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18 BURTON CUMMINGS and  
19 RANDOLPH BACHMAN

20 **UNITED STATES DISTRICT COURT**  
21 **CENTRAL DISTRICT OF CALIFORNIA**

22 BURTON CUMMINGS, an individual;  
23 and RANDOLPH BACHMAN, an  
24 individual,

25 Plaintiffs,

26 v.

27 MICHAEL JAMES KALE, an  
28 individual; GARRY PETERSON, an  
individual; THE GUESS WHO, a  
Canadian partnership; and DOES 1–10,

Defendants.

Case Number: 2:23-cv-9130

**COMPLAINT FOR:**

- (1) Federal False Advertising, 15 U.S.C. § 1125(a)
- (2) California Unfair Competition, Cal. Bus. & Prof. Code § 17200
- (3) California False Advertising, Cal. Bus. & Prof. Code. § 17500
- (4) Violation of Right of Publicity

**DEMAND FOR JURY TRIAL**

1 Plaintiffs Burton Cummings (“Cummings”) and Randolph “Randy” Bachman  
2 (“Bachman”) (collectively, “Plaintiffs”), through Plaintiffs’ attorneys Yu Leseberg,  
3 A Professional Law Corporation and Fross Zelnick Lehrman & Zissu, P.C., for their  
4 complaint against defendants Michael James Kale (“Kale”), Garry Peterson  
5 (“Peterson”), The Guess Who (the “Partnership”) and Does 1–10 (together with  
6 Kale, Peterson and the Partnership, “Defendants”), allege as follows:

7 **Introduction**

8 1. Cummings, Bachman, Kale and Peterson are the original four members  
9 of The Guess Who (the “Original TGW”), one of the most successful and well-  
10 known rock bands of the mid 1960s and 1970s, and the first Canadian rock band to  
11 reach international acclaim achieving a Billboard Top 10 in the United States in  
12 1969. Widely beloved, especially in the United States and Canada, for such classic  
13 rock songs as “American Woman,” “No Time,” “These Eyes” “No Sugar Tonight,”  
14 “Undun” and “Share The Land,” the Original TGW disbanded in 1975.

15 2. The claims herein arise from a deceptive scheme subsequently concocted  
16 by Defendants to assemble a band of hired musicians (the “Cover Band”) to perform  
17 live concerts, record albums, and advertise and promote such concerts and albums  
18 using The Guess Who band name and trademark, falsely misleading the general  
19 public by giving the impression that this Cover Band includes performances by the  
20 highly regarded legendary musicians, Cummings and Bachman of the Original  
21 TGW, all for the sole purpose of Defendants’ own greed and commercial gain.  
22 Defendants’ false and deceptive advertisements, marketing, promotions and posts to  
23 social media imply that this “hired” Cover Band’s performances include members of  
24 the Original TGW, including Plaintiffs. Defendants’ devious design to mislead the  
25 public is pervasive and widespread, including giving statements in interviews  
26 creating the false impression that the Cover Band is affiliated with or includes  
27 Plaintiffs.

1           3. Defendants’ false and misleading tactics include their hiring and control  
2 of the Cover Band coupled with numerous other maneuvers such as utilizing  
3 Cummings’ vocal recordings on Original TGW albums and embodying them in  
4 commercial advertisement videos to give the false impression that Plaintiffs will be  
5 performing at the Cover Band’s live shows. Additional tactics include Defendants’  
6 authorization of online video advertisements containing songs written by Plaintiffs  
7 without obtaining appropriate synchronization or master use licenses, along with  
8 utilizing photographs of Cummings in the Cover Band’s advertisements of their live  
9 shows. Defendants further post Original TGW recordings and songs originally  
10 written or co-written by Plaintiffs in their video advertisements and online ticketing  
11 agendas to Instagram, Facebook and YouTube to further their duplicitous marketing  
12 tactics.

13           4. Defendants’ tactics also include removing Plaintiffs’ images and  
14 photographs on Wikipedia and the landing pages of music streaming platforms such  
15 as Spotify, Apple Music and Deezer, as well as surreptitiously replacing the images  
16 of the Original TGW with images of the Cover Band for the purpose of implying  
17 that the Cover Band is the Original TGW in an effort to boost the Cover Band’s  
18 ticket sales for live performances and to give the false impression that Plaintiffs are  
19 performing as part of the Cover Band or have an affiliation with the Cover Band.

20           5. Defendants’ deceptive scheme is by design: Kale has publicly stated in  
21 an interview that his intent was to hire “*a band of trained monkeys out there just to*  
22 *piss [Cummings] off. I’d love to take the high road, but I’m not going to.*”<sup>1</sup>

23           6. In recent promotions to market and boost ticket sales for a February  
24 2024 performance in the Los Angeles area, the Cover Band’s advertisements include  
25 language such as “*The Guess Who are a group that’s connected the masses for*  
26 *decades with a virtual hit parade spanning 14 Top 40 hits, including ‘These Eyes,’*”

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27 <sup>1</sup> [https://www.winnipegfreepress.com/breakingnews/2012/11/17/former-guess-who-friends-now-](https://www.winnipegfreepress.com/breakingnews/2012/11/17/former-guess-who-friends-now-bitter-enemies)  
28 [bitter-enemies.](https://www.winnipegfreepress.com/breakingnews/2012/11/17/former-guess-who-friends-now-bitter-enemies)

1 ‘Clap for the Wolfman’ and ‘Hand Me Down World,’” implying that Plaintiffs and  
2 the Original TGW will be performing. Other language in their advertisements  
3 include: “Add in classics and double-sided singles like their #1 rock anthem  
4 ‘American Woman’ and ‘No Sugar Tonight,’ and the Canadian-bred stateside  
5 conquerors are among rock music’s most indelible treasures, eternally etched  
6 within the very fabric of pop culture history.”<sup>2</sup>

7 7. In promoting various recent shows to online ticket sales websites,  
8 Defendants describe the Cover Band as “a troupe of true musical luminaries who  
9 through over four decades in show business have been loaded with more hits than  
10 members can count. . . . The name is none other than The Guess Who, a group that’s  
11 connected with the masses throughout an exultant hit parade including ‘These  
12 Eyes,’ ‘Clap For the Wolfman,’ ‘Hand Me Down World,’ ‘No Time,’ ‘Star Baby’  
13 and ‘Share the Land.’”<sup>3</sup> By portraying the Cover Band as a band of “musical  
14 luminaries” that is “connected” to hit songs that the Original TGW recorded and  
15 released in the 1960s and 1970s to elevate ticket sales for the Cover Band’s  
16 performances, these promotional materials falsely imply that the concerts will  
17 feature members of the Original TGW and Plaintiffs.

18 8. Because Defendants, through the Cover Band’s manager, must approve  
19 of all “advertisement and publicity” of any performance by the Cover Band “prior to  
20 being released to the general public,” Defendants have stamped their imprimatur on  
21 the promotional statements displayed on online ticket sale platforms such that the  
22 statements contained in these materials are equally attributable to Defendants. See  
23 [https://www.theguesswho.com/info/TheGuessWho\\_Rider\\_PartA.pdf](https://www.theguesswho.com/info/TheGuessWho_Rider_PartA.pdf).

24 \_\_\_\_\_  
25 <sup>2</sup> See <https://bapachthousandoaks.com/show-details/the-guess-who>.

26 <sup>3</sup> <https://www.celebritytalent.net/sampletalent/819/the-guess-who/>. See also  
27 <https://arlingtonmusichall.net/events/https-www-eventbrite-com-e-the-guess-who-tickets-153860180943/> (same); <https://www.thepalacetheatre.org/concerts-events/guess-who/> (same);  
28 <https://nortoncenter.com/event/the-guess-who/> (same); <https://broomearts.org/event/the-guess-who/> (same); <https://www.nowplayingaustin.com/event/the-guess-who-live-in-concert-at-one-world-theatre/> (same).



1 successful albums. Bachman is a highly regarded musician and the lead guitarist of  
2 the Original TGW. Plaintiffs wrote and/or co-wrote The Guess Who's biggest chart  
3 toppling hits, which still enjoy extreme popularity today as some of music's most  
4 recognizable classic rock songs recognized throughout the world, including  
5 "American Woman," "No Time," "These Eyes," "No Sugar Tonight," "Undun" and  
6 "Share The Land." Plaintiff Cummings recorded and co-wrote on every one of the  
7 12 studio albums that The Guess Who recorded and released prior to their  
8 disbanding. Bachman wrote and/or co-wrote on no less than 4 studio albums during  
9 the band's most successful period.

10 14. Following Bachman's initial departure from The Guess Who in 1970,  
11 he went on to cofound (among other groups) Bachman-Turner Overdrive (BTO),  
12 another enormously successful Canadian rock band with such popular hit singles as  
13 "Takin' Care of Business" and "You Ain't Seen Nothing Yet."

14 15. Cummings also enjoyed substantial success as a solo artist after the  
15 disbanding of the Original TGW with hit songs such as "Stand Tall," "Break It To  
16 Them Gently" and "You Saved My Soul."

