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

Proceeding	92051449
Party	Defendant Commerce Capital, LP
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Date	12/03/2009
Attachments	Complaint.pdf (22 pages)(78862 bytes)

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

COMMERCE CAPITAL, LP,)	
)	Case No.
Plaintiff,)	
v.)	
)	
UNITED STOREOWNERS ASSOCIATION OF BABY STORES, LLC,)	
)	
Defendants.)	JURY TRIAL DEMANDED

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiff Commerce Capital, LP (“Commerce Capital”), by its undersigned attorneys, complains of United Storeowners Association of Baby Stores, LLC (“United Storeowners”) as follows:

NATURE OF CASE

1. This is an action for preliminary and permanent injunctive relief, and for damages. It arises from, seeks to enjoin, and prays for monetary damages caused by United Storeowners’ deliberate, knowing, unlawful, and unauthorized use and exploitation of certain service marks belonging to Commerce Capital. Commerce Capital, a secured creditor, became the owner of such marks after USA Baby, Inc. was forced into bankruptcy. USA Baby, Inc. was a franchisor with dozens of franchisees across the US. Alan Levine, the former owner of USA Baby, Inc’s predecessor, is the Manager of United Storeowners. Whether misguided or malicious, United Storeowners’ current conduct is part of an overall scheme to wrest control of the intellectual property of the USA Baby franchise from Commerce Capital.

2. United Storeowners’ conduct, as further alleged herein, violates Commerce Capital’s rights under the Lanham Act, 15 U.S.C. §§ 1114, 1125(a) and 1125(d); Section 2 of the

Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510/2; constitutes infringement of Commerce Capital's common law trademark rights; and constitutes tortious interference and unfair competition under Illinois common law.

PARTIES

3. Commerce Capital is a Tennessee limited partnership with its principal place of business located at 5115 Maryland Way, Suite 304, Brentwood, TN 37027.

4. United Storeowners Association of Baby Stores, LLC is an Illinois limited liability company with its principal place of business located at 11328 West Monticello, Westchester, IL 60154.

JURISDICTION

5. This Court has jurisdiction over Counts I through III of the Complaint pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1338(a), and 15 U.S.C. § 1121(a). This Court has jurisdiction over Counts IV through VI pursuant to principles of supplemental jurisdiction as codified by 28 U.S.C. § 1367, and pursuant to 28 U.S.C. § 1338(b), as these claims are joined with substantial and related claims under the Lanham Act.

VENUE

6. Venue is proper pursuant to 28 U.S.C. § 1391(b) because United Storeowners, resides in this Judicial District and has committed one or more of the acts complained of herein within this Judicial District.

ALLEGATIONS COMMON TO ALL COUNTS

Relationship Between the Parties and the Registered Marks

7. In 1975, Levine opened a specialty retail store selling furniture, toys, and accessory merchandise for infants and children under the mark THE BABY'S ROOM. He and his business partner, Barry Cohodes, operated their business through the Illinois corporation, The Baby's Room, Inc. ("The Baby's Room") until 1985. Levine served as President and owned 85.71 % of the stock; Cohodes was the CFO and owned 14.29% of the company stock. During those ten years, they opened seven (7) more stores in the Chicagoland area.

8. In 1985, Levine elected franchising as the method for further growing the business. As part of that process, they adopted the new brand USA BABY. In 1985, Levine and Cohodes formed Baby's Room U.S.A., Inc. in Illinois ("Baby's Room USA") to serve as the franchisor entity.

9. Over the next several years, Baby's Room USA sold many franchises. It adopted additional design marks and brand names including THE BABY'S ROOM and Design, USA BABY and Design, CHILD SPACE, and CHILD SPACE and Design. It ultimately registered these marks with the United States Patent and Trademark Office ("USPTO").

10. To generate even faster expansion, Levine hired Ron Eriksen in January 1999 as Director of Market Development. In 1999, there were forty (40) USA Baby stores.

