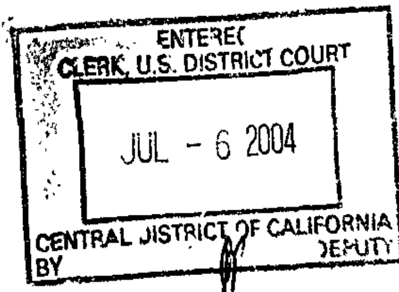

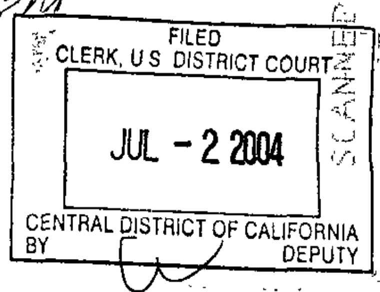

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CLEOPATRA RECORDS,

Plaintiff,

v.

WILLIAM BRUCE BAILEY, an individual professionally known as W. AXL ROSE, et al.

Defendants.

Case No. CV 04-3120 GAF (FMOx)

MEMORANDUM AND ORDER REGARDING COUNTERCLAIMANTS' MOTION FOR PRELIMINARY INJUNCTION

I.

INTRODUCTION

This case presents the question of whether, and under what circumstances, an obscure rock band can market its recordings by informing consumers of its historical connections to a famous, successor music group.

The Plaintiff and Counter-defendant in this action, Cleopatra Records, purchased the rights to certain sound recordings of the band Hollywood Rose, a group whose performers included William Bailey (aka "Axl Rose") and Jeffrey Isbell

(aka "Izzy Stradlin") and which, with the departure of some and the addition of other performers, became popular as the band Guns N' Roses. Cleopatra Records has produced and released an album that includes those sound recordings, along with several re-mixes, on an album entitled "Hollywood Rose: The Roots of Guns N' Roses."

When Defendants and Counter-claimants Guns N' Roses, along with individual performers Axl Rose, Saul Hudson ("Slash"), and Michael McKagan (collectively referred to throughout as GNR or Guns N' Roses) learned of the album's title, they objected to the release of the album. Cleopatra Records responded to their objections by bringing this action for declaratory relief seeking a determination of its rights regarding the album, including the right to use the name Guns N' Roses in the title, and to use photographs of Hollywood Rose, which include the images of Axl Rose and others who later performed as Guns N' Roses. Defendants have counterclaimed, and now seek a preliminary injunction to stop distribution of the album on the ground that it infringes their trademark rights under the Lanham Act and constitutes a false designation of origin, that it violates their right of publicity and otherwise constitutes an unfair business practice.

In support of their Lanham Act claims, Defendants present a traditional infringement analysis by arguing that the mark used by Hollywood Rose is "confusingly similar" to the Guns N' Roses mark and constitutes a false endorsement, but this approach ignores the Ninth Circuit's "nominative fair use" doctrine. Under Ninth Circuit case law, when a person uses another's trademark to identify the ***trademark owner's*** product or service, for the purpose of making a comparison, stating a criticism or establishing a point of reference, traditional infringement analysis does not apply. Rather, the circuit has described such use as "nominative" and applies the nominative fair use doctrine to determine whether the nominative use is "fair." If so, then the user does not infringe the owner's rights. Because the Court finds that Cleopatra's use of the Guns N' Roses mark is a "nominative use," and

because Counter-claimants have not shown either a likelihood of success, or substantial questions going to the merits, on the issue of the fairness of that use, the Court concludes that Counter-claimants should not be granted a preliminary injunction on the Lanham Act claims. It follows that the state law unfair practice claims, which are based on the same set of facts, provide no ground for preliminary injunction.

As to the state law right of publicity claim, the evidence clearly establishes that members of Hollywood Rose agreed that their images, included as part of pictures of the band, could be used to promote that band. Counter-claimants present neither evidence, nor legal authority, for the proposition that their consent should be considered ineffective to permit the use of the photographs included on the current album. Accordingly, the Court further concludes that the right of publicity claim provides no basis for a preliminary injunction. For these reasons, which are discussed in greater detail below, GNR's motion for a preliminary injunction is **DENIED**.

II.

BACKGROUND

For approximately nine months in the mid-1980s, Chris Weber, Defendant Axl Rose, and Izzy Stradlin were members of a band called "Hollywood Rose." (Weber Decl. ¶ 2). They played local clubs in Los Angeles and co-wrote songs, five of which they recorded for a demo tape, which was paid for by Weber's parents. (Id. ¶ 3). According to Cleopatra Records, Weber was replaced by Defendant Slash, new band members were added, and after performing a few more gigs as Hollywood Rose, the band changed its name to Guns N' Roses. (Id. ¶¶ 6-7). Fast forward twenty years and Guns N' Roses is now a famous band that has sold tens of millions of albums and recently released its Greatest Hits. (Mercuriadis Decl. ¶¶ 2, 7).

In November 2003, Chris Weber sold his rights in the Hollywood Rose sound recordings, as well as related promotional materials, to Cleopatra Records. (Perera Decl. ¶ 3). In early 2004, Cleopatra prepared to release an album entitled

"Hollywood Rose: The Roots of Guns N' Roses," which includes the original five songs recorded for the Hollywood Rose demo tape, plus two re-mixes of each of those five songs. (Id. ¶¶ 4-5).

In early April, Cleopatra sought and was granted what the parties refer to as "mechanical licenses" for three songs used on the album that were not co-written by Weber. (Id. ¶ 8). The license agreement provided that Guns N' Roses Music would receive royalties at the "mechanical rate" on a quarterly basis. (Compl. Exh. A). On April 29th, Cleopatra received a "cease-and-desist" letter from Defendant Axl Rose demanding that Cleopatra stop its plans to release the album. (Id. Exh. B). On May 11th, Cleopatra received a letter "rescinding" the mechanical license. (Michel Decl. Exh. C). On May 14th, Guns N' Roses sent a follow-up letter, stating that it was rescinding the licenses because the licenses were issued for a project called "The Roots of Hollywood Rose" ***not*** "The Roots of Guns N' Roses."

On May 3rd, Cleopatra filed the pending action seeking a declaration of its rights related to the Hollywood Rose album, including a declaration that the title of the album does not infringe on the Guns N' Roses trademark and the pictures used do not infringe on Defendant Rose's right to publicity. On June 8th, GNR filed an answer and counterclaims for trademark infringement, false designation of origin, right of publicity, and unfair business practices. On that same day, they also filed the pending motion seeking a preliminary injunction, noticed for hearing on June 28, 2004.

