

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

RONNIE VAN ZANT, INC., GARY R. ROSSINGTON,
JOHNNY VAN ZANT, BARBARA HOUSTON, as the
Trustee of the ALLEN COLLINS TRUST, and ALICIA
RAPP and CORINNA GAINES BIEMILLER, as the
Personal Representatives of the Estate of STEVEN
GAINES,

Plaintiffs,

-against-

ARTIMUS PYLE (a/k/a THOMAS D. PYLE),
CLEOPATRA RECORDS, INC., JOHN DOE, JANE
DOE, XYZ CORPORATION, and XYZ LLC (the names
of the last four defendants being fictitious and unknown
to plaintiffs, and intended to designate persons or entities
that have or may have a role in the production and
distribution of the Motion Picture complained of in the
Complaint herein),

Defendants.

Case No: 17-cv-3360

**CLEOPATRA RECORDS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

Cleopatra Records, Inc.'s ("Cleopatra") affiliate is making a movie about Lynyrd Skynyrd's 1977 plane crash. In addition to reviewing all of the written material that Cleopatra could find, it interviewed Lynyrd Skynyrd member Artimus Pyle about the plane crash. Pyle has given numerous interviews about the band and the plane crash, apparently without any objections from Plaintiffs. Pyle did not write, direct, or produce the film, the beginning of which will include an explicit disclaimer stating that neither Lynyrd Skynyrd nor any member of the band has authorized the film. Plaintiffs bring only a single claim against Cleopatra: they allege that the film violates a settlement agreement in a 1988 civil action to which Cleopatra was not a party. The settlement agreement was memorialized in a Consent Decree. Plaintiffs' sole claim is as meritless as its request for a preliminary injunction.

No Likelihood of Success on the Merits. First, the bedrock of the American legal system is that a party is not bound by a judgment in a case to which it was not a party. This principle is particularly strong when it comes to consent decrees, the source of which are the parties' consent as opposed to obligations imposed by law. Cleopatra is not bound by the Consent Decree because it was not a party to the 1988 action. Second, Cleopatra has not violated the Consent Decree because the Decree explicitly permits Pyle to discuss the band and its members when relating his experiences. As far as we are aware, Plaintiffs have not raised any objection to the numerous interviews that Pyle has granted in the past, and there is no basis for Plaintiffs to start doing so now. Third, Cleopatra has a First Amendment right to publish the film. Fourth, even if the Consent Decree could be read to prohibit third-parties from publishing books, articles, and films that use a Lynyrd Skynyrd member as a source, such a reading would constitute an unconstitutional prior restraint of speech. The heavy presumption against prior

restraints can only be overcome, if at all, by interests that rise to the level of direct and immediate threats to national security. Plaintiffs' speculative concerns about lost box office sales of a movie that there is zero evidence will ever be made cannot justify a prior restraint.

Only Cleopatra Will Suffer Irreparable Harm. Plaintiffs have had 40 years to make a movie about the 1977 plane crash but have failed to do so. For the first time, they claim in conclusory fashion that they have "selected" a producer. There is zero evidence that they have hired anyone to make the film, that they have a script, or that they have the financial resources to make such a film. Such conclusory and speculative evidence cannot support irreparable harm. Because Cleopatra is going to explicitly advise viewers at the outset of the film that it has not been authorized by the band or any of its members, there is no risk of consumer confusion. And Plaintiffs cannot seriously be arguing that Cleopatra's interview of Pyle will somehow cause them reputational harm in light of the fact that, under the Consent Decree, Pyle is one of the core members of Lynyrd Skynyrd. In contrast, even a temporary prohibition on the release of the film constitutes irreparable harm because "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The balance of hardships and public interest similarly favors denial of the preliminary injunction sought by Plaintiffs.

STATEMENT OF FACTS

Lynyrd Skynyrd and Its Coverage in the Media

As the Court is aware, the rock band Lynyrd Skynyrd popularized the Southern rock genre in the 1970s. The band toured all over the world, released multiple platinum records, and Rolling Stone magazine has named its debut one of the 500 greatest albums of all time. While

on tour in 1977, the plane in which the band was flying ran out of gas and crashed. Founding members of the band Ronnie Van Zant and Steve Gaines, among others, were killed in the crash. Lynyrd Skynyrd was inducted into the Rock and Roll Hall of Fame on March 13, 2006.

Public interest in the band has continued to this day. There have been multiple films about Lynyrd Skynyrd and its history, including *Lynyrd Skynyrd: Uncivil War* (2002), a VH1 film written and narrated by Jake Tapper; *Sweet Home Alabama: The Southern Rock Saga* (2012), by the BBC; and *Gone With the Wind: The Remarkable Rise and Tragic Fall of Lynyrd Skynyrd* (2015), which is nearly three hours long. May 10, 2017 Declaration of Brian Perera ("Perera Declr.") ¶ 5.

