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9 Attorneys for Plaintiffs,
Thomas Derrick McElroy, Denzil Delano Foster, and
10 Jay King

11 UNITED STATES DISTRICT COURT

12 CENTRAL DISTRICT OF CALIFORNIA

13 THOMAS DERRICK McELROY, an) CASE NO.
individual; DENZIL DELANO)
14 FOSTER, an individual; and JAY)
KING, an individual) COMPLAINT FOR:
15)
Plaintiffs,) 1. COPYRIGHT INFRINGEMENT;
16) 2. BREACH OF FIDUCIARY DUTY;
vs.) 3. ACCOUNTING.
17)

18 MIKKEL S. ERIKSEN, an)
individual;; TOR ERIK HERMANSEN,)
an individual; PRISCILLA) DEMAND FOR JURY TRIAL
19 HAMILTON, an individual, ORI)

20 KAPLAN, an individual; STARGATE,)
an entity of unknown form; WB)
MUSIC CORP., a California)
21 corporation; EMI APRIL MUSIC,)
INC, a Connecticut corporation;)
22 SONY MUSIC HOLDINGS, INC, a)
Delaware corporation; SONY/ATV)
23 MUSIC PUBLISHING LLC, a limited)
liability company; and SONY/ATV)
24 MUSIC PUBLISHING ACQUISITION,)
INC., a Delaware corporation,)
25 EPIC-SYCO RECORDS, a joint)
venture; and DOES 1 through 10,)
26 inclusive,)

27 Defendants.)
28)

1 Plaintiffs, DENZIL DELANO FOSTER, an individual (hereinafter
2 "FOSTER"), THOMAS DERRICK McELROY, an individual (hereinafter
3 "McELROY"); and JAY KING, an individual (hereinafter, "KING"),
4 complain, aver, and allege as follows:
5

6 PARTIES

7 1. Plaintiff, DENZIL DELANO FOSTER, is an individual, and a
8 resident in the state of California.

9 2. Plaintiff, THOMAS DERRICK McELROY, is an individual, and a
10 resident in the state of California.

11 3. Plaintiff, JAY KING, is an individual, and a resident in the
12 state of California.

13 4. Defendant, MIKKEL S. ERIKSEN, is an individual, resident in
14 the City and State of New York.

15 5. Defendant, TOR E. HERMANSEN, is an individual, resident in
16 the City and State of New York.

17 6. Plaintiff is informed and believes that Defendant, STARGATE,
18 is an entity of unknown form, owned and controlled by Defendants
19 ERIKSEN and HERMANSEN, and conducting business in the State of
20 California, county of Los Angeles.

21 7. Defendant, PRISCILLA HAMILTON, is an individual, resident in
22 the County of Los Angeles, State of California.

23 8. Defendant, ORI KAPLAN, is an individual, resident in the
24 County of Los Angeles, State of California.

25 9. Defendant WB MUSIC CORP (hereinafter referred to as "WB
26 MUSIC"), is a California corporation admitted and authorized to
27 conduct business in the State of California, with offices in the
28 County of Los Angeles, State of California.

1 10. Defendant, EMI APRIL MUSIC, INC, (hereinafter referred to
2 as "EMI APRIL") is a Connecticut corporation, admitted and
3 authorized to conduct business in the State of California, with
4 offices in the County of Los Angeles, State of California.

5 11. Defendant, Sony/ATV Music Publishing, LLC, is a limited
6 liability company admitted and authorized to conduct business in
7 the State of California, and with offices in the County of Los
8 Angeles, State of California.

9 12. Defendant, Sony/ATV Music Publishing Acquisition, Inc.,
10 is a Delaware corporation, admitted and authorized to conduct
11 business in the State of California, and with offices in the
12 County of Los Angeles, State of California. Defendant, Sony/ATV
13 Music Publishing Acquisition, Inc. is the successor in interest to
14 all rights, titles, interests and claims of right held by EMI
15 APRIL MUSIC, INC. (Collectively, Sony/ATV Music Publishing, LLC
16 and Sony/ATV Music Publishing Acquisition, Inc. shall be called
17 the "Sony/ATV Defendants")

18 13. Defendant, SONY MUSIC HOLDINGS, INC. (hereafter referred
19 to as "SONY MUSIC"), is a corporation organized and existing in
20 the state of Delaware, and admitted to conduct business in the
21 State of California.

22 14. Defendant SYCO RECORDS (hereafter referred to as "SYCO
23 RECORDS") is an entity of unknown form organized and existing in
24 the United Kingdom, and is a music recording and producing
25 division of Syco Entertainment, a company created by entertainment
26 executive Simon Cowell.