On June 21st, GNR filed an emergency motion seeking a temporary restraining order to prevent the June 22nd release of the album. The Court denied the TRO on the ground that Defendants had unreasonably delayed the request and did not provide an adequate explanation as to why such extraordinary relief was justified. Now before the Court is GNR's motion for a preliminary injunction. Because the album has already been released, the requested injunction would require Cleopatra to recall the albums already sent out to stores and to cease manufacture or

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release of any additional albums bearing the Guns N' Roses trademark and Defendant Rose's likeness pending resolution of this dispute.

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III.

ANALYSIS

A. STANDARD APPLICABLE TO PRELIMINARY INJUNCTIONS

A party seeking preliminary injunctive relief must show either (1) a likelihood of success on the merits, and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits, and the balance of hardships tipping in its favor. Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596, 602 (9th Cir. 2000). "These are not two distinct tests, but rather the opposite ends of a single continuum in which the required showing of harm varies inversely with the required showing of meritoriousness." Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987) (citation omitted). The United States Supreme Court has held that "the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). Thus, in every case, a finding of at least some irreparable injury is a fundamental prerequisite to relief. Id.

B. GNR IS NOT ENTITLED TO INJUNCTIVE RELIEF ON THEIR LANHAM ACT CLAIMS

1. Likelihood of Success on the Merits

In their counterclaims, GNR alleges that the packaging of the Hollywood Rose album infringes on their "Guns N' Roses" trademark.[1] Specifically, GNR contends that because Cleopatra's mark is "confusingly similar" to GNR's mark, the use constitutes trademark infringement and false endorsement under the Lanham Act.

As discussed more fully below, because Cleopatra uses the Guns N' Roses trademark as a point of reference, the use is nominative and the "confusingly similar" analysis is not applicable. Rather, the use of another's mark as a point of reference

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[1] The present motion does not raise any copyright issues related to Cleopatra's right to distribute the actual sound recordings.

calls into play the Ninth Circuit's nominative fair use test, which controls the resolution of the present motion.

a. The Doctrine of Nominative Fair Use – New Kids and Its Progeny

In New Kids on the Block v. New Am. Publ'g, 971 F.2d 302 (9th Cir. 1992), the Ninth Circuit explained that when a case involves a "non-trademark" or "nominative" use of a mark, "the infringement laws simply do not apply." Id. at 397. The New Kids nominative fair use defense acknowledges that "it is often virtually impossible to refer to a particular product for purposes of comparison, criticism, ***point of reference*** or any other such purpose without using the mark." Id. at 306 (emphasis added). The Ninth Circuit distinguished the "classic" fair use defense, which is applicable "where the defendant has used the plaintiff's mark to describe the defendant's own product," from the "nominative" fair use defense, which applies "where the defendant uses a trademark to describe the [mark owner's] product, rather than its own." Id. at 308. The court held that, in the latter case,

> a commercial user is entitled to a nominative fair use defense provided he meets the following three requirements: First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

Id.

In New Kids, the defendant newspaper used the plaintiffs' trademark in the context of a poll asking readers to vote for their favorite "New Kid." The court found that the defendant was using the mark to "refer to the New Kids themselves," thus the nominative, rather than the classic, fair use test applied. Under that test, the court held that: (1) there was no way for the defendants to reasonably refer to the New Kids without using the trademark; (2) the use was limited to that reasonably necessary to

identify the New Kids; and (3) the defendants did not use the mark in such a way as to imply sponsorship by the New Kids, therefore, the use was permissible. Id. at 308-09.

Since New Kids, the Ninth Circuit has applied the nominative fair use test in a number of different circumstances. See, e.g., Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 810 (9th Cir. 2003) (finding that an artist's use of plaintiff's trademarked "Barbie figure and head in his works to conjure up associations of Mattel, while at the same time to identify his own work, which is a criticism and parody of Barbie" was nominative); Cairns v. Franklin Mint Co., 292 F.3d 1139, 1155 (9th Cir. 2002) (finding that defendant's use of the name and likeness of Princess Diana to describe its Princess Diana commemorative products was nominative); Playboy Enters., Inc. v. Welles, 279 F.3d 796, 803-04 (9th Cir. 2002) (finding that defendant's use of the trademarked title Playboy Playmate of the Year 1981 to identify herself in headlines and banner advertisements on her website was nominative); Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407 (9th Cir. 1996) (finding that the defendant car manufacturer's use of the plaintiff basketball star's name in its television commercial comparing defendant's car with various attributes of the star – "like the basketball star, the Olds 88 won an 'award' three years in a row, and like the star, the car is a 'champ' and a 'first round pick'" was nominative).

b. The Nominative Fair Use Test Applies Here

Although their brief focuses primarily on their false endorsement claim, GNR argues in a footnote that it is undisputed that they own the Guns N' Roses mark and that the mark is valid. GNR contends that because the exact mark appears on Cleopatra's product, the mark is necessarily "confusingly similar" and its use, therefore, constitutes direct infringement under 15 U.S.C. § 1114(1). It is unnecessary to evaluate this claim separately because when an alleged infringer "raises a nominative use defense, the [New Kids] three-factor test should be applied

instead of the test for likelihood of confusion set forth in Sleekcraft."[2] Playboy, 279 F.3d at 801. As the Playboy court explained:

> When a defendant uses a trademark nominally, the trademark will be identical to the plaintiff's mark, at least in terms of the words in question. Thus, application of the Sleekcraft test, which focuses on the similarity of the mark used by the plaintiff and the defendant, would lead to the incorrect conclusion that virtually all nominative uses are confusing.

Id.

"The nominative fair use analysis is appropriate where a defendant has used the plaintiff's mark to describe the plaintiff's product, even if the defendant's ultimate goal is to describe his own product." Cairns, 292 F.3d at 1151. Here, Cleopatra is using the mark Guns N' Roses to identify the band Guns N' Roses for the purpose of describing its own product, recordings by the band Hollywood Rose. Because the use "is grounded in [Cleopatra's] desire to refer to [GNR's] product as a point of reference for [Cleopatra's] own work," the use is nominative. Mattel, 353 F.3d at 810. Because the Court finds that Cleopatra's use of the Guns N' Roses mark is nominative, the Court must consider whether the use is not only nominative, but also fair, *i.e.* that it satisfies all three prongs of the New Kids test.