There have also been several books written about the band and the fateful plane crash, including *Whiskey Bottles and Brand-New Cars: The Fast Life and Sudden Death of Lynyrd Skynyrd* by Mark Ribowsky (2015); *Turn It Up! My Years with Lynyrd Skynyrd: Love, Life, and Death, Southern Style* by Lynyrd Skynyrd tour manager and plane crash survivor Ron Eckerman (2011); *The Last Tour: Love, Laughter, and Tears: In Memory of Ron Eckerman* by Carolyn Day (2014); and *Lynyrd Skynyrd: Remembering the Free Birds of Southern Rock* by Gene Odom (2003). May 10, 2017 Declaration of Jared Cohn ("Cohn Declr.") ¶ 7. There is even a website devoted to the Lynyrd Skynyrd plane crash, www.tennesseeconcerts.com/planecrash (last accessed May 10, 2017).

Cleopatra and Its Motion Picture

Defendant Cleopatra Records ("Cleopatra") is a record label that also produces films about musical groups, musicians, and events that have historical importance in rock history. (Perera Declr. ¶ 4.) In June 2016, Cleopatra engaged Jared Cohn, a director and screenwriter, to write and direct a film about the three or four-day period surrounding the Lynyrd Skynyrd plane

crash in 1977 titled *Street Survivor: The Story of the Lynyrd Skynyrd Plane Crash* (the "Motion Picture"). *Id.* ¶ 8.

Lynyrd Skynyrd has been beset by tragedy, and several original members have died in the years following the plane crash, including Allen Collins, Leon Wilkeson, and Billy Powell. One of the remaining "original" members of Lynyrd Skynyrd is its former drummer Artimus Pyle, who was on the band's touring plane during the crash in 1977 but survived. (Cohn Declr. ¶ 11.) With other members of the band, Pyle was inducted into the Rock and Roll Hall of Fame in 2006.

To further the historical accuracy of the Motion Picture, Cleopatra planned to have Pyle assist with the writing of the script. (Perera Declr. ¶ 9.) In summer 2016, Plaintiffs complained about Pyle's role in the film, and to address their concerns, Cleopatra removed Pyle from any involvement with writing any part of the script. *Id.* Instead, Cohn obtained all of the information that he was able to obtain about the plane crash. (Cohn Declr. ¶¶ 7-10.) He utilized books, films, articles, interviews conducted by third-parties, and websites. Mr. Cohn also consulted Dean Goodman, a historian who has written extensively about the crash. *Id.* ¶ 10. And he interviewed Pyle. *Id.* ¶ 11. Although Cohn exhaustively researched the history of the plane crash, he is the sole author of the script for the Motion Picture. *Id.* ¶ 12.

Pyle did not write the script for the Motion Picture; he will not be credited as the writer, director, or producer of the film; and he has no input as to how the film is made, its content, or its final cut. (Perera Declr. ¶ 11.) Pyle is a witness to the Lynyrd Skynyrd plane crash who Cohn interviewed, and there are few other living eyewitnesses to that event.

Pyle has told his story of the plane crash and involvement with Lynyrd Skynyrd to the public numerous times, apparently without objection from Plaintiffs, including:

- a. a 90-minute interview with Pyle on Howard Stern's radio show on January 17, 2017, about among other things the plane crash, <https://www.youtube.com/watch?v=3dtIISh0yIY> (last accessed May 10, 2017). Pyle had previously discussed the plane crash with Stern years before. *Artimus Pyle, Former Lynyrd Skynyrd, Recalls That Horrible Day*, Howard Stern Show (Feb. 12, 2007) (available at <https://www.howardstern.com/show/2007/2/12/that-fateful-night-RundownGalleryModel-10547/>);
- b. a 90-minute interview with Pyle on the DJ Eddie Winters radio show on January 26, 2015, <https://www.youtube.com/watch?v=GltGL70QkQs> (last accessed May 10, 2017), an excerpt of which discussing the plane crash is also available on YouTube, <https://www.youtube.com/watch?v=cXKYAdDJ2Bw> (last accessed May 10, 2017);
- c. a June 13, 2015 interview with Pyle available on YouTube, see <https://www.youtube.com/watch?v=-11-NDZN05w> (last accessed May 10, 2017);
- d. a November 5, 2013 interview with Pyle available on YouTube, <https://www.youtube.com/watch?v=c3naooEC6IQ> (last accessed May 10, 2017); and
- e. a 1982 Modern Drummer interview with Pyle available on YouTube, <https://www.youtube.com/watch?v=eA6p0Jm6hqY> (last accessed May 10, 2017).

(Cohn Declr. ¶ 11.)

While the Motion Picture is concerned with the 1977 plane crash, it will not use recordings of the music of Lynyrd Skynyrd or any songs written by the band. (Perera Declr. ¶ 12.) And Cleopatra intends to place cards in the opening credits of the film that make clear that it was not authorized by Lynyrd Skynyrd, or any current or former member of Lynyrd Skynyrd.

