeding. Going forward with this Cancellation proceeding would therefore needlessly waste resources of the TTAB and the parties, and possibly result in a decision that would be nullified by a contrary decision by the Ohio court.

Thus, to avoid needless duplication and the possibility of inconsistent determinations, Defendants hereby respectfully request that this Cancellation proceeding be suspended pending full determination of the Ohio action.

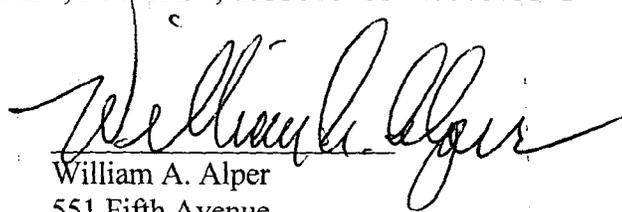
### CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Board suspend this Cancellation proceeding pending the final outcome of the Ohio Action.

Respectfully submitted,

COHEN, PONTANI, LIEBERMAN & PAVANE

By



William A. Alper  
551 Fifth Avenue  
New York, New York 10176  
(212) 687-2770

*Attorneys for Defendants*

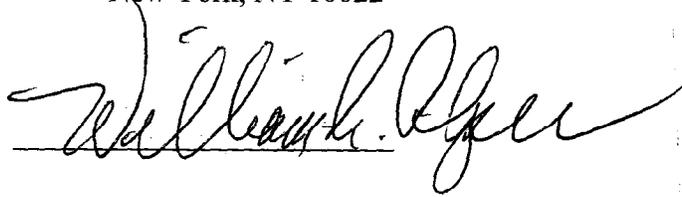
Dated: February 20, 2003

**CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below, a true and correct copy of the foregoing Motion in Cancellation proceeding Proceeding No. 92041556 entitled *Limco, Inc., et al. v. American Marketing Enterprises, Inc.*, was served by first class mail, postage prepaid, on counsel for Petitioners, addressed as follows:

Frank J. Colucci, Esq.  
COLUCCI & UMANS  
101 East 52nd Street  
New York, NY 10022

20 FEB 2003  
Date

A handwritten signature in cursive script, appearing to read "William H. O'Neil", written over a horizontal line.

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
KENNETH J. MURPHY  
CLERK  
03 JAN 31 PM 4:04

U.S. DISTRICT COURT  
SOUTHERN DIST. OHIO  
EASTERN DIVISION  
COLUMBUS

TOO, INC., et al.

Plaintiffs,

v.

AMERICAN MARKETING  
ENTERPRISES, INC., et al.

Defendants.

Civil Action No. C2-03-046

Judge Sargus

Magistrate Judge Kemp

**JURY TRIAL DEMANDED**

02-20-2003

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #7C

**PLAINTIFFS' ERRATA CONCERNING COMPLAINT FILED JANUARY 10, 2003**

Plaintiffs file this errata to add lines inadvertently omitted from the complaint filed January 10, 2003.

A complete and accurate copy of the Complaint is attached, incorporating these corrections. The exhibits attached to the original Complaint are complete and accurate.



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101 East 52<sup>nd</sup> Street  
New York, New York 10022  
(212) 935-5700

1-31-03

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via regular U.S. mail, postage prepaid, this 31<sup>st</sup> day of January, 2003 upon the following:

AMERICAN MARKETING ENTERPRISES, INC.  
10 West 33<sup>rd</sup> Street, Suite 516  
New York, New York 10001

KOHL'S DEPARTMENT STORES, INC.  
N56 W17000 Ridgewood Drive  
Menomonee Falls, Wisconsin 53051

TARGET CORPORATION  
1000 Nicollet Mall  
Minneapolis, Minnesota 55402



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James B. Hadden

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

TOO, INC.,  
8323 Walton Parkway  
New Albany, Ohio 43054

TOO BRANDS INVESTMENTS, LLC,  
8323 Walton Parkway  
New Albany, Ohio 43054

and

LIMCO, INC  
1105 North Market Street  
Wilmington, Delaware 19801

Plaintiffs,

v.

AMERICAN MARKETING  
ENTERPRISES, INC.,  
10 West 33<sup>rd</sup> Street, Suite 516  
New York, New York 10001

KOHL'S DEPARTMENT STORES, INC.  
N56 W17000 Ridgewood Drive  
Menomonee Falls, Wisconsin 53051

TARGET CORPORATION,  
1000 Nicollet Mall  
Minneapolis, Minnesota 55402,

and

ROSS STORES, INC.,  
8333 Central Avenue  
Newark, California 94560

Defendants.

