

1 Joseph C. Andras (State Bar # 138181)
2 andras@myersandras.com
3 MYERS ANDRAS LLP
4 1990 MacArthur Blvd., Suite 1150
5 Irvine, CA 92612
6 Phn: (949) 223-9600
7 Fax: (949) 223-9610

8 Tawnya R. Wojciechowski (State Bar #180063)
9 tawnya@trwlawgroup.com
10 TRW LAW GROUP
11 1990 MacArthur Boulevard, Suite 1150
12 Irvine, California 92612-8433
13 Phn: (949) 701-4747
14 Fax: (949) 701-4712

15 Attorney for Plaintiff
16 TIPSYP ELVES LLC

17 UNITED STATES DISTRICT COURT
18 SOUTHERN DISTRICT OF CALIFORNIA

19 TIPSYP ELVES LLC, a California limited
20 liability company,

21 Plaintiff,

22 v.

23 TARGET CORPORATION, a Minnesota
24 corporation; and DOES 1 through 10,

25 Defendants.

Case No.: '17CV385 DMS RBB

**COMPLAINT FOR COPYRIGHT
INFRINGEMENT, FOR VICARIOUS
AND/OR CONTRIBUTORY
COPYRIGHT INFRINGEMENT,
AND FOR CONSTRUCTIVE TRUST**

1 Plaintiff TIPSYP ELVES LLC, by and through its attorneys, alleges as follows:
2

3 **JURISDICTION AND VENUE**

4 1. This is an action for copyright infringement arising under the Copyright Act
5 of 1976, Title 17 U.S.C. §§ 101 et seq.

6 2. This Court has jurisdiction of this action under 28 U.S.C. § 1331, 1338(a)
7 and (b), and under its supplemental jurisdiction.

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

10
11 **THE PARTIES**

12 4. Plaintiff TIPSYP ELVES LLC (hereinafter “Plaintiff”) is a California limited
13 liability company with its principal place of business at 1041 Market Street, #306, San
14 Diego, California 92101.

15 5. Plaintiff is informed and believes, and on that basis alleges, that TARGET
16 CORPORATION is a Minnesota corporation that (hereinafter “TARGET”), has a
17 principal place of business in Minneapolis, Minnesota, and conducts business in and with
18 the state of California.

19 6. Plaintiff is informed and believes, and on that basis alleges, that some of
20 Defendants DOES 1 through 5, inclusive, are manufacturers and/or vendors of garments
21 to Defendants, and have manufactured and/or supplied, and/or are manufacturing and/or
22 supplying, garments that are unlawful copies of the SUBJECT WORK (as hereinafter
23 defined) without Plaintiff’s knowledge or consent. The true names, whether corporate,
24 individual or otherwise, of Defendants DOES 1 through 5, inclusive, are presently
25 unknown to Plaintiff, which therefore sues said Defendants by such fictitious names, and
26 will seek leave to amend this Complaint to show their true names and capacities when
27 their true names have been ascertained.
28

1 7. Plaintiff is informed and believes, and on that basis alleges, that Defendants
2 DOES 6 through 10, inclusive, are other parties not yet identified who have infringed
3 Plaintiff's copyright(s), have contributed to the infringement of Plaintiff's copyright(s),
4 and/or have engaged in one or more of the wrong practices alleged herein. The true
5 names, whether corporate, individual or otherwise, of Defendants DOES 6 through 10,
6 inclusive, are presently unknown to Plaintiff, which therefore sues said Defendants by
7 such fictitious names, and will seek leave to amend this Complaint to show their true
8 names and capacities when their true names have been ascertained.

9 8. Plaintiff is informed and believes, and on that basis alleges, that at all times
10 relevant hereto each of the Defendants was the agent, affiliate, officer, director, manager,
11 principal, alter-ego, and/or employee of the remaining Defendants and was at all times
12 acting with the scope of such agency, affiliation, alter-ego relationship and/or
13 employment; and actively participated in or subsequently ratified and adopted, or both,
14 each and all of the acts or conduct alleged, with full knowledge of all the facts and
15 circumstances, including, but not limited to, full knowledge of each and every violation
16 of Plaintiff's rights and the damages to Plaintiff proximately caused thereby. TARGET,
17 and DOES 1 through 10 shall sometimes be referred to herein collectively as
18 "Defendants."
19
20

21 **BACKGROUND FACTS**

22 9. Plaintiff, among other things, designs, manufactures, and sells apparel and
23 related accessories. Plaintiff has established itself as the source of high quality Ugly
24 Christmas Sweaters and has further built its previously seasonal business into a year-
25 round novelty apparel company.