11. In January 2000, Levine promoted Eriksen to Vice President of Market Development. That year, the company sold fourteen (14) franchises – a new company record. By the end of 2000, there were 51 USA Baby locations nationwide.





12. Sometime in 2001, Levine offered to sell Baby's Room USA to Eriksen, and Eriksen agreed. Eriksen began what would be a lengthy process of consummating this asset

purchase. He formed USA Baby, Inc. in Illinois (“USA Baby”) in 2001 to purchase the assets of Baby’s Room USA and ultimately serve as the franchisor.

13. Meanwhile, the company’s growth continued. In 2003, there were sixty-four (64) franchised outlets, and by the end of 2004 there were sixty eight (68).

14. The asset purchase was not finalized until May, 2004. As part of the asset purchase agreement, USA Baby purchased all of Baby’s Room USA’s assets, and became the franchisor. These assets included all of the intellectual property such as the registered service marks, common law marks, and copyrights (collectively the “Marks”). It also included all of the contractual relationships with the USA Baby franchisees.

15. The marks that were transferred to USA Baby or that were registered under USA Baby, Inc. included the following registered marks:

Mark	Registration Number	Registration Date
USA BABY	1,498,176 (Supplemental)	July 26, 1988
 USA BABY and Design	1,500,843	August 16, 1988
THE BABY’S ROOM	1,634,474	February 5, 1991
 THE BABY’S ROOM	2,443,615	April 17, 2001
CHILD SPACE	2,474,811	August 7, 2001
 CHILD SPACE and Design	2,472,684	July 31, 2001
 USA BABY and Design	2,692,465	March 4, 2003

Mark	Registration Number	Registration Date
THE BABY'S ROOM	3,031,990	December 20, 2005

Copies of the certificates of registration for the above Marks are attached hereto as Exhibit A.

16. As part of this transfer of assets, Levine obtained 12.66% of the stock of USA Baby, and the title President/Founder of the company. His new employment agreement provided him sundry benefits and perks, including the purchase of a car comparable to his Jaguar. He was responsible for representing the company in the marketplace and the trade, with the goal of ultimately transitioning power to Eriksen.

17. Also as part of this asset sale, Levine's minority partner, Cohodes, also retained his position as Chief Financial Officer, and obtained 2.11% of the stock of the new company.

18. Eriksen became the CEO of USA Baby and controlled the company as the owner of 85.23% of the stock.

19. In part to finance the purchase of the assets, USA Baby entered into a loan agreement with Commerce Capital. Commerce Capital is in the business of financing small business ventures.

20. As a result of the loan transaction, Commerce Capital became the primary secured lender of USA Baby. Commerce Capital recorded its security interest in the Marks at the USPTO.

21. Over the course of the next few years, the relationship between the three key parties disintegrated. They strongly disagreed about the vision and the management of the company.

22. In 2005 there were sixty-four (64) franchised outlets.

23. In or about 2005, Eriksen terminated Levine and Cohodes. Levine and Cohodes sued USA Baby and Eriksen for amounts allegedly owed to Levine and Cohodes pursuant to their asset purchase agreement.

24. On or about March, 2, 2007, several franchisees filed a class-wide arbitration claim against USA Baby.

25. On September 5, 2008, Wallis Kraham, Jack Whisler, and at least one of the franchisees and debenture holders (collectively, "Petitioning Creditors") filed an involuntary bankruptcy petition (the "Petition") against USA Baby (the "Bankruptcy Proceedings"). After the Petitioning Creditors filed the Petition, several additional franchisees discontinued making their royalty payments.

26. By the end of November 2008, all of USA Baby's franchisees had stopped paying their royalty payments. The failure of the franchisees to pay royalties was crippling to USA Baby, as these funds were USA Baby's primary source of income.

27. On or about November 26, 2008, the bankruptcy court entered an order for relief under Chapter 11, and USA Baby became a debtor in possession.