(Cohn Declr. ¶ 11.)

The Consent Decree and Plaintiffs' Violation of It

The purpose of *Grondin v. Rossington*, 690 F. Supp. 200 (S.D.N.Y. 1988) (the "1988 Action"), was to resolve which version of the Lynyrd Skynyrd band held the rights to its name. *Id.* at 202. The Consent Decree resolved this dispute, making clear who had which rights to the

band's name. The Consent Decree explicitly authorizes Pyle to use the "Lynyrd Skynyrd" name and "related matters" when exploiting his own life story "in any medium":

Each of the Individual Defendants, Ronnie's Estate and Gaines' Estate shall have the right to exploit his (or with respect to the Estates, the applicable decedent's) own respective life story in any manner or medium, including without limitation, in books or other print publications and in theatrical feature or television motion pictures, without obligation, financial or otherwise, to any other party hereto. In such connection, each of the foregoing shall have the right to refer to "Lynyrd Skynyrd" and related matters to describe and portray his experience(s) with "Lynyrd Skynyrd;" provided that no such exploitation of life story rights is authorized which purports to be a history of the "Lynyrd Skynyrd" band, as opposed to the life story of the applicable individual.

(Consent Decree ¶ 3.)

The Consent Decree places certain restrictions on the use of the "Lynyrd Skynyrd" name in connection with live musical performances, including that "two of the following four musicians shall also appear on stage actively performing for substantially the entire concert: Pyle, [Leon] Wilkeson, [William] Powell and [Ed] King." (Consent Decree ¶ 2 (c)(ii)(B).)

Lynyrd Skynyrd has been on tour since February 2017. May 11, 2017 Declaration of Donald Conklin Ex. A. The touring band includes Gary Rossington, Johnny Van Zant, Rickey Medlocke, Mark "Sparky" Matejka, Michael Cartellone, Johnny Colt, Peter Keys, Dale Krantz Rossington and Carol Chase. *Id.* at Ex. B. It does not include Pyle, Wilkeson, Powell or King – at least two of which are required by the Consent Decree to participate each time the band performs. Thus, it appears that that Plaintiffs have been ignoring the Consent Decree for some time.

ARGUMENT

Preliminary injunctions are "extraordinary and drastic remed[ies] that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Alzheimer's*

Found. of Am., Inc. v. Alzheimer's Disease & Related Disorders Ass'n, Inc., No. 10-cv-3314 (RWS), 2015 WL 4033019, at *4 (S.D.N.Y. June 29, 2015) (Sweet, J.).

The moving party must show "(1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and (3) that the public's interest weighs in favor of granting an injunction." *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011).

The standard for a preliminary injunction is higher where the movant seeks the ultimate relief in the action. "Where a plaintiff seeks a preliminary injunction that would in effect grant the ultimate relief, plaintiff must show a 'substantial' likelihood of success on the merits and make a 'strong' showing of irreparable harm if the preliminary injunction is not granted." *Risenhooven v. Bayer Corp. Group Health Plan*, 83 F. Supp. 2d 408, 410 (S.D.N.Y. 2000). *Accord N.Y. ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015).

Here, Plaintiffs seek the same relief preliminarily – an injunction preventing the production, distribution and display of the Motion Picture – that they seek ultimately. *See* Complaint ¶¶ 73-82.

I. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THE MERITS

A. The Consent Decree Cannot Apply to Cleopatra Records Because It Was Not a Party to the 1988 Action and Did Not Consent to the Decree

Plaintiffs' sole claim against Cleopatra is that it violated the Consent Decree. However, Cleopatra was not a party to the 1988 Action and, as a result, is not bound by the Consent Decree that resolved the Action.

At the heart of our legal system lies the principle that a party is only bound by judgments issued in actions to which it is a party:

[I]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. This rule is part of our deep-rooted historic tradition that everyone should have his own day in court. A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.

Martin v. Wilks, 490 U.S. 755, 761–62 (1989) (superceded by statute, 42 U.S.C. § 2000e-2(n), but only for employment-related claims) (internal quotation marks and citations omitted).

Accord United States v. City of N.Y., 198 F.3d 360, 366 (2d Cir. 1999) ("Those who are not parties to a consent decree are free to challenge the decree and actions taken under it."); *Cobalt Multifamily Inv'rs I, LLC v. Shapiro*, No. 06 CIV. 6468 KMW MHD, 2013 WL 5418588, at *1 (S.D.N.Y. Sept. 27, 2013) (denying motion to issue order limiting third-parties' rights).

This principle applies even more forcefully to a consent decree than it does to a traditional judgment because such a decree "does not determine that the obligations assumed by the parties are required by law" and "often impose[s] rights and obligations greater than those required by law." *Ass'n for Retarded Citizens of Connecticut, Inc. v. Thorne*, 30 F.3d 367, 370 (2d Cir. 1994). "Because the terms of the consent decree were voluntarily assumed rather than legally imposed, there is no basis for extending the negotiated outcome to a nonparty." *Id.* *Accord Martin*, 490 U.S. at 768 ("A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors.") (internal quotation marks omitted); *Madison Square Garden Boxing, Inc. v. Shavers*, 562 F.2d 141, 143-44 (2d Cir. 1977) (reversing injunction issued against non-party to consent judgment because "[a] judgment entered by consent and stipulation is binding upon the consenting parties only.")