26 10. Plaintiff is informed and believes, and on that basis alleges, that TARGET's
27 business is the retail sales of consumer products, including but not limited to clothing and
28 accessories via its stores worldwide, its website and other third party websites. On

1 information and belief, TARGET also retails clothing products directly to the public over
2 the internet throughout the United States, including substantial sales in and to the State of
3 California.

4 11. Prior to November 15, 2015, Plaintiff created an original work of authorship
5 known as the “Naughty and Nice” two-person sweater. (hereinafter referred to as the
6 “SUBJECT WORK”).

7 12. The SUBJECT WORK contains material wholly original with Plaintiff that
8 is copyrightable subject matter under the laws of the United States.

9 13. On or about November 15, 2015, Plaintiff published the SUBJECT WORK,
10 i.e. its “Naughty and Nice” two-person sweater. This sweater was a popular part of
11 Plaintiff’s “Christmas Collection” for the years 2015 and 2016. A true and correct
12 photograph of Plaintiff’s “Naughty and Nice” two-person sweater, the SUBJECT
13 WORK, is attached hereto as **Exhibit 1**.

14 14. In December, 2013, Plaintiff was featured on ABC’s popular
15 television series *Shark Tank*, along with several of its “ugly” sweater designs. Plaintiff
16 and its sweaters have subsequently received significant media attention. Plaintiff’s
17 “Naughty and Nice” two-person sweater was often featured by the media. For example,
18 Plaintiff’s “Naughty and Nice” two-person sweater appeared in: (a) an article in *The*
19 *Huffington Post* entitled “Weird Christmas Gifts 2015” featuring Plaintiff’s “Nice and
20 Naughty Two -Person Sweater”; (b) an article in *E News* entitled “Hollywood’s Must-
21 Have Ugly Holiday Sweater Revealed: Why Celebrities Can’t Get Enough of Topsy
22 Elves”; and (c) an article in *Mic* entitled “2016: Where to buy the best sweaters.” True
23 and correct copies of excerpts from these articles which includes photographs of
24 Plaintiff’s Naughty and Nice sweater are attached hereto as **Exhibit 2**.

25 15. Plaintiff is informed and believes, and on that basis alleges, that since at
26 least as early as December, 2016, Defendants have been reproducing, distributing,
27 promoting and offering for sale illegal and unauthorized copies of the SUBJECT WORK.
28

1 16. Plaintiff is informed and believes, and on that basis alleges, that since at
2 least as early as December, 2016, on its website and in its retail stores, TARGET has
3 been selling a sweater that is an unauthorized copy of the SUBJECT WORK (the
4 “ACCUSED COPY”). A true and correct copy of a website photograph showing the
5 ACCUSED COPY reproduced on a website and on a clothing item depicted therein is
6 attached hereto as **Exhibit 3**.

7 17. Plaintiff is informed and believes that the consuming public is purchasing
8 the ACCUSED COPY from TARGET believing it to be Plaintiff’s “Naughty and Nice”
9 two-person sweater, the SUBJECT WORK. **Exhibit 4** is a true and correct copy of an
10 Instagram photo featuring the SUBJECT WORK, followed by a user comment which
11 says, “I bought this same exact sweater at target for half the price.”

12 18. Plaintiff requested that TARGET stop selling the ACCUSED COPY, and
13 remove the inventory of the ACCUSED COPY from its stores, both physical and online.

14 19. On or about December 2, 2016, Plaintiff applied to the United States
15 Copyright Office for a Certificate of Registration for its copyright in the SUBJECT
16 WORK. A true and correct copy of Plaintiff’s application for copyright registration is
17 attached hereto as **Exhibit 5**.

18
19

20 **FIRST CLAIM FOR RELIEF**

21 **(For Copyright Infringement – Against All Defendants)**

22 20. Plaintiff repeats, re-alleges, and incorporates by reference as though fully set
23 forth herein, the allegations contained in paragraphs 1 through 19, inclusive, of this
24 Complaint.

25 21. At all times relevant hereto, Plaintiff has been and still is the holder of the
26 exclusive rights under the Copyright Act of 1976 (17 USC §§ 101 et seq. (“Copyright
27 Act”), and all amendments thereto) to reproduce, distribute, or license the reproduction
28

1 and distribution of the SUBJECT WORK shown in **Exhibit 1** (sometimes hereinafter
2 “Copyrights” or “Plaintiff’s Copyrights”).

3 22. The SUBJECT WORK is an original work created by Plaintiff,
4 copyrightable under the Copyright Act. An application for registration of Plaintiff’s
5 Copyrights in the SUBJECT WORK has been duly filed in the United States Copyright
6 Office; all applicable formalities and notice requirements under the Copyright Act have
7 been duly complied with; and Plaintiff has thereby secured and now owns the exclusive
8 right and privilege to enforce its rights in such Copyright.

