

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

THIRD SIDE MUSIC, INC.,
1334 Notre-Dame Street West, Suite 2
Montreal (Quebec) H3C 1K7 Canada

Plaintiff,

vs.

EVENFLO COMPANY, INC.,
225 Byers Road
Miamisburg, Ohio 45342

Defendant.

Case No. 3:22-cv-315

Judge:

COMPLAINT WITH JURY DEMAND

Plaintiff Third Side Music, Inc. (“Third Side”) for its complaint against Defendant Evenflo Company, Inc. (“Evenflo”) alleges as follows:

Nature of the Action

1. Music can make or break an advertisement. It can harmonize with the visuals of a commercial to create an iconic piece of pop culture, or it can fall flat and cause the ever more distracted consumer to deservedly shift their attention elsewhere.
2. Here, Defendant Evenflo, a baby stroller company seeking to lure young, hip consumers, has tried to both sell its products and enhance its appeal by mimicking the music used by well-established major brands such as Apple, the FIFA video game series, and Jimmy Choo. But while these companies go to great lengths to curate their sonic branding through the discovery and licensing of not-yet-but-soon-to-be-popular songs, Evenflo chose to take the less honorable path: using a soundalike copy of a hit song to avoid paying the artists what they are owed while still appealing to the young, hip fans of the musical artist and major brands.

3. No more. By this complaint, Plaintiff seeks actual damages and a permanent injunction arising from Evenflo's unlawful infringement of the immensely popular song "Best Friend" by SOFI TUKKER, a soundalike copy of which Evenflo has used in ads appearing on, but not limited to Evenflo's website, Amazon.com, YouTube, Bed Bath and Beyond, and Buy Buy Baby without proper licensing or authorization from Plaintiff or the artists.

Parties, Jurisdiction, and Venue

4. Third Side is a corporation organized under the laws of Quebec, Canada, with its principal place of business located in Montreal, Quebec. Third Side's claims arise under the Copyright Act, 17 U.S.C. §§ 101 *et seq.* Subject matter jurisdiction over this action is conferred upon this Court by 28 U.S.C. §§ 1331 and 1338.

5. Evenflo is a corporation organized under the laws of Delaware with its principal place of business located at 225 Byer Road, Miamisburg, Ohio 45342. This Court has personal jurisdiction over Evenflo based on its presence within this judicial district.

6. Venue in this district is proper under 28 U.S.C. § 1391 because Evenflo's principal place of business is within this judicial district.

Third Side, SOFI TUKKER, and "Best Friend"

7. SOFI TUKKER is an American musical duo consisting of Ms. Sophie Hawley-Weld ("Ms. Hawley-Weld") and Tucker Halpern ("Mr. Halpern").

8. Ms. Hawley-Weld and Mr. Halpern met and began collaborating on music in 2014 when they were college students at Brown University. Upon graduation, they moved to New York and started their band "SOFI TUKKER," developing an invigorating and energetic blend of "jungle pop" and dance music. On July 8, 2016, SOFI TUKKER released an EP, *Soft Animals*, which

included the song, “Drinkee,” which was nominated for a 2017 Grammy for Best Dance Recording.

9. SOFI TUKKER quickly reached new heights with the release of their hugely successful single “Best Friend (feat. NERVO, The Knocks & Alisa Ueno)” (hereinafter, “Best Friend”), which was released in September 2017 and reached #1 on Billboard’s Dance/Mix Show Airplay chart in January 2018. Famously, “Best Friend” was licensed by Apple for use in its advertisement for the launch of the groundbreaking iPhone X in September 2017. “Best Friend” has generated and continues to generate substantial revenue in licensing fees.

10. Third Side is the exclusive administrator for Ms. Hawley-Weld’s and Mr. Halpern’s share of the copyrights in and to the musical composition of “Best Friend” (the “Composition”), and has the exclusive right, along with the owners and/or administrators of the other co-writers’ shares, to grant licenses to publicly perform, manufacture, distribute, license, and otherwise commercially exploit the Composition, and to collect the royalties generated from the commercial exploitation of the Composition.

