

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

SCHOOL SPECIALTY, INC., et al.,
Debtors.¹

Chapter 11

Case No. 13-10125-KJC

(Jointly Administered)

**Obj. Deadline: August 22, 2013
(by agreement)**

**Hearing Date: September 10, 2013
@ 1:00 p.m.**

Re: D.I. 902, 1158

**SAN DIEGO STATE UNIVERSITY RESEARCH FOUNDATION'S
OBJECTION TO SCHOOL SPECIALTY, INC.'S PROPOSED
ASSUMPTION OF EXECUTORY CONTRACT**

SAN DIEGO STATE UNIVERSITY RESEARCH FOUNDATION ("SDSURF"), by and through its undersigned counsel, objects to the assumption by SPORTIME, LLC ("SPORTIME") and SCHOOL SPECIALTY, INC. ("SCHOOL SPECIALTY, INC." and collectively with SPORTIME, "SCHOOL SPECIALTY")² of the copyright and trademark license ("SPARK License"), and states as follows:

PRELIMINARY STATEMENT

SDSURF is a non-profit organization chartered to further the educational, research and community service objectives of San Diego State University ("SDSU"). In such capacity, SDSURF administers the licensing of all intellectual property developed by professors, researchers, and other personnel of SDSU. At issue in this objection proceeding is Debtors

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: School Specialty, Inc. (1239); Bird-In-Hand Woodworks, Inc. (8811); Califone International, Inc. (3578); Childcraft Education Corp. (9818); ClassroomDirect.com, LLC (2425); Delta Education, LLC (8764); Frey Scientific, Inc. (3771); Premier Agendas, Inc. (1380); Sax Arts & Crafts, Inc. (6436); and Sportime, LLC (6939).

² SPORTIME is a wholly owned subsidiary of SCHOOL SPECIALTY and is entirely controlled by SCHOOL SPECIALTY. Except as otherwise expressly stated herein, the acts described within this objection were committed by SCHOOL SPECIALTY exercising governance authority over SPORTIME. Consequently, the remainder of this objection refers only to SCHOOL SPECIALTY based on its exclusive ownership and control of SPORTIME.



SPORTIME, INC. and SCHOOL SPECIALTY, INC. desire to assume the SPARK License for a research based physical education curriculum known as SPARK.

SDSURF objects to the assumption by SPORTIME and/or SCHOOL SPECIALTY, INC. of the SPARK License because:

- (1) SCHOOL SPECIALTY has for literally years systematically underreported revenue earned and royalties due SDSURF for the sales of physical education curriculum products covered by the SPARK License, such that there is due and owing \$410,339.92 in unpaid royalties plus interest of \$74,430.22 for a total delinquency of \$489,708.93;
- (2) SCHOOL SPECIALTY licensed the royalty covered SPARK materials to PREMIER, a subsidiary of SCHOOL SPECIALTY,³ without ever reporting the sales revenue generated or paying the royalties due thereon;
- (3) SCHOOL SPECIALTY dramatically underreported the amount necessary to cure the existing default under the SPARK License by filing a notice to cure for only \$2,523.02;
- (4) SCHOOL SPECIALTY has failed to either cure the default or provide adequate assurances of future performance; and
- (5) The nature and severity of SCHOOL SPECIALTY's breach of the SPARK License prevents the assumption thereof.

SDSURF files this objection pursuant the April 24, 2013 order of this Court establishing, *inter alia*, the deadlines for objection to the assumption of executory contracts by SCHOOL SPECIALTY ("Objection Order," Docket No. 902). The Objection Order extended the standard objection deadline of May 16, 2013 to May 31, 2013 for SDSURF, as well as permitted SCHOOL SPECIALTY and SDSURF to further extend such objection deadline. The objection deadline has been continued by SCHOOL SPECIALTY in writing on numerous occasions with the most recent extension setting a deadline of August 22, 2013. *See* Declaration of Sean D. Schwerdtfeger, attached hereto as **Exhibit "A"** (the "Schwerdtfeger Declaration").