28. On December 19, 2008, however, a group of eight franchisees filed two motions seeking an order to either appoint a Chapter 11 trustee or to convert the Chapter 11 case into a Chapter 7 case. On December 23, 2008, another 27 franchisees filed joinders to the motions.

29. On January 28, 2009, the court granted the motion to appoint a Chapter 11 trustee who in turn and shortly thereafter filed his own motion to convert the Chapter 11 case into a Chapter 7 case. The motion to convert was granted on February 4, 2009, and a Chapter 7 trustee was appointed.

30. On or about May 13, 2009, upon motion to the court, an order was entered granting Commerce Capital relief from the automatic stay in order to foreclose on its lien against the assets of USA Baby. After proper notice and in accordance with Article 9 of the Uniform Commercial Code on July 6, 2009, Commerce Capital conducted a UCC sale of USA Baby's assets.

31. Commerce Capital purchased substantially all of the assets of USA Baby in the amount of \$1 million, including USA Baby's Marks and the USA Baby franchise agreements. It properly recorded the assignment of these Marks at the USPTO.

32. After purchasing the assets, Commercial Capital spent significant time and money investigating the status of the franchisee agreements as well as the intellectual property formerly owned by USA Baby as part of an effort to sell the assets of USA Baby to another buyer.

33. USA Baby, Inc., its predecessor, Baby's Room USA, its former affiliate, The Baby's Room, and the numerous franchisees extensively advertised their goods and services under the Marks. These parties variously spent millions of dollars to advertise the Marks. Pursuant to the franchise agreements, franchisees were required to pay five percent (5%) of their gross revenues on local advertising. For example, in 2006 the Franchisee's revenues were around \$70M; so the franchisees were expected to spend approximately \$3.5 million that year alone on local advertising. For a period of time, the franchisor also required franchisees to pay an additional percentage into a national advertising fund. For several years and approximately until 2006, the franchisor was an active member of a trade association which contributed an additional \$100,000 into the national advertising fund. These funds were used for television commercials and direct mailings.

34. The Marks have become known throughout the United States for high-quality children's and infants' goods and services. The Marks are widely known and recognized by consumers. Consumers choose the USA Baby brand because of its reputation for, among other things, quality service and specialty baby and children's products.

35. These Marks have been continuously used throughout the United States, Puerto Rico, and Mexico in connection with the sale of baby products and the operation of the USA Baby's branded franchised businesses.

36. The Marks serve to identify the source, origin and sponsorship of the USA Baby brand, its franchisees, its products and services, and serve to distinguish those products and services from those established, made, offered and sold by others.

37. The Marks have always been and continue to be in full force and effect. Each registration, (with the exception of Registration No. 1,498,176, which is on the Supplemental Register), is *prima facie* evidence of the validity of the mark, the registration of the Marks, of Commerce Capital's ownership of the Marks, and of its exclusive right to use those Marks in commerce for the services and goods for which the registrations were granted, as provided in 15 U.S.C. §§ 1057(b) and 1115(a).

38. The USA Baby franchise agreements grant each franchisee a limited license to use the Marks. Further, the franchise agreements provide that the franchisor owns the Marks, and that all goodwill associated with using the Marks inures to the benefit of the franchisor.

39. During this tumultuous time, however, Levine was not entirely on the sidelines. Upon information and belief, he became associated (or reacquainted) with Steve Krickovic, the franchisee at the Richmond, Virginia location.

40. On or about December 29, 2008, Steve Krickovic registered the domain name USABabyStores.com with the domain name registrar GoDaddy. He is listed as the administrative and technical contact. The GoDaddy Whois information lists the registrant as “USA Baby” (See attached Record as Exhibit B).

41. Upon information and belief, on or about July 27, 2009, Levine became the Manager of the then newly formed United Storeowners. It has adopted the trade name USA Baby Stores. Upon information and belief, several of the USA Baby franchisees are members of United Storeowners, including John Walston a franchisee in Scottsdale, Arizona, and Melissa Waring, a franchisee in Houston, Texas.