11. Third Side has secured several lucrative and high profile licenses in various platforms for the Composition, including, but not limited to, multiple deals with Apple, Major League Baseball, the FIFA video game series, Jimmy Choo, Triumph, and many television shows and films, among other uses.

12. On August 21, 2018, Third Side obtained the currently valid and subsisting Certificate of Copyright Registration from the United States Copyright Office on behalf of the Ms. Hawley-Weld and Mr. Halpern for the Composition under registration number PS 2-117-966. *See*

Exhibit A.

13. As of the date of this filing, “Best Friend” has been widely disseminated, with the music video collecting over 45,000,000 views on YouTube, and the song receiving over 114,000,000 plays on Spotify.

14. Third Side and its respective predecessors and/or successors-in-interest have fully complied with the statutory formalities governing copyrights with respect to the Composition.

Evenflo’s Infringement of “Best Friend”

15. In or around May 2021, Third Side became aware that Evenflo was using a “soundalike” version of the Composition (the “Infringing Song”) in and as part of a set of online advertisements for the Evenflo® Pivot Xpand™ Modular Travel System stroller product (the “Infringing Ads”).

16. A cursory comparison of the Infringing Ads containing the Infringing Song and “Best Friend” reveals that the Infringing Song is a “soundalike” that substantially copies from the Composition. Indeed, Third Side retained an independent, qualified and acclaimed musicologist to render a musicological analysis and comparison of the two works. The musicologist concluded that the Infringing Song “sounds substantially similar to BEST FRIEND, the similarity does not appear to be coincidental, and the amount of musical expression that appears to have been copied is substantial and constitutes the musical ‘heart’ of both works.”

17. Third Side is informed and believes, and on that basis alleges, that Evenflo deployed the Infringing Ads on, but not limited to, the Evenflo website, as well as the Amazon.com, YouTube, Bed Bath and Beyond, and Buy Buy Baby product pages for its Evenflo® Pivot Xpand™ stroller, from at least September 2018 until April 2022.

18. Third Side is unaware of the full extent of Evenflo's use of the Infringing Song and may amend this Complaint and seek appropriate damages if such further infringing uses emerge through discovery.

19. Third Side is informed and believes, and on that basis alleges, that at no time before publication of the Infringing Ads did Evenflo obtain a synchronization license to use the Composition in the Infringing Ads, either from Third Side or from the owners or administrators of the other co-writers' shares of the Composition.

20. Third Side is informed and believes, and on that basis alleges, from at least September 2018 to April 2022, Evenflo has released, distributed, commercially exploited the Composition through the use of the Infringing Song in the Infringing Ads to sell its Evenflo® Pivot Xpand™ Modular Travel System stroller product, all without obtaining a license for the Composition and without paying any royalties or other compensation to Third Side.

21. In January 2022, Third Side notified Evenflo's copyright agent of Evenflo's copyright infringement of the Composition and demanded that Evenflo immediately remove the Infringing Ads, cease and desist any further use of Composition in the Infringing Songs or Infringing Ads, disclose the extent of Evenflo's use of the Composition, and detail any source of a legitimate license to use the Composition.

22. Evenflo denied that it had used the Composition and continued to utilize the Infringing Ads to sell their Evenflo® Pivot Xpand™ product.

23. It was not until Third Side had retained outside counsel and sent a series of cease and desist letters that Evenflo removed the Infringing Ads in or around April 2022.

24. Evenflo's unlicensed and unauthorized use of the Composition in the Infringing Ads, despite repeated cease and desist letters by Third Side and its counsel beginning in January 2022, was a willful infringement of Third Side's copyrights therein.

First Cause of Action

(Direct Copyright Infringement, 17 U.S.C. § 501, Against Evenflo)

25. Third Side incorporates the allegations set forth in paragraph 1 through 24 hereof, inclusive, as though the same were set forth herein.

26. Third Side is the exclusive administrator for Ms. Hawley-Weld's and Mr. Halpern's share of the copyrights in and to the Composition—an original work and constituting copyrightable subject matter under 17 U.S.C. § 102—and has the exclusive right, along with the owners and/or administrators of the other co-writers' shares, to license the public performance, manufacture, distribution, licensing, and otherwise commercial exploitation of the Composition, and to collect the royalties generated from the commercial exploitation of the Composition.