1. The First Prong

Cleopatra argues that its use satisfies the first prong because the only alternative to it saying "The Roots of Guns N' Roses" is to engage in complicated linguistics such as "The Roots of the Popular Rock Band on Geffen Records that Sold Millions of Albums and Sang the Hit Song 'Welcome to the Jungle.'" (Opp. at 11). GNR responds that Cleopatra's use of their mark fails the first prong, arguing that "[o]f course there is a way to identify the album without the use of the trademark GUNS N'

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[2] AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979) sets forth the eight-factor test used to determine if an alleged infringer's mark is "confusingly similar" to the trademark holder's mark for the purpose of a trademark infringement analysis.

ROSES: one could, and should, call the product what it is – the recordings of the band Hollywood Rose." (Reply at 2). But the argument misses Cleopatra's point, which is that it has a right to inform potential purchasers that the band Hollywood Rose is an historical antecedent of Guns N' Roses and included among its members two of the principal artists in Guns N' Roses. Cleopatra forcefully argues that the nominative fair use doctrine permits precisely this type of use of another's trademark.

A review of the controlling case law demonstrates that Cleopatra correctly states and applies the nominative fair use doctrine. In Cairns, the Ninth Circuit explained that the question in circumstances like these is not whether Cleopatra's use of the trademark is necessary for it to describe its own product. Clearly it is not. Rather, the question being asked when evaluating the first prong of the nominative fair use doctrine is whether there is any other way to describe ***the trademark owner's*** product – in this case the musical group Guns N' Roses – without using the mark. Cairns, 292 F.3d at 1153. In other words, because Cleopatra is using the mark "Guns N' Roses" to refer to the band Guns N' Roses, its use is nominative even though it is also using that reference to describe its own product. This quintessential nominative fair use circumstance satisfies the first prong of the New Kids test. Id. at 1151 n.8 ("Only rarely, if ever, will a defendant choose to refer to the plaintiff's product unless that reference ultimately helps to describe the defendant's own product.").

2. The Second Prong

The second prong of the nominative fair use test considers whether the alleged infringer has used only so much of the mark as is "reasonably necessary" to identify the product. New Kids, 971 F.2d at 308. As with the first prong, the point of reference is the amount necessary to identify the ***trademark owner's*** product.[3] Cairns, 292 F.3d at 1153. Here, the only portion of the mark Cleopatra uses is the

[3] In other words, the question is not whether Cleopatra's use of the mark is "reasonably necessary" to identify Cleopatra's product, but rather whether the use is reasonably necessary to identify the band Guns N' Roses.

actual words "Guns N' Roses." GNR does not dispute that neither the typeface nor the logos used on the Hollywood Rose album resemble those used on Guns N' Roses albums. See New Kids, 971 F.2d at 308 n.7 (explaining the second prong by stating that "a soft drink competitor would be entitled to compare its product to Coca-Cola or Coke, but would not be entitled to use Coca-Cola's distinctive lettering"); Volkswagenwerk Aktiengesellschaft v. Church, 411 F.2d 350, 352 (9th Cir.1969) (discussing that the defendant "did not use Volkswagen's distinctive lettering style or color scheme, nor did he display the encircled 'VW' emblem").

GNR argues that Cleopatra fails the second prong because the description of Cleopatra's product does not "depend" upon identifying any purported connection to Guns N' Roses. (Reply at 2-3). Although, as discussed above, the question is actually the amount needed to describe the ***trademarked*** product, the argument nevertheless has some merit because, as the court in Cairns explained, what courts will find "reasonably necessary" varies from case to case. Cairns, 292 F.3d at 1154. Where "the description of the defendant's product depends on the description of the plaintiff's product, more use of the plaintiff's trademark is 'reasonably necessary to identify the plaintiff's product' than in cases where the description of the defendant's product does not depend on the description of the plaintiff's product." Id.

The situation presented here falls somewhere in between the situation in Cairns, where the user could not possibly describe a Princess Diana commemorative plate or doll without reference to Princess Diana and the situation in Abdul-Jabbar, where GM could easily describe its car without any reference whatsoever to the basketball star. See Cairns, 292 F.3d at 1154. Although Cleopatra could literally describe its product in a generic way without any reference at all to Guns N' Roses, the nature and significance of its product cannot be understood without referring to its historical connection to that band. A title that contained no reference to the fact that Axl Rose and Izzy Stradlin were members of Hollywood Rose, or that otherwise failed to connect the two bands, would thereby omit important information that could be

significant to potential consumers of the product. In short, recordings by the little-known and short-lived band "Hollywood Rose" have little meaning without the link that connects the band to Guns N' Roses. Thus, the situation resembles that in Playboy, where Terri Welles could have described herself as a nude model, but that description would have had little meaning without also describing her relationship to the well-known Playmate of the Year title. Similarly, the present case parallels that in Brother Records, Inc. v. Jardine, 318 F.3d 900 (9th Cir. 2003), where a founding member of the Beach Boys, whose own name is not readily recognized, described his connection to the Beach Boys by calling his new band "The Beach Boys Family and Friends."

Accordingly, at least some reference to the Guns N' Roses mark should be acceptable. In Playboy, the court found that the plaintiff's use of the trademark on her website satisfied the second prong because she used "only the trademarked words, not the font or symbols associated with the trademarks." Playboy, 279 F.3d at 802. Similarly, in Brother Records, the court found that the defendant's use of the words "The Beach Boys" in the title of his band satisfied the second prong because the defendant did not use "any distinctive logo 'or anything else that isn't needed' to identify the Beach Boys." Brother Records, 318 F.3d at 908. As stated previously, Cleopatra only used as much of the mark that is reasonably necessary to identify Guns N' Roses, *i.e.*, the words themselves, none of which duplicated any font or script used by Guns N' Roses in any of its previous works. Such minimal use is reasonable and satisfies the second prong.

3. The Third Prong

The final question when determining whether a nominative use is also a fair use is whether Cleopatra did anything "that would, in conjunction with the mark, suggest sponsorship or endorsement by [Guns N' Roses]." New Kids, 971 F.2d at 308. To a significant extent this prong controls the analysis because "the nominative fair use defense is available only if 'the use of the trademark does not attempt to

capitalize on consumer confusion or to appropriate the cachet of one product for a different one.'" Brother Records, 318 F.3d at 908 (quoting New Kids, 971 F.2d at 307-08).

i. GNR's Music Cases Are Distinguishable

GNR argues that courts invariably find that any unauthorized use of a protected mark to promote a music album equates to false endorsement. To support this proposition, GNR relies on several music cases, but only one of these cases applied the Ninth Circuit's nominative fair use test.[4] Because the nominative fair use test completely supplants the likelihood of confusion test used in a standard false endorsement analysis, GNR's cases are not on point. In fact, if the Court were to accept GNR's argument, most nominative uses would automatically fail the third prong, thereby eviscerating the New Kids test. See Playboy, 279 F.3d at 801 (stating that application of the Sleekcraft likelihood of confusion test "would lead to the incorrect conclusion that virtually all nominative uses are confusing"). Nevertheless, the Court has considered GNR's music cases to the extent that they assist in determining whether Cleopatra did anything that other courts found could cause confusion as to endorsement.

