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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
SKETCHWORKS INDUSTRIAL STRENGTH
COMEDY, INC.,

Plaintiff,

-against-

JAMES H. JACOBS, AS TRUSTEE OF THE JAMES
H. JACOBS TRUST, and HARRIS, N.A., AS
TRUSTEE UNDER THE WILL OF WARREN
CASEY,

Defendants.

Case No. 19-cv- 7470

COMPLAINT

Plaintiff Sketchworks Industrial Strength Comedy, Inc. (“Sketchworks” or “Plaintiff”) pleads the following for its complaint against the defendants, James H. Jacobs, as Trustee of the James H. Jacobs Trust, and Harris, N.A., as Trustee under the Will of Warren Casey (collectively, “Defendants”):

NATURE OF THE CASE

1. Sketchworks brings this action for a judgment declaring that its play, *Vape: The Musical* (“*Vape*”), does not infringe upon Defendants’ copyright in the musical play *Grease* because *Vape* is a parody of *Grease* and therefore constitutes fair use under the Copyright Act of 1976 (17 U.S.C. § 107). *Vape* and *Grease* are incorporated herein by reference, and a performance of *Vape* is also available online at https://youtu.be/ex0_zjaIeRs.

PARTIES

2. Sketchworks is a Georgia corporation that operates an award-winning sketch comedy company in the Atlanta, Georgia area. Sketchworks owns the copyright in *Vape*, which was duly registered with the United States Copyright Office effective August 2, 2019 (registration number PAu003980762).

3. On information and belief, James H. Jacobs (“Jacobs”) is an individual residing in California and he is the Trustee of the James H. Jacobs Trust (the “Trust”), which is organized under the laws of California.

4. On information and belief, Harris, N.A. (“Harris”) is an entity headquartered at 111 West Monroe Street, Chicago, IL 60603, and is the Trustee under the Will of Warren Casey (“Casey”).

5. On information and belief, Jacobs and Casey are the co-authors of the musical play *Grease*, and Defendants are their successors-in-interest to the copyright in theatrical performances of *Grease*.

JURISDICTION AND VENUE

6. This is a declaratory judgment action involving a case of actual controversy under the Copyright Act of 1976. The basis of jurisdiction is 28 U.S.C. §§ 1331, 1338(a), and 2201.

7. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. §§ 1391(b)(2) and 1400(a) because: (i) a substantial part of the events giving rise to the claims arose in this district; and (ii) Defendants’ agent, non-party Concord Theatricals (“Concord”), sent the underlying cease and desist letter and Concord may be found, on information and belief, at 229 West 28th Street, New York, NY 10001.

FACTS

Grease

8. *Grease* is a popular musical that is set in the 1950s at fictional Rydell High School. The story follows a group of teenagers as they navigate adolescence, peer pressure, personal values, sexual exploration, love and friendship. *Grease* has been performed on both stage and screen, and exploitations include a long-run on Broadway and a popular feature film starring John Travolta and Olivia Newton-John. On information and belief, *Grease* and various derivative works based thereon are registered with the United States Copyright Office.

9. On information and belief, several variants of *Grease* exist such that there are differences between the original play, the 1978 film, and versions currently licensed by Defendants. The following is a synopsis of the popular film version, a derivative of Defendants' original musical and upon which *Vape* is based.

10. It is the late 1950s, and over summer break a local teenager named Danny Zuko has a brief romance with Sandy Olsson, who is visiting from abroad. Sandy is planning on leaving at the end of the summer and she worries that the two of them may never meet again.

11. The school year then starts at Rydell High School. Among the student body is: (i) a group of boys (or greaser gang) who call themselves the "T-Birds," which consists of Danny and his friends Kenickie, Doody, Sonny, and Putzie; and (ii) a group of girls who call themselves the "Pink Ladies," consisting of Rizzo, Frenchy, Marty, and Jan. They are all seniors at Rydell High School, though Frenchy is considering dropping out of school to become a beautician.

12. Sandy does not return home and instead enrolls at Rydell High School, where she is befriended by Frenchy. Unaware that they are both students at Rydell, through song and dance

Danny tells the T-Birds a sexualized account of his “summer love” with Sandy and Sandy likewise tells the Pink Ladies her perspective of those “summer nights.”