³ SDSURF alleges that PREMIER is a subsidiary of SCHOOL SPECIALTY based on its own investigation and research conducted in connection with the preparation of this objection.

I

FACTUAL BACKGROUND

1. SDSURF owns the intellectual property developed by SDSU and has the exclusive authority to license such intellectual property. The specific intellectual property at issue in this proceeding is the physical education curriculum sold and administered under the SPARK License (discussed below). James F. Sallis Ph.D and Thomas McKenzie Ph.D developed the SPARK concept, trademark, and curriculum under research grants from the National Institutes of Health, while serving on the faculty of SDSU. James F. Sallis, Ph.D and Thomas McKenzie, Ph.D remain an integral part of the development of the SPARK intellectual property. *See* Declaration of James F. Sallis, Ph.D., attached hereto as **Exhibit “B”** (the “Sallis Declaration”) and Declaration of Thomas McKenzie, Ph.D., attached hereto as **Exhibit “C”** (the “McKenzie Declaration”).

2. SPARK is a non-profit organization existing under the auspice of SDSURF, which creates programs that promote lifelong health and wellness. To this end, SPARK creates and disseminates evidence-based physical activity and nutrition programs that provide curriculum, staff development, follow-up support, and equipment to teachers of Pre-K through 12th grade students.

3. SDSURF owns all SPARK intellectual property, trademarks and copyrights, as well as licenses the marketing and sale thereof (“SPARK License”).

4. Under the Copyright Act, the owner of a copyright has the exclusive right to copy, distribute or display his work, as well as license the right thereto to another party. *See* 17 U.S.C. §106 and §101. The owner of a trademark may also “license” the trademark to another. 74 Am Jur 2d Trademarks and Tradenames § 16.

5. On or about September 30, 2002, SDSURF granted SCHOOL SPECIALTY, the SPARK License to market, use, demonstrate, sell, and commercialize the following intellectual property: (1) copyrighted SPARK works; (2) all derivatives of those works; (3) any SPARK works, present or future, created with any assistance from SDSU faculty or staff; (4) all derivatives of those works; and (5) any SPARK works, present or future, bearing the SPARK

Trademark (collectively “SPARK Products”). The SPARK License further defined “derivative work” to mean “a work derived from and based on a pre-existing copyrighted work.” The SPARK License also defined “work” to mean “any instructional text used in the SPARK Program that is sold, leased, distributed or otherwise transferred to SPARK Customers, in any media format.” *See* Exhibit A to the Schwerdtfger Declaration.

6. The SPARK License thus allowed SCHOOL SPECIALTY to market the SPARK Products, as well as to use the SPARK trademark in connection with the marketing and sale of any derivative works created therefrom.

7. In exchange for the exclusive right to market and sell the SPARK Products, SCHOOL SPECIALTY agreed to: (1) pay SDSURF on a quarterly basis a royalty equal to eleven percent (11%) of all revenue derived from the sale of any SPARK Products; (2) pay SDSURF on a quarterly basis a royalty equal to twenty-two percent (22%) of all revenue derived from the sale of any SPARK Products under any sublicense; (3) maintain accurate books of account with respect to the SPARK Products sold along with permitting SDSURF to review and audit such books on an annual basis; and (4) provide SDSURF with written accountings on a quarterly basis of all SPARK Products sold. *See* Exhibit A to the Schwerdtfger Declaration.

