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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**
25 **TEMPLETON,**

26 Defendants.

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

**DEFENDANTS' REPLY IN
FURTHER SUPPORT OF THEIR
MOTION FOR RECONSIDERATION
OF ORDER DENYING MOTION
FOR ISSUANCE OF REQUEST TO
THE REGISTER OF COPYRIGHTS
PURSUANT TO 17 U.S.C. § 411(b)**

Honorable Janis L. Sammartino

Hearing: June 10, 2021, 1:30 p.m.
Courtroom: 4D

1 The Court should grant Defendants’ motion for reconsideration (ECF No.
2 177), reconsider its order denying Defendants’ request under 17 U.S.C. § 411(b)
3 (ECF No. 88; “411 Order”), refer Defendants’ well-pleaded questions of copyright
4 validity to the Register of Copyrights, and stay the proceedings pending the
5 Register’s response. In opposition (ECF No. 178), Plaintiff Dr. Seuss Enterprises,
6 L.P. (“DSE”) identifies no procedural basis to avoid reconsideration and no
7 substantive basis to decline referral, which is mandated by the intervening decision
8 in *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 959 F.3d 1194 (9th Cir. 2020).

9 Reconsideration is procedurally proper. An intervening change in controlling
10 law is always a proper basis to reconsider an order, and DSE identifies nothing
11 inconsistent with that basic principle in the Ninth Circuit’s mandate, the law of the
12 case doctrine, or any procedural rule. *Unicolors* decidedly represents such a change.
13 It transformed Section 411(b) procedure in the Ninth Circuit by finding that “courts
14 may not consider in the first instance whether the Register of Copyrights would
15 have refused registration due to the inclusion of known inaccuracies in a
16 registration application.” *Id.*, 959 F.3d at 1197.

17 The 411 Order did what *Unicolors* now prohibits. When Defendants moved
18 for referral, they showed that the copyright applications filed for *Oh the Places*
19 *You’ll Go!* (“*Go!*”) and *The Sneetches and Other Stories* (“*Sneetches*”) had not
20 informed the Copyright Office that the books incorporated previously published
21 work. ECF No. 57-1 pp. 9-16. Yet the Court denied the motion upon concluding
22 that the previously published material was not a substantial enough part of *Go!* or
23 *Sneetches* to have required disclosure. 411 Order pp. 7-10; *see* ECF No. 149 p. 13.
24 But because referral is mandatory under *Unicolors*, any such conclusion about
25 substantiality was premature. Whether the Copyright Office would have considered
26 the omissions significant enough to require disclosure is a question that must be
27 addressed to the Register of Copyrights in the first instance.

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1 **I. Whether under Rule 54(b) or 60(b), reconsideration is appropriate.**

2 Reconsideration is appropriate upon an intervening change in controlling law
3 under either Rule 54(b), *see Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882
4 F.2d 364, 369 n. 5 (9th Cir. 1989), or Rule 60(b)(6), *see Henson v. Fid. Nat'l Fin.,*
5 *Inc.*, 943 F.3d 434, 444 (9th Cir. 2019). DSE does not dispute that principle.

6 DSE argues that only Rule 60(b) allows reconsideration of the interlocutory
7 411 Order because the Court entered a “final judgment.” ECF No. 178 pp. 12-13.
8 But when a judgment is vacated and remanded, there is no finality until an amended
9 judgment. *See United States v. Colvin*, 204 F.3d 1221, 1224-26 (9th Cir. 2000);
10 *Holland Transp. Inc. v. Upper Chichester Twp.*, 75 Fed. Appx. 875, 877 (3d Cir.
11 2003) (“the remand essentially made the ... ‘final decision’ not final anymore”);
12 *Haggart v. United States*, 133 Fed. Cl. 568, 573 (Fed. Cl. 2017) (applying the
13 analogous Fed. Cl. R. 54(b) on remand after court of appeals vacated a “final
14 judgment”). “[W]here a circuit court reverses a district court’s grant of summary
15 judgment ... there has been no [final] judgment on the merits.” *Emard v. Hughes*
16 *Aircraft Co.*, 153 F.3d 949, 962 (9th Cir. 1998). Under Rule 54(b), earlier “adverse
17 rulings can still be set aside by the district court prior to the entry of a final
18 judgment following remand.” *Dewberry v. City of Bakersfield*, No. 93-16456, 1995
19 U.S. App. LEXIS 89, *2 (9th Cir. Jan. 3, 1995); *see id.* *15 (*citing* Rule 54(b)).