27. Evenflo had access to the Composition because the Composition was a widely disseminated huge commercial success that was used in many mediums in 2017 and 2018, including Apple's advertising campaign for the launch of the iPhone X in the fall of 2017 and the soundtrack for the best-selling FIFA 18 video game released on September 29, 2017, and subsequently reached the top of Billboard's Dance/Mix Show Airplay chart in January 2018.

28. On information and belief, in or around 2018, Evenflo created, or caused to be created, an audiovisual advertisement which used a sound recording that copied the numerous original and protected elements of the Composition to create a substantially similar Infringing Song. Evenflo has utilized this Infringing Song in Infringing Ads that appear online at, but not limited to, Evenflo's website and the Amazon.com, YouTube, Bed Bath and Beyond, and Buy Buy Baby

product pages for its Evenflo® Pivot Xpand™ stroller. The Infringing Ads have also appeared on Facebook pages appearing to be dedicated to Evenflo's products. In sum, Evenflo's Infringing Ads contain an Infringing Song that is substantially similar to the Composition due to the numerous original and protected elements the Infringing Song copied from Composition.

29. Third Side first learned of Evenflo's infringing use of the Composition in or around May 2021.

30. Third Side notified Evenflo of its infringing use in January 2022. Evenflo denied that it had used the Composition and continued to utilize the Infringing Ads to sell their Evenflo® Pivot Xpand™ product. It was not until Third Side had retained outside counsel and sent a series of cease and desist letters that Evenflo removed the Infringing Ads in or around April 2022. Evenflo has not compensated Third Side for Evenflo's infringing use despite repeated notices and warnings.

31. All of Evenflo's acts and omissions set forth above were performed without the permission, license, authority or consent of Third Side or SOFI TUKKER.

32. Third Side is informed and believes, and on that basis alleges, that all of Evenflo's acts and omissions set forth above were performed without the permission, license, authority or consent of the co-writers or administrators of the other co-writers' shares of the Composition.

33. Upon information and belief, Evenflo has knowingly, willfully, and intentionally infringed Third Side's exclusive rights under 17 U.S.C. § 106 through the unauthorized copying, licensing, reproduction and/or distribution of the Composition by Evenflo and or its affiliates, subsidiaries, agents, owned/managed/controlled entities and/or parent company, and/or predecessors-in-interest.

34. Evenflo's infringements are willful and intentional given that Evenflo were aware and had reason to believe that their acts constituted infringement of Third Side's copyright, especially because Evenflo continued to infringe the Composition for several months after receiving notice in January 2022.

35. Third Side has suffered actual damages as a direct and proximate result of Evenflo's infringement of Third Side's exclusive rights, which it may recover under 17 U.S.C. § 504(b).

36. Third Side is further entitled to recover Evenflo's profits attributable to the infringement, pursuant to 17 U.S.C. § 504(b).

Prayer for Relief

WHEREFORE, Third Side respectfully prays for judgment against Evenflo as follows:

- (a) Entry of judgement that Evenflo has willfully infringed Third Side's registered copyright in the Composition;
- (b) That Evenflo be required to pay Third Side such actual damages as Third Side has sustained as a result of Evenflo's infringements of the Composition, and to account for and pay to Third Side all gains, profits and advantages derived by Evenflo from its infringements of the Composition pursuant to 17 U.S.C. § 504, in an amount to be proven at trial;
- (c) That Evenflo, and each of their respective officers, agents and employees, and all persons acting in concert or participation with them, be enjoined both during the pendency of this action and permanently thereafter from copying, reproducing, distributing, or publicly performing the Infringing Song and/or any derivative work thereof without authorization from Third Side, or otherwise infringing

Third's copyrights in any manner, and from permitting, authorizing or causing others to do so;

- (d) Awarding Third Side its costs and disbursements incurred in prosecuting this action; and
- (e) Such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Third Side requests a trial by jury on all issues so triable.

Respectfully submitted,

By: /s/Brent D. Craft

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