13. When the Pink Ladies learn that Sandy’s summer romance was with Danny, Rizzo arranges a surprise reunion for the two at a school pep rally which is led by the school’s athletics coach. At the pep rally, Danny is giddy when he first sees Sandy. But when Danny realizes that his friends are watching the encounter, Danny abruptly changes his attitude and becomes a stand-offish jerk. Sandy gets upset and storms off.

14. Time passes. Sandy begins dating a jock; Kenickie unveils a used car that he plans to restore with the T-Birds and then race (the Greased Lightnin’); and the Pink Ladies and Sandy have a pajama party, where Sandy gets made fun of after she tries a cigarette and gets her ears pierced by Frenchy (who has dropped out of Rydell High to study to become a beautician). Rizzo departs the pajama party and has unprotected sex with Kenickie, but not before they are disturbed by Leo, the leader of a rival greaser gang (the Scorpions), and his girlfriend Cha-Cha.

15. In an attempt to impress Sandy, Danny turns to the school’s athletics coach to join a sports team and he eventually joins the track and field team. Danny and Sandy reunite, and they go on a date to a restaurant popular with the high school students, where their friends end up crashing the date. Kenickie and Rizzo get into an argument and split up. Everyone leaves except Frenchy, who is visited by a guardian angel that tells her (through song) to return to high school.

16. Then it is time for the school dance, which is being broadcast live on TV as part of a dance competition. Out of spite, Rizzo and Kenickie bring Leo and Cha-Cha as their respective dates. Danny and Sandy are dates and successfully progress in the dance competition,

but just before the end of the contest Sandy is pulled off the dance floor and Cha-Cha cuts-in to dance with Danny and win the competition with him.

17. Danny tries to reconcile with Sandy and takes her to a drive-in movie theater, but she leaves after he clumsily tries to make out with her. Meanwhile, Rizzo discloses to her friend that she thinks she is pregnant and the rumor quickly spreads, eventually to Kenickie whom Rizzo denies is the father.

18. Then it is the race day between Kenickie and Leo. Kenickie tells Danny that he is his best friend, but Kenickie injures his head and Danny takes his place as the race car driver. Danny and Leo race at Thunder Road, and Danny wins. Sandy watches the race, and still in love with Danny she asks Frenchy to help her impress him.

19. On the last day of school, the principal and her assistant (who had previously appeared making various announcements to the student body) sob about the end of the school year and everyone attends a graduation carnival. Rizzo discovers she is not pregnant and reunites with Kenickie.

20. Danny, meanwhile, has lettered in track and field and is dressed clean-cut in a letter jacket. Sandy, who is normally conservatively dressed (ponytail, cardigan, skirts), shocks Danny when she arrives provocatively dressed like a greaser in black leather with teased hair and smoking a cigarette. Danny and Sandy reunite while professing over song that “you’re the one that I want.”

21. Contemplating where their lives will lead after graduating high school, the T-Birds and Pink Girls come together to sing that “we’ll always be together.” It concludes with Danny and Sandy riding together in a car that flies off into the sky.

Vape

22. *Vape* is an award-winning, approximately 1-hour long, parody of *Grease*.

23. Roughly following the story-arc (and abrupt transitions) of *Grease*, *Vape* begins with Danny and Sandy on the beach at the end of summer. It is immediately apparent that *Vape* is a parody.

DANNY

Oh, Sandy, I can't believe the summer's already over. We haven't even had sex yet!

SANDY

I know, Danny, and I appreciate you not pressuring me into anything I don't want to do. I'm gonna miss you so much when I go back to...wherever it is I came from.

(They kiss)

DANNY

What do you say, Sandy? How about that hand job finally?

SANDY

Oh, Danny, don't ruin this special moment!

DANNY

I don't care, Sandy. I...I think I heart you.

SANDY

I love you, too.

DANNY

Oh, wow. I said I heart you...I didn't drop the L bomb.

SANDY

I heart you, too, Danny.