"While a district court has authority to enforce a judicially-approved consent decree against the parties to it, a district court that enforces the decree against a nonparty acts beyond its

jurisdiction and thus beyond the scope of the All Writs Act." *Thorne*, 30 F.3d at 370 (holding that state agency was not bound by consent decree entered into by another agency of the very same state).

Here, Cleopatra was not a party to the 1988 Action. In fact, Cleopatra was not formed until 1992 and did not even exist at the time of the 1988 Action. Thus, Cleopatra is not bound by the Consent Decree. Other than the Consent Decree, there is no basis for prohibiting Cleopatra from making a film about this band. Even Plaintiffs admit that "Cleopatra is free to make a movie concerning Lynyrd Skynyrd" provided it does not violate of the Consent Decree. (Jeness/Rossington Declr. ¶ 22.)

B. Cleopatra Has Not Run Afoul of the Consent Decree

Even if Cleopatra were somehow bound by the Consent Decree (and it is not), Cleopatra has not violated the Consent Decree. Although Plaintiffs attempt to hang their hat on numerous provisions of the Decree (Pl. Br. at 5-6), only paragraph 1 purports to apply to persons who were not parties to the 1988 Action. Plaintiffs argue that Cleopatra violated paragraph 1 by: using the name Lynyrd Skynyrd (¶ 1(ii)); and using the "name, likeness, portrait, picture, performances or biographical material of" Ronnie Van Zant or Steven Gaines (¶ 1(iii)). The purpose of the 1988 Action was to resolve which version of the Lynyrd Skynyrd band held the rights to its name. *See Grondin v. Rossington*, 690 F. Supp. 200, 202 (S.D.N.Y. 1988). The Consent Decree resolved this dispute, making clear who had which rights to the band's name.

The Consent Decree does not purport to prohibit third-parties from interviewing parties to the 1988 Action. To the contrary, it explicitly authorizes Pyle to use the "Lynyrd Skynyrd" name and "related matters" when exploiting his own life story "in any medium":

Each of the Individual Defendants, Ronnie's Estate and Gaines' Estate shall have the right to exploit his (or with respect to the Estates, the applicable decedent's) own respective life story in any

manner or medium, including without limitation, in books or other print publications and in theatrical feature or television motion pictures, without obligation, financial or otherwise, to any other party hereto. In such connection, each of the foregoing shall have the right to refer to "Lynyrd Skynyrd" and related matters to describe and portray his experience(s) with "Lynyrd Skynyrd;" provided that no such exploitation of life story rights is authorized which purports to be a history of the "Lynyrd Skynyrd" band, as opposed to the life story of the applicable individual.

(Consent Decree ¶ 3.) At no point did Pyle convey the band's story rights to Cleopatra. Thus, the Consent Decree explicitly authorized Pyle to use the band and its members' names when providing his own biographical information.

Even if the Decree did not explicitly permit Cleopatra to interview Pyle, any references to the band or its members would have constituted a nominative fair use. The trademark laws cannot be used "to prevent the publication of an unauthorized group biography or to censor all parodies or satires which use their name." *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 309 (9th Cir. 1992) (publisher allowed to use musicians' name for money-generating survey). Similarly, "a defendant may lawfully use a plaintiff's trademark where doing so is necessary to describe the plaintiff's product and does not imply a false affiliation or endorsement by the plaintiff of the defendant." *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93, 102–03 (2d Cir. 2010). To the extent that Pyle used any of the Plaintiffs' names in his interview with Cleopatra, he did so because it was the only way to identify such persons and, as a result, any use of the names constituted a nominative fair use.

C. Cleopatra Has a First Amendment Right to Publish the Film

This is not merely a case in which the defendant has not breached any obligation that it has to the plaintiff. This is a case in which the defendant has an affirmative constitutional right to engage in the speech for which it is being sued: in producing and releasing the film, Cleopatra

is exercising its right to make a film about a newsworthy event from the past, a form of constitutionally protected free speech.

The application of the First Amendment's protections to motion pictures has been established since the Supreme Court's decision in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), where the Court recognized that "[t]he importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." *Id.* at 501. The Court also held that motion pictures are "within the free speech and free press guaranty of the First and Fourteenth Amendments." *Id.* at 502; *cf. Superior Films, Inc. v. Dep't of Educ. of State of Ohio, Div. of Film Censorship*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring) ("Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas."). The fact that a motion picture is intended as entertainment is immaterial. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee"); *cf. Hicks v. Casablanca Records*, 464 F. Supp. 426, 433 (S.D.N.Y. 1978) (denying preliminary injunction and granting motion to dismiss claims against fictional film and book about Agatha Christie titled "Agatha").