27 15. Defendant, EPIC-SYCO RECORDS (hereafter referred to as
28 "EPIC SYCO") is a joint venture composed of Epic Records, a

1 subsidiary of SONY MUSIC, and SYCO RECORDS, and EPIC-SYCO conduct
2 business in the state of California, County of Los Angeles.

3 JURISDICTION AND VENUE

4 16. Plaintiffs, FOSTER, MCELROY and KING , allege that
5 jurisdiction in this court is proper under 28 U.S.C. §1338(a), as
6 it is an action arising under Acts of Congress relating to
7 copyrights namely, the Copyright Act of 1976, 17 U.S.C. §101 et
8 seq. This Court has pendant jurisdiction over the claims arising
9 under state law pursuant to 28 U.S.C. §1338(b).

10 17. Venue is proper in this district pursuant to 28 U.S.C.
11 §1400(a) and 1391 (b) and (c), as the Defendants, ERIKSEN,
12 HERMANSEN, HAMILTON, KAPLAN are individuals resident in and/or
13 conduct business in the District, and WB MUSIC, EMI APRIL, SONY
14 MUSIC, EPIC-SYCO, and the SONY/ATV Defendants are subject to
15 personal jurisdiction in this district, and are therefore deemed
16 to reside here for purposes of venue.

17 FACTUAL BACKGROUND

18 18. Plaintiffs FOSTER and MCELROY are a music songwriting
19 and production duo who have been composing and producing musical
20 works for more than thirty (30) years.

21 19. Plaintiffs FOSTER and MCELROY have written compositions
22 and produced songs for such musical acts s Club Nouveau,
23 Tony!Tone!Toni!, Alexander O'Neal, Regina Bell, Madonna, and Swing
24 Out Sister, among others.

25 20. Plaintiffs FOSTER and MCELROY are also the creators,
26 producers, and songwriters for the group known as En Vogue, whose
27 songs "Hold On", "Lies", "You Don't Have to Worry", "My Loving
28 (You're Never Gonna Get It)"; and "Giving Him Something He Can

1 Feel" reached number 1 on the BillBoard Magazine R&B Charts; and
2 the En Vogue album Funky Divas was nominated for five (5) Grammy
3 Awards.

4 21. In or about 1986, FOSTER and MCELROY, and Plaintiff,
5 KING, co-wrote and produced the musical composition "Why You Treat
6 Me So Bad" which composition was recorded and performed by the
7 musical group Club Nouveau.

8 22. Plaintiffs FOSTER, MCELROY, and KING are the registered
9 copyright songwriters of the composition "Why You Treat Me So Bad"
10 which original copyright registration is dated September 12, 1988,
11 and bears copyright registration number V2391P015. A true and
12 correct copy of the copyright registration record maintained by
13 the United States Copyright office for "Why You Treat Me So Bad"
14 is attached hereto as Exhibit 1.

15 23. Plaintiffs FOSTER, MCELROY and KING, all that in or
16 about October 1993, by and through their music publishing entity
17 2-Tuff-E-Nuff Publishing, a Division of 2-Tuff-E-Nuff Productions,
18 Inc., transferred and assigned an undivided fifty (50%) percent
19 interest in certain musical compositions written by Plaintiffs,
20 which transfer and assignment included an undivided fifty (50%)
21 interest in the composition "Why You Treat Me So Bad" to EMI April
22 Music. (hereafter referred to as "The Original Agreement").

23 24. Plaintiffs allege that The Original Agreement accorded
24 EMI April Music, among other things, the right and responsibility
25 to administer the copyrights in and to "Why You Want To Treat Me
26 So Bad", which rights and responsibilities included the right to
27 protect against and seek to enjoin any infringement of the
28 Plaintiffs' copyright interests.

1 25. Plaintiffs further allege that they have entered into a
2 series of extensions and/or modifications of The Original
3 Agreement and that all such extensions and/or modifications of The
4 Original Agreement have vested in EMI APRIL the right to
5 administer and protect the copyright interests of the Plaintiffs.

6 26. Plaintiffs allege that the composition "Why You Want to
7 Treat Me So Bad" has a unique and readily identifiable rhythm
8 track and that such composition has been licensed and sampled for
9 use in other compositions more than twenty (20) times.

10 27. Plaintiffs further allege that one the most prominent
11 uses of composition before the release of "Worth It", was the
12 composition "I Got 5 On It" performed by Luniz.

13 28. Plaintiffs FOSTER, MCELROY and KING are credited as
14 songwriters of the composition "I Got 5 On It" due to the
15 prominent use of the rhythm track from "Why You Want To Treat Me
16 So Bad". A true and correct copy of the copyright registration
17 bearing number V3252P352 and indicating that Plaintiffs are co-
18 authors with other of the composition "I Got 5 On It" is attached
19 hereto as Exhibit 2.