17 16. Kale, a bassist, and Peterson, a drummer, were fellow original members  
18 of The Guess Who. Kale was kicked out of the group in 1972 by his bandmates, and  
19 then went on to join the band Scubbaloe Caine, releasing only one album until they  
20 disbanded in 1975.

21 17. In the 1980s, Kale and Peterson covertly formed a partnership without  
22 Plaintiffs and have been exploiting the band name, The Guess Who, and have  
23 authorized hired musicians, whom are the current Cover Band performing to utilize  
24 The Guess Who band name.

25 18. Defendants' deceptive and underhanded conduct described herein has  
26 damaged Plaintiffs' reputations by alienating them from many of their most fervent  
27 fans who feel they have been "duped" and limiting Plaintiffs' ability to perform and  
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1 sell tickets to their live performances in the United States, since venues believe that  
2 the Cover Band meets the demand of consumers to hear The Guess Who when it  
3 most certainly does not.

4 19. Accordingly, to protect both consumers and Plaintiffs' reputation from  
5 Defendants' deceptive conduct, Plaintiffs bring this action. Plaintiffs seek both  
6 injunctive and monetary relief.

7 **The Parties**

8 20. Plaintiff Cummings is an individual residing in the county of Los  
9 Angeles, State of California.

10 21. Plaintiff Bachman is an individual residing in British Columbia,  
11 Canada.

12 22. Upon information and belief, defendant James Kale is an individual  
13 residing at 31 Hemlock Place, Winnipeg, Manitoba R2H1L9.

14 23. Upon information and belief, defendant Garry Peterson is an individual  
15 residing at 3640 North Indianhead Road, Hernando, Florida 34442.

16 24. Upon information and belief, defendant The Guess Who is a Canadian  
17 partnership comprised of defendants Kale and Peterson with a principal place of  
18 business at 31 Hemlock Place, Winnipeg, Manitoba, Canada R2H1L9.

19 25. Plaintiffs are informed and believe and based thereon allege pursuant to  
20 Local Rule 19-1 that the fictitiously named defendants sued herein as Does 1  
21 through 10, inclusive, and each of them, are in some manner responsible or legally  
22 liable for the actions, events, transactions and circumstances alleged herein.

23 Plaintiffs are informed and believe and based thereon allege that one or more of the  
24 Doe defendants conspired with and/or aided and/or abetted one or more of the  
25 named defendants in their wrongful conduct as alleged herein. The true names and  
26 capacities of such fictitiously named defendants, whether individual, corporate,  
27 associate or otherwise, are presently unknown to Plaintiffs, and Plaintiffs will seek  
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1 leave of court to amend this Complaint to assert the true names and capacities of  
2 such fictitiously-named defendants when the same have been ascertained. All  
3 defendants, including the named defendants and the Doe defendants, are sometimes  
4 collectively referred to herein as “Defendants.”

5         26. Plaintiffs are informed and believe and based thereon allege that the  
6 Defendants, and each of them, were and/or currently are the agents, employees,  
7 partners, joint venturers, co-conspirators, owners, principals and/or employers of the  
8 remaining Defendants, and each of them are, and at all times herein mentioned were,  
9 acting within the course and scope of that agency, partnership, employment,  
10 conspiracy, ownership and/or joint venture. Plaintiffs are further informed and  
11 believe and based thereon allege that the acts and conduct herein alleged of each  
12 such Defendant were known to, authorized by and/or ratified by the other  
13 Defendants, and each of them. Plaintiffs are further informed and believe and based  
14 thereon allege that Defendants, and each of them, were aware of, complicit in,  
15 cooperated with and/or unfairly benefitted from the wrongful conduct of defendants  
16 Kale, Peterson and the Partnership as alleged herein.

17   **Jurisdiction and Venue**

18         27. The Court has jurisdiction over the subject matter of this action under  
19 Section 39(a) of the Lanham Act, 15 U.S.C. § 1121(a), and Sections 1331 and  
20 1338(a) and (b) of the Judicial Code, 28 U.S.C. §§ 1331, 1338 (a) & (b), and under  
21 principles of supplemental jurisdiction, 28 U.S.C. § 1367.

22         28. The Court has personal jurisdiction over Defendants because (1) they  
23 have conducted substantial business in the State of California and in this District by  
24 advertising, promoting, offering, selling and providing their goods/services to  
25 residents of this District; (2) they have derived financial benefits from residents of  
26 the State of California by conducting business in the State of California; (3) they  
27 have purposefully availed themselves of the privilege of conducting business within  
28



1 the State of California; (4) they have sought the protection and benefits of the laws  
2 of the State of California; and (5) the causes of action in this Complaint arise from  
3 Defendants' activities within and actions targeted at the State of California.

4 29. Venue is proper under Sections 1391(b) and (c) of the Judicial Code, 28  
5 U.S.C. §§ 1391(b) and (c), because a substantial part of the events giving rise to  
6 Plaintiffs' claims occurred in this District and because most of the Defendants are  
7 not residents of the United States.

8 **Facts Common to All Claims**

9 **A. The Original The Guess Who**

10 30. The Original TGW was initially comprised of Cummings on vocals and  
11 keyboard, Bachman on lead guitar, Kale on bass guitar and Peterson on drums.

12 31. The Original TGW released a dozen studio albums and top Billboard  
13 charting hit singles during the mid-1960s to the mid-1970s and became one of the  
14 most successful and well-known rock bands during this time in the United States  
15 and Canada.

16 32. For example, the Original TGW released the single "These Eyes,"  
17 which Cummings and Bachman cowrote, in 1969. It was the group's first top ten  
18 single on the *Billboard* Hot 100 record chart. "These Eyes" reached a coveted Gold  
19 certification by the Recording Industry Association of America ("RIAA") for selling  
20 over one million copies.

21 33. In 1970, the Original TGW released its most famous album, *American*  
22 *Woman*, which achieved gold certification by the RIAA for its sales success.  
23 *American Woman* reached number nine in the United States on the *Billboard* Top  
24 LPs & Tape record chart for albums (now known as the *Billboard* 200), and it  
25 remained on the chart for 55 weeks.

26 34. *American Woman* includes several hit songs: the titular song, which  
27 was released as a single and enjoyed three weeks as number one on the *Billboard*  
28

1 Hot 100, and the single “No Time,” which peaked at number five on the record  
2 chart. Plaintiffs cowrote “American Woman,” “No Sugar Tonight/New Mother  
3 Nature” and “No Time.”

4 35. The Original TGW ended in 1975 after putting out its final studio  
5 album, *Power in the Music*, that year. A handful of archival recordings from 1970  
6 were retroactively released as *The Way They Were* in 1976. Although the band’s  
7 legendary, chart-topping era concluded by that point, its hit songs have remained  
8 popular during the decades since.

9 **B. The Original TGW Reunions**

10 36. The Original TGW, including Plaintiffs, would go on to perform  
11 together on various reunion tours at high-profile concerts from the 1980s to the early  
12 2000s.

13 37. The principal four members of the Original TGW (namely, Plaintiffs,  
14 Kale and Peterson) reunited for the first time in 1983 to play about a dozen concerts  
15 throughout Canada. A vinyl album, CD and VHS/Beta movie of the tour titled  
16 *Together Again* were released.

17 38. Plaintiffs, Kale and Peterson came together again in the early 2000s.  
18 After playing at the closing ceremonies of the Pan American Games, they attempted  
19 to mount another reunion tour including all four members of the Original TGW.  
20 Approximately a week before the second reunion tour was to begin, however, it  
21 became evident that Kale would be unable to perform adequately due to substance  
22 abuse problems. He was once again replaced on bass by Bill Wallace.

23 39. Joined as well by Donnie McDougall (who had previously joined the  
24 Original TGW on guitar in 1972), the resulting lineup proceeded to tour as The  
25 Guess Who from 2000 through 2003. In addition, through their jointly-owned  
26 corporate entity GW 2000, Ltd, they commercially released a DVD recording of  
27 their performances in 2004.

28

1 **C. Covert and Deceptive Plan**

2 40. Without Plaintiffs' knowledge or consent, in 1986—nearly 15 years  
3 after being forcibly ejected from the Original TGW—Kale covertly registered THE  
4 GUESS WHO as a service mark in the United States. He applied for and obtained a  
5 federal registration of THE GUESS WHO covering entertainment services in  
6 International Class 41 under registration number 1425229.

7 41. In his registration application, Kale falsely misrepresented to the United  
8 States Patent and Trademark Office, among other things, that THE GUESS WHO  
9 was first used in commerce for entertainment services in November 1977. But by  
10 that point, the Original TGW—which used the mark exclusively and continuously  
11 from 1965 through 1975—had already disbanded. Upon information and belief, no  
12 one (including Kale or Peterson) performed live anywhere as The Guess Who in  
13 1977.