Civil Action No. C2 03 046  
Judge Sargus  
Magistrate Judge Kemp  
**JURY TRIAL DEMANDED**

1-21-03

## COMPLAINT

Plaintiffs, TOO, INC., TOO BRANDS INVESTMENTS, L.L.C., and LIMCO, INC. (collectively "Limited Too"), by their attorneys, as and for their complaint against defendants, AMERICAN MARKETING ENTERPRISES, INC., KOHL'S DEPARTMENT STORES, INC., TARGET CORPORATION, and ROSS STORES, INC. (collectively "defendants"), aver as follows.

### THE PARTIES

1. Plaintiff TOO, INC. ("TOO") is a Delaware corporation, having its principal office and place of business at 8323 Walton Parkway, New Albany, Ohio 43054.

2. Plaintiff TOO BRANDS INVESTMENTS, L.L.C. ("TOO BRANDS") is an Ohio State Limited Liability Company, having its principal office and place of business at 8323 Walton Parkway, New Albany, Ohio 43054.

3. Plaintiff LIMCO, INC. ("LIMCO") is a Delaware corporation, having its principal office and place of business at 1105 North Market Street, Wilmington, Delaware 19801.

4. Upon information and belief, defendant AMERICAN MARKETING ENTERPRISES, INC. ("AME") is a New York corporation, having its principal office and place of business at 10 West 33<sup>rd</sup> Street, Suite 516, New York, New York 10001. Upon information and belief, AME is an importer and wholesaler of, inter alia, girls' sleepwear and is doing and/or transacting business in the State of Ohio and this judicial district.

5. Upon information and belief, defendant KOHL'S DEPARTMENT STORES, INC. ("KOHL'S") is a Delaware corporation, having its principal office and place of business at N56 W17000 Ridgewood Drive, Menomonee Falls, Wisconsin 53051, with a place of business within this judicial district. Kohl's is a discount retailer of, inter alia, girls' sleepwear and is

doing business in the State of Ohio and this judicial district.

6. Upon information and belief, defendant TARGET CORPORATION ("TARGET") is a Minnesota corporation, having its principal office and place of business at 1000 Nicollet Mall, Minneapolis, Minnesota 55402, with a place of business within this judicial district. Target is a discount retailer of, inter alia, girls' sleepwear and is doing business in the State of Ohio and this judicial district.

7. Upon information and belief, defendant ROSS STORES, INC. ("ROSS") is a Delaware corporation, having its principal office and place of business at 8333 Central Avenue, Newark, California 94560. Ross is a retailer of, inter alia, girls' sleepwear and is doing business in the State of Ohio and this judicial district.

#### **JURISDICTION AND VENUE**

8. This is a civil action involving claims of trademark infringement and unfair competition arising under the trademark laws of the United States, namely, the Trademark Act of July 5, 1946, commonly referred to as the Lanham Act, 15 U.S.C. § 1051, et seq., copyright infringement arising under the Copyright Law of the United States, 17 U.S.C. § 101, et seq., and trademark infringement and unfair competition in violation of the statutory and common law of the State of Ohio. This Court has jurisdiction over plaintiffs' federal claims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338(a). Jurisdiction of this Court for the related state law claims is based upon 28 U.S.C. §§ 1338(b) and 1367.

9. Venue is proper in this judicial district under 28 U.S.C. §§ 1391 and 1400(a).

### FACTS COMMON TO ALL COUNTS

10. TOO has become one of the leading specialty retailers for the market segment serving the American 'tween girl (ages 7-14), selling apparel, underwear, sleepwear, swimwear, lifestyle, and personal care products. TOO owns and operates over 510 LIMITED TOO stores in 48 states and Puerto Rico. It also distributes a LIMITED TOO catalog nationwide, with an annual circulation of over 31 million copies. It also conducts e-commerce on its website at [www.limitedtoo.com](http://www.limitedtoo.com). In 2002, TOO sent nearly 50 million direct-to-consumer mailings. TOO has promoted its brands and trademarks in hundreds of television commercial spots that have aired nationwide as well as in dozens of radio advertisements. Its Passion For Fashion promotional contest and fashion show attracted thousands of girls to these events that were held in major metropolitan areas across the country.