8. SCHOOL SPECIALTY currently markets six lines of SPARK Products each aimed at a separate Pre-K through 12th grade demographic.⁴ For each program, SCHOOL SPECIALTY sells: (1) on-line access to the SPARK curriculum at SPARKfamily.org (“On-Line Curriculum”); (2) a printed and bound copy of the SPARK curriculum (“Printed Curriculum”); (3) a compact disc containing music specific to the SPARK program (“SPARK CD”); and (4) a teacher’s edition for implementing the SPARK curriculum marketed under the trade name SPARKfolio (collectively “SPARK Works”). All four SPARK Works relate to one another and constitute individual components of an integrated lesson plan, such that each

⁴ These are the (1) SPARK K-2 Physical Education program (“SPARK K-2”), (2) SPARK 3-6 Physical Education program (“SPARK 3-6”), (3) SPARK Middle School Physical Education program (“SPARK MS”), (4) SPARK High School Physical Education program (“SPARK HS”), (5) SPARK Early Childhood program (“SPARK EC”), and (6) SPARK After School Physical Activity program (“SPARK AS” and collectively the “SPARK Programs”).

component of the SPARK Works are directly referenced in and incorporated into the other SPARK Works for coordinated use in carrying out the SPARK educational program.

9. The On-Line Curriculum, Printed Curriculum, SPARK CD and SPARKfolio all prominently display the SPARK trademark, and are all marketed by SCHOOL SPECIALTY as components of the SPARK educational program. The SPARK Works are marketed and sold both individually and in bundles. *See* Exhibit B to Schwerdtfeger Declaration.

10. In addition to the SPARK Works, SCHOOL SPECIALTY disclosed to SDSURF during the pendency of these proceedings that it has sublicensed the SPARK Products material to PREMIER for commercialization and sale. (Declaration of Sean D. Schwerdtfeger.) SDSURF has demanded an accounting of the revenue received from such venture, but SCHOOL SPECIALTY has failed to provide any accounting thereof.

11. The gravamen of this objection arises from SCHOOL SPECIALTY's active concealment of the revenue derived from the sale of the On-Line Curriculum, SPARK CD, and SPARKfolio, as well as SCHOOL SPECIALTY's failure to ever pay any royalty to SDSURF thereon. The objection also addresses the accounting and royalties due on the marketing and sale of the SPARK Products under sublicense with PREMIER.

12. Prior to the initiation of the above-captioned bankruptcy, SCHOOL SPECIALTY neither accounted for nor paid SDSURF any royalty on the revenue derived from the sale of the On-Line Curriculum, SPARK CD, and SPARKfolio. Rather SCHOOL SPECIALTY only reported revenue and paid royalties on the sale of the Printed Curriculum. It did so, however, in a manner calculated to deceive SDSURF into believing that it was receiving the contractually required royalty for the On-Line Curriculum, SPARK CD, and SPARKfolio. *See* Sallis Declaration and McKenzie Declaration. Similarly, SCHOOL SPECIALTY never disclosed nor paid any royalty on the revenue derived from the sale of SPARK Products and/or materials under its venture with PREMIER.

13. Prior to discovering the concealed revenue and failure to pay the contractually required royalties thereon, SDSURF had been negotiating with SCHOOL SPECIALTY to obtain adequate assurances of future performance in an effort to avoid filing an objection to

SCHOOL SPECIALTY's proposed assumption of the SPARK License. As a direct and proximate result of those negotiations, SCHOOL SPECIALTY included paragraph 32 in the April 24, 2013 order of this Court establishing, *inter alia*, the deadlines for objection to the assumption of executory contracts by SCHOOL SPECIALTY ("Objection Order," Docket No. 902). The Objection Order extended the standard objection deadline of May 16, 2013 to May 31, 2013 for SDSURF ("Extended Objection Deadline"). The Objection Order further provided for SCHOOL SPECIALTY and SDSURF to further extend the Extended Objection Deadline. The Extended Objection Deadline has been extended by SCHOOL SPECIALTY in writing up to and including August 22, 2013.

14. After this Bankruptcy Court executed the Objection Order, but prior to SDSURF discovering the unaccounted and unpaid royalties, SCHOOL SPECIALTY filed a cure notice for \$2,523.02 to assume the SPARK License. At the time SCHOOL SPECIALTY filed the cure notice for \$2,523.02, it had no reasonable basis on which to believe that the sum of \$2,523.02 was the only amount due and owing SDSURF under the SPARK License. SDSURF is informed and believes that SCHOOL SPECIALTY intentionally stated the meager cure amount of \$2,523.02 in furtherance of its scheme to assume the SPARK License, while continuing to conceal and deprive SDSURF of the royalties due for the sale of the On-Line Curriculum, SPARK CD, and SPARKfolio.