14 42. In 2005, Kale assigned his purported rights in the 1986 THE GUESS  
15 WHO trademark registration to a partnership he formed with Peterson (but without  
16 Plaintiffs) which claims to have a principal place of business in Canada.

17 43. Over the course of 2000 to 2012, Defendants applied for and obtained  
18 three additional federally-registered marks for THE GUESS WHO covering  
19 entertainment-related goods and services in International Classes 9 and 41, all of  
20 which are registered in the name of the Partnership.

21 **D. The Guess Who Cover Band**

22 44. Defendants developed a scheme to assemble the Cover Band to perform  
23 as The Guess Who at music venues around the United States and to release music  
24 albums under the same name.

25 45. Kale has not performed publicly with the Cover Band since 2016.

26 46. Peterson infrequently performs with the Cover Band.

27  
28

1 47. The Cover Band released albums under the name The Guess Who in  
2 2018 and 2023.

3 48. Upon information and belief, Defendants have authorized members of  
4 the Cover Band to perform as The Guess Who and to promote their live  
5 performances and music albums using The Guess Who name and the GUESS WHO  
6 Marks in exchange for commercial gain.

7 49. Upon information and belief, the Cover Band has performed numerous  
8 songs originally recorded and released by the Original TGW at live performances in  
9 which none of the original members of the Original TGW (including defendants  
10 Kale or Peterson) performed with the Cover Band, including but not limited to the  
11 following performances:

- 12 • September 17, 2022, Arbogast Performing Arts Center in Troy, Ohio
- 13 • October 2, 2022, The Palace Theatre in Canton, Ohio
- 14 • October 29, 2022, Glema Mahr Center for the Arts in Madisonville,  
15 Kentucky
- 16 • November 9, 2022, Riviera Theatre in North Tonawanda, New York
- 17 • November 11, 2022, Weinberg Center for the Arts in Frederick,  
18 Maryland
- 19 • November 12, 2022, Shea Center for Performing Arts in Wayne, New  
20 Jersey
- 21 • November 18, 2022, Donnell Theater in Findlay, Ohio
- 22 • January 26, 2023, Performing Arts Center at Kent State Tuscarawas in  
23 New Philadelphia, Ohio
- 24 • January 27, 2023, Robins Theater in Warren, Ohio
- 25 • January 29, 2023, Effingham Performance Center in Effingham, Illinois
- 26 • February 23, 2023, Oxford Performing Arts Center in Oxford, Alabama
- 27 • April 2, 2023, The Arcada Theater in St. Charles, Illinois

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- 1 • April 13, 2023, Hettenhausen Center for the Arts in Lebanon, Illinois
- 2 • April 14, 2023, Norton Center for the Arts in Danville, Kentucky
- 3 • April 15, 2023, Ritz Theatre in Tiffin, Ohio
- 4 • May 12, 2023, Admiral Theatre in Bremerton, Washington
- 5 • May 14, 2023, Pantages Theater in Tacoma, Washington
- 6 • May 18, 2023, Blue Ocean Music Hall in Salisbury, Massachusetts
- 7 • May 19, 2023, Tilles Center for the Performing Arts in Brookville,  
8 New York
- 9 • May 20, 2023, American Music Theatre in Lancaster, Pennsylvania
- 10 • May 31, 2023, Grand Falls Casino Resort in Larchwood, Iowa
- 11 • June 2, 2023, Skyline Event Center in Tulsa, Oklahoma
- 12 • June 28, 2023, Edward A. Kenley Centennial Amphitheater in Layton,  
13 Utah
- 14 • June 30, 2023, Symphony Hall in Duluth, Minnesota
- 15 • July 2, 2023, Surf Ballroom in Clear Lake, Iowa
- 16 • July 22, 2023, Ferro Pavilion in Williams Bay, Wisconsin
- 17 • July 28, 2023, Harborfest in Oswego, New York
- 18 • July 29, 2023, Point of the Bluff Vineyards in Hammondsport, New  
19 York
- 20 • August 17, 2023, Erie County Fair in Hamburg, New York
- 21 • August 18, 2023, Tupelo Music Hall in Derry, New Hampshire
- 22 • August 19, 2023, Public Square in Wilkes-Barre, Pennsylvania
- 23 • August 21, 2023, Lorain County Fairgrounds in Wellington, Ohio
- 24 • September 21, 2023, Robins Theatre in Warren, Ohio
- 25 • September 22, 2023, Temple Theatre in Saginaw, Michigan
- 26 • September 23, 2023, Golden Nugget Casino in Atlantic City, New  
27 Jersey
- 28

- 1 • October 6, 2023, Stephens Auditorium in Ames, Iowa
- 2 • October 7, 2023, Grand Casino Mille Lacs Event Center in Onamia,
- 3 Minnesota
- 4 • October 12, 2023, Mary G. Steiner Egyptian Theater in Park City, Utah
- 5 • October 13, 2023, Mary G. Steiner Egyptian Theater in Park City, Utah
- 6 • October 14, 2023, Mary G. Steiner Egyptian Theater in Park City, Utah
- 7 • October 15, 2023, Mary G. Steiner Egyptian Theater in Park City, Utah
- 8 • October 20, 2023, Golden Nugget Casino in Las Vegas, Nevada

9 50. Despite often performing with none of the original members of the  
10 Original TGW, the Cover Band invariably performs the hit songs originally released  
11 by the Original TGW and written or co-written by Plaintiffs.

12 51. The Cover Band’s performances regularly take place at various venues  
13 with a few hundred to several thousand seats, and ticket prices often run from \$50 to  
14 over \$375. According to the Cover Band’s website, in 2022, the Cover Band  
15 performed 43 live concerts and is scheduled to perform 57 live concerts by the end  
16 of 2023. See <https://www.theguesswho.com/on-tour/>.

17 **E. Defendants’ False Advertising**

18 52. Over the past two years, in an effort to book more shows and increase  
19 attendance, Defendants have escalated their efforts to deceive the public by taking  
20 affirmative steps to convince concertgoers that the Cover Band’s performances  
21 include the members of the Original TGW, including Plaintiffs. Defendants’ scheme  
22 exploits The Guess Who name to engage in false advertising that boosts the Cover  
23 Band’s ticket and album sales by deceiving consumers into believing that the Cover  
24 Band is affiliated or synonymous with the Original TGW and, therefore, Plaintiffs  
25 are involved with the Cover Band’s live performances and albums.

26 53. By leveraging The Guess Who to promote live performances and sell  
27 concert tickets for concerts at which “The Guess Who” will perform classic hit  
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1 songs that the Original TGW released, Defendants are knowingly, willfully and  
2 intentionally misleading consumers into believing that Plaintiffs and other members  
3 of the Original TGW will perform at the Cover Band's live performances and are  
4 featured on the Cover Band's albums.

5 54. To protect his rights, in April and May 2023, Cummings and music  
6 publisher, Shillelagh Music sent the Cover Band's manager, Randy Erwin, cease-  
7 and-desist letters objecting to the Cover Band's use of Cummings' photographs,  
8 image and music containing his vocals in their advertisements to promote live  
9 performances on social media because doing so created the false and misleading  
10 implication that the performances would feature Plaintiffs.

11 55. Although the Cover Band's manager responded to the April and May  
12 2023 letters that immediate action would be taken, false and misleading statements  
13 by the Cover Band persist today.

14 56. On October 3, 2023, Cummings sent the Cover Band's attorney a  
15 cease-and-desist letter objecting to the Cover Band's false and misleading use of  
16 The Guess Who name. No substantive response was received, and no remedial  
17 actions have been taken.

18 57. Examples of the Cover Band's false and misleading statements and  
19 conduct are widespread and rampant. For example, in promoting various concerts  
20 over the recent years, online ticket sales websites describe the Cover Band as "*a*  
21 *troupe of true musical luminaries who through over four decades in show business*  
22 *have been loaded with more hits than members can count. . . . The name is none*  
23 *other than The Guess Who, a group that's connected with the masses throughout an*  
24 *exultant hit parade including 'These Eyes,' 'Clap For the Wolfman,' 'Hand Me*  
25 *Down World,' 'No Time,' 'Star Baby' and 'Share the Land.'*" See

26 <https://www.celebritytalent.net/sampletalent/819/the-guess-who/>. See also

27 <https://arlingtonmusichall.net/events/https-www-eventbrite-com-e-the-guess-who->

28

1 [tickets-153860180943/](https://www.thepalacetheatre.org/concerts-tickets-153860180943/) (same); [https://www.thepalacetheatre.org/concerts-](https://www.thepalacetheatre.org/concerts-events/guess-who/)  
2 [events/guess-who/](https://www.thepalacetheatre.org/concerts-events/guess-who/) (same); <https://nortoncenter.com/event/the-guess-who/> (same);  
3 <https://broomearts.org/event/the-guess-who/> (same);  
4 [https://www.nowplayingaustin.com/event/the-guess-who-live-in-concert-at-one-](https://www.nowplayingaustin.com/event/the-guess-who-live-in-concert-at-one-world-theatre/)  
5 [world-theatre/](https://www.nowplayingaustin.com/event/the-guess-who-live-in-concert-at-one-world-theatre/) (same); <https://wendoverfun.com/shows/the-guess-who/> (same);  
6 <https://cantonpalacetheatre.org/event/the-guess-who/> (same).