The act of making a film is necessarily included within the First Amendment's guarantee of free speech rights. *E.g., ACLU of Illinois v. Alvarez*, 679 F.3d 583, 595-96 (7th Cir. 2012) ("The right to publish or broadcast an audio or audiovisual recording would be insecure, or

largely ineffective, if the antecedent act of *making* the recording is wholly unprotected ... there is no fixed First Amendment line between the act of creating speech and the speech itself").

There can be no serious dispute that Cleopatra has a First Amendment right to publish the Motion Picture.

D. An Injunction Would Constitute an Impermissible Prior Restraint

The injunction Plaintiffs seek here against Cleopatra would be an unconstitutional prior restraint. The essence of prior restraints are that they give "public officials the power to deny use of a forum in advance of actual expression." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). "Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993).

A prior restraint on expression comes with a "heavy presumption" against its constitutional validity. *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees and Rest. Employees Int'l Union*, 239 F.3d 172, 176 (2d Cir. 2001) ("[w]hen a prior restraint takes the form of a court-issued injunction, the risk of infringing on speech protected under the First Amendment increases"). *See also Matter of Providence Journal Co.*, 820 F.2d 1342, 1348 (1st Cir. 1986), *opinion modified on reh'g*, 820 F.2d 1354 (1st Cir. 1987) ("In its nearly two centuries of existence, the Supreme Court has never upheld a prior restraint on pure speech."); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996), *opinion clarified* (May 8, 1996) ("Indeed, the Supreme Court has never upheld a prior restraint[.]")

Provided the material is neither obscene nor violates a copyright, this strong presumption can be overcome "when either national security or an individual's right to a fair trial is at stake." *Matter of Providence Journal Co.*, 820 F.2d at 1351. Although Plaintiffs do not address the prior

restraint issue, they may attempt to argue that there are several grounds for a prior restraint here. In fact, no such grounds exist.

First, Plaintiffs may attempt to argue that privacy or reputational interests can support a restraint. "An individual's right to protect his privacy from damage by private parties, although meriting great protection, is simply not of the same magnitude" as the national-security-type concerns that can support a prior restraint. *Id.* (reversing prior restraint on the publication of material that the government had obtained in violation of private citizens' Fourth Amendment rights). *See also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976) ("Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record.") (internal quotation marks omitted). Courts will not even restrain speech that is defamatory. *See Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 721-22 (1931) (holding statute that permits prior restraint of defamatory material unconstitutional); *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union*, 239 F.3d 172, 177 (2d Cir. 2001) ("Indeed, for almost a century the Second Circuit has subscribed to the majority view that, absent extraordinary circumstances, injunctions should not ordinarily issue in defamation cases.").

Second, Plaintiffs claim (incorrectly) that Pyle's willingness to be interviewed constitutes a breach of his confidentiality obligations to them. However, courts consistently find prior restraints cannot be supported by the fact that the putative speaker obtained the information from a source that was obligated to keep the information confidential. In *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971), the Supreme Court rejected any prior restraint on the publication of classified information because "[t]he guarding of military and diplomatic secrets at the expense

of informed representative government provides no real security for our Republic." *Id.* at 719 (Black, J., concurring). In *CBS, Inc. v. Davis*, 510 U.S. 1315 (1994), Justice Blackmun, acting as the Circuit Justice, reversed a lower court's injunction against the publication of a video of a meat packing plant surreptitiously taken by an employee even though there was evidence that the video had been taken unlawfully. *Id.* at 1318/

In *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224-26 (6th Cir. 1996), the court rejected a district court's temporary injunction prohibiting the publication of documents that were the subject of a protective order. The court explained that "[t]he private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint." *Id.* at 225. The justification for a prior restraint was so weak that the district court never would have issued the injunction "had it engaged in the proper constitutional inquiry." *See also Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 753 (E.D. Mich. 1999) (interest in protecting trade secrets insufficient to warrant prior restraint).

Third, Plaintiffs claim that, absent an injunction, they will suffer financial injury. But, courts reject applications for a prior restraint premised on an economic harm. *See CBS*, 510 U.S. at 1315 (reversing preliminary injunction premised upon economic harm); *Procter & Gamble*, 78 F.3d at 224-26 ("[C]ommercial self-interest" insufficient to justify prior restraint). Even if economic harm could be sufficiently catastrophic to warrant a prior restraint, as discussed below, the harm allegedly here is wildly speculative and only certain and immediate harms can justify a prior restraint. *New York Times Co.*, 403 U.S. at 730 (Stewart, J., concurring) (to support prior restraint, movant must show that publication would "surely result in direct, immediate, and irreparable damage" to his rights).