42. After Commerce Capital purchased the assets of USA Baby, Levine, on behalf of several franchisees and likely on behalf of United Storeowners, approached Commerce Capital about acquiring the assets. These negotiations were unsuccessful as neither Levine nor United Storeowners was willing to pay any cash for the assets. Commerce Capital informed Levine that it had another more substantial offer from a former USA Baby franchisee and current licensee, Michael Schaul (“Schaul”).

43. On or about September 4, 2009, Commerce Capital agreed to sell the assets of USA Baby to Schaul’s company, Lone Star Baby & Kids Franchise Co., LLC (“Lone Star”). As part of that agreement, Commerce Capital represented and warranted that it had ownership of certain intellectual property and that those assets were free and clear of any encumbrances or interests.

44. On September 8, 2009, Commerce Capital sent a letter to all franchisees explaining that it was planning to sell the assets of USA Baby to Lone Star. The letter provided the franchisees with three options: 1) close their business; 2) to settle any outstanding obligations

under the franchise agreements and rebrand their store; or, 3) enter into a new franchise agreement.

45. On September 11, 2009, United Storeowners filed a cancellation proceeding with the United States Trademark Trial and Appeal Board against Commerce Capital, claiming that: 1) it sells goods and services under the trademarks owned by Commerce Capital; 2) that USA Baby, Inc. was dissolved; and 3) that Commerce Capital has abandoned its trademarks.

46. On the same date, United Storeowners filed applications for all of the marks owned by Commerce Capital and acquired from USA Baby in the UCC sale. As part of those applications, it falsely alleged that United Storeowners is the rightful owner of the Marks with the exclusive right to use them throughout the United States.

47. Also on September 11, 2009, United Storeowners issued a press release entitled: "U.S.A. Baby Stores Reserve Their Intellectual Property" in which it claimed that it was formed by a majority of USA Baby, Inc.'s former franchisees and that they have filed new federal registration applications to reserve their trademarks to USA BABY, CHILD SPACE and THE BABY'S ROOM." The press release further states that "U.S.A. Baby Stores has 24 members with 25 stores spread across 15 States and two countries (plus the territory of Puerto Rico)."

48. On September 22, 2009, counsel for several franchisees wrote a letter to Commerce Capital claiming, among other things, that the franchise agreements were no longer in effect.

49. After United Storeowners filed its cancellation proceeding, Commerce Capital was unable to go forward with closing on the deal with Lone Star because it could no longer warrant that the title to the trademarks was free and clear of any encumbrances or interests.

United Storeowners' Website

50. Upon information and belief, Krickovic's domain name USABabyStores.com is associated with United Storeowners. The website offers information concerning locations, products, and services associated with the Marks. United Storeowners uses the website to market products and services to customers, the public, and the trade.

51. Specifically, on the United Storeowners' website, there is a link entitled "Store Locator." Under "Store Locator" is a list of stores located throughout the United States, Mexico, and Puerto Rico. All of the stores identified are USA Baby franchisees.

52. On the list of stores are links to some of the individual franchisee websites. Each of the individual websites demonstrates that the franchisees are using the Marks in an unauthorized manner, often changing the color, font, and text of the Marks. The marks being used by the franchisees are, however, aside from these alterations, identical to the Marks. None of the franchisees obtained the necessary permission under their franchise agreement to establish the offending websites or to be affiliated with United Storeowners.

53. For years, USA Baby maintained its own website at: <http://www.usababy.com> (the "USA Baby Website"). The USA Baby Website contained information about its products, its store locations, and about franchisee opportunities and was strikingly similar to the United Storeowners' website. A copy of the archived USA Baby Website home page is attached hereto as Exhibit C. Archived pages from the USA Baby Website with the USA Baby service mark go back at least as far as 1999.