9 23. Plaintiff is informed and believes and thereupon alleges that Defendants
10 acquired possession of the SUBJECT WORK to which Plaintiff is the owner of exclusive
11 rights represented by the Copyrights, and have reproduced copies without Plaintiff’s
12 authorization for sale, license, and/or use in the United States and elsewhere.

13 24. Defendants have sold unauthorized copies of the copyrighted SUBJECT
14 WORK to which Plaintiff owns the exclusive rights under the Copyrights.

15 25. Defendants have infringed Plaintiff’s exclusive rights in the SUBJECT
16 WORK by copying, reproducing, and displaying the SUBJECT WORK and/or by
17 distributing, advertising, selling and/or offering for sale or license the unlawfully
18 reproduced SUBJECT WORK.

19 26. Plaintiff has never authorized Defendants, by license or otherwise, to copy
20 or reproduce the SUBJECT WORK by incorporating it into apparel or on websites.

21 27. Each infringing sale of the ACCUSED COPY, as well as the threat of
22 continuing the same, constitutes a separate claim against Defendants under the Copyright
23 Act. Plaintiff has sustained, and will continue to sustain, substantial damage to the value
24 of the SUBJECT WORK in that the previously described activities of Defendants have
25 directly diminished and will continue to diminish the revenue which Plaintiff would
26 otherwise receive.

27 28. Defendants have realized unlawful and unjust profits from the unauthorized
28 and illegal reproduction and use of the SUBJECT WORK. As such, Plaintiff is entitled

1 to disgorgement of Defendant's profits directly and indirectly attributable to Defendant's
2 infringement of the SUBJECT WORK in an amount to be established at trial.

3 29. Defendants have continued to infringe said Copyrights in the SUBJECT
4 WORK, and unless temporarily, preliminarily and permanently enjoined by Order of this
5 Court, will continue to infringe said Copyrights, all to Plaintiff's irreparable injury. As a
6 result of Defendants' acts of infringement, Plaintiff is without an adequate remedy at law
7 in that damages are difficult to ascertain.

8 30. Defendants have committed all of the aforesaid acts of infringement
9 deliberately, willfully, intentionally, maliciously and oppressively, without regard to
10 Plaintiff's proprietary rights.

11 31. Plaintiff is informed and believes and thereupon alleges that Defendants, and
12 each of them, have acted with knowledge and/or reckless disregard of Plaintiff's rights
13 such their acts of copyright infringement as alleged above were, and continue to be,
14 willful, intentional and malicious, subjecting Defendants, and each of them, to liability
15 therefore. Further, Defendants, and each of them, willfully and intentionally
16 misappropriated, palmed-off and/or infringed Plaintiff's SUBJECT WORK which
17 renders Defendants, and each of them, liable for damages as described herein.

18
19 **SECOND CLAIM FOR RELIEF**

20 **(For Vicarious and/or Contributory Copyright Infringement – Against All**
21 **Defendants)**

22
23 32. Plaintiff repeats, re-alleges, and incorporates by reference as though fully set
24 forth herein, the allegations contained in paragraphs 1 through 31, inclusive, of this
25 Complaint.

26 33. Plaintiff is informed and believes and thereon alleges that Defendants, and
27 each of them, knowingly induced, participated in, aided and abetted, and resultantly
28

1 profited from the illegal reproduction, and/or creation of derivative works based on the
2 Subject Photographs as alleged herein.

3 34. Plaintiff is informed and believes and thereon alleges that Defendants, and
4 each of them, are vicariously liable for the infringement alleged herein because they had
5 the right and ability to supervise the infringing conduct and because they had a direct
6 financial interest in the infringing conduct.

7 35. By reason of the Defendants', and each of their, acts of contributory and/or
8 vicarious infringement as alleged above, Plaintiff has suffered and will continue to suffer
9 substantial damages to its business in an amount to be established at trial.

10 36. By reason of the Defendants', and each of their, acts of contributory and/or
11 vicarious infringement as alleged above, Plaintiff has suffered and will continue to suffer
12 general and special damages to its business in an amount to be established at trial.

13 37. Due to Defendants' acts of contributory and/or vicarious copyright
14 infringement, Defendants, and each of them, have obtained direct and indirect profits
15 they would otherwise not have realized but for their infringement of the Subject
16 Photographs. As such, Plaintiff is entitled to disgorgement of Defendants' profits directly
17 and indirectly attributable to Defendants' infringement of the SUBJECT COPYRIGHT in
18 an amount to be established at trial.