15. After SCHOOL SPECIALTY issued a cure notice for \$2,523.02, SDSURF discovered SCHOOL SPECIALTY's concealment of unpaid royalties and deceptive accounting practices, as well as confronted SCHOOL SPECIALTY with such deceptive conduct. Only after direct confrontation did SCHOOL SPECIALTY admit that it had: (1) **never** accounted to SDSURF for revenue derived from the On-Line Curriculum, SPARK CD, and SPARKfolio; (2) **never** paid SDSURF any royalty on the revenue derived from the sale of the On-Line Curriculum, SPARK CD, and SPARKfolio; and (3) **never** accounted or paid SDSURF any royalty due on sales of SPARK Products and/or materials through its subsidiary, PREMIER. SCHOOL SPECIALTY promised to produce accountings of the revenue derived from the sale of the On-Line Curriculum, SPARK CD, and SPARKfolio, but failed to do so until May 28,

2013. SCHOOL SPECIALTY has still not accounting for any of the revenue derived from its venture with PREMIER.

16. On May 28, 2013, SCHOOL SPECIALTY produced an accounting (“SPARK Accounting”) of the sales and royalties due on the SPARK Works dating back to 2007. The SPARK Accounting reveals that SCHOOL SPECIALTY owes SDSURF **\$489,708.93** in past due royalties for the unaccounted sales of the On-Line Curriculum, SPARK CD, and SPARKfolio, including interest at ten percent (10%) per annum as allowed by controlling California law. Cal. Civ. Code, § 3289. *See* Exhibit D to Schwerdtfeger Declaration.

17. Since SCHOOL SPECIALTY only produced the accounting a mere three (3) days before the Extended Objection Deadline of May 31, 2013, SCHOOL SPECIALTY agreed in writing pursuant to the Objection Order to extend the time for SDSURF to file this objection multiple times with the final extension being August 22, 2013. *See* Schwerdtfeger Declaration. SDSURF attempted to resolve its differences with SCHOOL SPECIALTY, but has not been able to do so to date. *See* Exhibit E to Schwerdtfeger Declaration.

18. Despite its best effort to salvage the relationship, SDSURF has lost all faith in SCHOOL SPECIALTY’s integrity and ability to administer the SPARK License in a manner respecting either the SPARK License or reputation of SDSU and SDSURF in the educational community.

II.

PROCEDURAL BACKGROUND

19. SCHOOL SPECIALTY filed a voluntary petition under Chapter 11 of the Bankruptcy Code on January 28, 2013. SCHOOL SPECIALTY currently operates as a debtor-in-possession.

20. SCHOOL SPECIALTY’s First Amended Supplement to its Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code [Docket No. 1044] states it intends to assume the SPARK License in connection with its Chapter 11 reorganization plan.

21. Pursuant to the Objection Order [Docket No. 902], SCHOOL SPECIALTY was to provide SDSURF with a cure note that “set forth the amount that [SCHOOL SPECIALTY]

believe must be paid in order to cure all monetary defaults” under the SPARK License. The Objection Order further extended the time for SDSURF to object to the proposed assumption until May 31, 2013, as well as provided for additional extensions as SCHOOL SPECIALTY and SDSURF may agree upon.

22. SDSURF files this objection in accordance with the Objection Order and objects to SCHOOL SPECIALTY’s assumption of the SPARK License.

III.

OBJECTION

23. A Chapter 11 debtor-in-possession may, under limited circumstances and with court approval, assume an executory contract of the debtor. 11 U.S.C. § 365(a); see 11 U.S.C. § 1107(a). Assumption, however, is not permissible when the contract has become nonexecutory by material breach thereof. Even if the SPARK License were deemed an “executory contract” within the meaning of section 365(c),⁵ SDSURF objects to SCHOOL SPECIALTY’s proposed assumption and assignment as stated below.