GNR relies heavily upon Rostropovich v. Koch Int'l Corp., 34 U.S.P.Q.2d 1609 (S.D.N.Y. 1995), a case where the defendant produced ten compact discs featuring recordings by the plaintiff Rostropovich, a famous cellist and pianist, that were made very early in his career. The plaintiff sued alleging, among other things, false endorsement in violation of the Lanham Act. In finding for the plaintiff on the false endorsement claim, the court found that even though all labeling on the compact discs was truthful, "the overall effect of the packaging of the discs could confuse a reasonable juror as to whether Rostropovich in fact endorsed the discs." Id. at 1612. In particular, the court noted that all ten of the discs "prominently display the name

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[4] Significantly, GNR's single nominative fair use case also happens to be the only one of GNR's cases that is even from within the Ninth Circuit.

'Rostropovich' in large print" and that "six of the ten compact discs at issue also prominently display Rostropovich's likeness." Id. The Court considers it noteworthy that these discs were promoted as those of Rostropovich, while the disc in this case is marketed as a Hollywood Rose album. Cleopatra's album, though linked to Guns N' Roses due to the participation of Axl Rose and Izzy Stradlin in the earlier band, does not portray itself as containing the music of Guns N' Roses. In this respect it differs significantly from the Rostropovich discs.

Similarly, in CBS, Inc. v. Springboard Int'l Records, 429 F. Supp. 563 (S.D.N.Y. 1977), the defendant released an album by country music artist Charlie Rich, which featured recordings from the 1950s and 60s, before Rich became famous. The album did not indicate the year of the recordings, and the album jacket included current photographs of Rich. The court concluded that, as a result of the packaging, a "consumer, confronted with the album as presented to the Court, would very likely think he was purchasing the contemporary Charlie Rich, when in fact he was getting a substantially different product." Id. at 569.

Benson v. Paul Winley Record Sales Corp., 452 F. Supp. 516 (S.D.N.Y. 1978) presented a somewhat different situation. In that case, the defendant released an album containing twelve-year old recordings of a jazz combo in which George Benson, who later became a famous performing artist, was a member. The court noted, "The prominent use of Benson's name and picture on the album and in the advertisements creates the false impression that Benson was responsible for the contents of the album. The recent jacket photograph and the promotion claims of 'new' material deceptively portray the album as a current release." Id. at 518. For that reason, the court concluded that "Defendants have more than likely misled the public as they doubtless intended into believing that their album contains recent recordings by George Benson as principal performer." Id.

This case presents the reverse situation from Rich and Benson. The album clearly indicates that the music is that of Hollywood Rose, that the music is not of

recent vintage, and that the band's existence and its music preceded the formation of Guns N' Roses, hence the reference to "roots." Thus, these cases discussing likelihood of confusion deal with situations significantly different from that presented here, and, in fact, support the conclusion that the limited use of the name Guns N' Roses and the photographs of Hollywood Rose in this context do not improperly suggest endorsement by Guns N' Roses or its members.

While the court in Springboard also addressed a more factually similar situation concerning two distinct musical groups that shared common members – the little known "Patti LaBelle and the Bluebelles" and the later, more famous group "Labelle" – that portion of the case is also distinguishable. The court in Springboard based its finding of false endorsement on the fact that the defendant's release of old recordings by "Patti LaBelle and the Bluebelles" not only dropped the name "Patti" from the title, but also used current pictures of the members of "LaBelle" and displayed the name "LaBelle" much more prominently than the remainder of the title "and the Bluebelles." Id. at 565. The court deemed the defendant's behavior to be "egregious" and found that defendant's actions showed a "desire to ride the crest of the current critical and popular acclaim enjoyed by 'LaBelle.'" Id. at 569. The court "conclude[d] that the unwary consumer, and even the fairly sophisticated consumer, could well think they were purchasing the recording of 'LaBelle' when in fact they were getting a cobweb-covered conglomeration of past recordings." Id. Here the point of the album, and the use of the phrase "the roots of Guns N' Roses," is to place the consumer on notice that what he or she is buying is music that was written and recorded before Guns N' Roses was formed.

GNR also cites to PPX Enters., Inc., v. Autofidelity Enters., Inc., 818 F.2d 266 (2d Cir. 1987), which is not at all on point. PPX not only did not apply the nominative fair use test, it also concerned a claim for false advertising, not false endorsement. In PPX, the defendant had marketed eight albums as containing the feature performances of Jimi Hendrix, "but which either did not contain Hendrix performances

at all or contained performances in which Hendrix was merely a background performer or undifferentiated session player." Id. at 268. The court upheld the jury and the trial court's determination that the recordings, "through their design, labeling and album covers, purported to contain feature performances of Jimi Hendrix, when in fact they did not," and that such conduct constituted false advertising. Id. at 271-72.

In Brother Records, the only case cited by GNR that applied the nominative fair use test, the court found that the defendant's use of the trademarked name "The Beach Boys" in the title of his band "The Beach Boys Family and Friends," failed the third prong because the promotional materials displayed "The Beach Boys" more prominently and boldly than "Family and Friends," suggesting sponsorship by the Beach Boys. 318 F.3d at 908. The court also noted that the plaintiff presented evidence that the title was selected to increase marquee value and that people who booked or attended defendant's shows expressed confusion about who was performing. Id.

ii. Cleopatra's Use of GNR's Mark

Here, the title of the album includes the words "the roots of guns n' roses," in all lowercase letters in font one-quarter of the size of that used to identify "Hollywood Rose." (Sutton Decl. ¶ 8). The relatively small size of the Guns N' Roses mark, as opposed to the more prominent display of the Hollywood Rose mark, weighs in Cleopatra's favor and distinguishes this case from Springboard, Rostropovich, and Brother Records.[5] In addition to the words "guns n' roses," the album cover and insert also includes photographs of Hollywood Rose, which includes Defendant Axl Rose as

[5] During the hearing on this motion, GNR's counsel argued that Cleopatra should not be allowed to use the Guns N' Roses mark merely because Cleopatra was "clever" enough to use small font. However, the case law instructs that the relative size and prominence of the trademark is a relevant consideration. In essence, GNR's argument is that the fair use defense does not apply to a party who reviews the relevant case law and then attempts to tailor its conduct accordingly. The Court declines to consider Cleopatra's efforts to comply with the law as evidence of bad faith.

a member of the band.[6] GNR concedes that the pictures used depict the band Hollywood Rose and its members (not Guns N' Roses) as the band appeared at the time of the recordings. (Weber Decl. ¶ 5). This fact distinguishes the case at bar from Benson and Springboard where the record company used a ***current*** picture of the recording artist in question on the cover of an album of recordings made by the artist before he or she became famous.

