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16 **UNITED STATES DISTRICT COURT**
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 **DR. SEUSS ENTERPRISES, L.P.,**

19 Plaintiff,

20 v.

21 **COMICMIX LLC; GLENN**
22 **HAUMAN; DAVID JERROLD**
23 **FRIEDMAN a/k/a DAVID**
24 **GERROLD; and TY TEMPLETON,**

25 Defendants.

Case No. 3:16-cv-02779-JLS-BGS

COMICMIX LLC'S REQUEST FOR
JUDICIAL NOTICE PURSUANT TO
FED. R. EVID. 201

Assigned to Hon. Janis L. Sammartino
United States District Judge

Hearing Date: March 16, 2017
Hearing Time: 10:00 a.m.
Hearing Place: Schwartz Courthouse,
Courtroom 4A

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Pursuant to Federal Rule of Evidence 201, defendant ComicMix LLC (“ComicMix”) respectfully requests that the Court take judicial notice of the records attached hereto as Exhibits 1 through 6, and the monologue from the opening credits of the original *Star Trek* series.

The Federal Rules of Evidence mandate that judicial notice be taken “if a party requests it and the court is supplied with the necessary information,” Fed. R. Evid. 201(c)(2), and authorizes it “at any stage of the proceeding.” Fed. R. Evid.

1 201(d). Judicially noticed facts are those not “subject to reasonable dispute because”
2 they are either “generally known within the trial court’s territorial jurisdiction” or are
3 capable of accurate and ready determination by resort to “sources whose accuracy
4 cannot reasonably be questioned.” Fed. R. Evid. 201(b). Here, the requested facts are
5 not subject to reasonable dispute in that they are capable of accurate and ready
6 determination by referring to “sources whose accuracy cannot reasonably be
7 questioned.” *Id.*

8 The Court “must consider the complaint, in its entirety, as well as other sources
9 courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss,
10 including documents incorporated into the complaint by reference, and matters of
11 which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,
12 551 U.S. 308, 322 (2007). And “to ‘[p]revent[] plaintiffs from surviving a Rule
13 12(b)(6) motion by deliberately omitting ... documents upon which their claims are
14 based,’ a court may consider a writing referenced in a complaint but not explicitly
15 incorporated therein if the complaint relies on the document and its authenticity is
16 unquestioned.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (*quoting*
17 *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (brackets and ellipsis in
18 original)).

19 In its complaint, Plaintiff Dr. Seuss Enterprises, L.P. (“DSE”) references, quotes
20 from, and otherwise relies on a Kickstarter campaign conducted by ComicMix
21 between August 31, and September 30, 2016. *See* Doc. 1 ¶¶ 34, 35; *see also id.* ¶ 2
22 (alleging that “Defendants have already distributed portions of the Infringing Work
23 online in connection with their fundraising efforts”). The campaign web page is not
24 attached to the complaint as an exhibit. The Court may take judicial notice of the
25 content of a publicly available website referenced in the complaint when no party
26 reasonably disputes its authenticity. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.
27 2005). DSE may not “seek to delay potential resolution of this action by asserting
28 that this Court may not review the material it claims is infringing and has

1 specifically identified in its Complaint.” *City of Inglewood v. Teixeira*, No.
2 CV-15-01815-MWF (MRWx), 2015 U.S. Dist. LEXIS 114539, 2015 WL 5025839,
3 at *2 (C.D. Cal. Aug. 20, 2015). A true and correct copy of screenshots reflecting the
4 full ComicMix Kickstarter campaign web page, as it appeared on the website on or
5 about September 30, 2016, is attached hereto as Exhibit 1.

6 The complaint also references and relies on a takedown notice DSE’s counsel
7 sent to Kickstarter pursuant to 17 U.S.C. § 512(g), on or about October 7, 2016.
8 Doc. 1 ¶ 40; *see also id.* ¶ 41 (alleging that Kickstarter thereafter disabled access to
9 the campaign webpage pursuant to 17 U.S.C. § 512(g)). The takedown notice is not
10 attached to the complaint. The Court may take judicial notice of web pages
11 referenced in the complaint. *Knievel*, 393 F.3d at 1076. A true and correct copy of
12 the takedown notice posted online by Kickstarter, as it appeared ComicMix
13 Kickstarter campaign web page, as it appeared on the website on December 16,
14 2016, is attached hereto as Exhibit 2.

15 The Kickstarter campaign web page now redirects to a page that states, “Oh The
16 Places You’ll Boldly Go! is the subject of an intellectual property dispute and is
17 currently unavailable.” The Court may take judicial notice of web pages referenced
18 in the complaint, the fact that the website redirects to a different page than identified
19 in the complaint, and the content of the current web page. *See Closed Loop Mktg. v.*
20 *Closed Loop Mktg., LLC*, 589 F. Supp. 2d 1211, 1215 & n.2 (E.D. Cal. 2008). A true
21 and correct copy of the page to which the Kickstarter campaign web page now
22 redirects, as it appeared on the website on December 16, 2016, is attached hereto as
23 Exhibit 3.