20 Rule 54(b) would not support reconsideration “after appeal with respect to an
21 issue decided and affirmed on appeal.” *Photomedex, Inc. v. Irwin*, No. 04-CV-24
22 JLS (CAB), 2010 U.S. Dist. LEXIS 101590, *8-9 (S.D. Cal. Sept. 27, 2010). But as
23 DSE concedes, the “411(b) Order was not before the Ninth Circuit in the first
24 place,” and the basis for the Ninth Circuit’s decision on appeal “has nothing to do
25 with the reasoning or outcome in the Court’s § 411(b) Order.” ECF No. 178 p. 22.¹

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27 ¹ Copyright validity was not even implicitly addressed on appeal. When “only fair use is at issue”
28 on appeal, the Ninth Circuit will “assume the legitimacy” of a plaintiff’s copyright registrations
without “express[ing] an opinion as to the ultimate copyright status” of the works. *Monge v.*
Maya Magazines, Inc., 688 F.3d 1164, 1170 n. 2 (9th Cir. 2012).

1 DSE attempts to distinguish *Marketquest*, in which a pre-appeal order was
2 treated as interlocutory after remand, but its posture had extensive parallels with
3 this case. *Id.* In that trademark case, a fair use finding was reversed without
4 reaching the issue of invalidity, and the district court concluded: “The Ninth Circuit
5 did not address the validity of Plaintiff’s trademarks in any way and, therefore, on
6 remand, this Court has the authority to address the issue.” *Marketquest Grp., Inc. v.*
7 *BIC Corp.*, No. 11-cv-0618-BAS-JLB, 2018 U.S. Dist. LEXIS 62359, *12 n. 2
8 (S.D. Cal. Apr. 12, 2018). The Ninth Circuit’s silence as to validity and the 411
9 Order makes Rule 54(b) a proper framework for reconsideration.²

10 The mandate rule does not vary this result because “‘mandates require
11 respect for what the higher court decided, *not for what it did not decide.*’ ... A
12 lower court is therefore left to address any issue not expressly or impliedly disposed
13 of on appeal.” *Id.* (quoting *United States v. Kellington*, 217 F.3d 1084, 1093 (9th
14 Cir. 2000)). Likewise, the “‘law of the case’ does not apply to issues or claims that
15 were not actually decided.” *Mortimer v. Baca*, 594 F.3d 714, 720 (9th Cir. 2010).

16 It would make no difference if the Court applies Rule 60(b) instead. After
17 *Unicolors*, continuing to apply the 411 Order “would no longer be equitable.” Fed.
18 R. Civ. P. 60(b)(5). Under that Rule, “a *bona fide*, significant change in subsequent
19 law” supports reconsideration when “it is no longer equitable for the judgment to
20 operate prospectively.” *Belleveue Manor Assocs. v. United States*, 165 F.3d 1249,
21 1252, 1256 (9th Cir. 1999) (quoting *Agostini v. Felton*, 521 U.S. 203, 239 (1997)).

22 **II. *Unicolors* set new Ninth Circuit law controlling Section 411 requests.**

23 But DSE denies that *Unicolors* is “an intervening change in law affecting the
24 Court’s § 411(b) Order.” ECF No. 178 p. 20. It also argues that despite *Unicolors*, a
25 district court may still unilaterally “determine in the first instance whether an
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27 ² See also *Fiber Sys. Int’l v. Roehrs*, No. 4:04-CV-355, 2007 U.S. Dist. LEXIS 118927, *5-7
28 (E.D. Tex. Aug. 6, 2007); *Mansourian v. Bd. of Regents of the Univ. of Cal.*, No. CIV. S 03-2591
FCD EFB, 2011 U.S. Dist. LEXIS 53637, *3-4, *15-16 (E.D. Cal. May 18, 2011).