Moreover, the packaging in this case includes very detailed historical information on the back cover, which puts the album into context and clearly identifies that the music is that of Hollywood Rose, a "pre-GN'R band." (Cohen Decl. Exh. C). The back cover also states that the songs are performed by "AXL Rose, Izzy Stradlin, Chris Weber and Johnny Kreis. Recorded January 1984 in Hollywood, California." (Id.). The liner notes include a detailed explanation of the history behind the recordings under the title "The Hollywood Rose Story."[7] (Id.). In the following four pages of text, the name "Guns N' Roses" does not appear until the final sentences of the last page, where the author describes the end of Hollywood Rose and the birth of Guns N' Roses. The story ends with the line "That's where the Guns N' Roses story really begins. . . ." (Id.). This detailed background information, which clearly indicates

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[6] In their brief, GNR argues that Plaintiff is attempting to create customer confusion by including a picturing of Axl Rose on the cover and asks: why else would Cleopatra include the picture? (Mot. at 9-10). The answer to that question is obvious. The picture is not of Rose alone; it is a picture of the band Hollywood Rose on the cover of an album featuring recordings by Hollywood Rose.

[7] GNR states that Cleopatra has marketed the album as "the story of Guns N' Roses" but this is not supported by the evidence. The cited press release is actually a print out of a posting by a user named "Redhead" on an unofficial Guns N' Roses fan site, www.gunnertemple.com. (Reply Michel Decl., Exh. A). The actual press release was not presented to the Court by either party and GNR has not provided evidence that "Redhead" or the website is affiliated in any way with Cleopatra. In any case, the title of the purported press release is "Before There Was Guns N' Roses There Was Hollywood Rose." Moreover, the font and positioning of the words "Guns N' Roses" is no more prominent than that used to designate Hollywood Rose. The contents of the press release, like the album packaging, merely provide the history of Hollywood Rose and the relationship to Guns N' Roses. A different posting, also by "Redhead" discusses a future television special titled "The Story of . . . Guns N' Roses." This posting is not at all related to the Hollywood Rose album, the press release, or Cleopatra Records.

the source and year of the recordings, further distinguishes the case from all of those cited by GNR.

GNR's papers occasionally dispute the truthfulness of the assertion that Hollywood Rose is, in fact, the "roots" of Guns N' Roses, but in their reply they contend that "Cleopatra's insistence that its title is 'true' is irrelevant." (Reply at 14). The Court finds that the truth of the statement ***is*** relevant to the question of whether Cleopatra is attempting to cause consumer confusion. If Cleopatra had chosen to market the Hollywood Rose album as "the Roots of Nirvana," the Court would likely conclude that such action was designed to capitalize on consumer confusion. But here, the evidence supports that Hollywood Rose was indeed the precursor to or, at least an aspect of, the "roots of" Guns N' Roses. Axl Rose was the frontman for both bands, Izzy Stradlin was a founding member of both bands, and the time frame between the end of Hollywood Rose and the beginning of Guns N' Roses was minimal and possibly overlapped. (Weber Decl. ¶ 7). In addition, it is undisputed that songs recorded in 1984 by Hollywood Rose were later performed by Guns N' Roses. (Id. ¶ 9). Thus, the declaration of Rose and Isbell stating that they personally do not consider Hollywood Rose to be the roots of Guns N' Roses is at odds with the significant evidence to the contrary.

GNR's argument under the third prong appears to be premised on the conclusion that consumers will automatically view inclusion of the mark "Guns N' Roses" in the album title as an endorsement. However, the Ninth Circuit has recognized that while consumers expect a title to communicate a message about the product, "they do not expect it to identify the publisher or producer." Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 902 (9th Cir. 2002). In Mattel, the court held that "literary titles do not violate the Lanham Act 'unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work.'" Id. (citing Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989)). The court then found that the song title

"Barbie Girl" was artistically relevant to a song about Barbie and that the title was unlikely to lead consumers to think that the song was produced by Mattel, the owner of the Barbie trademark. Id.

GNR attempts to distinguish Mattel by citing to a Second Circuit case stating that an album cover "bearing the name and likeness of a performer, is one of the primary means of advertisement for a record album, particularly when, in the normal retail situation, 'a customer has no way of hearing the record prior to purchase.'" PPX, 818 F.2d at 272.[8] However, as stated above, the PPX court made that observation in the context of a false advertisement case where the albums in question "purported to contain feature performances of Jimi Hendrix, when in fact they did not." Id. at 271. Therefore, the title of the album was not artistically relevant. Here, unlike in PPX, the album bears the name and likeness of the band Hollywood Rose and only uses the mark Guns N' Roses as a point of reference. Moreover, the use of the mark in the title of the album has artistic relevance because it describes the historical context of the underlying recordings and it is clear that the recordings are by Hollywood Rose, not Guns N' Roses.

In a more factually similar case, Kassbaum v. Steppenwolf Prods., Inc., 236 F.3d 487 (9th Cir. 2000), a former member of the famous band Steppenwolf referred to himself in promotional materials for his new band as being "formerly of Steppenwolf," an "original member of Steppenwolf," or an "original founding member of Steppenwolf." Id. at 488. Although it does not appear that Kassbaum raised a nominative fair use defense, the court nevertheless found no trademark infringement because there was unlikely to be "confusion about the source of the band's music." Id. at 493. The court continued by observing that "the context of the historical references to Kassbaum's affiliation with Steppenwolf in World Classic Rockers'

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[8] If this was indeed true in 1987, when the PPX decision was rendered, it is clearly no longer the case. Large music retailers today provide listening kiosks where potential consumers can sample the works on an album before making the decision to purchase.

promotional materials further reduces any likelihood of confusion between these two bands." Id. The court also noted that references to the new band were more prominent and in larger type than references to Steppenwolf.