A. THE CONDUCT OF SCHOOL SPECIALTY CONSTITUTES FRAUD AND DECEIT RENDERING THE SPARK LICENSE NONEXECUTORY FOR MATERIAL BREACH THEREOF.

24. The SPARK License contains a choice of law provision stating: “This Agreement shall be governed by the laws of the State of California.” *See* Exhibit A to Schwerdtfeger Declaration.

25. California Civil Code §1710 codifies the definition of “deceit” as including: “**3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact;**” *See* also California Civil Jury Instructions (“CACI”) 1900 [Intentional Misrepresentation].

⁵ The test applied in this jurisdiction to determine whether a contract is executory is the “Countryman” test, which provides that a contract is executory “when the obligations of ‘both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.’” *In re Golden Books Family Entm’t, Inc.*, 269 B.R. 311, 314 (Bankr. D. Del. 2001) (citations omitted).

26. California Civil Code §1572 codifies the definition of “fraud” as including: “**3. The suppression of that which is true, by one having knowledge or belief of the fact;** 4. A promise made without any intention of performing it; **or, 5. Any other act fitted to deceive.**” [Emphasis supplied.]

27. SCHOOL SPECIALTY had, and continues to have, a contractual duty to account to SDSURF for the revenue generated by the use of SPARK License, which includes both the sale of the SPARK Works and use of the SPARK trademark. The SPARK License states the quarterly accounting requirements due from SCHOOL SPECIALTY in clear terms by providing:

4.2 On or before the forty-fifth (45th) day immediately following each calendar quarter, LICENSEE shall make and deliver a written accounting SDSURF of all SPARK Products Marketed by LICENSEE and sublicensees. **True and accurate copies of all records for SPARK Products Marketed by LICENSEE or sublicensees must be reported to SDSURF.** Such written accounting shall further include at least the following:

- (a) **Total number of sales and gross Revenue received from Customer and/or Sublicensee for the sale of SPARK Products during the preceding calendar quarter;**
- (b) Any deductions as set forth in Exhibit B attached;
- (c) Total fees due SDSURF per Exhibit B attached. [Emphasis supplied.]

28. SCHOOL SPECIALTY never reported the sales and gross revenue derived from the On-Line Curriculum, SPARK CD, or SPARKfolio, even though each of these products constitutes a SPARK Product. Similarly, SCHOOL SPECIALTY never reported nor paid any royalty on the revenue derived from the sale of the SPARK Products and materials through PREMIER. Instead, SCHOOL SPECIALTY suppressed the material fact that it was neither accounting for nor paying SDSURF any royalties on the sales of the On-Line Curriculum, SPARK CD, SPARKfolio and PREMIER venture. In so doing, SCHOOL SPECIALTY materially breached the SPARK License in order to actively profit from its deceit in the sale of SPARK Works and related materials.

29. At no time did SCHOOL SPECIALTY ever advise, inquire, or otherwise alert SDSURF to the fact that it was neither accounting for nor paying SDSURF any royalties on the sales of the On-Line Curriculum, SPARK CD, and SPARKfolio. If any doubt existed as to

whether the On-Line Curriculum, SPARK CD and/or SPARKfolio were within the purview of the royalties due under the SPARK License, the duty of good faith and fair dealing would require SCHOOL SPECIALTY to alert SDSURF as to the doubt and seek the input SDSURF thereon. No such inquiry or advisement ever occurred.