7 58. Promotions for a February 2024 performance in the Los Angeles area  
8 similarly advertise, for example: “*The Guess Who are a group that’s connected the*  
9 *masses for decades with a virtual hit parade spanning 14 Top 40 hits, including*  
10 *‘These Eyes,’ ‘Clap for the Wolfman’ and ‘Hand Me Down World.’ Add in classics*  
11 *and double-sided singles like their #1 rock anthem ‘American Woman’ and ‘No*  
12 *Sugar Tonight,’ and the Canadian-bred stateside conquerors are among rock music’s*  
13 *most indelible treasures, eternally etched within the very fabric of pop culture*  
14 *history.” See <https://bapacthousandoaks.com/show-details/the-guess-who>.*

15 59. By portraying the Cover Band as a band of “musical luminaries” that is  
16 “connected” to hit songs that the Original TGW recorded and released in the 1970s  
17 in connection with ticket sales for the Cover Band’s performances, these  
18 promotional materials falsely imply that the concerts will feature members of the  
19 Original TGW such as Plaintiffs.

20 60. Because Defendants, through the Cover Band’s manager, must approve  
21 of all “advertisement and publicity” of any performance by the Cover Band “prior to  
22 being released to the general public,” Defendants have stamped their imprimatur on  
23 the promotional statements displayed on online ticket sale platforms such that the  
24 statements contained in these materials are equally attributable to Defendants. See  
25 [https://www.theguesswho.com/info/TheGuessWho\\_Rider\\_PartA.pdf](https://www.theguesswho.com/info/TheGuessWho_Rider_PartA.pdf).

26 61. The Cover Band also uses social media to post and share articles in  
27 connection with promoting its live performances. For example, to promote  
28



1 upcoming tour dates, the Cover Band shared on Facebook an August 2023 article in  
 2 *Goldmine* covering an interview of Derek Sharp, the Cover Band’s vocalist, and  
 3 describing the Cover Band as follows: “With 14 Top 40 singles—including the  
 4 legendary FM radio staple ‘American Woman’—The Guess Who has played a  
 5 massive role in classic rock history. These days, The Guess Who is still rolling,  
 6 perpetuating the good word of ’60s and ’70s rock to an adoring and everlasting  
 7 fanbase.” See [https://www.goldminemag.com/10-albums-that-changed-my-life/10-](https://www.goldminemag.com/10-albums-that-changed-my-life/10-albums-that-changed-my-life-derek-sharp-of-the-guess-who)  
 8 [albums-that-changed-my-life-derek-sharp-of-the-guess-who](https://www.goldminemag.com/10-albums-that-changed-my-life/10-albums-that-changed-my-life-derek-sharp-of-the-guess-who).



22 62. Similarly, in connection with promoting an October 2023 concert, the  
 23 Cover Band shared a Facebook post by the concert venue, Andiamo Celebrity  
 24 Showroom. The Facebook post, which is accompanied by a photograph of the Cover  
 25 Band, impliedly attributes to the Cover Band many of the Original TGW’s hit songs,  
 26 such as “Shakin’ All Over” and “American Woman,” despite the fact that members  
 27 of the Original TGW originally wrote, recorded and released those songs.

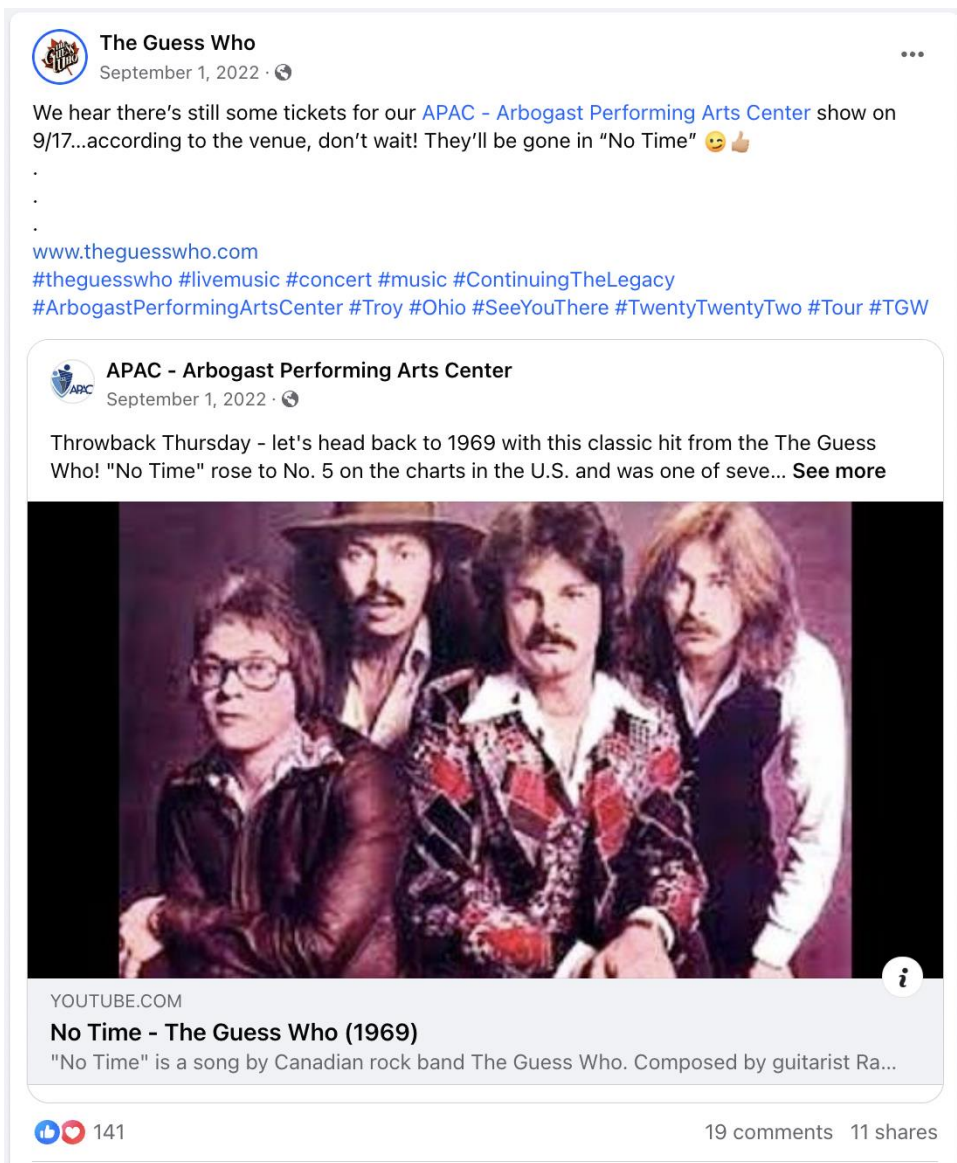
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63. The Cover Band also uses social media to share deceiving posts containing old photographs of the Original TGW to promote upcoming live concerts by the Cover Band. For example, in a Facebook post on September 2, 2022, the Cover Band shared a post by a music venue that includes a 1969 photograph of Plaintiffs and other members of the Original TGW. The Cover Band’s post promotes an upcoming show and uses the photograph to deceive consumers into believing that the people depicted in it—Plaintiffs and the Original TGW’s other

1 members—would be performing at the advertised concert:



21 64. In a Facebook post from September 15, 2022, the Cover Band shared a  
22 photograph from when the Original TGW performed at the White House in 1970.  
23 The post, which is shown below, includes a photograph depicting several members  
24 of the Original TGW, implying that Plaintiffs and other members of the Original  
25 TGW are involved with the Cover Band:

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**The Guess Who**

September 15, 2022 · 🌐

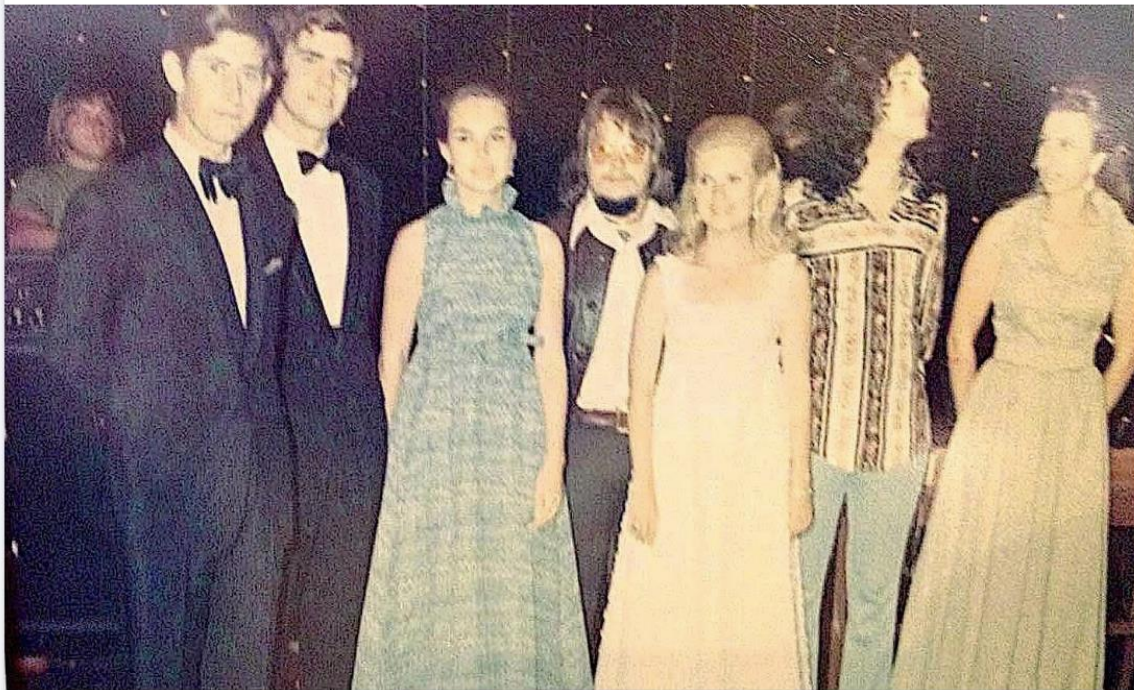


#ThrowBackThursday HEADLINE 1970! You never know who you're going to meet... Pictured below, from R to L: Princess Royal Anne, Burton Cummings, Patricia Nixon Cox, Garry Peterson, Julie Nixon Eisenhower, David Eisenhower, Prince Charles aka King Charles III (also pictured Jim "Jumbo" Martin farthest left background). This photo was taken at an event at the White House, that had [The Guess Who](#) performing as musical guest along with Gary Puckett accompanied by The Marine Command Band, on its South Lawn for contributors of then President Richard Nixon's Presidential campaign.

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[www.theguesswho.com](http://www.theguesswho.com)

#TheGuessWho #Memory #RevisitingThePast #ContinuingTheLegacy #TGW #KingCharlesIII #WhiteHouse #Nixon #Eisenhower #RoyalFamily #Prince #Princess #President #Musicians #Throwback



👍👎❤️ 517

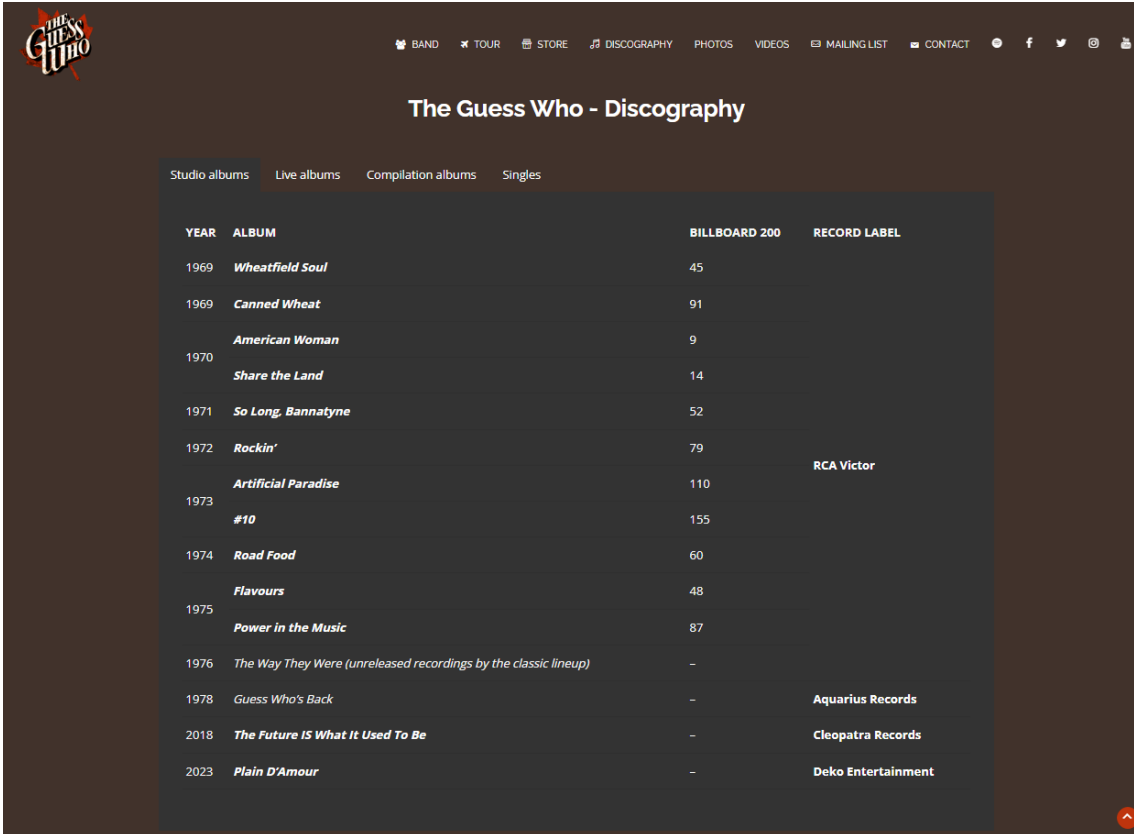
34 comments 37 shares

65. Although the Cover Band has released two (2) albums using The Guess Who name and the GUESS WHO Marks, the Cover Band's album sales, like its ticket sales, are dependent upon Defendants' scheme to deceive consumers into believing that albums released by the Cover Band feature members of the Original TGW, such as Plaintiffs, because the Cover Band releases the albums under the

1 name “The Guess Who” and promotes them alongside songs and albums by the  
2 Original TGW.

3 66. For example, the Cover Band’s website contains a page listing the  
4 discography for “The Guess Who,” but this discography list intermingles the studio  
5 albums by the Original TGW with the newer albums by the Cover Band. *See*  
6 <https://www.theguesswho.com/discography/>.

7 67. By conflating the Original TGW’s discography with the Cover Band’s  
8 discography, the Cover Band’s website deceives consumers into believing that the  
9 Cover Band is the same as the Original TGW and that Plaintiffs and other members  
10 of the Original TGW are featured on the Cover Band’s newer albums:

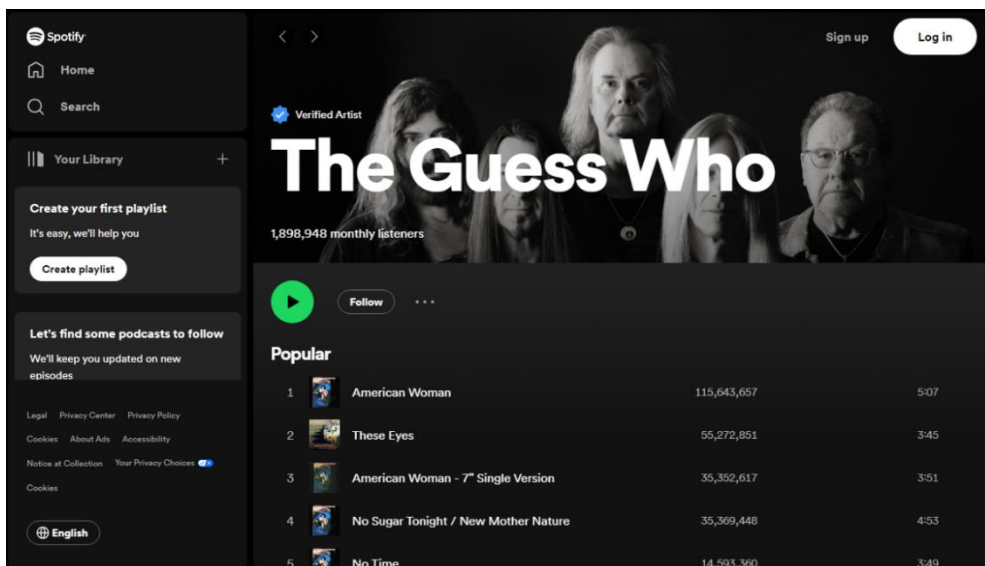


The screenshot shows the 'The Guess Who - Discography' page. It features a navigation menu at the top with links for BAND, TOUR, STORE, DISCOGRAPHY, PHOTOS, VIDEOS, MAILING LIST, and CONTACT. Below the navigation is a table of studio albums. The table has four columns: YEAR, ALBUM, BILLBOARD 200, and RECORD LABEL. The albums listed are:

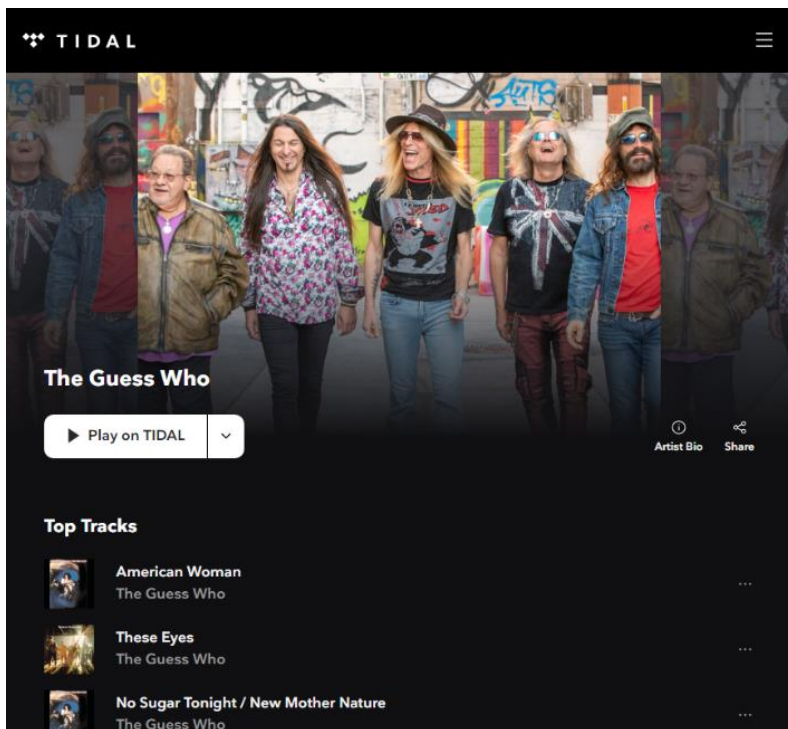
YEAR	ALBUM	BILLBOARD 200	RECORD LABEL
1969	<i>Wheatfield Soul</i>	45	
1969	<i>Canned Wheat</i>	91	
	<i>American Woman</i>	9	
1970	<i>Share the Land</i>	14	
1971	<i>So Long, Bannatyne</i>	52	
1972	<i>Rockin'</i>	79	
	<i>Artificial Paradise</i>	110	RCA Victor
1973	<i>#10</i>	155	
1974	<i>Road Food</i>	60	
	<i>Flavours</i>	48	
1975	<i>Power in the Music</i>	87	
1976	<i>The Way They Were (unreleased recordings by the classic lineup)</i>	-	
1978	<i>Guess Who's Back</i>	-	Aquarius Records
2018	<i>The Future IS What It Used To Be</i>	-	Cleopatra Records
2023	<i>Plain D'Amour</i>	-	Deko Entertainment

25 68. Defendants have also wrongfully gained control of the “Spotify for  
26 Artists” official streaming page for The Guess Who, along with the official artist  
27 page for The Guess Who on other digital service provider platforms such as Tidal,  
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1 Apple Music and Deezer. Screenshots of these artist pages are shown below.

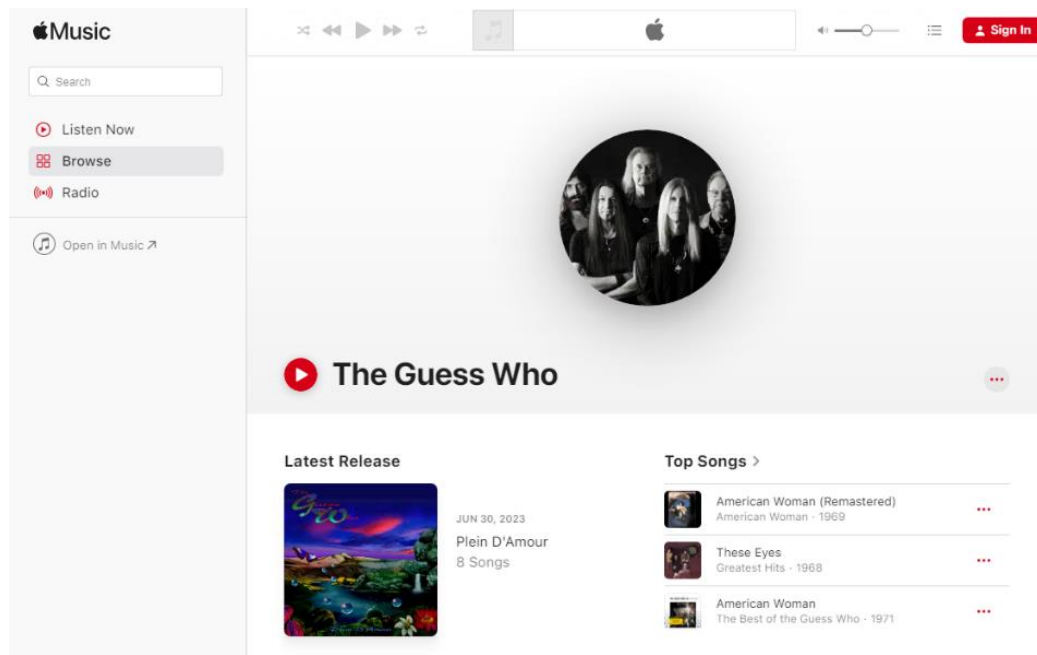


11 Spotify, <https://open.spotify.com/artist/0cQuYRSzIIItquYxsQKDvVc>

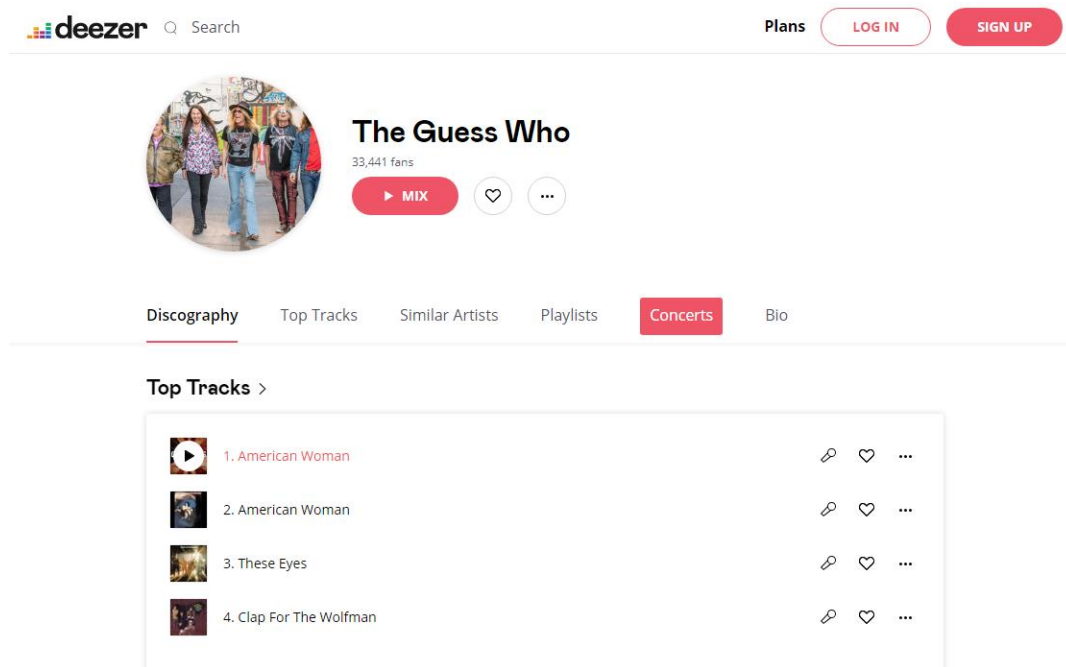


24 Tidal, <https://tidal.com/browse/artist/4427>

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Apple Music, <https://music.apple.com/us/artist/the-guess-who/216203>



Deezer, <https://www.deezer.com/us/artist/4254>

69. These artist pages intermingle music by the Original TGW with music by the Cover Band, and Defendants in some cases replaced photographs of the Original TGW members with photographs of the Cover Band's members to further

1 sow confusion that they are the same as the Original TGW. This intermingling of  
2 music and use of the Cover Band's photographs creates the false and misleading  
3 impression that the music all comes from the same source, such that Plaintiffs and  
4 members of the Original TGW are involved with the Cover Band's newer albums  
5 and the Cover Band's members were involved with the Original TGW's classic  
6 songs and albums.

7 70. Defendants have also commandeered control of the YouTube Official  
8 Artist Channel for The Guess Who. The YouTube Official Artist Channel includes a  
9 limited collection of music by and videos featuring the Cover Band, but these videos  
10 are intermingled with music and videos featuring the Original TGW. *See*  
11 <https://www.youtube.com/@theguesswho/featured>. This intermingling of music and  
12 videos falsely suggests that the Cover Band and the Original TGW are one and the  
13 same.

