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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 JOINT
MOTION TO SEAL EXHIBITS

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

26 Pursuant to CivLR 7.2 and 79.2(c), defendant ComicMix LLC ("ComicMix")
27 and plaintiff Dr. Seuss Enterprises L.P. ("DSE") hereby jointly move for and
28 stipulate to an order sealing the documents at ECF Nos. 8-9 and 8-10. In support of
the motion, ComicMix states as follows.

On December 19, 2016, ComicMix filed a motion to dismiss the complaint
and, among other supporting documents, a request for judicial notice. ECF Nos. 8,
8-2. The exhibits to its request for judicial notice include complete copies of its book
Oh, the Places You'll Boldly Go! (ECF No. 8-9), and of DSE's book *Oh, the Places*

1 *You'll Go!* (ECF No. 8-10). *See* ECF No. 8-2 p. 4. Both exhibits were inadvertently
2 placed on the public docket pursuant to CivLR5.4(b). No protective order has yet
3 been entered in this case.

4 “A district court may seal its records pursuant to its inherent supervisory
5 power over such documents.” *Brennan v. Opus Bank*, 796 F.3d 1125, 1134 (9th Cir.
6 2015) (citing *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995) and *Nixon*
7 *v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978)). The decision to seal is
8 “best left to the sound discretion of the trial court, a discretion to be exercised in
9 light of the relevant facts and circumstances of the particular case.” *Nixon*, 435 U.S.
10 at 599. In that decision, the Court must “weigh[] the interests advanced by the parties
11 in light of the public interest and the duty of the courts.” *Id.* at 602; *Hagestad*, 49
12 F.3d at 1434. An inadvertent disclosure does not limit the Court’s jurisdiction to
13 seal. *See Hagestad*, 49 F.3d at 1433-34 (acknowledging district court’s jurisdiction
14 to seal records even after dismissal); *Estate of Martin Luther King, Jr., Inc. v. CBS,*
15 *Inc.*, 184 F. Supp. 2d 1353, 1363-65 (N.D. Ga. 2002) (finding, in copyright
16 infringement action, an initial failure to file documents under seal “does not moot
17 the Estate’s retroactive effort to seal them”).

18 Courts deciding whether to seal a document begin with a presumption of
19 public access to judicial records. *Hagestad*, 49 F.3d at 1434. Yet the Supreme Court
20 has recognized that the common-law right of access to records in civil proceedings
21 is not absolute. *Nixon*, 435 U.S. at 598. At common law, “courts have refused to
22 permit their files to serve as ... sources of business information that might harm a
23 litigant’s competitive standing.” *Id.* (citations omitted). The presumption of public
24 access does not apply to documents that have “traditionally been kept secret for
25 important policy reasons.” *Kamakana v. City & County of Honolulu*, 447 F.3d 1172,
26 1178 (9th Cir. 2006) (quoting *Times Mirror Co. v. United States*, 873 F.2d 1210,
27 1219 (9th Cir. 1989)). The risk that court records may be used to “release trade
28 secrets” is a “compelling reason[]” sufficient to outweigh the public’s interest in

1 disclosure and justify sealing court records.” *Id.* at 1179 (*citing Nixon*, 435 U.S. at
2 598 and *Valley Broad. Co. v. United States District Court*, 798 F.2d 1289, 1294 (9th
3 Cir. 1986)). “One factor that weighs in favor of sealing documents is when the
4 release of the documents will cause competitive harm to a business.” *Apple Inc. v.*
5 *Samsung Elecs. Co.*, 727 F.3d 1214, 1221 (Fed. Cir. 2013) (applying Ninth Circuit
6 law).

7 The Court should seal the two exhibits to prevent the parties from being
8 harmed or prejudiced by any unauthorized wholesale dissemination of their books.
9 The presence of a complete copy of either book on the public docket, available for
10 public download, poses risks of material commercial harm. *See Bartech Int’l, Inc. v.*
11 *Mobile Simple Solutions, Inc.*, Case No. 2:15-cv-02422-MMD-NJK, 2016 U.S. Dist.
12 LEXIS 59852 (D. Nev. May 5, 2016) (granting motion to seal copyrighted source
13 code in copyright infringement/trade secrets misappropriation action); *Viable*
14 *Solutions, LLC v. Solace Consulting, LLC*, Case No. 3:09-CV-129-DCK, 2009 WL
15 2590284, 2009 U.S. Dist. LEXIS 81523 (W.D.N.C. Aug. 17, 2009) (granting motion
16 to seal plaintiff’s and defendant’s works in copyright infringement action); *Corbello*
17 *v. DeVito*, No. 2:08-cv-867-RCJ-PAL, 2011 U.S. Dist. LEXIS 124774, *4-7 (D.
18 Nev. Oct. 27, 2011) (same), *rev’d on other grounds*, 777 F.3d 1058 (9th Cir. 2015).
19 As the *Corbello* court held, “[m]aking the entire *Jersey Boys* Script publically and
20 digitally available through the Court’s PACER and ECF system greatly
21 compromises the opportunity to exploit the various subsidiary rights and/or their
22 value because the digital copy can be easily, literally and quickly reproduced in its
23 entirety and pirated.” *Id.* at *6; *accord id.* at *4 (“disclosure of the *Jersey Boys* DVD
24 could reasonably become a vehicle for improper purposes, such as unauthorized
25 reproduction, distribution and viewing”). ComicMix and DSE face the same harms.