54. The most recent archived page of the USA Baby Website was August 2008. Upon information and belief, however, the USA Baby Website was operational until approximately December of 2008 or January 2009.

**The Franchise Agreements and United Storeowners' False Statements,
Acts of Unfair Competition, and Trademark Infringement**

55. The obligations of the franchisees under the various franchisee agreements with USA Baby remain in full force and effect¹. Each of those agreements requires the franchisee to seek permission for all advertising. Each of those agreements contains restrictive covenants that extend beyond the termination of the franchise. Even if any of the franchise agreements have terminated, the terminated franchisees do not have the permission, authority or consent of USA Baby/Commerce Capital to use any of the Marks.

56. The USA Baby franchisees are either current franchisees of USA Baby who are misusing the Marks and falsely disavowing association with the USA Baby franchise, or they are terminated franchisees using the Marks without permission, authority, or consent of USA Baby/Commerce Capital.

57. Despite the fact that the franchisees are still using the Marks, they have formed United Storeowners and maintain a website that wrongly suggests that the franchisor of the USA Baby stores is United Storeowners.

58. The United Storeowners' website has a link to store locations where several USA Baby franchisees can be located as well as links to the individual franchisees' websites.

59. Furthermore, United Storeowners has issued public statements falsely claiming that the individual franchisees have rights to the Marks with full knowledge that the Marks, as well as the franchisee agreements, were purchased by Commerce Capital.

60. Defendant's trade name "USA Baby Stores" is a name that is confusingly similar to "USA Baby" and was intended to trade on or take advantage of the USA Baby Brand's reputation and goodwill.

61. United Storeowners' use of confusingly similar and identical marks is without the license or consent of Commerce Capital and has caused or is likely to cause mistake, confusion, or deception in the minds of the public as to source, affiliation, and sponsorship.

62. The USA Baby franchise and United Storeowners allegedly offer essentially identical services to the same consumers. In fact, they are comprised in many instances of the same franchisees. Upon seeing the familiar Marks through United Storeowners' unauthorized use thereof, consumers will be deceived into concluding that United Storeowners' business and the products and services offered and sold in connection therewith, are sponsored or endorsed by USA Baby/Commerce Capital. Consumers will likely conclude that United Storeowners' products and services bear the Marks pursuant to USA Baby or its successor's authority and permission.

63. United Storeowners has full knowledge of the registration and validity of Commerce Capital's Marks. United Storeowners' continued infringement is willful, malicious, fraudulent, and deliberate.

64. United Storeowners has been improperly using the Marks and passing them off as their own. True and correct copies of the homepage and Store Locator page of the United Storeowners' Website are attached hereto as Exhibit D.

65. Upon information and belief, from approximately February or March of 2009 through October 28, 2009, the United Storeowners' Website has repeatedly displayed the Marks.

66. Through and including the present, United Storeowners was not authorized to display the Marks on the United Storeowners' Website or anywhere else, or to use the Marks in any other way.

¹ Commerce Capital has issued a Termination Notice to Steve and Happy Krickovic terminating their franchise agreement for breach.

COUNT I
(Trademark Infringement - 15 U.S.C. § 1114(1)(a))

67. Commerce Capital repeats and re-alleges the allegations set forth in Paragraphs 1 through 66 of this Complaint as though set forth fully herein.

68. United Storeowners, without consent or authorization by USA Baby or its successor-in-interest Commerce Capital, has used and continues to use all or some of the Marks or a reproduction, copy, or colorable imitation of the Marks in connection with its business.

69. United Storeowners' actions constitute an infringing use in interstate commerce of a reproduction, copy, or colorable imitation of the Marks, and United Storeowner's sale, offering for sale, distribution, or advertising of goods and services under the Marks similar thereto, is likely to cause confusion or mistake or to deceive the public in violation of 15 U.S.C. § 1114(1)(a).

