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Via ECF, Under Seal

February 6, 2020

Hon. Valerie E. Caproni
United States District Court
Southern District of New York
40 Foley Square, Room 240
New York, NY 10007

Re: *Chronicle Books et. al. v. Audible, Inc.*, 19 Civ. 7913 (VEC)

Dear Judge Caproni:

We represent Defendant Audible, Inc. ("Audible") in the above-captioned matter. We write on behalf of all parties. On January 13, 2020, the parties notified the Court that they had reached an agreement settling the above-captioned matter. (Dkt. No. 68.) The next day the Court issued an Order (Dkt. No. 69) closing the case and advising the parties that they had 30 days in which to request the Court retain jurisdiction to enforce the settlement agreement, pursuant to Rule 7.A of the Court's Individual Practices.

The parties jointly request both that the Court enter the enclosed proposed Stipulated Consent Permanent Injunction and Dismissal with Prejudice (the "Permanent Injunction") and that the Court retain jurisdiction over enforcement of the parties' settlement agreement (the "Agreement"), as indicated therein. As to the Permanent Injunction, part of the parties' resolution of this litigation hinged on this Court entering a permanent injunction such as the one enclosed. It is an important part of their Agreement. As to the request for this Court to retain jurisdiction over the Agreement, the parties have included language to that effect in both their Permanent Injunction and the Agreement as the Court is familiar with the parties' dispute, the legal issues involved, and the facts.

In addition, for the reasons set forth below, the parties—along with the Association of American Publishers ("AAP"), the national trade association for the American publishing industry, which is a party to the Agreement but not the Permanent Injunction—jointly and respectfully request the Court's permission to file under seal the Agreement, attached to this letter as Exhibit A, between Plaintiffs, Audible, and the AAP. The parties make this request to seal the Agreement because the parties negotiated and entered into the Agreement based upon the expectation it would remain confidential, it contains confidential settlement terms between Audible and the AAP, a non-party, as well, and the public will not be prejudiced if it is sealed.

When evaluating a request to a file a document under seal, a court must undertake a three-part inquiry to determine whether there is a right of access to a document submitted to the court. *See United States v. Sattar*, 471 F. Supp. 2d 380, 384 (S.D.N.Y. 2006). First, a court must

determine whether the document is a "judicial document," such that a presumption of access attaches. *United States v. Amodeo*, 71 F.3d 1044, 1050-51 (2d Cir. 1995) ("*Amodeo I*"). Second, if it is a "judicial document" courts ask whether the presumption of access is the "common law right of access or the more robust qualified First Amendment right to attend judicial proceedings and to access certain judicial documents." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 2016 WL 1071107, at *4 (S.D.N.Y. Mar. 18, 2016) (Caproni, J.), *aff'd*, 814 F.3d 132 (2d Cir. 2016) (internal citations omitted). Third, "[o]nce the weight of the presumption is determined, a court must balance competing considerations against it." *Amodeo I*, 71 F.3d at 1050. "[T]he crux of the weight-of-the-presumption analysis" requires "balancing the value of public disclosure and countervailing factors such as (i) the danger of impairing law enforcement or judicial efficiency and (ii) the privacy interests of those resisting disclosure." *Bernstein*, 814 F.3d at 143.

The Second Circuit has defined "judicial documents" as documents that are "relevant to the performance of the judicial function and useful in the judicial process," *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo II*"), and courts evaluate whether the document "would materially assist the public in understanding the issues before the district court, and in evaluating the fairness and integrity of the court's proceedings," *Newsday LLC v. Cty. of Nassau*, 730 F.3d 156, 166-67 (2d Cir. 2013).

The Agreement, unlike the publicly filed Permanent Injunction, is not a 'judicial document' that needs to be evaluated under the rubric set forth above. First, other courts have declined to classify settlement agreements as public documents. *See Schoeps v. Museum of Modern Art*, 603 F. Supp. 2d 673, 676 n. 2 (S.D.N.Y. 2009) (declining to hold that settlement agreement submitted to court was a "judicial document"). Second, this document has a limited, if any, role in the judicial process. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). Because the parties have also submitted a Permanent Injunction to the Court, which includes a request to retain jurisdiction, it is not necessary to consider the Agreement as the basis for the Court's retention of jurisdiction. Third, the public, via the Permanent Injunction and other briefing in the matter, will be able to understand the issues in the case and the resolutions reached by the parties in this matter.