GNR contends that, like the use of the Beach Boys mark in Brother Records, Cleopatra's use of the Guns N' Roses mark has led to actual consumer confusion. GNR's only supporting evidence is three postings from an unidentified Guns N' Roses chat room indicating that fans are confused as to whether the album is an "official release," whether "Slash and Axl and the boys" are on the tracks, and whether "Axl was the one to give the go-ahead on this one." (Michel Decl., Exh. E).[9] However, there is no evidence that any of the allegedly confused customers had actually seen the album (and it is very unlikely that they had, considering the postings were in March and May and the album was not released until June 22nd); rather, it appears that the consumers were commenting about what they had heard about the album second-hand. Thus, this evidence does not support that ***Cleopatra*** did anything, in conjunction with the mark, that was designed to create confusion, which is the relevant inquiry under the New Kids test. See Mattel, Inc. v. MCA Records, Inc., 28 F. Supp. 2d 1120, 1143 (C.D. Cal. 1998) ("Despite plaintiff's assertions regarding actual confusion, however, the New Kids fair use test is not a likelihood of confusion standard. The focus lies, instead, on whether defendants took actions to 'capitalize on consumer confusion or to appropriate the cachet of one product for a different one.'").

Unlike the cases cited by GNR, this is not a case where a record company is attempting to pass off sound recordings as either being current, when they are not, or

[9] Cleopatra objects to this evidence on the grounds of hearsay and "inherent unreliability." (Cleopatra's Evidentiary Objections ¶ 3). The statements are not being offered to prove their truth, but rather to show the state of mind of the declarant; therefore, they are not hearsay. Cleopatra has not provided any support for its contention that statements posted on the internet "are not known for their truthfulness, accuracy, or reliability." (Opp. at 17). In any case, the statements are only being used to show state of mind and there is little reason to think that the declarants are purposefully misrepresenting their own confusion.

as being those of famous artist when they are in fact made by another artist. Rather, like in Kassbaum, this is a case where one musical group is merely indicating its historical relationship to another group, a fact that may be of interest to consumers. And, unlike in Brother Records and PPX, Cleopatra is not actively trying to confuse consumers into thinking that the recordings are by Guns N' Roses. Cleopatra's use is more akin to protected commentary or social criticism than to passing off or false endorsement.

GNR also argues that the release is timed strategically to capitalize on consumer interest in the Guns N' Roses Greatest Hits release and that it will unfairly reduce sales of that album. However, GNR's evidence as to the reduction in sales – the unsupported statement of Gun N' Roses's manager – utterly lacks foundation. In any case, even if the release of Hollywood Rose was strategically timed, nothing about the marketing of the album could reasonably lead a consumer to believe that the album was the Greatest Hits album. If a consumer chooses to purchase the Hollywood Rose album instead of the Greatest Hits album, such a choice is the consumer's to make. The court in New Kids expressly rejected the argument "that a nominative fair use defense is inapplicable where the use in question competes directly with that of the trademark holder." New Kids, 971 F.2d at 309. The court stated that while a trademark holder has

> a limited property right in their name, that right does not entitle them to control their fans' use of their own money. Where, as here, the use does not imply sponsorship or endorsement, the fact that it is carried on for profit and in competition with the trademark holder's business is beside the point.

Id.

After considering that Cleopatra's use of the Guns N' Roses trademark is minimal and much less prominent than its use of the mark Hollywood Rose, that the photographs are all pictures of the band Hollywood Rose and not Guns N' Roses, and

that the disc back and liner notes clearly inform the consumer that the recordings are by Hollywood Rose and not Guns N' Roses, the Court concludes that Cleopatra has done nothing to suggest that Guns N' Roses has endorsed this album. While it is possible that some consumers may assume that Defendant Axl Rose, an undisputed member of the band Hollywood Rose, endorsed or at least approved of the release of the album, this does not lead to the conclusion that consumers will think that Guns N' Roses, the owner of the mark at issue, endorsed the album. And, to the extent that consumers make the assumption that Guns N' Roses endorsed the album merely because its name appears in the title, as explained above, that assumption is unwarranted by the facts and thus is not a result of actions by Cleopatra, which is the proper focus of the third prong. Because the Court finds that Cleopatra's use of the Guns N' Roses mark is likely to be deemed a nominative fair use, it finds that it is unlikely that GNR will succeed on the merits of their trademark infringement and false endorsement claims.

2. Irreparable Harm/Balance of the Hardships

Where a party demonstrates a likelihood of succeeding on a trademark infringement claim, irreparable harm is presumed. See Brookfield Communications, Inc. v. West Coast Entm't Corp., 174 F.3d 1036, 1066 (9th Cir. 1999). However, because GNR has not shown that they are likely to succeed on the merits of their trademark infringement claims, the presumption of irreparable harm is not a relevant consideration. GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1205 n.4 (9th Cir. 2000) ("This presumption effectively conflates the dual inquiries of this prong into the single question of whether the plaintiff has shown a likelihood of success on the merits.").

Accordingly, the Court must consider the second prong of the preliminary injunction test, *i.e.* whether GNR has raised "serious questions going to the merits" ***and*** that "the balance of hardships tips sharply in [their] favor." Id. at 1205. The burden of persuasion lies with GNR, the moving party. See Mattel, Inc. v. Greiner &

1 Hausser GmbH, 354 F.3d 857, 869 (9th Cir. 2003). In this case, GNR has not even
2 raised serious questions as to the merits of their claims because Cleopatra's
3 nominative fair use defense is quite strong. But, even if the Court agreed that
4 substantial questions exist, Defendants have not shown that the balance of the
5 hardships tips strongly in their favor.

6 GNR's only evidence of hardship is the unsupported and self-serving
7 declarations from Defendant Rose and Guns N' Roses's manager that release of the
8 Hollywood Rose album will reduce sales of the Guns N' Roses Greatest Hits album
9 and confuse customers. (Reply at 14; Mercuriadis Decl. ¶¶ 6-7; Rose Decl. ¶ 5).
10 However, the only evidence of actual confusion are the statements of three users of a
11 Guns N' Roses fan site and those postings give no indication that the users would not
12 ***also*** be interested in the Guns N' Roses Greatest Hits album. Moreover, the
13 confusion displayed in those statements is not about whether the Hollywood Rose
14 album is replacing the Greatest Hits album and, in any case, as the Ninth Circuit
15 explained in New Kids, Guns N' Roses cannot dictate how their fans should spend
16 their money.

17 GNR also appears to argue that release of the Hollywood Rose album will
18 lead to "tarnishment." (Reply at 10). GNR then cites to cases where the albums in
19 question contained the trademark holder's ***own*** recordings, but those recordings had
20 been modified and then deceptively marketed. Here, the recordings are those of
21 ***Hollywood Rose*** and, as discussed above, it is quite clear from the packaging that
22 the user is purchasing recordings by ***Hollywood Rose***. To the extent that the album
23 also includes remixes, GNR does not argue that the remixes themselves were not
24 authorized. In short, GNR produces no evidence to support that release of the
25 Hollywood Rose album will unfairly tarnish the Guns N' Roses mark.