Fourth, Plaintiffs may point to the fact that the court's interest in enforcing its order in the 1988 Action justifies a prior restraint in this action. *Crosby v. Bradstreet & Co.*, 312 F.2d 483 (2d Cir. 1963) precludes any such argument. There, the district court entered a consent decree prohibiting the company that ultimately became Dun & Bradstreet from publishing any information about certain persons' business activities. *Id.* at 484. Thirty years later, the district court denied a motion to vacate the decree, and the Second Circuit reversed, holding that the decree was an unconstitutional prior restraint:

We are concerned with the power of a court of the United States to enjoin publication of information about a person, without regard to truth, falsity, or defamatory character of that information. Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which Dun & Bradstreet had and has the right to publish. The court was without power to make such an order; that the parties may have agreed to it is immaterial.

Id. at 485. The court invalidated the thirty-year old consent decree because "there does not seem to be any equity in... the continuation of an injunction which should never have been entered in the first place." *See also Matter of Providence Journal*, 820 F.2d at 1353 (reversing contempt citation when order that was violated was an unconstitutional prior restraint of speech).

Here, as in *Crosby*, to the extent the Consent Decree precludes third-parties like Cleopatra from publishing its film, it constitutes an unconstitutional prior restraint on such third-parties. Any temporary or permanent injunction issued in the instant case would similarly constitute an unlawful prior restraint.

Finally, reading the instant Consent Decree as an order that restrains the speech of third-parties like Cleopatra would be particularly inappropriate. The Consent Decree permits the parties to the 1988 Action to amend the Decree without leave of Court. (Consent Decree ¶ 37 ("The parties hereto may unanimously agree to amend their respective rights and obligations

pursuant to this Order, without seeking further intervention of the Court, provided such shall be in a writing signed by all parties.")) Thus, if the Consent Decree were read to bind third-parties, it would mean that the 1988 Action parties could impose obligations on third-parties without obtaining the consent of the third-parties or the approval of the court. One judge has referred to such an order as "ludicrous." *Procter & Gamble*, 78 F.3d at 228 (Martin, J., concurring).

There is no rationale for prohibiting Cleopatra's publication of the Motion Picture that can withstand First Amendment scrutiny.

II. PLAINTIFFS HAVE FAILED TO MAKE A STRONG SHOWING OF IRREPARABLE HARM

The Second Circuit has repeatedly noted that "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." *Borey v. National Union Fire Ins. Co.*, 934 F.2d 30, 33 (2d Cir. 1995). A "mere possibility of irreparable harm" is insufficient to justify the drastic remedy of a preliminary injunction. *Id.* See also *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999).

Plaintiffs' irreparable injury claims are threefold. First, they claim that they are "actively engaged" in the development of a competing film "about the history of Lynyrd Skynrd," and "there is a limited and uncertain market for motion pictures about the band, and the Defendants' production will dilute the market, causing irreparable injury to the Plaintiffs' right to produce and distribute their prospective motion picture." (Pl. Br. at 8.) Second, they claim that there is a substantial risk that "customers will be confused as to the source of the Motion Picture." *Id.* Third, they maintain that there is "a substantial risk of reputational harm to the Plaintiffs as a result of (a) any objectionable content concerning Lynyrd Skynrd, Ronnie Van Zant, or Steven

Gaines contained in an unauthorized version," and "(b) the potential spillover effect of Pyle's sordid personal history." *Id.*

All three of Plaintiffs' irreparable harm assertions fail.

A. Plaintiffs' Conclusory Allegations about a Competing Film Do Not Warrant an Injunction

To establish irreparable harm, Plaintiffs must demonstrate injury "that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation." *Worldwide Diamond Trademarks, Ltd. v. Blue Nile, Inc.*, No. 14-CV-3521 (VSB), 2014 WL 7933941, at *3 (S.D.N.Y. Nov. 6, 2014) (citing *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995)). "It is not enough for a movant to demonstrate the possibility of irreparable harm; the movant must show that it is likely to suffer irreparable harm if equitable relief is denied." *Worldwide Diamond*, 2014 WL 7933941, at *3 (citing *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990)).

Here, Plaintiffs' only evidence that they are producing a competing film is their statement that "[w]e have selected a producer for the project and are moving forward." (Jeness/Rossington Declr. ¶ 6.) Plaintiffs do not claim that they have engaged the supposed producer or that the person is willing to work on such a film. They have not even identified the alleged producer. They do not appear to have raised any money to make the film. Nor do they appear to have actors or a script. In short, Plaintiffs have not identified anything that they have done to create a film or any evidence whatsoever that they are likely to make such a film. At most, Plaintiffs hope to make a film some day. This type of conclusory evidence is not enough to withstand a motion to dismiss, nevertheless a preliminary injunction restraining speech. *See Ascroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Even if Plaintiffs had offered sufficient evidence to support the proposition that they will actually produce a film (and they have not), Plaintiffs have not even attempted to show how the Motion Picture would affect, let alone impair, their "right to produce and distribute" their prospective film. *See Burroughs v. Metro-Goldwyn Mayer, Inc.*, 491 F. Supp. 1320 (S.D.N.Y.), *aff'd*, 636 F.2d 1200 (2d Cir. 1980) (rejecting plaintiff's speculative claim that a potential film based on "Tarzan" would not be made by plaintiff's licensee in absence of injunction assuring that licensee would have exclusive rights to "Tarzan"). Courts in the Second Circuit have long held that an injury compensable by money damages is insufficient to establish irreparable harm. *E.g., CRP/Extell Parcel I, L.P. v. Cuomo*, 394 Fed. Appx. 779, 781 (2d Cir. 2010) ("[N]otwithstanding any compensable losses, a movant must provide evidence that it is likely to suffer damage that cannot be rectified by financial compensation before a district court may providently exercise its equitable power to grant injunctive relief.").