14 **F. Harm to Consumers and Plaintiffs**

15 71. Defendants' deception is material and harmful to consumers. Indeed,  
16 there are numerous instances in which fans and potential consumers have posted  
17 comments on Facebook, YouTube, and other platforms expressing either confusion  
18 about who will perform at the Cover Band's advertised performances or  
19 disappointment and outrage at being tricked into purchasing tickets to one of the  
20 Cover Band's concerts under the false belief that Plaintiffs and other members of the  
21 Original TGW would be performing.

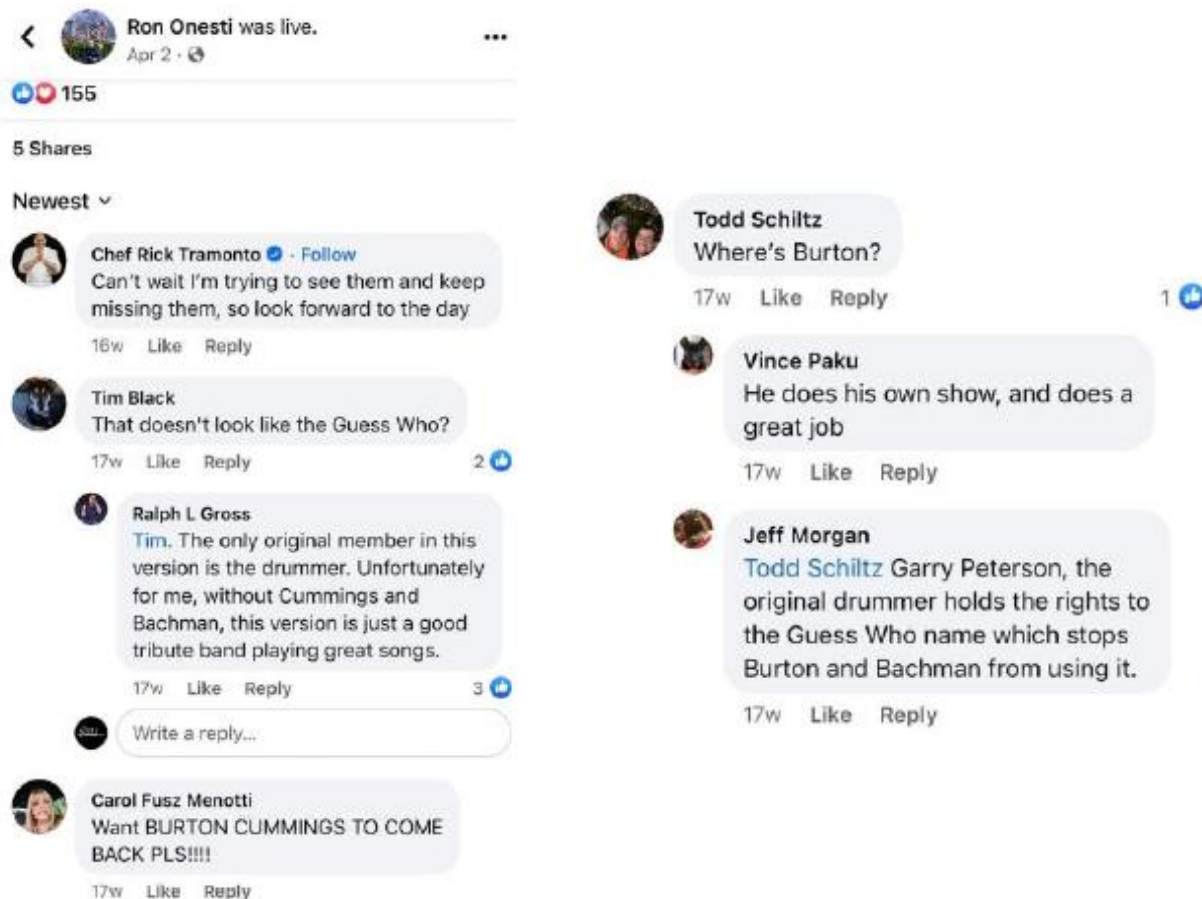
22 72. For example, in response to a Facebook post promoting a future  
23 performance by the Cover Band, one user expressed his uncertainty about who is  
24 pictured in the post. The comment also describes a past concert by the Cover Band  
25 where the vocalist spoke about when "we recorded" a particular song by the  
26 Original TGW and the audience responded by booing because the Cover Band tried  
27 to pass itself off as the Original TGW. The Facebook comment is shown below.  
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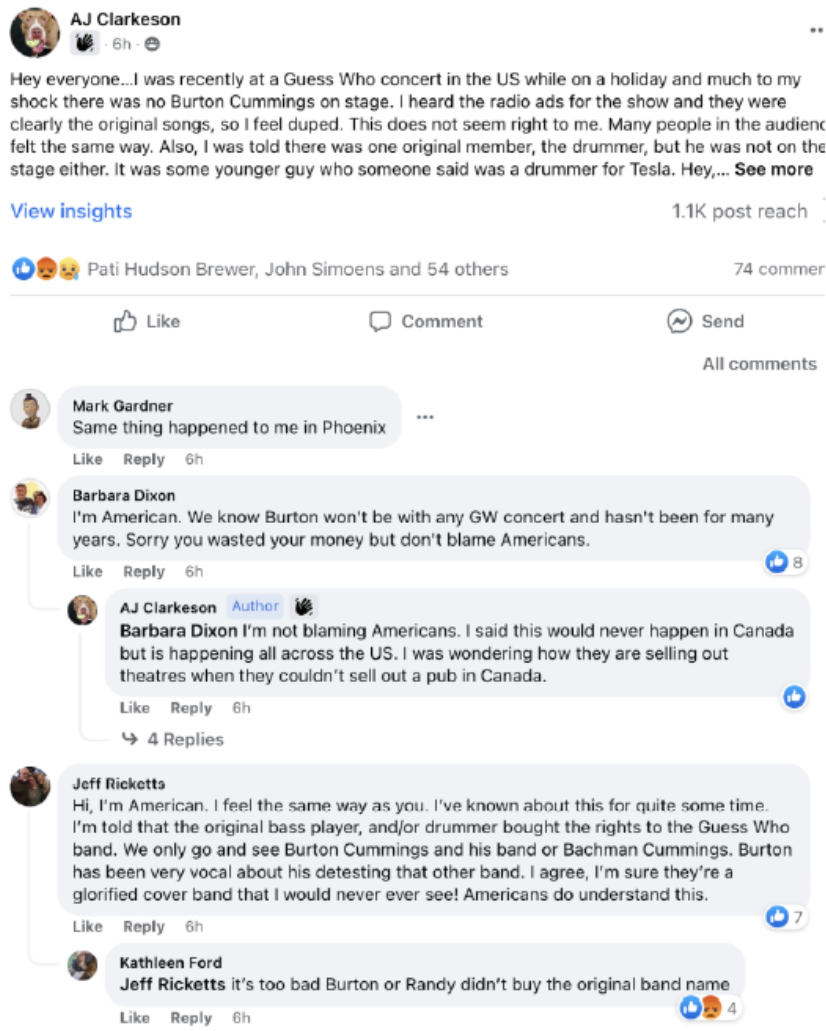
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73. Similarly, in comments on a music venue’s Facebook live feed for one of the Cover Band’s performances in April 2023, users expressed uncertainty about who was performing, and one user even commented, “Where’s Burton?” Some of these comments are shown below.



1           74. Actual consumers of the Cover Band’s performance tickets have also  
 2 taken to Facebook to express anger that they were deceived by the Cover Band into  
 3 believing that Plaintiffs would be performing at one of the Cover Band’s concerts,  
 4 bought a ticket, and then were surprised when Plaintiffs did not appear. For  
 5 example, in one post on a Facebook page named “The Burton Cummings Faithful,”  
 6 a user says they were “shocked” that Cummings did not perform at a recent  
 7 performance they attended for the Cover Band and felt “duped” by Defendants’  
 8 advertising for the performance. Several users commented on the post, echoing  
 9 these concerns and, in many cases, explaining how they have similarly been  
 10 deceived by Defendants’ false and misleading advertising. This Facebook post and  
 11 many of the accompanying comments are shown below.



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75. Defendants’ false advertising is also harming Plaintiffs’ reputations. They have received numerous emails from fans expressing anger that they were tricked into wasting money on tickets for one of the Cover Band’s concerts based on the false impression—created by Defendants’ advertising—that Plaintiffs would be performing. As a result, Plaintiffs have been alienated from many of their fans, which has hampered Bachman’s and Cummings’ ability to garner tickets sales for their own performances.

76. Due to Defendants’ false advertising, and their refusal to discontinue such false advertising or police how the Cover Band uses The Guess Who name and the GUESS WHO Marks, Plaintiffs are now forced to bring this Complaint to protect consumers and Plaintiffs’ reputation.

1 77. The false and misleading statements by Defendants have caused and  
2 will continue to cause irreparable damage to consumers and to Plaintiffs' goodwill  
3 and reputation amongst their fans unless permanently restrained by this Court.

4 78. Defendants' scheme to deceive the public through false and misleading  
5 statements and conduct is knowing, intentional and willful.