26 Cleopatra, on the other hand, will suffer great hardship if the injunction is
27 granted. Because the albums have already been produced and released to stores,
28 the cost of recalling the albums would be significant. Although GNR is correct that ***if***

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they had shown a strong likelihood of success on the merits, the cost to Cleopatra would not be a concern, that is not the situation. GNR also argues that as long as GNR posts a bond, the injunction will cause no harm to Cleopatra. While the Court may have considered the bond if GNR's claims were stronger, here, the Court is balancing a relatively weak trademark infringement claim against a very significant hardship to Cleopatra. Accordingly, the Court concludes that GNR has not borne its burden of establishing that a preliminary injunction is justified.

C. GNR Is Not Entitled to Injunctive Relief on their State Law Claims

1. Likelihood of Success on the Merits

a. Right to Publicity

"California has long recognized a common law right of privacy for protection of a person's name and likeness against appropriation by others for their advantage." Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001). In addition, California Civil Code § 3344 provides a statutory right to privacy, which complements, though does not replace, the common law right. Id. In their counterclaims, GNR alleges that Cleopatra's use of the Guns N' Roses name and Defendant Rose's likeness to sell its album is a violation of both the common law and statutory right to publicity.

The elements of a common law right to publicity claim are "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercial or otherwise; (3) lack of consent; and (4) resulting injury." Id. (quoting Eastwood v. Superior Court (National Enquirer), 149 Cal. App. 3d 409, 417 (1983)). Civil Code § 3344 provides a statutory right to publicity under which the "plaintiff must prove all the elements of the common law cause of action. In addition, the plaintiff must allege a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose." Downing, 265 F.3d at 1001.

1. Preemption

Although the parties devote much of their discussion of the right to publicity claims to federal copyright preemption, that defense is not applicable here. While photographs are subject to copyright laws, many cases have explained that "it is not the publication of the photograph itself, as a creative work of authorship," that forms the basis for a right to publicity claim, but rather it is the use of the person's persona that is at issue, and a person's persona is not copyrightable." Id. at 1003-04; see also KNB Enters. v. Matthews, 78 Cal. App. 4th 362, 365 (2000) (concluding "that because a human likeness is not copyrightable, even if captured in a copyrighted photograph," a section 3344 claim based on the unauthorized publication of a photograph is not preempted).

Unlike in Fleet v. CBS, Inc., 50 Cal. App. 4th 1911 (1996), the only case cited by Cleopatra, there is no evidence that Cleopatra is the exclusive copyright holder of the photograph or that Defendant Rose has no interest in the work. See, e.g., Downing, 265 F.3d at 1005 n.4 (distinguishing Fleet on the ground that the case concerned the distribution of the actors' copyrighted performances, not their likenesses); KNB, 78 Cal. App. 4th at 374 (limiting Fleet's "broad language" to situations "where an actor or model with no copyright interest in the work seeks to prevent the exclusive copyright holder from displaying the copyrighted work"). Accordingly, that case provides no support for the proposition that preemption applies in this case.

2. Consent

Defendant Rose states that he did not consent to the use of his picture to advertise or market the Hollywood Rose album. (Rose Decl. ¶ 3). Cleopatra responds that Defendant Rose did consent, albeit twenty years ago. (Weber Decl. ¶ 5). GNR argues, without citation to any supporting authority, that "the fact that twenty years ago, Rose stated that a photograph could be used for one purpose, does not give Cleopatra [the right] to use it for a different purpose today." (Reply at 10).

However, viewing the purpose as "promotion of the music of Hollywood Rose," Cleopatra is using the photograph for the same purpose to which Rose previously consented.

The only case that GNR cites to support the right to publicity claim is Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998). Michaels concerned the unauthorized distribution and marketing of a videotape depicting two celebrities engaging in sexual conduct. In that case, the court found a preliminary injunction was justified because the celebrities were likely to succeed on the merits of their right to publicity claims. Id. at 838. The facts in Michaels are not at all similar to those here, as the court noted that the celebrities clearly did not consent to the distribution of the tape for any purpose. Id. at 837. For that reason, the case provides no support for GNR's position in this case, where consent was given.

Defendant Rose does not state in his declaration that he did not consent to the photographs or that the purpose of the photographs was something other than promotion of the band. Rather, he states only that he did not consent to the use of the photo to promote this particular album. (Rose Decl. ¶ 3). Defendants do not, however, present authority for the proposition that such particularized consent is necessary under these circumstances.[10] Weber, on the other hand, states in his sworn declaration that, at the time the band made the recordings, they also took photos to promote the band – photos that everyone, including Rose – agreed were to promote the band's music. (Weber Decl. ¶ 5). Weber's statement is supported by the fact that both of the pictures that Cleopatra used on the album cover were pictures that Hollywood Rose used to promote its shows. (Id., Exh. A).

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[10] During the hearing GNR's counsel argued that it is more significant that Cleopatra has not provided support for its theory that Rose's consent twenty years ago is sufficient. However, as the moving party, the burden is on GNR, not Cleopatra, to establish a likelihood of success on the merits.

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3. First Amendment Defense

Although California law protects a person's right to publicity, the California Supreme Court "has acknowledged that 'the right of publicity has not been held to outweigh the value of free expression.'" Cher v. Forum Intern., Ltd., 692 F.2d 634, 638 (9th Cir. 1982) (quoting Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 872 (1979) (Bird, J. concurring)). Accordingly, a right to publicity action will not lie "solely for publication which is protected by the First Amendment." Id. In fact, "[b]ecause a plaintiff bears a reduced burden of persuasion to succeed in a right of publicity action, courts and commentators have recognized that publicity rights carry a greater danger of impinging on First Amendment rights than do rights associated with false advertising claims." Parks v. LaFace Records, 329 F.3d 437, 460 (6th Cir. 2003) (finding that a material issue of fact existed as to whether the defendant's song title "Rosa Parks" was "wholly unrelated" to the content of the song so as to be undeserving of First Amendment protection against a right of publicity action by Ms. Parks).