11. The business of TOO (which includes the business of its predecessors) began in 1987 and continues to thrive. Over the past five fiscal years, TOO's sales have more than doubled, as follows:

1997	\$256,699,000
1998	320,228,000
1999	374,637,000
2000	450,426,000
2001	545,040,000

12. The LIMITED TOO trademark and service mark and variations ("LIMITED TOO Marks") are the subject of a number of registrations in the United States Patent and Trademark Office. LIMCO is the record owner of the trademark registrations, and TOO is the exclusive licensee thereof worldwide. The LIMITED TOO trademark in a stylized font, together with a five-point daisy design, is the subject of Registration Nos. 2,243,565 and 2,336,279 and is depicted below:

# LIMITED TOO

13. Since long prior to the acts of defendants, TOO has continuously used its LIMITED TOO Mark in the same stylized font and with the same five-point daisy on its exterior store signage, interior point-of-sale, on sewn-in labels in its apparel, on its catalogs and website and on virtually all of its advertising and promotional materials.

14. The five-point daisy design ("Daisy Design"), apart from the mark LIMITED TOO, has been extensively used by TOO on signage, point-of-sale, on garments and non-apparel merchandise, in its catalogs and on its website and in molds to make accessory items in the shape of the five-point daisy, all of which are sold in LIMITED TOO stores. The five-point daisy has become a primary signature design of TOO.

15. In addition to its use of its corporate name Too, Inc., its trade name TOO, its trademarks and service marks LIMITED TOO, and its Daisy Design, TOO is the owner and/or exclusive user of the trademark TOO alone as well as part of a composite creating a family of marks ("TOO Marks") as follows:

MARK

TOO  
TOO  
TOOWARE  
TOO BUCKS  
TEAM TOO  
TOO ZZZZ'S  
TOO SWIM  
TOO SWIM

REGISTRATION/APPLICATION NO.

Registration No. 2,609,813  
Application No. 78/096,517  
Registration No. 2,553,951  
Registration No. 2,349,865  
Application No. 78/130,773  
Application No. 78/113,081  
Application No. 78/093,237  
Application No. 78/092,228

TOO TWISTED and Design	Registration No. 2,386,563
TOO THE GYM	Registration No. 2,462,251
TOES BY TOO and Design	Registration No. 2,400,776
TOO LIPS	Registration No. 2,504,431
TOO MUCH SHINE	Registration No. 2,611,990
TOO MUCH SHINE	Application No. 78/075,377
TOO 'DO	Registration No. 2,592,460
TOO 'DO	Application No. 76/428,598
TEAM TOO	Application No. 78/135,467
TOO SWEETS	Application No. 78/134,994
TOO IN ONE and Design	Application No. 75/456,372
TOO TUNES	Application No. 78/113,252
TOO GIRLS	Application No. 75/690,870
TOO MUCH FUN	Application No. 76/194,512
TOO MUCH FUN	Application No. 75/671,223
TOO BANDS	Application No. 76/194,486
TOO CHAT	Application No. 75/671,100

16. As a result of TOO's extensive use of the LIMITED TOO and TOO Marks, the name and mark TOO has become well and favorably known in the United States. As a result of TOO's extensive advertising and sales of goods and rendering of services under the LIMITED TOO and TOO Marks, as well as the extensive media coverage that plaintiffs and their Marks have received, the LIMITED TOO and TOO Marks have become and now are well-known as a leading source of apparel, personal care products, and accessories for girls. Plaintiffs are widely known and recognized by the LIMITED TOO and TOO Marks, which are closely and universally associated with plaintiffs as a means by which plaintiffs and their merchandise have become known to the public and their source and origin identified. For example, the TOO BUCKS program is a promotional event held three times per year during the key Easter, back-to-school, and holiday selling periods, which provides customers with coupons for discounts on future purchases based on purchases over a set amount. TOO BUCKS is a buyer reward program to offer customers an incentive to return to the store and buy again.

17. AME manufactures, distributes, and wholesales girls' sleepwear that features on the label and hangtag the mark TOO-NITE alongside a stylized star. AME sells to and distributes such sleepwear through national retailers, including defendants KOHL'S, TARGET, and ROSS. Defendant AME's manufacture and sale of girls' sleepwear under the mark TOO-NITE is confusingly similar to and likely to cause confusion with TOO's use of its LIMITED TOO and TOO Marks. In addition to the infringing use of the trademark TOO-NITE, defendant AME has stylized the font of TOO-NITE to appear confusingly similar to TOO's graphic font, as shown below:



18. AME has copied TOO's toggled lettering style of intermixing capital and lowercase letters. For example, AME's use of the letters "ITE" in TOO-NITE imitates TOO's LIMITED TOO Mark because both use lower case "i" and "e", but capitalize the interior letter "T". The dot on the "i" in each rises higher than the top of the capital "T". The lowercase "e" in both marks also appears strikingly similar. For the "TOO" portion of each mark, both use a capital "T" and two "O"s of varying widths. Most indicative of the substantial similarity is that AME places the second "O" higher than the first "O", just as TOO does, and that the first "O" also is positioned partially under the top of the "T". In addition, the vertical portion of the "T" itself meets the top of the letter left of center, just as TOO's "T" does.