At bottom, this complaint is that there is a "limited and uncertain market for motion pictures" about Lynyrd Skynyrd, and the Defendants' production will "dilute the market." But Plaintiffs have not demonstrated that there is, in fact, a "limited and uncertain market" for films. To the contrary, Cleopatra's film is at least the fourth film about Lynyrd Skynyrd. (Perera Decl. ¶ 5.) And Cleopatra's film focuses on three or four days surrounding a historic plane crash. (Cohn Decl. ¶ 6.) Certainly, the fourth film about a band cannot foreclose the market for a fifth film when the fourth film is so narrow in scope.

Ultimately, the law requires that Plaintiffs provide something more than their subjective belief that they are likely to be damaged before they will be entitled to injunctive relief. "Such belief and speculation do not amount to evidence of irreparable harm." *Worldwide Diamond*, 2014 WL 7933941, at *4.

B. Plaintiffs' Conclusory Allegations of Customer Confusion Do Not Warrant an Injunction

Plaintiffs claim that there is a substantial risk that "customers will be confused as to the source of the Motion Picture." Setting aside whether the concept of customer confusion is relevant at all in this non-trademark case, Plaintiffs have not explained why the alleged marketplace confusion would create any harm to them, much less the required likelihood of irreparable harm.

Even if there was a danger of marketplace confusion between Cleopatra's film and Plaintiffs' speculative and theoretical competing film, it would not rise to the kind of irreparable harm that would support an injunction:

Marketplace confusion between two movies ... does not lead inexorably to a finding of irreparable harm. In contrast to the purchase of an expensive camera, the purchase of one DVD is not likely to preclude the purchase of another. And unlike confusion between two cameras, marketplace confusion about the alleged connection between these movies is not as likely to affect consumer judgments about the quality of either. Finally, there is evidence here that any confusion has actually benefitted [Plaintiff] by bringing it increased publicity.

Clonus Assocs. v. Dreamworks, LLC, 417 F. Supp. 2d 248, 256 (S.D.N.Y. 2005).

In any event, Cleopatra's film includes a clear statement in the opening of the film that Plaintiffs have not authorized the film. (Cohn Declr. ¶ 14.) Such a disclaimer precludes a finding of consumer confusion. *See Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1053 (2d Cir. 1983) ("Disclaimers are a favored way of alleviating consumer confusion as to source or sponsorship. ... Absolute prohibitions of speech as provided for in the instant preliminary injunction are improper where there is any possibility that an explanation or disclaimer will suffice.").

C. Plaintiffs' Conclusory Allegations of Reputational Harm Do Not Warrant an Injunction

Plaintiffs' vague averments of alleged reputational harm do not support a request for an injunction. Plaintiffs do not make any specific allegations as to what Lynyrd Skynyrd's current reputation is and how that reputation would be affected by the Motion Picture or "the potential spillover effect" of Pyle's personal history. Similarly, Plaintiffs do not make any non-speculative claims concerning supposedly "objectionable content" concerning Lynyrd Skynyrd, Ronnie Van Zant, or Steve Gaines. A court will not find irreparable harm based on a conclusory proffer unsupported by facts. *In re United Pan-Europe Comms, N.V.*, Nos. 02-16020 (BRL), M-47(RWS), 2003 WL 221819, at *4 (S.D.N.Y. Jan. 30, 2003) (rejecting "irreparable harm" because there were no "specific allegations" as to what movant's reputation was at time and how it would be affected by non-movant's actions); *see also Nat'l Football League Players Ass'n v. Nat'l Football League Props., Inc.*, No. 90 Civ. 4244 (MJL), 1991 WL 79325, at *4-5 (S.D.N.Y. May 7, 1991) ("Plaintiff also argues that it faces destruction of its reputation and goodwill, the loss of which cannot be compensated with money damages. However, we fail to see convincing evidence of any loss of reputation or goodwill in the elaborate affidavits and exhibits submitted with this motion."); *Worldwide Diamond*, 2014 WL 7933941, at *4 (subjective belief and speculation do not establish irreparable harm).