24. The lights go down and credits appear on a video screen. When the lights go up, Sandy and Frenchy are walking together outside of Rydell High School. Frenchy explains to Sandy that Rydell is "the one school where everybody randomly busts into choreographed song and dance, and we all look at least 30." Frenchy then tells Sandy, "Nobody cares about your

backstory,” and when the #PinkSquad come on-stage all vaping e-cigarettes Frenchy introduces Sandy by saying “She just moved here and no one knows why!”

25. The girls start talking about what they did the past summer, with one of them saying she went on 500 Tinder dates leading to a joke about oral sex. Sandy tells the #PinkSquad about her summer love, explaining that “We fell in love but didn’t make any plans to keep in touch. I’m hoping he’ll just friend me on Facebook.” Sandy is asked, “What was his name? You know in the off chance that he’ll go to this supremely large high school.”

26. The girls then comment on modern dating apps, and the scene ends with Rizzo telling Sandy to “Meet us at the pep rally tonight. We’re gonna give you a bigger surprise than your parents moving across the world without any notice, k byeee.”

27. Danny, Kenickie, Putzy, Sonny and Doody (the T-Bros) then all appear on the stage vaping e-cigarettes and talking about their respective summers. Kenickie tells his friends that he worked at a vape shop so that he could earn money to buy a car: “I’m not a lazy Millennial like the rest of you.” Doody “traveled abroad to find [him]self” and also started a YouTube channel. When Sonny asks Danny about his summer, Danny says: “It was alright. I tricked a girl into falling in love with me” and that he has “snaps to prove it.”

28. The cast then breaks into a song called “Summer Snaps.” Rather than being a song about innocent summer love, “Summer Snaps” is about how modern dating involves nude selfies, social media, and dating apps like Tinder and Bumble.

29. After the song, the T-Bros discuss going to the pep rally and Putzy says he is “only going to inappropriately touch cheerleaders.” The play then transitions to the school principal and her assistant making an announcement to the school welcoming the students back

for another school year. She announces that “this year teachers are all packing heat,” and encourages the students to attend the pep rally that night.

30. The next scene is the pep rally, where the #PinkSquad approaches the T-Bros.

RIZZO

Hey Zucko, we got a little surprise for you.

DANNY

Oh yeah, you girls ready for a threesome?

31. The #PinkSquad then pushes Sandy in front of Danny. Like in *Grease*, Danny is at first giddy to see Sandy but then changes his attitude when he realizes that his friends are watching. Danny “was just about to send you a Facebook friend request” but then says “Actually, ha, I’m not on Facebook anymore. I like to stay off the grid, too many bitches trying to get up in my business.” Sandy, confused, asks Danny why he is talking that way and Danny responds, “I don’t know, baby, around these parts I’m a bad boy with a reputation to uphold. In fact, last year I was voted ‘Most Likely to Slip You a Roofie.’” Sandy responds, “This seems problematic and kinda rapey” and she runs off stage with the girls following her.

32. The show then briefly transitions to the principal and her assistant, who are discussing a police search of the school for opioids. The audience learns that the police found a lot of drugs, all of which belong to the principal.

33. *Vape* then quickly transitions to the slumber party scene, where Sandy and the #PinkSquad discuss sexting and fat shaming, drink alcohol, and Sandy agrees to let Frenchy (who “watched a YouTube tutorial”) pierce her ears with a dirty needle “cause FOMO.” Like in *Grease*, Rizzo then makes fun of Sandy for being different.

RIZZO

Can you believe this Sandy girl? First of all, she’s def a virgin. Second of all, she doesn’t vape. Third of all, why can’t she go back to wherever it is she came from?

JAN

She's different and, as we know, different is bad.

MARTY

Of course, that's the number one rule of high school.

34. The girls then sing a song about Sandy, which starts: "Look at me, I'm Sandra Dee / Flat chested nothing to see; Won't even vape or get a tattoo / I can't, I'm Sandra Dee!"

35. Sandy returns to the scene, bleeding effusively from the ear piercing, and realizes that the other girls are making fun of her: "There was literally just hollow door in between us. I could hear every word you were singing." One of the girls then realizes that "the boys are outside exposing themselves," and Rizzo admits that she texted Kenickie to come get her because she is "bored AF" and has "gotta go sit on some faces."