1 application contains known inaccuracies,” and decline to refer the question to the
2 Register of Copyrights if it sees no inaccuracy. *Id.* p. 17. And, though not disputing
3 that *Go!* and *Sneetches* include unclaimable published work, DSE maintains that
4 failing to disclose that prior work did not constitute any inaccuracy at all. *Id.* p. 11.

5 That is all contrary to the text of Section 411 and how the Ninth Circuit now
6 reads it. Referral is not discretionary. “*In any case in which inaccurate information*”
7 in a copyright application and registration “*is alleged, the court shall request the*
8 Register of Copyrights” to advise as to its materiality. 17 U.S.C. § 411(b)(2)
9 (emphasis added). *Unicolors* now requires courts to take those terms literally. “In
10 practice, once a defendant *alleges* that ... a plaintiff’s certificate of registration
11 contains inaccurate information” that ““was included on the application for
12 copyright registration ... with knowledge that it was inaccurate,’ *a district court is*
13 *then required* to submit a request to the Register of Copyrights.” *Unicolors*, 959
14 F.3d at 1197 (*quoting* 17 U.S.C. § 411(b)(1)-(2)) (emphasis added).

15 This marks a change in law. Section 411(b) was added to the Copyright Act
16 in 2008 and the Ninth Circuit had not analyzed it in depth when Defendants moved
17 for referral in 2017. *See SellPoolSuppliesOnline.com LLC v. Ugly Pools Ariz., Inc.*,
18 No. CV 15-08156-PHX-BSB, 2017 U.S. Dist. 222236, *24 (D. Ariz. June 9, 2017)
19 (“The parties have not cited, and the Court has not found, Ninth Circuit case law
20 interpreting § 411(b).”). Since then it has interpreted the statute twice, refuting in
21 each case a supposed “burden” that DSE claimed Section 411(b) movants bear.

22 First, in 2019, the Ninth Circuit held that “the plain language of § 411(b) ...
23 does not require a showing of fraud[.]” *Gold Value Int’l Textile, Inc. v. Sanctuary*
24 *Clothing, LLC*, 925 F.3d 1140, 1147 (9th Cir. 2019)). Knowing inaccuracy suffices.
25 *See SellPoolSuppliesOnline.com LLC v. Ugly Pools Ariz., Inc.*, 804 Fed. Appx. 668,
26 670 (9th Cir. 2020). That refutes DSE’s contention that Section 411(b) “imposes [a]
27 prejudice-or-fraud burden of proof on infringement defendants.” ECF No. 69 p. 12.
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1 DSE argued yet another “burden” must be met in seeking a Section 411(b)(2)
2 referral: that Defendants “must initially prove” an inaccuracy in the application; and
3 that it was so stark “that at the time the application was made, it was clear, from the
4 Copyright Office’s instructions to the application form or from separate Copyright
5 Office guidance, that ... the applicant’s entry or omission of information was ...
6 clearly precluded.” *Id.* p. 11. *Unicolors* refuted that argument. It read “alleged” in
7 Section 411(b)(2) to mean “alleged,” not “proved,” as it found referral is required
8 “once a defendant alleges” a knowing inaccuracy. *Unicolors*, 959 F.3d at 1197.
9 “Under *Unicolors*, for the Court to send an inquiry to the Register of Copyrights, it
10 is sufficient for [Defendants] to allege that the inaccuracies were knowingly
11 included in the application.” *Yellowcake, Inc. v. Morena Music, Inc.*, No. 1:20-cv-
12 0787 AWI BAM, 2021 U.S. Dist. LEXIS 86372, *6 (E.D. Cal. May 5, 2021).
13 Accordingly, “factual support for the question is not required.” *Fashion Ave.*
14 *Sweater Knits, LLC v. Poof Apparel Corp.*, No. 2:19-cv-06302-CJC-JEM, 2020
15 U.S. Dist. LEXIS 245889, *3 (C.D. Cal. Dec. 3, 2020). The position “that the Court
16 can only submit questions rooted in fact supported by evidence is belied by the text
17 of the statute.” *Id.* *4. Under *Unicolors*, the allegation suffices.