19. Moreover, AME's stylized font for TOO-NITE appears alongside a five-sided stylized star which bears a striking resemblance to TOO's Daisy Design in that both have rounded points and use pink thread.

20. TOO BRANDS is the owner of copyrights in the designs or patterns applied to certain apparel sold through the LIMITED TOO retail channels. Copies of two such designs, namely, a Star Design and a Cloud Design are appended as Exhibits A and B, respectively. These designs are the subject of copyright registrations in TOO BRANDS' name issued by the United States Copyright Office. AME has manufactured or had manufactured and distributed and sold in commerce girls' pajamas featuring designs substantially similar to plaintiffs' copyrighted Star and Cloud Designs.

21. Although AME is the owner of United States Trademark Registration No. 2,585,720 of TOO NITE, plaintiffs LIMCO and TOO have filed a petition to cancel AME's registration in the United States Patent and Trademark Office before the Trademark Trial and Appeal Board.

22. On December 13, 2002, plaintiffs' counsel sent a letter to AME demanding that it immediately discontinue any and all further manufacture, offering for sale, sale or distribution of any apparel or accessories using TOO-NITE as mark and any apparel bearing a cloud or star design substantially similar to TOO's Star and Cloud Designs. Through counsel, AME refused to comply, and plaintiffs commenced this action.

23. AME's use of TOO-NITE, both with and without its five-pointed star design, infringes and unfairly competes with TOO's name and family of LIMITED TOO and TOO Marks in violation of the Trademark Act of the United States, commonly called the Lanham Act, as well as the common law. In addition, AME's star design (Exhibit D) and cloud design (Exhibit F) are substantially similar to TOO's Star and Cloud Designs (Exhibits A and B) and infringe TOO's copyrights in its designs in violation of the Copyright Act of the United States.

**COUNT I**

**FEDERAL TRADEMARK INFRINGEMENT**  
**(All Defendants)**

24. Plaintiffs repeat and incorporate herein by reference each and every one of the allegations contained in paragraphs 1 through 23, inclusive, of this complaint with the same force and effect as if herein again set forth in detail.

25. Defendants' use and sale of goods in commerce bearing the stylized TOO-NITE mark and star are likely to cause confusion, to cause mistake, or to deceive consumers into the erroneous belief that such sleepwear is approved, licensed, endorsed, sponsored by or in some way connected with plaintiffs.

26. Defendants' unauthorized use of a mark confusingly similar to plaintiffs' LIMITED TOO and TOO Marks in connection with a line of competing products has and continues to harm plaintiffs irreparably. The goodwill that plaintiffs have built up in the brand through years of substantial investment and effort, and in particular through its development of a consistent brand image featuring unique and highly distinctive elements, such as the distinctive font and Daisy Design described above, is now put at risk by virtue of defendants' misappropriation. Defendants' acts are transparently designed to confuse the public, and it is overwhelmingly likely that they will succeed in doing so.

27. Defendants' acts are likely to injure plaintiffs' goodwill and reputation in a number of ways. Plaintiffs have no control over the quality of defendants' products, which may well be inferior to the exceptionally high standards plaintiffs set for goods sold under the LIMITED TOO and TOO Marks. As a result, plaintiffs will not only suffer a diversion of sales and loss of profits due to defendants' deceptive practices, but the extremely valuable reputation

signified by the LIMITED TOO and TOO Marks also may be permanently damaged if, for example, a customer who is dissatisfied with a TOO-NITE product mistakenly believes that TOO is the source of or is in some way associated with that product.

28. Further, the public is likely to be harmed, as customers are confused or deceived into purchasing defendants' products thinking they are made, approved, sponsored, or endorsed by plaintiffs or in some other way connected to plaintiffs.

29. Upon information and belief, defendant AME adopted and defendants have used and are using the mark TOO-NITE in bad faith with full knowledge of plaintiffs' rights in and to the LIMITED TOO and TOO Marks, and with the intent to trade off of the goodwill associated therewith.