70. As a direct and proximate result of Defendant's infringement, Commerce Capital has been irreparably injured – including injury to the goodwill and reputation created by USA Baby and sold to Commerce Capital – resulting in lost revenues and profits to the franchisor and the continued diminution of goodwill, which has caused the USA Baby Brand to lose value and will likely cause further depreciation of the value of the USA Baby Brand.

71. Commerce Capital has no adequate remedy at law because the Marks are unique and represent to the public USA Baby Brand's identity, reputation, and goodwill, such that damages alone cannot fully compensate Commerce Capital for United Storeowners' misconduct.

72. Unless enjoined by this Court, United Storeowners will continue to use and infringe the Marks, causing further injury irreparable injury to Commerce Capital.

COUNT II
(Passing Off, False Advertisement and Unfair Competition
15 U.S.C. § 1125(a))

73. Commerce Capital repeats and re-alleges the allegations set forth in Paragraphs 1 through 72 of this Complaint as though set forth fully herein.

74. United Storeowners' misrepresentation of its ownership rights to the USA Baby Marks and its unauthorized use of the Marks on United Storeowners' website are confusing and highly likely to confuse, mislead, and/or deceive customers, purchasers, and members of the general public as to the origin, source, sponsorship, and/or affiliation of United Storeowners and their members' services, and are highly likely to cause such individuals to erroneously believe that United Storeowners and their members have the right, authorization, and approval to use the Marks, when in fact, United Storeowners' members are still USA Baby franchisees and only have such authority in the context of their status as USA Baby franchisees.

75. United Storeowners' actions constitute false or misleading descriptions, false advertising, and false designations of the origin and/or sponsorship of United Storeowners and its members' services and products in violation of 15 U.S.C. § 1125(a). In employing the foregoing false descriptions, false advertising, and false designations of origin, United Storeowners has engaged in unfair competition with the USA Baby franchises now owned by Commerce Capital.

76. The Marks were variously used continuously by USA Baby and its successors from as early as 1975 and have been continuously used in connection with the franchises and with the sale of baby products all over the United States.

77. United Storeowners' actions, as aforesaid, were taken with actual notice and full knowledge that they were not authorized or licensed by USA Baby/Commerce Capital. United Storeowners has nevertheless used, and continues to willfully and unlawfully use, the Marks

with the intent to confuse, mislead, and/or deceive customers, purchasers, and members of the general public as to the origin, source, sponsorship, and/or affiliation of United Storeowners' products, and with the intent to trade on the USA Baby Brand's reputation and goodwill, all for United Storeowners' own commercial gain and enrichment and to the commercial loss and disadvantage of the USA Baby franchises and Commerce Capital.

78. United Storeowners' conduct is willful and in flagrant disregard of Commerce Capital's lawful rights, warranting a finding that this is an "exceptional case" within the meaning of 15 U.S.C. § 1117(a).

79. As a direct and proximate result of United Storeowners' unlawful acts, false and deceptive practices, and intent to trade on the goodwill of the USA Baby Brand, Commerce Capital has suffered irreparable harm including injury to the goodwill and reputation created by USA Baby and sold to Commerce Capital – resulting in lost revenues and profits to the franchisor and the continued diminution of goodwill, which has caused the franchise to lose value and will likely cause further depreciation of the value of the franchise.

80. Commerce Capital has no adequate remedy at law and will continue to be damaged by United Storeowners' conduct unless this Court preliminarily and permanently enjoins USA Baby Stores' unlawful activities as provided by 15 U.S.C. § 1116.

COUNT III
(Cybersquatting – 15 U.S.C. § 1125(d))

81. Commerce Capital repeats and re-alleges the allegations set forth in Paragraphs 1 through 80 of this Complaint as though set forth fully herein.

82. On or about December 2008, Stephen Krickovic, an owner of D&R Ventures, Inc., which was at that time a USA Baby franchisee, but is no longer registered the domain name USABabyStores.com.