18 **III. DSE’s arguments against reconsideration have no merit.**

19 DSE concocts another unfounded burden for Defendants to meet, positing
20 that “[t]he burden is on the movant to show both that there has been a change in
21 controlling law since the prior decision *and* that the change undermines the basis
22 for the prior decision.” ECF No. 178 p. 14 (emphasis in original). Defendants have
23 shown just that above, and DSE misstates what is required for reconsideration.
24 “[T]he standard for evaluating the relationship between intervening law and the
25 underlying issue in a district court’s dismissal is not whether the change in
26 law *requires* a different outcome; we consider only whether the change in law
27 affects an issue dispositive to the outcome of the case.” *Bynoe v. Baca*, 966 F.3d
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1 972, 986 (9th Cir 2020) (emphasis in original) (*citing Lopez v. Ryan*, 678 F.3d
2 1131, 1137 (9th Cir. 2012)). The issue of copyright validity affected by *Unicolors*
3 is dispositive because it is an element of DSE’s claims. *See* ECF No. 178 p. 12.

4 DSE claims that moving for reconsideration based on *Unicolors* was not
5 timely and that “Defendants’ time to move expired on June 18, 2018,” almost two
6 years before the *Unicolors* opinion. *Id.* p. 13. DSE also argues that Defendants
7 “were required to cross-appeal” to preserve the validity issue, though *Unicolors*
8 revived the issue a year after a notice of cross-appeal would have been due. *Id.* p. 9.
9 But Defendants were not obligated to raise *Unicolors* before the opinion issued.
10 And having prevailing at summary judgment, they were neither required nor
11 entitled to cross-appeal on invalidity. “A party who receives all that he has sought
12 generally is not aggrieved by the judgment affording the relief and cannot appeal
13 from it.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 333 (1980)). “[A]
14 proper cross-appeal must attack some aspect of the judgment below, rather than
15 attacking contingently the judgment that might result if the appellant prevails.”
16 *Ernst v. W. States Chiropractic College*, 40 Fed. Appx. 577, 578 (9th Cir. 2002)
17 (*citing United States v. Lewis County*, 175 F.3d 671, 679 (9th Cir. 1999)).

18 Moreover, “[a]n appellate mandate does not turn a district judge into a robot,
19 mechanically carrying out orders that become inappropriate in light of subsequent
20 factual discoveries or changes in the law.” *Barrow v. Falck*, 11 F.3d 729, 731 (7th
21 Cir. 1993). The change in law dictates reconsideration and makes it immaterial that
22 Defendants did not cross-appeal on that issue. *See Dilts v. Maxim Crane Works*.
23 *L.P.*, Civ. A. No. 07-38, 2013 U.S. Dist. LEXIS 165570, *6-8 (E.D. Ky. Nov. 21,
24 2013) (reviving on remand, in light of an intervening change of law, an order from
25 which no appeal had been taken); *see also id.* *9 (citing Rule 54(b) as grounds to
26 reconsider after judgment and appeal).

1 **IV. The Court should request the Register of Copyrights’ advice about the**
2 ***Sneetches* and *Go!* registrations pursuant to 17 U.S.C. § 411(b)(2).**

3 Because Defendants have thoroughly alleged knowing inaccuracies in the
4 registration applications under 17 U.S.C. § 411(b), the Court must obtain and
5 consider the Register of Copyrights’ opinion before rendering judgment on the
6 registrations’ validity. Referral to assess validity is particularly critical because the
7 issue hinges on how the Register would have dealt with the omissions, if they were
8 known, in light of the Copyright Office’s guidance and examining principles.
9 *Unicolors* forecloses any argument that the Court may supplant or avoid the
10 Register’s assigned role in advising on the materiality of the inaccuracies.