In any event, a finding that Cleopatra's interview of Pyle will somehow harm Lynyrd Skynyrd's reputation is precluded by the Consent Decree, which provides that Pyle is one of the core members of the band. In order for Lynyrd Skynyrd to conduct a live performance, "two of the following four musicians shall also appear on stage actively performing for substantially the entire concert: Pyle, Wilkerson, Powell and King." (Consent Decree ¶ 2(c)(ii)(B).) Pyle's

limited involvement in the film is far more narrow in scope than Pyle's involvement in Lynyrd Skynyrd itself and, thus, could not possibly harm the band's reputation.

Finally, Pyle has given detailed interviews about his experience in the 1977 plane crash numerous times over the course of decades. *See, e.g.*, Cohn Declr. ¶ 11; *Artimus Pyle, Former Lynyrd Skynyrd, Recalls That Horrible Day*, Howard Stern Show (Feb. 12, 2007) (*available at* <https://www.howardstern.com/show/2007/2/12/that-fateful-night-RundownGalleryModel-10547/>) ("Artimus then remembered he was playing Pong on the plane just prior to the crash, and that the band had auditioned 30 pilots to fly their private plane for that trip. ..."). To the extent Plaintiffs' complaint is that Pyle gave an interview about the plane crash to Cleopatra, it is barred by their inexcusable delay in taking action against Pyle for granting numerous prior interviews. Cleopatra relied in good faith on Plaintiffs' prior conduct in allowing Pyle to speak about the plane crash and his experiences with the band, and would be prejudiced by Plaintiffs' delay in asserting that claim here. *Saratoga Vichy Spring Co., Inc. v. Lehman*, 625 F.2d 1037, 1040 (2d Cir. 1980).

III. BALANCING HARDSHIPS WEIGHS IN FAVOR OF CLEOPATRA

As set forth above, Plaintiffs have failed to show that they would be irreparably injured by the production and distribution of the Motion Picture. However, an injunction would irreparably injure Cleopatra because the loss of First Amendment rights, even for a moment, is irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.") *Accord N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (reversing denial of preliminary injunction against statute that limited speech).

Further, while preliminary injunctions are often used to preserve the status quo while the parties provide the court with information and the court deliberates, prior restraints cannot be imposed for the purpose of preserving the status quo. *See Procter & Gamble*, 78 F.3d at 226 ("Where the freedom of the press is concerned, however, the status quo is to publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion.") (internal quotation marks omitted).

IV. THE PUBLIC INTEREST FAVORS CLEOPATRA

Here, the public's right to view Cleopatra's film strongly favors denial of the preliminary injunction. *See, e.g., N.Y. Times Co.*, 403 U.S. at 730 (Stewart, J. concurring) (Even though "I am convinced that the executive is correct with respect to some of the documents involved" that publication is against "the national interest," "I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparably damage to our Nation or its people," and, as a result, no injunction against publication of classified documents should issue); *Monster Comms., Inc. v. Turner Broadcasting Sys., Inc.*, 935 F. Supp. 490, 494 (S.D.N.Y. 1996) ("There is a public interest in receiving information concerning the world in which we live. The more newsworthy the person or event depicted, the greater the concern that too narrow a view of the fair use defense will deprive the public of significant information.").

Any interest that the public has in ensuring that its court orders are enforced is easily outweighed by the public's interest in freedom of speech. *See Crosby*, 312 F.2d at 485 (invalidating thirty-year old consent decree that violated the First Amendment because "there does not seem to be any equity in... the continuation of an injunction which should never have been entered in the first place"); *Matter of Providence Journal*, 820 F.2d at 1353 (reversing contempt citation when order that was violated was an unconstitutional prior restraint of speech).

V. PLAINTIFFS' BOND WOULD HAVE TO BE AT LEAST \$1.3 MILLION

Fed. R. Civ. P. 65(c) requires the posting of a bond by Plaintiffs "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." *See, e.g., Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1037-39 (1994) (holding that defendant who was wrongfully enjoined was entitled to recover full amount of \$15 million bond). The failure to require a bond is reversible error. *Hoechst Diafoil v. Nan Ya Plastics Corp.*, 174 F.2d 411, 421 (4th Cir. 1999). Cleopatra submits that Plaintiffs' motion fails to satisfy the requirements for preliminary injunctive relief, but should the Court grant the motion a bond in the amount of at least \$1.3 million should be required, which constitutes the cost of the film and, as such, the lowest possible valuation of the harm that Plaintiffs will suffer if the film is not published. (Perera Declr. ¶ 15.)

VI. THE MOTION TO SEAL

Because Plaintiffs have yet to provide Cleopatra with proposed redactions of the filings in this case, Cleopatra cannot take a position on Plaintiffs' motion to seal at this time. That being said, in the highly unlikely event that this Court issues a preliminary injunction, Cleopatra objects to the sealing of the injunction.

CONCLUSION

For the reasons set forth above, Defendant Cleopatra Records, Inc. respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction and grant it such other and further relief as it deems just and proper.

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Respectfully submitted,

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