83. The domain name is confusingly similar to USA Baby – a mark owned by Commerce Capital.

84. As the time Krickovic registered the domain name, the USA Baby mark was distinctive.

85. United Storeowners is using Krickovic's domain name to advertise the USA Baby Marks.

86. United Storeowners' actions were done willfully in an effort to trade on the goodwill of the USA Baby franchise and to permanently misappropriate USA Baby's intellectual property in violation of the franchise agreements of its members.

87. As a direct and proximate result of United Storeowners' unlawful acts and intent to trade on the good will of the USA Baby Brand, Commerce Capital has suffered irreparable harm including injury to the goodwill and reputation created by USA Baby and sold to Commerce Capital – resulting in lost revenues and profits to the franchisor and the continued diminution of goodwill, which has caused the franchise to lose value and will likely cause further depreciation of the value of the franchise.

COUNT IV
(Tortious Interference)

88. Commerce Capital repeats and re-alleges the allegations set forth in Paragraphs 1 through 87 of this Complaint as though set forth fully herein.

89. On or about September 4, 2009, Commerce Capital entered into an agreement with Lone Star whereby Lone Star agreed to purchase the assets of the USA Baby franchise.

90. United Storeowners was aware of the agreement.

91. United Storeowners intentionally interfered with the agreement by filing a petition to cancel the Marks owned by Commerce Capital and by filing applications to register the Marks in its own name.

92. Such interference by United Storeowners rendered it impossible for Commerce Capital to close on the asset purchase agreement as Commerce Capital could no longer represent that it had an unencumbered title to the intellectual property of the USA Baby franchise.

93. As a direct and proximate cause of Commerce Capital's inability to close on the agreement, Commerce Capital was in breach of the agreement and suffered damages in an amount to be determined at trial, but not less than \$1,180,000.

94. In addition, United Storeowners' conduct was willful and malicious entitling Commerce Capital to punitive damages.

COUNT V
(Illinois Uniform Deceptive Trade Practices - 815 ILCS 510/2)

95. Commerce Capital repeats and re-alleges the allegations set forth in Paragraphs 1 through 94 of the Complaint as though set forth fully herein.

96. United Storeowners' conduct constitutes deceptive trade practices in violation of Section 2 of the Illinois Uniform Deceptive Trade Practices Act (the "Deceptive Trade Practices Act"), 815 ILCS 510/2.

97. United Storeowners' has engaged in business activity that creates confusion as to the source, sponsorship, approval, and/or affiliation of its business, products, and services. Among other things, United Storeowners has violated the Deceptive Trade Practices Act by engaging in the unauthorized use of the Marks and diverting business from the USA Baby

franchise and falsely stating that it or its members have the right to use the Marks or have ownership interests in the Marks.

98. United Storeowners has engaged in the foregoing conduct willfully and wantonly, or at the very least, with reckless indifference to Commerce Capital's rights.

99. As a direct and proximate result of United Storeowners' deceptive trade practices, Commerce Capital has suffered irreparable harm including injury to the goodwill and reputation created by USA Baby and sold to Commerce Capital – resulting in lost revenues and profits to the franchisor and the continued diminution of goodwill, which has caused the franchise to lose value and will likely cause further depreciation of the value of the franchise.

100. Commerce Capital has also suffered damages in an amount to be determined at trial.

101. Commerce Capital does not have an adequate remedy at law and will continue to be damaged by United Storeowners' deceptive trade practices unless this Court preliminarily and permanently enjoins United Storeowners' unlawful activities as provided by Section 3 of the Deceptive Trade Practices Act, 815 ILCS 510/3.

102. United Storeowners' willful misconduct warrants an award of attorneys' fees and costs as permitted by Section 3 of the Deceptive Trade Practices Act, 815 ILCS 510/3.