11 DSE cannot argue the inaccuracies out of existence. It acknowledges that the
12 application forms did not disclose the *Redbook* source material used in *Sneetches* or
13 the “Economic Situation” artwork cut-and-pasted into *Go!*. ECF No. 69 pp. 7-10.
14 As detailed below, at the time of each application, the Copyright Office wanted
15 such previously published material disclosed. The Register of Copyrights must be
16 asked whether the omissions, if known, would have occasioned a refusal to register.

17 **A. The initial 1962 *Sneetches* registration.**

18 *Sneetches* was published in 1961 and its copyright was registered in 1962.
19 Several illustrations, 9% of the lines, and the premises and titles of half its stories
20 derived from works previously published in *Redbook*. Nothing in the registration
21 application distinguished the new from the old. Yet since at least 1944, Copyright
22 Office applications had required a “comprehensive statement to establish the new
23 matter claimed in a work previously published or registered or both.” ECF No. 177
24 pp. 13-14 (*quoting* United States Copyright Office Examining Section, Section
25 Manual (ca. 1944)). And by 1961, the Copyright Office was requiring applicants to
26 provide a “limitation of the claim to the new material only, where a work contains
27 both preexisting and new material.” *Id.* p. 13 (*quoting* Copyright Law Revision,
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1 Report of the Register of Copyrights on the General Revision of the U.S. Copyright
2 Law, 87th Cong., 1st Sess., 142 (House Judiciary Comm. Print 1961)).

3 DSE's opposition does not respond to these contemporaneous Copyright
4 Office statements. Their broad terms indicate that the Copyright Office sought
5 disclosures whenever new works contained *any* preexisting material. Yet the Court
6 found that the *Sneetches* application only required disclosure of prior work if it was
7 a "substantial part" of the new work. 411 Order pp. 7-8. The Court should revisit
8 the issue in light of *Unicolors* and these Copyright Office statements, and ask the
9 Register of Copyrights in the first instance whether, if the nondisclosure were
10 known, an examiner would have considered it material to the registration.

11 **B. The 1989 renewal *Sneetches* registration.**

12 "At the time Dr. Seuss filled out the copyright registration for *Sneetches*" in
13 1961, the Court found, only a "substantial part" of a new work required disclosure
14 if previously published. *Id.* p. 8. Yet the Court has not found that such a limitation
15 governed when Dr. Seuss, a/k/a Theodor Geisel ("Geisel"), applied to renew the
16 registration in 1989. It should now pose the question to the Register of Copyrights.

17 The 1989 renewal form did not suggest that only a "substantial part" of the
18 work should be disclosed. ECF No. 57-8, ECF No. 69-2 p. 2. It requested
19 information on any "Contribution to Periodical or Composite Work," including the
20 periodical's title, volume, issue number, and date. *Id.* On its face, the form sought
21 disclosure of the elements of *Sneetches* previously contributed to *Redbook*,
22 "substantial part" or not. Yet Geisel left that line blank. *Id.*; ECF No. 177 p. 4.

23 At the time, the Copyright Office further required: "In order to be acceptable,
24 a renewal claim in an individual contribution [to a periodical] which was not
25 registered separately must be based on first publication of the contribution." U.S.
26 Copyright Office, Compendium of U.S. Copyright Office Practices § 1310.01, at p.
27 1300-9 (2d rev. ed. 1988). It also required that "[a] renewal application covering a
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1 contribution which was not registered separately must clearly identify the periodical
2 or other composite work in which the contribution appeared,” and “must contain the
3 facts of original registration, e.g., title of periodical, volume, and issue number,
4 issue date and original registration date, in addition to the publication date for the
5 periodical or other work.” *Id.* §§ 1310.03 & 1310.03(a), at p. 1300-10. These were
6 long-standing requirements. *See* ECF No. 57-1 pp. 19-20.