19 38. Plaintiff is informed and believes and thereupon alleges that Defendants, and
20 each of them, have continued to manufacture and/or sell articles bearing the ACCUSED
21 COPY with knowledge that such acts violate Plaintiff's intellectual property rights.
22 Therefore, Defendants' acts of copyright infringement as alleged above were, and
23 continue to be, willful, intentional and malicious, subjecting Defendants, and each of
24 them, to liability therefore. Further, Defendants, and each of them, willfully and
25 intentionally misappropriated, palmed-off and/or infringed Plaintiff's SUBJECT WORK
26 which renders Defendants, and each of them, liable for damages as described herein.
27
28

THIRD CLAIM FOR RELIEF
(For Constructive Trust)

1
2
3
4 39. Plaintiff repeats, re-alleges, and incorporates by reference as though fully set
5 forth herein, the allegations contained in paragraphs 1 through 38, inclusive, of this
6 Complaint.

7
8 40. Plaintiff is entitled to the profits that each Defendant has derived from the
9 infringement of Plaintiff's rights pursuant to the statutory laws of United States, and
10 damages under the statutes comprising the copyright laws of the United States.

11
12 41. Upon information and belief, Plaintiff alleges that each Defendant owns and
13 possesses tangible real and personal property and assets including, but not limited to, real
14 estate, bank savings and other financial accounts, consisting of profits from or obtained
15 by Defendants' illegal and tortious acts, as alleged herein.

16
17 42. Upon information and belief, Plaintiff alleges that each Defendant retains
18 possession of the Artwork, which Plaintiff alleges are used by each Defendant in the
19 continuing infringing activities described hereinabove, and Plaintiff requests that the
20 court impose a constructive trust over these profits for the benefit of Plaintiff.

21
22 43. Defendant holds the above-mentioned tangible real and personal property
23 and assets as constructive trustees for the benefit of Plaintiff, in an amount to be proven
24 at trial.

25
26 44. Plaintiff has no adequate remedy at law.
27
28

PRAYER FOR RELIEF

Wherefore, Plaintiff requests that this Court:

1. Enter judgment that each Defendant has infringed upon Plaintiff's Copyrights in its SUBJECT WORK.

2. Enter judgment that each Defendant's use, advertising, offering to sell, sale, or display of the ACCUSED COPY on its website and incorporated in apparel constitutes an infringement of Plaintiff's Copyrights.

3. For an order enjoining each Defendant, and each Defendant's officers, agents, employees, and those acting in concert or conspiracy with them, permanently from:

a. infringing or contributing to or participating in the infringement by others of any of the Copyrights or acting in concert with, aiding and abetting others to infringe any of said Copyrights in any way;

b. copying, duplicating, selling, renting, marketing, leasing, distributing, offering for sale over the internet, or otherwise disposing of any ACCUSED COPY to which Plaintiff is the owner of exclusive rights under its Copyrights;

4. That the Defendant be required to modify its website to completely remove any product bearing the ACCUSED COPY;

5. That each Defendant be permanently enjoined from duplicating, reproducing, copying, advertising, selling, offering for sale over the internet, or in any other manner using unauthorized copies of the SUBJECT WORK;

6. That Plaintiff be awarded all losses of Plaintiff, the exact sum to be proven at the time of trial, as available under the Copyright Act, 17 U.S.C. § 101 et seq.;

7. That Plaintiff be awarded all profits of Defendants;

8. That Plaintiff recover its attorney's fees and costs of suit incurred herein as available under the Copyright Act, 17 U.S.C. § 101 et seq.; and

1 9. That Plaintiff have such other and further relief as this Court deems just and
2 proper.

3
4 Dated: February 24, 2017

s/ Joseph C. Andras
Joseph C. Andras (State Bar # 138181)
andras@myersandras.com
MYERS ANDRAS LLP
1990 MacArthur Blvd., Suite 1150
Irvine, CA 92612
Phn: (949) 223-9600
Fax: (949) 223-9610

5
6
7
8
9
10 Tawnya R. Wojciechowski (State Bar #180063)
11 tawnya@trwlawgroup.com
12 TRW LAW GROUP
13 1990 MacArthur Boulevard, Suite 1150
14 Irvine, California 92612-8433
15 Phn: (949) 701-4747
16 Fax: (949) 701-4712

17
18
19
20
21
22
23
24
25
26
27
28
Attorney for Plaintiff
TIPSY ELVES LLC

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury of all issues triable by jury.

Dated: February 24, 2017

s/ Joseph C. Andras

Joseph C. Andras (State Bar # 138181)

andras@myersandras.com

MYERS ANDRAS LLP

1990 MacArthur Blvd., Suite 1150

Irvine, CA 92612

Phn: (949) 223-9600

Fax: (949) 223-9610

Tawnya R. Wojciechowski (State Bar #180063)

tawnya@trwlawgroup.com

TRW LAW GROUP

1990 MacArthur Boulevard, Suite 1150

Irvine, California 92612-8433

Phn: (949) 701-4747

Fax: (949) 701-4712

Attorney for Plaintiff

TIPSY ELVES LLC