24 The complaint references and characterizes a letter sent to DSE by ComicMix’s
25 undersigned counsel on or about October 28, 2016. Doc. 1 ¶ 43. The letter is not
26 attached to the complaint. The Court may take “judicial notice of the fact that
27 counsel made particular statements” in correspondence between the parties’ counsel
28 referenced in the complaint. *Theta Chi Fraternity, Inc. v. Leland Stanford Junior*

1 *Univ.*, No. 16-cv-01336-RMW, 2016 U.S. Dist. LEXIS 116863, *12-13 (N.D. Cal.
2 Aug. 30, 2016). A true and correct copy of the letter is attached hereto as Exhibit 4.

3 The complaint relies on, reproduces in miniature in part, and is substantially
4 based on allegations against a book entitled *Oh, the Places You'll Boldly Go!*, which
5 ComicMix sought to publish before DSE took measures to obstruct publication. *See*
6 Doc. 1 *passim* (referring to the book as the "Infringing Work"). The book is not
7 attached to the complaint, which reproduces seven excerpts from the book, as
8 transmitted to DSE's counsel by the undersigned counsel on October 28, 2016. *See*
9 *id.* pp. 7-10. The Court may take judicial notice of the contents of a defendant's
10 allegedly infringing work referenced in, but not attached to, the complaint. *Campbell*
11 *v. Walt Disney Co.*, 718 F. Supp. 2d 1108, 1111 n.3 (N.D. Cal. 2010). DSE may not
12 "seek to delay potential resolution of this action by asserting that this Court may not
13 review the material it claims is infringing and has specifically identified in its
14 Complaint." *City of Inglewood v. Teixeira*, No. CV-15-01815-MWF (MRWx), 2015
15 U.S. Dist. LEXIS 114539, 2015 WL 5025839, at *2 (C.D. Cal. Aug. 20, 2015). A
16 true and correct copy of the book, as transmitted to DSE's counsel on October 28,
17 2016, is attached hereto as Exhibit 5.

18 The complaint relies on, alleges copyright and trademark rights in, and
19 reproduces in miniature four images from, the Dr. Seuss book *Oh, the Places You'll*
20 *Go!* Doc. 1 ¶¶ 15, 17, 26; *see also id.* pp. 7-9 (reproducing four images as a "Dr.
21 Seuss Work"). The Dr. Seuss book is not attached to the complaint. The Court may
22 take judicial notice of allegedly infringed written works referenced in the complaint
23 but not attached thereto. *Walt Disney*, 718 F. Supp. 2d at 1111 n.3. A true and correct
24 copy of the book is attached hereto as Exhibit 6.

25 The complaint relies on allegations of trademark rights in the title of *Oh, the*
26 *Places You'll Go!* and alleges misappropriation of its title by ComicMix's book *Oh,*
27 *the Places You'll Boldly Go!* Doc. 1 ¶¶ 17, 26. The complaint further alleges that
28 ComicMix's book "purports to be an amalgamation of [Plaintiff's] works and certain

1 characters, imagery, and other elements from *Star Trek*, the well-known
2 entertainment franchise created by Gene Roddenberry.” *Id.* ¶ 18. The title of
3 ComicMix’s book invokes the monologue spoken during the the original *Star Trek*
4 television series’ opening credits sequence: “Space: the final frontier. These are the
5 voyages of the starship Enterprise. Its five-year mission: to explore strange new
6 worlds, to seek out new life and new civilizations, to boldly go where no man has
7 gone before.” The Court may take notice of the opening monologue because it “is
8 generally known within the trial court’s territorial jurisdiction” or because it “can be
9 accurately and readily determined from sources whose accuracy cannot reasonably
10 be questioned.” Fed. R. Evid. 201(b)(1), (2). The Smithsonian National Air and
11 Space Museum posted the opening credits and text of the monologue on its website
12 at [https://airandspace.si.edu/stories/objects/star-trek-starship-enterprise-studio-](https://airandspace.si.edu/stories/objects/star-trek-starship-enterprise-studio-model-opening-credits)
13 [model-opening-credits](https://airandspace.si.edu/stories/objects/star-trek-starship-enterprise-studio-model-opening-credits) and on YouTube at <https://youtu.be/4pptCGR9N4g>. Filmed
14 dialogue is a proper subject of judicial notice. *Walt Disney*, 718 F. Supp. 2d at 1111
15 n.3. The Court may take judicial notice of materials on a museum website because
16 their accuracy cannot be reasonably questioned. *See Cairns v. Franklin Mint Co.*,
17 107 F. Supp. 2d 1212, 1216 (C.D. Cal. 2000).

18 Wherefore, ComicMix respectfully requests that the Court take judicial notice of
19 the records attached hereto as Exhibits 1 through 6, and the monologue from the
20 opening credits of the original *Star Trek* series.

21 The instant request is based on this request for judicial notice, the exhibits
22 attached hereto, and undersigned counsel’s affidavit in support hereof.

1 Respectfully submitted,

2 DATED: December 19, 2016

3
4 BOOTH SWEET LLP

D'EGIDIO LICARI & TOWNSEND, APC

5
6 /s/ Dan Booth

/s/ Michael Licari

7
8 Dan Booth
9 *Pro Hac Vice Pending*

Michael Licari
Local Counsel

10 *Attorneys for Defendant ComicMix LLC*

11
12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on this December 19, 2016 I electronically filed the
14 foregoing document by using the Court's ECF system, thereby causing a true copy
15 thereof to be served upon counsel of record for each party to have appeared to date,
16 as identified on the Notice of Electronic Filing.

17
18 /s/ Michael Licari