30. Defendants' purchasing, offering for sale and/or sales of sleepwear bearing TOO-NITE, with or without defendants' star design, is likely to cause confusion, to cause mistake, or to deceive consumers with respect to plaintiffs' federally registered LIMITED TOO and TOO Marks in violation of Section 32 of the Lanham Act, 15 U.S.C. § 1114.

31. Defendants' purchasing, offering for sale and/or sale of girls' sleepwear bearing TOO-NITE, with or without defendants' star design, constitute willful and intentional infringement of plaintiffs' LIMITED TOO and TOO Marks, causing irreparable injury to plaintiffs for which there is no adequate remedy at law.

**COUNT II**

**UNFAIR COMPETITION IN VIOLATION OF FEDERAL LAW**  
**(All Defendants)**

32. Plaintiffs repeat and incorporate herein by reference each and every one of the allegations contained in paragraphs 1 through 31, inclusive, of this complaint with the same force and effect as if herein again set forth in detail.

33. Defendants' purchasing, offering for sale and/or sale of girls sleepwear bearing TOO-NITE, with or without defendants' star design, constitute false designations of origin and false descriptions and representations, and is likely to cause confusion, to cause mistake or to deceive consumers by creating the false impression that plaintiffs or their goods are affiliated, connected or associated with defendants or their goods or that defendants' sleepwear is approved, licensed, endorsed, or sponsored by plaintiffs.

34. Defendants' acts constitute the use of a false designation of origin, a false description and a false representation that defendants' goods are plaintiffs' goods, are identical to or interchangeable with plaintiffs' goods, or are in some way approved, sponsored, authorized by or affiliated with plaintiffs.

35. With full knowledge of said falsity, defendants have sold and continue to sell such sleepwear in interstate commerce in such manner as to cause confusion or mistake among the public and to deceive the public, resulting in defendants' profit and defendants' great damage and injury.

36. Defendants' aforesaid acts constitute deliberate and intentional violations of Section 43 of the Lanham Act, 15 U.S.C. § 1125, causing irreparable harm to plaintiffs for which there is no adequate remedy at law.

**COUNT III**

**COPYRIGHT INFRINGEMENT OF STAR DESIGN**  
**(AME and TARGET)**

37. Plaintiffs repeat and incorporate herein by reference each and every one of the allegations contained in paragraphs 1 through 36, inclusive, of this complaint with the same force and effect as if hereinagain set forth in detail.

38. Plaintiff TOO BRANDS owns a copyrighted Star Design and acquired the rights thereto by written assignment. (Exhibit A) The Star Design contains material wholly original with plaintiffs and constitutes copyrightable subject matter under the Copyright Law of the United States. Subsequent to the creation of the Star Design in 2001, plaintiffs developed a line of sleepwear featuring the Star Design intended for sale in LIMITED TOO retail stores nationwide.

39. The first publication of the Star Design was on or about November 2, 2001, when sleepwear bearing the Star Design was first offered for sale in LIMITED TOO retail stores nationwide.

40. Since the publication date of the Star Design, plaintiff TOO BRANDS has complied in all respects with the Copyright Revision Act of 1976, Title 17, United States Code, and all other laws governing copyright, has secured the exclusive rights and privileges in and to the copyright of said Star Design and has received Certificate of Registration No. VA 1-154-377, dated December 6, 2002, from the Registrar of Copyrights. A copy of said certificate is annexed hereto and made a part hereof as plaintiffs' Exhibit C.

41. TOO BRANDS is the sole owner of all right, title, and interest in and to the copyright in its Star Design and the corresponding Certificate of Registration thereof, No. VA 1-154-377.

42. Subsequent to the creation and/or publication by TOO BRANDS of its copyrighted Star Design, defendants AME and TARGET infringed plaintiffs' copyright in said design by reproducing, displaying, manufacturing, printing, reprinting, publishing, vending, distributing, selling, promoting or advertising pajamas featuring a design substantially similar to said Star Design or by causing and/or participating in such reproducing, displaying, manufacturing, printing, reprinting, publishing, vending, distributing, selling, promoting or advertising thereof or by preparing derivative works based upon said copyrighted design. A color photocopy of defendant AME's substantially similar star design, identified as AME style G49116EFT5 (Exhibit D), is annexed hereto and made a part hereof as plaintiffs' Exhibit D.

43. Upon information and belief, defendant AME sold the pajamas bearing a design substantially similar to plaintiffs' copyrighted Star Design to defendant TARGET, which offered for sale, sold, and distributed the infringing goods.

44. Both AME style G49116EFT5 (Exhibit D) and TOO's Star Design (Exhibit A) feature an abundance of large blue stars with a dotted outline of the star placed slightly off-center and a smaller, darker blue star centered within the larger star, and adjacent to this primary feature there is a trail of smaller stars and curvilinear dotted lines, all on a lime-green background.