The First Amendment also shields the incidental promotion and advertisement of otherwise protected works from a right to publicity action. See Cher, 692 F.2d at 638 ("Constitutional protection extends to the truthful use of a public figure's name and likeness in advertising which is merely an adjunct of the protected publication and promotes only the protected publication."); New Kids, 745 F. Supp. at 1546 ("California courts have specifically allowed incidental commercial exploitation of a public figure's name and likeness in the context of a publication's advertising activities.") (citing Guglielmi, 25 Cal. 3d at 873); see also William O'Neil & Co., Inc. v. Validea.com Inc., 202 F. Supp. 2d 1113, 1119 (C.D. Cal. 2002) (in the context of a right to publicity action under California law, finding that "because the book cover, flyleaf, and other material advertising The Market Gurus is 'an adjunct' of The Market Gurus, it is protected to the same extent as the book itself").

Even though New Kids and Cher both involved news publications, the doctrine is not so limited. In the oft-cited concurring opinion in Guglielmi, four justices agreed that neither the use of a celebrity's name and likeness in a fictional movie based on the celebrity's life nor the use of his name and likeness to advertise and promote the film was an actionable violation of his right to publicity because the underlying film was protected by the First Amendment. Id. at 872.[11] Thus, provided that the use in question is related to the artistic work ***and*** is being used to promote that work and not a collateral commercial product, the First Amendment defense applies. Id. at 865 n.6; Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989).

Although Cleopatra did not label its argument as such, it appears that a First Amendment defense may exist in this case. As with the film at issue in Guglielmi, "[m]usic, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989); see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 569 (1995) (music is "unquestionably shielded" by the First Amendment). The "publication" in question is the music album and GNR is not currently questioning Cleopatra's right to publish the music. As stated previously, the use of Rose's likeness and the name "Guns N' Roses" clearly has artistic relevance to the music itself.

Moreover, there is really no question, at least as to the use of Defendant Roses's likeness, that Cleopatra's publication is truthful – the picture is of Rose, a member of the band, as he appeared at the time of the recording. As for the truthfulness of the assertion that Hollywood Rose is "the roots of guns n' roses," not only did GNR fail to raise this issue, it appears that the statement is true or, at the very least, was not made with actual malice, which is the standard applied in the First Amendment context. Thus, Cleopatra's use of the likeness of Rose and the name

[11] The majority in Guglielmi dismissed the right to publicity claim on other grounds and did not reach the First Amendment issues.

Guns N' Roses to describe and promote the album likely fits the definition of a protected incidental-use and is not subject to a right to publicity action.

Accordingly, the Court concludes that GNR failed to carry their burden of establishing a likelihood of success on the merits.

b. Unfair Competition

In addition to their federal trademark infringement claims, GNR also brings a claim for unfair competition under California law. In their motion, GNR acknowledges that the basis for their state law claim is the same conduct underlying their Lanham Act and right to publicity claims. (Mot. at 14 (citing St. Ives Labs. Inc. v. Nature's Own Labs., 529 F. Supp. 347, 349-50 (C.D. Cal. 1981) (finding that the plaintiff's trademark infringement claims also established violations of California's unfair competition law) and Perfect 10, Inc., v. Cybernet Ventures, Inc., 213 F. Supp. 2d 1146, 1186 (C.D. Cal. 2002) (concluding that a likelihood of success as to the moving party's right to publicity claims "creates a high likelihood of success on both the 'unlawful' and 'unfair' prongs of California's unfair competition statute")). Because GNR failed to establish a likelihood of success on the merits of their underlying claims and they do not provide an independent basis for their unfair competition claim, they have necessarily failed to establish a likelihood of success on the merits of the unfair competition claim.

2. Irreparable Harm/Balance of the Hardships

As discussed previously, when the moving party has not shown a likelihood of success on the merits, the preliminary injunction inquiry focuses on the balance of the hardships rather than irreparable harm. However, GNR's arguments only discuss the irreparable harm that is presumed in cases where a celebrity's likeness is misappropriated. (Mot. at 13-14 (quoting Michaels, 5 F. Supp. 2d at 838 "a celebrity's property interest in his name and likeness is unique, and cannot be adequately addressed by money damages")). If GNR had demonstrated a strong likelihood of success on the merits, then they "would have needed only to make a minimal showing of harm to justify the preliminary injunction." Kootenai Tribe of Idaho v.

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Veneman, 313 F.3d 1094, 1124 (9th Cir. 2002). But because GNR has not shown such a strong likelihood success, the "converse side of the sliding scale is applicable." Id.

This case is not like the celebrity cases cited by GNR where the misappropriation was related to highly personal, sexual photographs like those in Michaels and Ali v. Playgirl, Inc., 447 F. Supp. 723, 729 (S.D.N.Y. 1978). Defendant Rose provides no evidence that his personal celebrity image will be harmed by the release of the Hollywood Rose album, with a truthful picture of Hollywood Rose on the cover. Unlike some of the other music cases, there is no evidence whatsoever that the "style" or "artistic vision" of Guns N' Roses is significantly different from that of Hollywood Rose. Moreover, the label previously licensed the distribution of the recordings and, although GNR is now contesting the license, the fact that it was issued undermines Rose's argument that the recordings will severely tarnish his or Guns N' Roses's image. (Compl. Exh. A).

As discussed previously, the hardship to Cleopatra in this case will be very severe and GNR has failed to establish that the balance of hardships in this case tips strongly in their favor (or even tips in their favor at all). Therefore, preliminary injunctive relief is not justified.

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IV.

CONCLUSION

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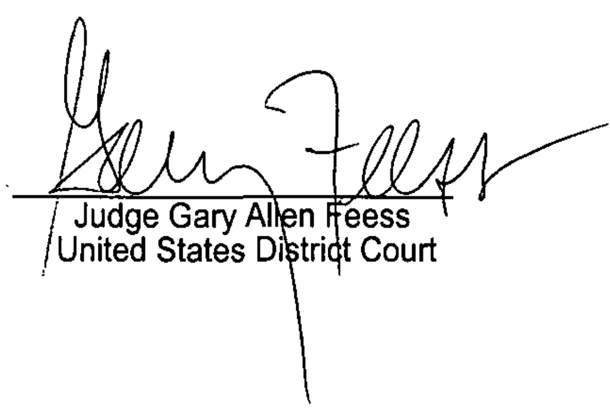
It goes without question that trademark holders have a strong interest in protecting their marks and that celebrities have a strong interest in their persona. Were GNR to prevail on their claims, the proposed injunction might well be the appropriate relief. But at this stage of the litigation, serious doubts exist as to the merits of GNR's claims and they have not shown that the balance of the hardships in this particular case tips so strongly in their favor that preliminary injunctive relief is warranted. Accordingly, GNR's motion for a preliminary injunction is **DENIED**.

IT IS SO ORDERED.

DATED: July 2, 2004



Judge Gary Allen Feess
United States District Court