36. Kenickie and Rizzo then have unprotected sex (Kenickie was too embarrassed to buy a condom at the drugstore), but it is interrupted by Leo (from a rival gang) and his girlfriend Cha-Cha. Leo and Kenickie get into an over-the-top juvenile argument, which sets the scene for the later car race at Thunder Road.

KENICKIE

Kind of like Rizzo, this car may not look like much now but after I get done committing felony level theft, we're gonna turn this bad boy into a Thunder Road champion!

LEO

Okay, whatever you say. I'll see you at Thunder Road, prick face.

KENICKIE

See you there, dickwad.

LEO

In awhile, penis breach.

KENICKIE

I'll see you at the Road, you little chode.

LEO

Meet you at the race, you fugly jizz face.

37. The next scene is in a mechanic shop. The T-Boys are doing a vlog about hybrid cars, and then start working on Kenickie's car to prepare for the race against Leo at Thunder Road.

KENICKIE

Boys, we gotta prove our manhood by turning this hunk of junk into a champion.

DANNY

You know, Kenick, this car is a real piece of shit that you worked super hard for. I'm gonna relentlessly make fun of it until it's fixed up nice, then I'm gonna steal it from you and take all the credit for how bad ass it is.

KENICKIE

That seems fair.

38. The T-Bros then break into a song called "Prius Lightning Pt. 1," which starts with Danny singing, "Why, this car is gonna be misogynistic. Problematic. Highly illegal. Why, it's gonna be Prius lightning!" Rather than brag about how fast the car can travel, the T-Bros sing about the car's fuel efficiency and minimal environmental impact.

39. The next scene is back in Rydell High, where Danny runs to catch up with Sandy. He apologizes to Sandy for his past behavior, explaining, "I have a reputation here and due to my shitty upbringing, I'm not allowed to look vulnerable or like I care about women in front of my boys." Sandy says that she understands: "Lucky for you, Society has taught me to give an unlimited amount of chances to undeserving men." Danny then asks Sandy to the dance, and Sandy gives him an ultimatum saying: "I only date guys who play sports. If you can clean up your act and join a team by the end of the week I'll go with you." Danny agrees to do it, observing "That's an oddly specific and unrealistic request."

40. Rizzo and Sandy then have an awkward encounter where Sandy tells Sandy that she “could really use a friend” but Sandy quickly excuses herself. Rizzo then breaks into a song entitled “I Prolly Just Need to Poo,” which ends with her asking “am I pregnant or just fullllllllll?”

41. The next scene is Danny with the athletics coach, who tries to sexually molest Danny. Danny wants to make himself “a better man” and impress Sandy (or at least he wants “to bang [Sandy] once before graduation”). The coach says, “As we all know, playing sports is literally the only way a person can improve himself” and that “Sex with beautiful women is the primary reason young men should participate in the athletics.”

42. *Vape* then transitions to Frenchy, who has dropped out of high school, sitting in a coffee shop taking an online class on her laptop. Her friend from the #PinkSquad enters and the two of them try to identify the sender of a “dick pic.” The show abruptly transitions to a guardian angel (played by the coach actor) singing a song called “Online School Dropout,” which encourages Frenchy to return to high school.

43. The next scene is the school dance. Sandy is proud of Danny for joining a sports team and for cleaning himself up, and she admits to being nervous because she does not know any of the choreographed dances “that literally everyone at this school knows.” Danny tells Sandy not to worry, “You’ll magically pick up on these moves in no time.” Danny and Sandy dance together, but then Danny ends up dancing with Cha-Cha and they win the competition. This makes Cha-Cha’s boyfriend, Leo, get “angry face emoji” but the two make up and then go to have sex.

44. In the next scene, Rizzo tells the #PinkSquad that her period is late. The news that Rizzo is pregnant spreads to Kenickie, who says that Rizzo should get checked out by a

doctor and then breaks the theatrical fourth-wall with the audience advocating for comprehensive sex education in high school and donating to Planned Parenthood.