45. As a result of their unauthorized manufacturing, offering for sale and/or sale of girls' sleepwear featuring a star pattern as shown in Exhibit D, which is substantially similar to plaintiffs' copyrighted Star Design, as shown in Exhibit A, defendants AME and TARGET have infringed and are continuing to infringe the subject of plaintiffs' copyright registration in violation of plaintiffs' exclusive rights under the Copyright Law of the United States, 17 U.S.C. § 106, causing irreparable harm to plaintiffs for which there is no adequate remedy at law.

**COUNT IV**

**COPYRIGHT INFRINGEMENT OF CLOUD DESIGN**  
**(AME and KOHL'S)**

46. Plaintiffs repeat and incorporate herein by reference each and every one of the allegations contained in paragraphs 1 through 45, inclusive, of this complaint with the same force and effect as if hereinagain set forth in detail.

47. Plaintiff TOO BRANDS owns a copyrighted CLOUD DESIGN and acquired the rights thereto by written assignment. (Exhibit B) The Cloud Design contains material wholly original with plaintiff and constitutes copyrightable subject matter under the Copyright Law of the United States. Subsequent to the creation of the Cloud Design in 1999, plaintiff began to develop a line of sleepwear featuring the Cloud Design intended for sale in LIMITED TOO retail stores nationwide.

48. The first publication of the Cloud Design was on or about May 19, 2000, when sleepwear bearing the Cloud Design was first offered for sale in LIMITED TOO retail stores nationwide.

49. Since the publication date of the Cloud Design, plaintiff LIMITED TOO has complied in all respects with the Copyright Revision Act of 1976, Title 17, United States Code, and all other laws governing copyright, has secured the exclusive rights and privileges in and to the copyright of said Cloud Design and has received Certificate of Registration No. VA 1-154-378, dated December 6, 2002, from the Registrar of Copyrights. A copy of said certificate is annexed hereto and made a part hereof as plaintiffs' Exhibit E.

50. Plaintiff is the sole owner of all right, title and interest in and to the copyright in its Cloud Design and the corresponding Certificate of Registration thereof, No. VA 1-154-378.

51. Subsequent to the creation and/or publication by plaintiff of its copyrighted Cloud Design, defendants AME and KOHL'S infringed plaintiffs' copyright in said design by reproducing, displaying, manufacturing, printing, reprinting, publishing, vending, distributing, selling, promoting or advertising pajamas featuring a design substantially similar to said Cloud Design or by causing and/or participating in such reproducing, displaying, manufacturing, printing, reprinting, publishing, vending, distributing, selling, promoting or advertising thereof or by preparing derivative works based upon said copyrighted design. A color photocopy of defendant AME's substantially similar cloud design is annexed hereto and made a part hereof as plaintiffs' Exhibit F.

52. Upon information and belief, defendant AME sold the pajamas bearing a design substantially similar to plaintiffs' copyrighted Cloud Design to defendant KOHL'S, which advertised, offered for sale, sold, and distributed the infringing goods.

53. As a result of their unauthorized manufacturing, offering for sale and/or sale of girls' sleepwear featuring a cloud pattern as shown in Exhibit F, which is substantially similar to plaintiffs' copyrighted Cloud Design, as shown in Exhibit B, defendants AME and KOHL'S have infringed and are continuing to infringe the subject of plaintiffs' copyright registration in violation of plaintiffs' exclusive rights under the Copyright Law of the United States, 17 U.S.C. § 106, causing irreparable harm to plaintiffs for which there is no adequate remedy at law.

**COUNT V**

**DECEPTIVE TRADE PRACTICES**  
**(All Defendants)**

54. Plaintiffs repeat and incorporate herein by reference each and every one of the allegations contained in paragraphs 1 through 53, inclusive, of this complaint with the same force and effect as if hereinagain set forth in detail.

55. Defendants' aforementioned acts constitute violations of the Ohio Deceptive Trade Practices Act, R.C. § 4165.02(A)(1)-(4), causing irreparable harm to plaintiffs for which there is no adequate remedy at law.

**COUNT VI**

**COMMON LAW UNFAIR COMPETITION**  
**AND MISAPPROPRIATION**  
**(All Defendants)**

56. Plaintiffs repeat and incorporate herein by reference each and every one of the allegations contained in paragraphs 1 through 55, inclusive, of this complaint with the same force and effect as if hereinagain set forth in detail.