Even if the Agreement were a "judicial document" to which a presumption of access attached—and it is not—the presumption of access should be accorded minimal weight here. Under the common-law presumption of access, where a "document's role in the performance of Article III duties is negligible . . . , the weight of the presumption is low" and must be "balanced against competing considerations such as the privacy interests of those resisting disclosure." *Bernstein*, 814 F.3d at 143. Under the First Amendment presumption of access, the Second Circuit has "articulated two different approaches for determining whether the public and the press should receive First Amendment protection in their attempts to access certain judicial documents. The first approach considers experience and logic: that is, whether the documents have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question. The second approach considers the extent to which the judicial documents are derived from or are a

necessary corollary of the capacity to attend the relevant proceedings." *Bernstein*, at 141 (internal citations omitted).

Under either framework, the presumption of access to the Agreement should be low. It is well-established Second Circuit law that there is no established presumption of public access with respect to confidential settlement discussions, terms and documents. *See, e.g.*, *United States v. Glens Falls Newspapers*, 160 F.3d 853, 857 (2d Cir. 1998) (holding that there is no presumptive right of access to settlement discussions and documents); *Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985) (noting that "[s]ecrecy of settlement terms . . . is a well-established American litigation practice") (citation omitted); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143–44 (2d Cir. 2004) (holding that it was a "serious abuse of discretion" for the district court to refer to the magnitude of the settlement in an unsealing order and noting that there is no established presumption of access to the terms of a settlement agreement); *but see Hardy v. Kaszycki & Sons*, 2017 WL 6805707, at *5 (S.D.N.Y. Nov. 21, 2017) (declining request to seal certain documents related to the settlement of the case and distinguishing *Glens Falls* and *Gambale*). Not only is the Agreement not the type of document to which a presumption of access attaches, public access to the Agreement will not play a significant positive role in the functioning of the judiciary because (i) the public will have access to the Permanent Injunction, which clearly and fully describes Audible's ongoing obligations to Plaintiffs and (ii) since the case is already resolved, the document will not play a role in the Court's adjudication of the matter. *Cf. Lugosch*, 435 F.3d at 123 (holding that documents submitted on summary judgment motion have the highest presumption of access because they will be used in adjudicating motion).

At the third step, a "court must balance competing considerations" against the presumption of access and should consider factors such as "the danger of impairing law enforcement or judicial efficiency" and the "privacy interests of those resisting disclosure." *Amodeo I*, 71 F.3d at 1051. The parties drafted and agreed to the Agreement based on their intention and understanding that it would remain confidential and it includes confidential settlement terms applicable to a non-party, the AAP, to which there is no basis for the public to have access. *See Schoeps*, 603 F. Supp. 2d at 676 (holding that the "Court has no choice . . . but to preserve the confidentiality of the settlement agreement" in spite of one party's "wholly unexplained" opposition to disclosure); *Alicia B. v. Malloy*, 2016 WL 9782480, at *1 (D. Conn. Dec. 20, 2016) (granting plaintiffs' motion to file settlement agreements under seal and noting that the "parties represent that they only were able to reach settlement because of their expectations that the terms of settlement would be kept confidential" and that the public benefitted from an "efficient litigation process"). Additionally, the parties explicitly agreed, as reflected in the Agreement, on the public statement that they could make regarding the resolution of the litigation. This negotiated statement further evidences that the parties contemplated the Agreement would be not be publicly disclosed and they may not have been able to settle the case without the expectation of confidentiality.[1] Not only did the parties agree on the confidentiality

[1] The parties note that the Agreement provides that nature and amount of consideration paid by Audible shall be disclosed to only a very limited category of individuals who are required to have access to the information. (Agmt. § 11.) The parties have a particularly compelling interest

of the agreement, judicial efficiency is bolstered by the resolution of this case and the public will not be harmed by keeping the Agreement under seal because the public can access the Preliminary Injunction.

In the event that the Court declines to grant the parties' joint request, they respectfully ask that they be accorded the opportunity to propose redactions to the Agreement before filing it publicly. In addition, to the extent that the Court finds it necessary to reopen the case to enter the Permanent Injunction, the parties jointly request that the Court do so. We thank the Court for its consideration of this matter.

Respectfully,

Emily Reisbaum

cc: All counsel, by ECF

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in protecting the confidentiality of the monetary terms they agreed upon and courts have routinely recognized that interest. *See, e.g. Mercer Health & Benefits LLC v. DiGregorio, et al.*, No. 18 Civ. 1805, Dkt. No. 83 (S.D.N.Y. July 16, 2018) (Koeltl, J.); *Pullman v. Alpha Media Pub., Inc.*, 624 F. App'x 774, 779 (2d Cir. 2015) (holding that a "district court also did not abuse its discretion in redacting the settlement amount" from transcript of proceeding).