45. A commercial for Thunder Road Racing then appears onscreen, promoting the race between Kenickie's Prius Lightning and "Leo in...his car." After the video ends, Kenickie tells Danny that Danny is his best friend, and Danny asks, "Wait, are you...gay?" But Kenickie gets hit in the head looking for a good luck charm the #PinkSquad had just given him (a used Nuva Ring), and Danny agrees to drive for him.

KENICKIE

Man, my head is pounding. I don't think I can drive. Danny, can you take over for me?

DANNY

I'll do anything for you.

(Danny kisses Kenickie.)

KENICKIE

What the fuck, man! Did you just kiss me?

DANNY

I thought you...were gay? No? Isn't that what you told me two minutes ago?

KENICKIE

Dude. What? Are you?

DANNY

I'm still figuring it out, to be honest. But yeah, I'll drive.

46. Danny and Leo then race, which is crudely reflected in a video of two toy cars racing. Danny wins the race, and Sandy asks Frenchy for her help.

SANDY

Hey, Frenchy, come here for a minute?

FRENCHY

What's up, Sandy, how'd you like that extremely dangerous dick-measuring contest?

SANDY

Oh, Frenchy, it was exhilarating! I need your help.

FRENCHY

Yeah? For what?

SANDY

I've made a decision. I want Danny back. Frenchy, I'm going to change everything about myself for him.

FRENCHY
(Sarcastically)

That's so great to hear. You definitely won't regret this later...*under breath* Said no one ever.

SANDY

Exactly!

FRENCHY

Let's go to my house for this totally unnecessary makeover!

47. The show briefly transitions to the school principal making an announcement about the graduation carnival and how it is "unbelievable we've made it through the entire school year in what felt like an hour." The principal wishes everyone a terrific summer, and then everyone is at the graduation carnival.

48. Sandy, who has had a makeover, enters. No longer dressed conservatively, Sandy is vaping and dressed provocatively, and explains that she has experienced a "sexual awakening while also abandoning my identity and values." Danny, meanwhile, impresses Sandy because he "lettered in track" and is wearing a letter-jacket.

49. The cast then breaks into a song, "You're the one that I want – right now," the title reflecting modern attitudes on casual sex. Danny's excitement takes a different form in *Vape* than in *Grease*; he sings: "I am hard and I cannot hide it. 'Cause these pants are a little too tight. And the vibe that you're projecting, why it's penis perplexing."

50. After the song, Rizzo observes: “Isn’t it great you both became something you’re not just to please your high school crush?” Kenickie agrees: “The best relationships are built on hiding your true self as much as humanly possible, ammiright?” Rizzo then tells Kenickie that she is not actually pregnant, she “just misread the results of the pregnancy test. In fact, the first time around I peed on a thermometer.”

51. The cast then has a big final scene, “one more choreographed dance for old times sake!” that they intend to make “as unrealistic as possible.” They sing a song entitled “We’re Totes Amazeballs,” which has lyrics written primarily in millennial slang, and then *Vape* ends.

52. Comparing *Vape* and *Grease*, it is apparent that *Vape* is a parody of *Grease*.

53. *Vape* uses millennial slang, popular culture, a modern lens, and exaggeration to comment upon the plot, structure, issues and themes of *Grease* and to criticize its misogynistic and sexist elements. *Vape*, which was written and directed by women and has a largely female cast, reexamines *Grease* from a female perspective in the #MeToo era and exposes how the “humor” and rape-culture elements of *Grease* have not aged well. *Vape* directly criticizes *Grease*’s “happy ending,” where a woman completely changes who she is in order to please a man.

54. At the same time, *Vape* recognizes that modern youth still navigate complex issues relating to sex, drugs, and peer pressure – just in different forms from their 1950s counterparts. *Vape* not only comments upon controversial themes in *Grease*, it also explores whether modern society has progressed at all by pointing to current systemic issues that still exist based on the misogyny of the era in which *Grease* was written and is set.

55. *Vape* also humorously pokes fun at various absurdities in *Grease*. For example, Sandy inexplicably does not return home at the end of the summer; everyone miraculously

breaks into song and choreographed dance, and (at least in the movie) appears to be older than teenagers; and *Grease*'s abrupt plot transitions.