30. California law is clear in dictating that when a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract. *Brown v. Grimes*, 192 Cal. App. 4th 265 (2011) (citing 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§813, 814, p.906); *De Burgh v. De Burgh*, 39 Cal.2d 858, 863 (1952) ("in contract law a material breach excuses further performance by [an] innocent party"); *Sanchez v. County of San Bernardino*, 176 Cal.App.4th 516, 529-530 (2009); *Wylar v. Feuer*, 85 Cal.App.3d 392, 404 (1978); *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 778 (1919) ("failure...to perform an obligation...release the oblige from the duty of making demand, and performance or tender, and justifies him in abandoning the contract..."); *see also California Co. Alderson v. Houston*, 154 Cal. 1 (1908); *De Prosse v. Royal Eagle Distilleries Co.*, 135 Cal. 408 (1902).

31. The suppression of the revenue derived from and royalties due on the sale of the On-Line Curriculum, SPARK CD, and SPARKfolio unequivocally constitutes a material breach SPARK License justifying termination thereof, just as does the suppression of the revenue derived from the sale of SPARK Products and royalty materials through PREMIER. *See Manuel Smith v. Empire Sanitation District*, 127 Cal.App.2d 63 (1953). The suppression of the revenue derived and royalties due on such SPARK Works also constitutes a breach of the implied covenant of good faith and fair dealing.

32. The covenant of good faith and fair dealing, implied by California law in every contract, exists to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement. *Guz v. Bechtel Nat'l, Inc.*, 24 Cal.4th 317, 349 (2000). "The covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits

of the agreement” even if it does not technically violate the express terms of the agreement. *Waller v. Truck Ins. Exch.*, 11 Cal.4th 1, 36 (1995). Thus, where a contracting party had an obligation to deal fairly with its contracting partner in calculating license fees, it violated that duty by using a method that unfairly undervalued fees owed even if there was no express contractual obligation to calculate them differently. *Ladd v. Warner Bros. Entm’t, Inc.*, 184 Cal.App.4th 1298, 1308 (2010) (breach of implied covenant of good faith and fair dealing established where movie studio used a straight-lining method instead of considering relative worth in licensing packages).

33. SCHOOL SPECIALTY’s preparation and tender of quarterly accountings and royalty checks that intentionally omitted the revenue derived from and royalties due on the On-Line Curriculum, SPARK CD, and SPARKfolio is a classic breach of the covenant of good faith and fair dealing. The fact that this practice has been perpetual since in the inception of the SPARK License makes the severity of the matter more significant.

34. SDSURF bargained for quarterly accountings and royalty payments on the sale of all of the SPARK Works, not just the Printed Curriculum. The SPARK License imposed a contractual duty upon SCHOOL SPECIALTY to provide the quarterly accountings along with the royalty payments, and the implied covenant of good faith and fair dealing ensured that such actions would be conducted in good faith consisted with commercial fair dealing. As stated above, SCHOOL SPECIALTY materially breached both its contractual duties and the implied covenant of good faith and fair dealing in chronically failing to account for and pay royalties on all of the SPARK Works.

35. Pursuant to California law, SDSURF elects to treat the SPARK License as terminated prior to SCHOOL SPECIALTY declaring bankruptcy, such that the SPARK License is no longer an executory contract capable of assumption by SCHOOL SPECIALTY. (Citation *supra*.) The unpaid royalties are ill gotten gain by fraud and deceit. No portion of such royalties should be discharged or diminished under the plan of reorganization.

36. The remaining points address why even if the SPARK License is determined to be executory (which should not be the case), SCHOOL SPECIALTY is precluded from assuming it.

B. THE CONDUCT OF SCHOOL SPECIALTY CONSTITUTES BAD FAITH UNDER THE BANKRUPTCY CODE.

37. Section 1129(b)(3) of the Bankruptcy Code provides that every plan of reorganization must be “proposed in good faith and not by any means forbidden by law.” Section 1123(b)(2) of the Bankruptcy Code states that, subject to Section 365 of the Bankruptcy Code, a plan may provide for the assumption, rejection, or assignment of any executory contract not previously rejected. Section 365 requires SCHOOL SPECIALTY to cure all monetary defaults under the SPARK License as a condition to assuming the license. Inherent in curing a monetary default in order to assume an executory contract is the use of good faith in identifying the cure amount.