20 29. Plaintiffs allege that the musical composition "Worth
21 It" is a single recording and musical composition performed and
22 recorded by Fifth Harmony featuring rapper Kid Ink for their debut
23 studio album entitled "Reflection". Plaintiffs further allege that
24 the composition "Worth It" was first released on or about March 2,
25 2015, on the EPIC-SYCO label. Plaintiffs further allege that
26 "Worth It" has sold in excess of 4,410,00 units has been certified
27 triple platinum (3 million record sales) in the United States by
28 the Recording Industry Association of America, and has been

1 certified as either gold or platinum in every other country in
2 which it has been released.

3 30. The Plaintiffs allege that the purported songwriters of
4 the composition "Worth It" copied key, critical, and distinctive
5 elements of the composition "Why You Want To Treat Me So Bad" and
6 incorporated such elements in the composition "Worth It" and
7 failed to acknowledge the authorship of Plaintiffs.

8 31. Plaintiffs further allege that Defendants WB Music Corp
9 and EMI APRIL and Sony/ATV erroneously registered the copyright to
10 "Worth It" by failing to credit the authorship of Plaintiffs.

11 32. Plaintiffs allege that the musical composition "Worth
12 It" was released and initially publicly performed on or about
13 March 2015, and was distributed and sold as part of the Album
14 Reflection by the group known as Fifth Harmony.

15 33. Plaintiffs allege that after the initial public
16 performances of the composition, "Worth It", the music listening
17 public immediately recognized the distinctive rhythm track of "Why
18 You Treat Me So Bad".

19 34. Plaintiff allege that the copying was so obvious that
20 the website "Who Sampled", which is a crowd sourced and moderated
21 website dedicated to publicizing the sampled and historical
22 musical sounds incorporated in contemporary music for younger
23 audiences, immediately posted that the composition "Worth It"
24 contained samples from "I Got 5 On It". A true and correct copy
25 the screen shot of the website "Who Sampled" from May 3, 2015 is
26 attached hereto as Exhibit 3. This screen shot indicates that the
27 musical community dedicated to publishing information about
28 sampled music in songs was of the collective opinion that "Worth

1 It" contained a sample from "I Got 5 On It" which rhythm track is
2 composed of the rhythm track from "Why You Want To Treat Me So
3 Bad".

4 35. Plaintiffs allege that they have communicated with the
5 music publisher of the composition, "Worth It" and made demand
6 that they cease and desist further distribution of the
7 composition, but that defendants WB Music and SONY/ATV have
8 refused to cease and desist distribution of the composition, or
9 provide Plaintiffs with credit as songwriters.

10
11 FIRST CAUSE OF ACTION

12 (Copyright Infringement

13 Denzil Foster, Thomas McElroy, and Jay King against All Defendants

14 36. Plaintiffs reallege and incorporate by reference each
15 and every allegation contained in Paragraphs 1 through 35,
16 inclusive, of the Complaint as though set forth in full.

17 37. Plaintiffs are the owners of a valid copyright in and to
18 the musical compositions known as "Why You Treat Me So Bad" and "I
19 Got 5 On It".

20 38. As the owners of the copyright in the Compositions,
21 Plaintiffs have the exclusive rights under 17 U.S.C Section 106,
22 among others to prepare derivative works.

23 39. The Defendants, and each of them, infringed, and
24 continue to infringe, upon Plaintiffs copyrights, including by
25 copying, reproducing, preparing, and selling works derived from
26 the Composition.

1 40. Plaintiffs have not authorized the Defendants to copy,
2 reproduce, or prepare derivative works from, perform, or sell the
3 Composition.

4 41. The Defendants, and each of them, did not seek or obtain
5 permission, consent, or license from Plaintiffs for the copying,
6 reproduction, preparation of derivative works from, performance,
7 or commercial release of the Composition.

8 42. The Defendants, and each of them, knew their acts of
9 constituted copyright infringement, and have been put on notice
10 that such copyright infringement was occurring, and continue to
11 infringe the copyrights demonstrating that such infringement is
12 willful within the meaning of the Copyright Act.

13 43. As a result of their wrongful conduct, Defendants, and
14 each of them liable to Plaintiffs for copyright infringement
15 pursuant to 17 U.S.C. Section 501. Plaintiffs have suffered and
16 will continue to suffer, substantial losses, including but not
17 limited to the value of the Defendant unauthorized use of the
18 Compositions, in an amount not yet ascertained, but which will be
19 determined according to proof.

20 44. Plaintiffs are entitled to recover damages, which
21 include their losses and any profits Defendants have made as a
22 result of their wrongful conduct pursuant to 17 U.S.C. Section
23 504. Alternatively, Plaintiff is entitled to statutory damages
24 under 17 U.S.C. Section 504(c).