Defendants Claim That *Vape* Infringes *Grease*

56. In 2018, *Vape* was performed in Atlanta, Georgia. Due to the overwhelming audience reaction to those performances, Sketchworks arranged for *Vape* to be performed in New York.

57. Performances of *Vape* were scheduled for August 8-10, 2019, at the Improv Asylum NYC theater, located at 307 West 26th Street in Manhattan (the "Theater").

58. Defendants or their agent, Concord, learned about the scheduled performances of *Vape*, and on July 29, 2019 Concord emailed a cease and desist letter to, *inter alia*, Sketchworks' principals and the Theater claiming that *Vape* infringed Defendants' rights in *Grease* and demanded that Sketchworks and the Theater "immediately cease and desist." Concord's letter also demanded an accounting for past performances of *Vape*.

59. On July 31, 2019, Sketchworks (through counsel) responded to the cease and desist letter objecting to the infringement claim and advising Concord (Defendants' agent) that *Vape* is fair use. Sketchworks' response included citations to relevant case-law, including *Lombardo v. Dr. Seuss Enterprises, L.P.*, 279 F. Supp. 3d 497 (S.D.N.Y. 2017), *aff'd* 729 Fed. Appx. 131 (Mem) (2d Cir. July 6, 2018).

60. However, on or about August 2, 2019, the Theater cancelled the performances of *Vape* that were scheduled for the next week.

61. On August 5, 2019, Defendants' attorney (Ronald Taft, Esq.) emailed Sketchworks' attorney and rejected Sketchworks' position that *Vape* is fair use, described the marketing and promotion of *Vape* as "blatant infringements of my clients' trademark and

copyrights,” and asserted that *Vape*’s director’s (not its author’s) “true purpose and intent of *Vape*” was not parody, criticism, or comment.

62. Defendants’ attorney represented that Defendants were “willing to reconsider” if Sketchworks briefed him on the fair use doctrine as it relates to *Vape*. However, it was too-little-too-late because performances had already been cancelled. Additionally, it appeared unlikely that even if Sketchworks briefed Defendants on the fair use doctrine that Defendants would actually reconsider or otherwise undertake a good faith analysis of whether *Vape* is a parody of *Grease*.

63. On information and belief, before sending their letters Defendants or their agents did not form a subjective good faith belief that *Vape* is not permitted by law. Nonetheless, Defendants successfully halted performances of *Vape* and caused Sketchworks to suffer monetary damages.

64. Although Defendants’ conduct caused performances in August 2019 to be cancelled, Sketchworks desires to perform and otherwise exploit *Vape* in the future, including in Manhattan. Accordingly, Sketchworks seeks a declaratory judgment of fair use so that it may perform and otherwise exploit *Vape* without further delay.

FIRST CAUSE OF ACTION – Declaratory Judgment That *Vape* Is Fair Use

65. Plaintiff repeats and re-alleges the foregoing paragraphs.

66. There is an actual case and controversy whether *Vape* is fair use such that it does not infringe Defendants’ copyright in *Grease*. 17 U.S.C. § 107. Defendants’ cease and desist letter halted the further production, and the future performances, of *Vape*. In Concord’s cease and desist letter and in later communications from Defendants’ lawyer, Defendants’ asserted that *Vape* infringes *Grease* and does not constitute fair use.

67. A judicial determination of the parties' rights and duties is necessary and appropriate at this time and under these circumstances to resolve the controversy between the parties.

68. Plaintiff requests that a judicial determination be made, pursuant to 28 U.S.C § 2201, that *Vape* constitutes fair use and does not infringe Defendants' copyright interest in *Grease* or any derivatives thereof.

69. *Vape* is an original work of authorship, and to the extent that any copyrightable elements of *Grease* are used in *Vape* then they are used for purposes of parody and/or in a highly transformative manner, and thus represent a non-infringing fair use.

70. The law has long recognized that some opportunity for fair use of copyrighted materials is necessary to promote progress in art. The doctrine of fair use, derived from common law, is now codified in the Copyright Act of 1976 (17 U.S.C. § 107). That codification does not so much define "fair use" as provide a non-exhaustive list of factors to guide fair use determinations.