26 ComicMix’s book constitutes a trade secret for purposes of this motion. *See*
27 *Bartech*, 2016 U.S. Dist. LEXIS 59852, at *2-3. California defines a “trade secret”
28 as

1 information, including a formula, pattern, compilation, program,
2 device, method, technique, or process, that:

3 (1) Derives independent economic value, actual or potential, from not
4 being generally known to the public or to other persons who can obtain
5 economic value from its disclosure or use; and

6 (2) Is the subject of efforts that are reasonable under the circumstances
7 to maintain its secrecy.

8 Cal. Civ. Code § 3426.1. The book remains unpublished. *See* ECF No. 8-8 pp.
9 1 & 4-5 (describing DSE’s takedown of ComicMix’s Kickstarter campaign before
10 the book was completed and published). Its potential value derives in part from its
11 unpublished nature, which ComicMix has generally preserved by keeping it
12 confidential. Prior to the inadvertent filing on the public docket, it had only been
13 disclosed to DSE, solely for the limited purpose of ComicMix’s attempt to negotiate
14 the reinstatement of its Kickstarter campaign. *See id.* It has not otherwise been made
15 publicly available except as excerpted in the complaint. *See* ECF No. 1 pp. 7-10;
16 ECF No. 8-1 pp. 12 & 13. “The fact that a work is unpublished is a critical element
17 of its ‘nature.’” *Harper & Row, Publishers v. Nation Enters.*, 471 U.S. 539, 564
18 (1985). Pre-publication distribution would impair the book’s commercial prospects.

19 DSE markets its books, including *Oh, The Places You’ll Go*, in a variety of
20 formats, including hardcover and eBook formats. *See e.g.*,
21 http://www.seussville.com/books/book_detail.php?isbn=9780385371988. The eBook format
22 employs standard digital rights management (“DRM”) technology to prevent
23 unauthorized distribution and reproduction. The full-color digital scan of *Oh, The*
24 *Places You’ll Go* on the Court’s PACER and ECF system lacks any such DRM
25 technology, and, therefore, presents a risk of unauthorized distribution and
26 reproduction and commercial harm to DSE. *See Corbello*, 2011 U.S. Dist. LEXIS
27 124774, at *6 (noting that because digital versions can be “easily, literally, and
28 quickly reproduced in [their] entirety,” and granting a motion to seal certain exhibits
to prevent digital copies of the works from becoming publicly available through the

1 court's electronic filing systems.). Accordingly, the motion to seal ECF No. 8-9
2 should be granted.

3 Sealing the books and removing them from the public record will not impair
4 the Court's duty to weigh the merits of its claims. Any effect on the public interest
5 is outweighed by the potential detriment to the books' commercial prospects. The
6 Court cannot undertake a fair use analysis without assessing both works. "Fair use
7 requires individualized weighing of the equities of a given use of a given work." *L.A.*
8 *News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 938 (9th Cir. 2002). Subjecting parties
9 to copyright infringements via PACER as the price of engaging in copyright
10 litigation would be inequitable, and would impair the court's exercise of its duties.

11 DSE, through counsel, has indicated to ComicMix that it joins in this motion
12 and stipulates to the relief sought herein. A proposed order is submitted herewith
13 pursuant to CivLR 7.2(c) and 79.2(c).

14 Wherefore, ComicMix and DSE respectfully request that the Court grant this
15 motion, and Order the Clerk of the Court to remove ECF Nos. 8-9 and 8-10 from the
16 docket, and place them under seal.

1 Respectfully submitted,

2 DATED: January 6, 2017

3 BOOTH SWEET LLP

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4 /s/ Dan Booth
5 *Pro Hac Vice*

s/ Michael Licari
Local Counsel

6 *Attorneys for Defendant ComicMix LLC*

7
8 DLA PIPER

9 /s/ Gina Durham

10 *Attorney for Plaintiff Dr. Seuss Enterprises, L.P.*

11
12
13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on this January 6, 2017 I electronically filed the
15 foregoing document by using the Court's ECF system, thereby causing a true copy
16 thereof to be served upon counsel of record for each party to have appeared to date,
17 as identified on the Notice of Electronic Filing.

18 /s/ Dan Booth