6 79. Plaintiffs have no adequate remedy at law.

7 **Count I: Federal False Advertising Under 15 U.S.C. § 1125(a)**

8 80. Plaintiffs repeat and reallege each and every allegation contained in  
9 paragraphs 1 through 79 above as if fully set forth herein.

10 81. Defendants have made numerous false and misleading statements of  
11 fact in connection with their promotion of the Cover Band's performances, albums  
12 and songs.

13 82. Defendants' conduct as set forth herein has caused and likely will  
14 continue to cause consumers to believe that Plaintiffs and other members of the  
15 Original TGW are involved with the Cover Band's performances, songs, albums and  
16 other entertainment-related services.

17 83. Defendants' social media posts about albums and songs by the Original  
18 TGW to promote performances by the Cover Band are both literally and impliedly  
19 false.

20 84. Defendants' conduct is material because it has impacted and is likely to  
21 impact the purchasing decisions of consumers.

22 85. Defendants' conduct constitutes commercial advertising or promotion  
23 that misrepresents the nature, characteristics, or qualities of the services they  
24 provide through the Cover Band.

25 86. Accordingly, Defendants' actions constitute false advertising in  
26 violation of Section 43(a)(1)(B) of the Lanham Act, 15 U.S.C. § 1125(a).

27 87. Plaintiffs have no adequate remedy at law.

28

1     **Count II: Unfair Competition Under Cal. Bus. & Prof. Code §§ 17200 et seq.**

2           88. Plaintiffs repeat and reallege each and every allegation contained in  
3 paragraphs 1 through 87 above as if fully set forth herein.

4           89. The aforesaid conduct of Defendants—false advertising—constitutes  
5 unfair competition in violation of California Business & Professions Code §§ 17200  
6 *et seq.*

7           90. Defendants’ conduct is causing immediate and irreparable injury to  
8 Plaintiffs and will continue to damage Plaintiffs and deceive the public unless  
9 enjoined by this Court.

10          91. Plaintiffs have no adequate remedy at law.

11     **Count III: False Advertising Under Cal. Bus. & Prof. Code §§ 17500 et seq.**

12          92. Plaintiffs repeat and reallege each and every allegation contained in  
13 paragraphs 1 through 91 above as if fully set forth herein.

14          93. The aforesaid conduct of Defendants constitutes unfair competition and  
15 false advertising in violation of California Business & Professions Code §§ 17500 *et*  
16 *seq.*

17          94. Defendants’ conduct as set forth herein has caused consumers to be,  
18 and consumers have been, misled and deceived into believing that Defendants’  
19 businesses and activities are associated with, sponsored by, or approved by  
20 Plaintiffs, when in fact they are not.

21          95. Defendants knew or should have known that their conduct was likely to  
22 mislead consumers and the public.

23          96. Defendants’ conduct is causing immediate and irreparable injury to  
24 Plaintiffs and will continue both to damage Plaintiffs and deceive the public unless  
25 enjoined by this Court.

26          97. Plaintiffs have no adequate remedy at law.  
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1 **Count IV: Violation of Right of Publicity**

2 98. Plaintiffs repeat and reallege each and every allegation contained in  
3 paragraphs 1 through 97 above as if fully set forth herein.

4 99. Defendants knowingly, and without authorization or Cummings’  
5 consent, used the likeness of Cummings in numerous posts containing videos and  
6 photographs on multiple media platforms, including but not limited to Facebook and  
7 YouTube.

8 100. Defendants have utilized and continue to utilize Cummings’  
9 likenesses for their own commercial advantage as a means of generating interest and  
10 profits for ticket sales and album sales generated by the Cover Band.

11 101. As a result of Defendants’ violation of Cummings’ publicity rights,  
12 Defendants have injured Cummings.

13 102. Defendants’ conduct is causing immediate and irreparable injury to  
14 Plaintiffs and will continue both to damage Plaintiffs and deceive the public unless  
15 enjoined by this Court.

16 103. Cummings has no adequate remedy at law.

17 **WHEREFORE**, Plaintiffs demand judgment as follows:

18 1. Entering judgment for Plaintiffs on each of their claims.

19 2. Directing that Defendants and their agents, representatives, licensees,  
20 successors or assigns, and all persons acting in concert or in participation with them,  
21 be immediately and permanently enjoined from:

22 (a) using, or authorizing anyone from using, false and/or misleading  
23 advertising and promotion in connection with the Cover Band’s live  
24 performances, albums, and songs;

25 (b) making any statements implying that the Cover Band’s  
26 performances, albums, or songs are in any way affiliated with the Original  
27 TGW or Plaintiffs;

1 (c) sharing or reposting statements on any social media platform  
2 implying that the Cover Band’s performances, albums, or songs are in any  
3 way affiliated with the Original TGW or Plaintiffs;

4 (d) performing any songs originally recorded by the Original TGW  
5 without indicating that the Cover Band is a “tribute band” in all advertising  
6 and promotion for the performance;

7 (e) using photographs of the Cover Band on any official artist page  
8 for any streaming music or video platform that hosts the music catalog of the  
9 Original TGW;

10 (f) using photographs of the members of the Original TGW to  
11 advertise or promote any live performance, song, or album by the Cover  
12 Band, whether on social media or any other medium;

13 (g) promoting, offering for sale, or selling the Cover Band’s albums  
14 and songs on the same artist page of any streaming music or video platform  
15 that features the music catalog of the Original TGW;

16 (h) aiding, assisting, or abetting any other party in doing any act  
17 prohibited by sub-paragraphs (a) through (g) above.

18 3. Directing that Defendants deliver up to Plaintiffs’ attorneys for  
19 destruction all products, labels, signs, stationery, prints, packages, promotional and  
20 marketing materials, advertisements, and other materials currently in their  
21 possession or under their control relating to the false and/or misleading statements  
22 pursuant to 15 U.S.C. § 1118.

23 4. Directing that Defendants publish notice to members of the public,  
24 namely, current and future concertgoers, who may have seen or heard of  
25 Defendants’ use of the false and/or misleading statements, which notice shall correct  
26 any false and/or misleading statements.

1           5.       Directing that Defendants publish notice to all music venues,  
2 distributors, brokers, retailers, tradeshow, sellers, customers, and other members of  
3 the trade who may have seen or heard of Defendants' use of the false and/or  
4 misleading statements, which notice shall correct any false and/or misleading  
5 statements.

6           6.       Directing that Defendants file with the Court and serve upon Plaintiffs'  
7 counsel within thirty (30) days after entry of judgment a report in writing under  
8 oath, setting forth in detail the manner and form in which they have complied with  
9 the above.

10          7.       Awarding Plaintiffs such damages they have sustained or will sustain in  
11 excess of \$20,000,000.00 by reason of Defendants' acts of false advertising and  
12 unfair competition and that such sums be trebled pursuant to 15 U.S.C. § 1117.

13          8.       Awarding Plaintiffs all restitution that is recoverable under Cal. Bus. &  
14 Prof. Code §§ 17200 *et seq.* and Cal. Bus. & Prof. Code §§ 17500 *et seq.*

15          9.       Awarding Plaintiffs all other recoverable gains, profits, property, and  
16 advantages derived by Defendants from their unlawful conduct.

17          10.       Awarding to Plaintiffs exemplary and punitive damages to deter any  
18 further willful infringement as the Court finds appropriate.

19          11.       Awarding to Plaintiffs their costs and disbursements incurred in this  
20 action, including reasonable attorneys' fees pursuant to 15 U.S.C. §1117(a).

21          112.       Awarding to Plaintiffs interest, including pre-judgment interest, on the  
22 foregoing sums.

23          13.       Awarding to Plaintiffs such other and further relief as the Court may  
24 deem just and proper.

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DATED: October 30, 2023

Respectfully submitted,

YU LESEBERG, A Professional Law Corporation

/s/ Henry L. Self III  
HENRY L. SELF III

FROSS ZELNICK LEHRMAN & ZISSU, P.C.  
JAMES D. WEINBERGER (*pro hac vice*  
application forthcoming)  
PARKER C. EUDY (*pro hac vice* application  
forthcoming)

*Attorneys for Plaintiffs*  
BURTON CUMMINGS and  
RANDOLPH BACHMAN

**DEMAND FOR JURY TRIAL**

1  
2 Plaintiffs Burton Cummings and Randolph Bachman hereby demand trial by  
3 jury in this action.

4  
5 DATED: October 30, 2023

Respectfully submitted,

6 YU LESEBERG, A Professional Law  
7 Corporation

8  
9 /s/ Henry L. Self III  
HENRY L. SELF III

10  
11 FROSS ZELNICK LEHRMAN & ZISSU, P.C.  
12 JAMES D. WEINBERGER (*pro hac vice*  
13 application forthcoming)  
PARKER C. EUDY (*pro hac vice* application  
forthcoming)

14 *Attorneys for Plaintiffs*  
15 BURTON CUMMINGS and  
16 RANDOLPH BACHMAN