57. Defendants' purchasing, offering for sale and/or sale of girls sleepwear bearing TOO-NITE, with or without its star design, which is a reproduction, copy or colorable imitation of plaintiffs' LIMITED TOO and TOO Marks, constitutes unfair competition and misappropriation in violation of the common law of Ohio, causing irreparable harm to plaintiffs for which there is no adequate remedy at law.

**COUNT VII**

**DELIBERATE AND INTENTIONAL INFRINGEMENT**  
**(KOHL'S)**

58. Plaintiffs repeat and incorporate herein by reference each and every one of the allegations contained in paragraphs 1 through 57, inclusive, of this complaint with the same force and effect as if hereinagain set forth in detail.

59. For the third time within a span of eighteen months, KOHL'S has infringed plaintiffs' copyrighted designs. Upon information and belief, KOHL'S is engaged in a continuing and systematic pattern to deliberately and willfully violate plaintiffs' intellectual property.

60. On August 31, 2001, TOO commenced Civil Action No. 01-8200 against KOHL'S in the United States District Court for the Southern District of New York. The action alleged copyright infringement based on KOHL'S sales of children's pajamas in a design substantially similar to TOO's copyrighted Panda Design. On December 7, 2001, TOO amended its complaint to allege additional claims of copyright infringement and false designation of origin under Section 43(a) of the Lanham Act based on the sale by KOHL'S of a children's pajama design that used TOO'S copyrighted Dreamer Design and its distinctive Dreamer trademark. The action remains pending.

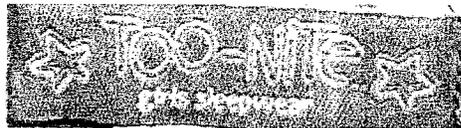
61. On December 19, 2001, TOO filed a civil action in this court captioned as Too, Inc. v. Kohl's Department Stores, Inc. and Wormser Company, Inc., C2 01 1256, seeking a temporary restraining order and preliminary injunction against KOHL'S and its supplier, alleging copyright infringement based on KOHL'S sale of children's pajamas substantially similar, if not identical, to TOO's pajamas featuring four different copyrighted fabric patterns. KOHL'S and its

supplier voluntarily agreed to a preliminary injunction, though the case has since settled.

62. As set forth in Count IV, KOHL'S is again offering for sale and selling girls' pajamas with designs substantially similar to plaintiffs' copyrighted designs. Specifically, KOHL'S has offered for sale and sold a girls' pajama in a cloud pattern, AME Style G49932LGKL (Exhibit F), that is substantially similar to TOO's Cloud Design (Exhibit B).

63. In addition, as set forth in Counts I and II, KOHL'S is offering for sale and selling sleepwear that bears a mark, TOO-NITE, which is confusingly similar to plaintiffs LIMITED TOO and TOO Marks. (Exhibits F and G) KOHL'S actions manifest a willful, intentional, and deliberate attempt to trade off of the goodwill plaintiffs enjoy in the competitive retail marketplace. As such, KOHL'S has caused and continues to cause substantial harm and damage to plaintiffs and should be held liable for damages, profits, treble damages, punitive damages, and attorneys fees.

64. The offering for sale and sale by KOHL'S of girls' sleepwear which feature on the label and hangtag the mark TOO-NITE alongside a stylized star, AME styles G49136DQT1 and G49932LGKL (Exhibits F and G), is confusingly similar to and likely to cause confusion with plaintiffs' LIMITED TOO and TOO Marks. In addition to the infringing use of the trademark TOO-NITE, the label on the goods in dispute feature the mark TOO-NITE in a stylized font confusingly similar to TOO's graphic font, as shown below:



65. The font copies TOO's toggled lettering style of intermixing capital and lowercase letters. For example, pajamas sold by KOHL'S use the letters "ITE" in TOO-NITE identically to

TOO's LIMITED TOO Mark because both use lower case "i" and "e", but capitalize the interior letter "T". The dot on the "i" in each rises higher than the top of the capital "T". The lowercase "e" in each also appears strikingly similar. For the "TOO" portion of each mark, both use a capital "T" and two "O"s of varying widths. Most indicative of the substantial similarity is that on the pajamas sold by KOHL'S the label places the second "O" higher than the first "O", just as TOO does, and that the first "O" also is positioned partially under the top of the "T". In addition, the vertical portion of the "T" itself meets the top of the letter left of center, just as TOO's "T" does.

66. Moreover, the stylized font for TOO-NITE appears alongside a five-sided stylized star which bears a striking resemblance to TOO's Daisy Design in that both have rounded points and use similar pink thread.