25 45. In addition, because Defendants' infringement was
26 willful, the award of statutory damages should be enhanced in
27 accordance with 17 U.S.C. Section 504(C)(2).

1 46. Plaintiffs are entitled to recover their attorneys fee
2 and cost of suit pursuant to 17 U.S.C Section 505.

3
4 SECOND CAUSE OF ACTION

5 (Breach of Fiduciary Duty against EMI APRIL MUSIC, INC, SONY MUSIC
6 HOLDINGS INC., and the SONY/ATV DEFENDANTS)

7 47. Plaintiffs reallege and incorporate by reference each
8 and every allegation contained in Paragraphs 1 through 46,
9 inclusive, of the Complaint as though set forth in full.

10 48. Defendant EMI APRIL is a music publisher and copyright
11 administrator pursuant to contract for the composition "Why You
12 Treat Me So Bad" written and composed by Plaintiffs.

13 49. Defendant EMI APRIL has a duty to investigate, and
14 notify Plaintiffs of any known or potential infringing uses of the
15 composition; and under the terms of the Agreements EMI APRIL has
16 the right and the duty to do any act or thing in the name of
17 Plaintiffs to protect, enforce, and/or implement the publishers or
18 songwriters rights in and to the copyright in the composition "Why
19 You Treat Me So Bad". Plaintiff further alleges that such right
20 and duty created a fiduciary duty on the part of EMI APRIL to at a
21 minimum investigate any potential infringing actions against the
22 composition.

23 50. Plaintiff alleges that SONY MUSIC and SONY/ATV
24 DEFENDANTS have infringed the copyright interests of Plaintiffs in
25 the composition "Why You Treat Me So Bad" by copying,
26 distributing, publishing, marketing, and selling the composition
27 "Worth It" without either crediting or compensating Plaintiffs for
28 their authorship of the composition.

1 51. Plaintiff alleges that in or about October 2015,
2 Plaintiff provided written notice to ERIKSEN, HERMANSEN, STARGATE,
3 SONY, EMI APRIL and EPIC-SYCO, that the composition "Worth It"
4 infringed upon the copyright of Plaintiff's in and to "Why You
5 Treat Me So Bad".

6 52. Plaintiffs allege that Defendant EMI APRIL, and its
7 parent entities SONY/ATV and SONY MUSIC breached their fiduciary
8 duty to Plaintiffs by failing to investigate the infringement
9 claim, failing to cease distributing, selling, marketing, and
10 exploiting the composition, "Worth It", and failing to do anything
11 of any nature whatsoever to protect the interests of their
12 songwriters, the Plaintiffs herein.

13 53. As result of the Breach of Fiduciary duty as herein
14 alleged, the Plaintiff's have been damaged in that they have not
15 been properly credited as co-authors of the composition "Worth
16 It", and have not received royalty payments as co-authors of the
17 composition "Worth-It", which amount shall be proven at trial.

18 THIRD CAUSE OF ACTION

19 (Accounting against all defendants)

20 54. Plaintiffs reallege and incorporate by reference each
21 and every allegation contained in Paragraphs 1 through 53,
22 inclusive, of the Complaint as though set forth in full.

23 55. Plaintiffs allege that as a true author and owner of the
24 copyright interest the Compositions held by Defendants, and each
25 of them, that they have been deprived of monies earned and paid
26 for the copying, publishing, distribution, and performance of The
27 Compositions.

1 56. Plaintiffs allege that they have no way of knowing the
2 exact amount of the monies earned and paid to the Defendants, and
3 each of them, from the exploitation of The Composition.

4 57. Plaintiffs therefore request a full and complete
5 accounting of all monies earned and paid by and to Defendants, and
6 each of them, from the exploitation of the song "Worth It" and
7 that such monies represented by Plaintiffs ownership and
8 authorship of the composition be paid immediately to Plaintiffs.

9 WHEREFORE, Plaintiff prays for judgment against Defendants, and
10 each of them, as follows:

11 On The First Cause of Action:

- 12 1. For a judicial determination and order that Plaintiffs
13 copyright has been infringed upon by Defendants;
- 14 2. For an order that Defendants account for and pay to
15 Plaintiff for all damages sustained by Plaintiff from
16 the infringement of his copyright interest;
- 17 3. For an enhanced award of statutory damages in accordance
18 with 17 U.S.C. § 504(c)(2) due to Defendants willful
19 conduct.
- 20 4. For an award of attorneys' fees and costs of suit
21 pursuant to 17 U.S.C. § 505.

22 On The Second Cause of Action:

- 23 5. For Damages for breach of fiduciary duty for loss of
24 royalties due and owing in an amount according to
25 proof.

26 On The Third Cause of Action:
27
28