COUNT VI
(Common Law Trademark Infringement)

103. Commerce Capital repeats and re-alleges the allegations set forth in Paragraphs 1 through 102 of the Complaint as though set forth fully herein.

104. Defendant's aforesaid acts constitute trademark infringement of Commerce Capital's common law rights in the Marks in violation of Illinois Common Law.

105. As a direct and proximate result of Defendants' conduct, Commerce has suffered damage and irreparably injury.

106. Defendants have damaged Commerce Capital in an amount to be determined at trial.

COUNT VII
(Common Law Unfair Competition)

107. Commerce Capital repeats and re-alleges the allegations set forth in Paragraphs 1 through 106 of the Complaint as though set forth fully herein.

108. Defendant's aforesaid acts constitute unfair competition in violation of the common law of the State of Illinois, thereby entitling Commerce Capital to equitable relief, as prayed for herein, and damages according to proof to the fullest extent allowed by law.

109. As a direct and proximate result of Defendants' conduct, Commerce Capital has suffered damage and irreparably injury.

110. Defendants have damaged Commerce Capital in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Commerce Capital requests the entry of an order in its favor and against United Storeowners:

1. Preliminarily and permanently enjoining United Storeowners its members, managers, officers, agents, servants, employees, and attorneys, and those in active concert or participation with any of them from: (1) using the USABabyStores.com domain name for any goods or services related to the sale of children and infants' goods and services related to any children or infant specialty retail franchise; (2) publishing or displaying the Marks on its website

or anywhere else or from publishing any marks confusingly similar to the Marks, including the websites of individual USA Baby franchisees containing the Marks and/or variations thereof that are confusingly similar to the Marks; (3) representing in any manner that it is the franchisor for the USA Baby franchisees; (4) otherwise representing to third parties, through whatever means or communications, that USA Baby or Commerce Capital endorses or accredits United Storeowners' products or services; and (5) representing that it has any rights to the Marks by virtue of the bankruptcy proceedings of USA Baby, Inc.

2. Ordering United Storeowners to file with the Court and serve on Commerce Capital within 30 days after the above injunction a report in writing, under oath, setting forth in detail the manner and form in which United Storeowners has complied with the injunction;

3. Ordering United Storeowners to submit an accounting so that all gains, sales, profits, and advantages derived by United Storeowners from each of its unlawful acts of unfair competition, consumer fraud, deceptive trade practices, and copyright infringement may be determined;

4. Declaring that United Storeowners has competed unfairly with the USA Baby franchise, and engaged in deceptive trade practices by utilizing the Marks and derivations thereof to divert business from the USA Baby franchise.

5. Finding that this case is exceptional, warranting an award of treble damages in Commerce Capital's favor and against United Storeowners pursuant to 15 U.S.C. § 1117(a);

6. Finding that United Storeowners has infringed Commerce Capital's trademarks by utilizing the Marks without consent, permission, or license, is liable for willful trademark infringement for each separate act of infringement, and, for such infringement, and each separate act thereof, must pay Commerce Capital: (1) such damages as Commerce Capital has sustained

in consequence of United Storeowners' infringement of said trademark rights including, to the extent available, punitive damages in an amount to be determined and to account for and pay to Commerce Capital, United Storeowners' gains, profits, and advantages derived by United Storeowners from its infringement, the total amount to be determined at a trial of this action, or such damages as shall appear proper within the provisions of the Lanham Act.

7. Awarding Commerce Capital punitive damages as a result of the intentional or gross and reckless nature of United Storeowners' conduct;

8. Awarding Commerce Capital attorneys' fees and costs against United Storeowners;

9. Awarding Commerce Capital pre-judgment interest and post-judgment interest; and/or

10. Awarding such other and further relief to Commerce Capital as the Court deems fair, just, and equitable.

Dated: November 18, 2009

Respectfully submitted,

COMMERCE CAPITAL, L.P.

By: /s/ Jamie A. Robinson
One of Its Attorneys

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