71. In the preamble to 17 U.S.C. § 107, Congress states that, "the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright." As the words "such as" indicate, the listing is illustrative and not limitative.

72. Four non-exclusive factors are properly considered in "determining whether the use made of a work in any particular case is a fair use." 17 U.S.C. § 107. These statutory factors are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the

amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

73. *Vape* is a parody of *Grease* and is protected by the First Amendment. *Vape* imitates *Grease* for comic effect or ridicule, and reasonably can be perceived as commenting on or criticizing *Grease*. *Vape*'s content refers to and comments upon both *Grease* and popular culture.

74. *Vape* does not merely use elements of *Grease* to get attention or to avoid the drudgery in working up something fresh.

75. Additionally, *Vape* is highly transformative of *Grease*. *Vape* contains original dialogue and adds something new to *Grease*, with a further purpose and different character that alters *Grease* with new expression, meaning, and message. *Vape* imbues *Grease* with a character different from that for which *Grease* was created and strives for new aesthetics with creative and communicative results distinct from *Grease*.

76. To the extent that *Vape* mimics, draws upon, or copies *Grease*, it does so to make its point and such use of *Grease* is not excessive in relation to the parodic purpose. *Grease* is an object of the parody, and *Vape*'s humor, or its comment, necessarily springs from recognizable allusion to *Grease* through distorted imitation. Using characteristic features of *Grease* cannot be avoided, as *Vape* must be able to refer to recognizable elements of *Grease* and conjure up at least enough of *Grease* to make the objects of its critical wit recognizable. To the extent that *Vape* mimics, draws upon, or copies *Grease*, it does so to make its point and such use of *Grease* is not excessive in relation to the parodic purposes. Any of *Vape*'s use of *Grease*'s characters, setting, plot, and style is in service of the parody.

77. *Vape* is not a substitute for *Grease*, does not merely supersede *Grease*, and does not usurp the market for *Grease*. The two works serve different market functions.

78. Defendants cannot prevent others from entering fair use markets, and Defendants' cannot control the market for parodies of *Grease*.

79. On information and belief, *Grease* has been the subject of other parodies (e.g., Mad Magazine, No. 205, March 1979, where during Sandy's transformation she says, "I love him, and I'm going to change for him! That's the moral of this movie! In order to get the guy you love...You have to be a SLUT!! What a wonderful message for the youth of America!!"); *Vape* is in the same tradition of fair use.

80. Precluding Sketchworks from exploiting *Vape* is contrary to the fundamental purpose of copyright law: to promote the arts and sciences.

81. Whatever trademark rights Defendants may have,¹ they do not trump Sketchworks' right of artistic expression and cannot be used as a back-door around copyright fair use. Any invocation of Defendants' trademark(s) by Plaintiff is relevant to *Vape*'s artistic purpose, and Plaintiff does not mislead as to *Vape*'s source or content because *Vape* is plainly a parody. Plaintiff's marketing materials also identify *Vape* as a parody.

82. The public's interest in free speech outweighs Defendants' interest in protecting its copyright and trademark(s).

83. Accordingly, Sketchworks is entitled to a judgment declaring, in its favor and against Defendants, that *Vape* is fair use and does not infringe *Grease* or its derivatives.

¹ Neither Concord's letter nor Defendants' counsel's letter identified with specificity the trademark(s) allegedly infringed.

WHEREFORE, Sketchworks demands a judgment:

- (i) Declaring that *Vape* constitutes fair use under 17 U.S.C. § 107, and does not infringe Defendants' copyright in *Grease* or any other of Defendants' rights in *Grease*;
- (ii) Awarding Sketchworks attorney's fees, pursuant to 17 U.S.C. § 505;
- (iii) Awarding Sketchworks costs and disbursements in this action; and
- (iv) For such other and further relief as the Court deems just and proper.

REQUEST FOR JURY TRIAL

Plaintiff requests a jury trial on all of the issues so triable. This request is without prejudice to, or waiver of, Plaintiff's right to move for judgment on all issues that may be decided by the Court, including without limitation the issue of fair use, which may be decided in this case by the Court on a Fed. R. Civ. P. 12 motion.

Dated: August 9, 2019
New York, NY

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