67. In addition, the use by KOHL'S of the stylized TOO-NITE mark and star are likely to cause confusion, to cause mistake, or to deceive persons into the erroneous belief that such sleepwear is approved, licensed, endorsed, or sponsored by plaintiffs or that it is in some way connected with plaintiffs.

68. KOHL'S purchasing, offering for sale and/or sales of sleepwear bearing TOO-NITE, with or without defendants' star design, constitute deliberate and intentional infringement of plaintiffs' LIMITED TOO and TOO Marks, and further manifests an ongoing and continuous pattern of deliberate and intentional copying of plaintiffs' intellectual property, for which KOHL'S should be held accountable.

WHEREFORE, plaintiffs pray that:

A. Defendants, their officers, directors, agents, servants, employees, attorneys and all persons, firms and corporations in active concert or participation with them or any of them, be permanently enjoined and restrained from:

(1) infringing plaintiffs' LIMITED TOO, TOO and family of TOO Marks (collectively, "TOO Marks") by manufacturing or causing to be manufactured, or by purchasing or causing to be purchased, or by offering for sale or by selling merchandise bearing plaintiffs' TOO Marks or any confusingly similar mark, including but not limited to TOO-NITE;

(2) copying and/or infringing Plaintiffs' copyrighted Star and Cloud Designs, and from distributing and selling any product bearing any design the same as or substantially similar to Plaintiffs' copyrighted Star and Cloud Designs;

(3) otherwise infringing plaintiffs' TOO Marks, copyrighted Star and Cloud Designs, or competing unfairly with plaintiffs;

B. Defendants be required to forthwith deliver up to plaintiffs for destruction any and all merchandise in their possession, custody, or control which would otherwise violate any of the aforesaid injunctions;

C. Defendants be further required to deliver up to plaintiffs for destruction any and all apparel, labels, signs, prints, packages, wrappers, receptacles, advertising, promotional and other material in their possession, custody or control displaying or promoting any merchandise bearing plaintiffs' TOO Marks or any confusingly similar mark, including but not limited to TOO-NITE, or plaintiffs' copyrighted Star and Cloud Designs;

D. Defendants be ordered, pursuant to Section 34 of the Lanham Act, 15 U.S.C. § 1116(a), to file with the Court and serve upon plaintiffs' counsel, within thirty (30) days of the entry of the injunctions and orders prayed for herein, a written report under oath setting forth in detail the form and manner in which they have complied with said injunctions and orders;

E. Defendant AME's Registration No. 2,585,720 of TOO NITE be cancelled, pursuant to Section 37 of the Lanham Act, 15 U.S.C. § 1119;

F. Plaintiffs have and recover from defendants, plaintiffs' reasonable attorneys' fees, costs and disbursements of this civil action pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117;

G. The Court award monetary relief against defendants TARGET and ROSS, including an accounting of such defendants' profits, plaintiffs' lost profits attributable to the infringing acts of TARGET and ROSS, and the damages sustained by plaintiffs by their acts, with such damages trebled, pursuant to Section 35(a) of the Lanham Act, 15 U.S.C. § 1117(a);

H. In addition to the foregoing prayer for relief, defendants KOHL'S and AME be ordered to:

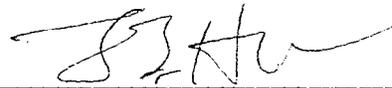
(1) account for all profits realized as a consequence of its unlawful acts of deliberate and intentional trademark infringement, unfair competition, and copyright infringement as alleged herein, and that the amount of profits realized by defendants KOHL'S and AME by reason of their unlawful acts be increased to a sum up to three times the amount thereof, as provided by law pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117;

(2) pay treble damages to plaintiffs in the full amount plaintiffs have sustained as a consequence of the deliberate and intentional acts of defendants KOHL'S and AME, pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117;

(3) pay plaintiffs' reasonable attorneys' fees, pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117, as the deliberate and intentional acts of defendants KOHL'S and AME renders this an exceptional case; and

(4) pay punitive damages to plaintiffs based on the deliberate and intentional acts of defendants KOHL'S and AME as may be allowed under Ohio law; and

I. Plaintiffs have such other and further relief against all defendants as the Court may deem just and proper.



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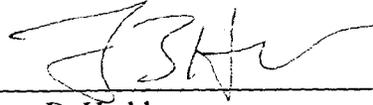
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**JURY DEMAND**

Plaintiffs hereby demand a trial by jury on all issues triable by a jury.



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James B. Hadden