7 Geisel did not comply. He had renewed the copyrights in fourteen earlier
8 *Redbook* contributions, but did not obtain separate registrations or renewals for the
9 two *Redbook* works incorporated in *Sneetches*. *Id.* pp. 9-10. His *Sneetches* renewal
10 claim did not disclose the *Redbook* contributions and was in no way “based on”
11 their initial publication. *Id.* p. 11. Geisel claimed renewal rights in the entire book
12 without disclaiming the elements previously published in *Redbook*, which by then
13 had entered the public domain. *Id.* p. 3; *see* ECF No. 120 p. 9. Previously published
14 material and public domain material is unclaimable. ECF No. 57-1 pp. 18-19; ECF
15 No. 88 p. 7 n. 6. The Court should ask the Register of Copyrights whether the
16 nondisclosure of the *Redbook* elements, if known, would have caused the Register
17 to reject either the 1962 registration for *Sneetches* or its 1989 renewal.

18 **C. The 1990 *Go!* registration and 1991 correction.**

19 *Go!* was published in 1990. It incorporates almost all of the “Economic
20 Situation” illustration first published in 1975. Disclosures required on the 1990
21 application form include: “Identify *any* preexisting work or works that this work is
22 based on or incorporates” and “Give a brief, general statement of the material that
23 has been added to this work and in which copyright is claimed.” ECF No. 57-1 pp.
24 16-17, ECF No. 57-13 p. 2 (emphasis added), ECF No. 177 p. 4. The disclosure
25 requirement expressly applies to “any” earlier work incorporated in the new work,
26 substantial or not. *Id.*; *see also* 17 U.S.C. § 409(9). Yet the 1990 application to
27 register *Go!* did not disclose “Economic Situation.” *Id.*

1 Neither did a 1991 application to correct the resulting registration. ECF No.
2 57-14. It claimed that the only “Incorrect Information As It Appears In Basic
3 Registration” was that it had identified the copyright claimants as individuals, not
4 in their capacities as trustees. *Id.*, ECF No. 57-1 pp. 17 & 24, ECF No. 177 p. 5.

5 DSE argued “that under the law at the time, Dr. Seuss only was required to
6 disclose the prior work if a substantial amount of the prior work was incorporated
7 in the derivative work.” 411 Order p. 9 (*citing* ECF No. 69 p. 18). Nothing in the
8 application forms suggest any substantiality threshold below which disclosure was
9 not required. Under *Unicolors*, without submitting any questions to the Register of
10 Copyrights, it was erroneous to agree with DSE that the amount of “Economic
11 Situation” used in *Go!*—essentially all of the illustration—was not substantial or
12 “appreciable” enough to require disclosure. 411 Order pp. 9-10.

13 Further, DSE must now be estopped from disputing the substantiality of the
14 undisclosed uses. Elements of one illustration is also all that Defendants allegedly
15 used from *How the Grinch Stole Christmas!*. ECF No. 39 pp. 14 & 30. That
16 sufficed to persuade the Ninth Circuit that “the amount and substantiality of the
17 portion [of *Grinch*] used in relation to the copyrighted work as a whole” weighed
18 against a finding of fair use. ECF No. 177 pp. 15-16 (*quoting* *Dr. Seuss Enters.,*
19 *L.P. v. ComicMix LLC*, 983 F.3d 443, 456 (9th Cir. 2020)). So, as Defendants
20 argued, DSE cannot claim that the amount taken from *Grinch* was “substantial
21 enough to infringe unless it concedes that Geisel’s taking of the same or greater
22 quantum for *Go!* was substantial enough to have required disclosure.” *Id.* p. 16.
23 DSE’s opposition does not dispute it, waiving any argument to the contrary.

24 The Court should ask the Register of Copyrights whether, if she had known
25 of the previously published “Economic Situation” material included in *Go!* without
26 disclosure, she would have refused the registration or the corrected registration.
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May 14, 2021

Respectfully submitted,

/s/ Dan Booth

Dan Booth

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Michael Licari

THE LAW OFFICES OF MICHAEL LICARI

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this May 14, 2021 I electronically filed the foregoing document by using the Court’s ECF system, thereby causing a true copy thereof to be served upon counsel of record for Plaintiff Dr. Seuss Enterprises, L.P., as identified on the Notice of Electronic Filing.

/s/ Dan Booth