38. There is no justifiable basis on which SCHOOL SPECIALTY could propose a cure amount of \$2,523.02 for the SPARK License when it has concealed for literally years the revenue derived from and royalties due on the sale of the On-Line Curriculum, SPARK CD, and SPARKfolio. The royalties due on the On-Line Curriculum, SPARK CD, and SPARKfolio since 2007 are **\$489,708.93**. This figure does not account for the royalties due on the sublicense of the SPARK Works and related materials through PREMIER. An immediate accounting is due on these sales, but SCHOOL SPECIALTY is failing and/or refusing to provide such accounting.

39. Bankruptcy fraud is committed by a person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so, either (1) files a petition under title 11; (2) files a document in a proceeding under title 11; or (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title. 18 U.S.C. 157.

40. By filing a notice to cure with a stated cure amount of \$2,523.03, SCHOOL SPECIALTY inherently represented that such stated cure amount was a good faith estimate of the delinquent royalties due under the SPARK License. There is, however, no good faith basis for the stated cure amount of \$2,523.02. To the contrary, the stated cure amount continued to perpetuate the deception of SCHOOL SPECIALTY in failing to both account for and pay royalties on the sales of the On-Line Curriculum, SPARK CD, and SPARKfolio. Even worse, without SDSURF having discovered and confronted SCHOOL SPECIALTY over the suppressed royalties, there is no indication or even a scintilla of evidence to suggest that SCHOOL SPECIALTY would ever have voluntarily reported it.

C. SCHOOL SPECIALTY HAS NEITHER CURED ALL DEFAULTS UNDER THE SPARK LICENSE NOR PROVIDED ADEQUATE ASSURANCE THAT IT WILL PROMPTLY CURE SUCH DEFAULTS.

41. A debtor-in-possession that has defaulted on an executory contract is prohibited from assuming the contract unless and until it complies with the requirements set forth in Section 365(b). The debtor-in-possession must, *inter alia*, cure the default or provide adequate assurance that the default will be promptly cured. 11 U.S.C. § 365(b)(1)(A).

42. One purpose served by this requirement is “to insure that the contracting parties receive the full benefit of their bargain if they are forced to continue performance.” *In re Ionosphere Clubs, Inc.*, 85 F.3d 992, 999 (2d Cir. 1996) (quoting *In re Superior Toy & Mfg. Co.*, 78 F.3d 1169, 1174 (7th Cir. 1996)). A cure under Section 365(b)(1)(A) thus means that all unpaid amounts due under the contract have been paid. *See In re Network Access Solutions, Corp.*, 330 B.R. 67, 76 (Bankr. D. Del. 2005); *see also In re Superior Toy & Manufacturing Co., Inc.*, 78 F. 3d 1169 (7th Cir. 1996) (“[T]he language of §365(b)(1) is unequivocal. A party to an executory contract must be paid all amounts due him under the contract before the contract may be assumed.”).

43. By stating a Cure Amount that is so grossly disproportionate to the amount of unpaid royalties actually due and owing to SDSURF, SCHOOL SPECIALTY has not only failed to cure its default or provide adequate assurance that it will promptly do so, it has materially

misrepresented the amount of royalties actually due and owing to SDSURF. No adequate assurance exists for curing the existing default when SCHOOL SPECIALTY would not properly account for the revenue received on the sale of the On-Line Curriculum, SPARK CD, SPARKfolio, or sale of SPARK Works through PREMIER.

D. SCHOOL SPECIALTY HAS NOT COMPENSATED, OR PROVIDED ADEQUATE ASSURANCE THAT IT WILL PROMPTLY COMPENSATE, SDSURF FOR THE PECUNIARY LOSSES CAUSED BY ITS DEFAULT UNDER THE SPARK LICENSE.

44. A debtor-in-possession must compensate the non-debtor party to a contract for any actual pecuniary losses caused by their default, or provide adequate assurance that it will promptly compensate them for such losses, before they may assume the contract. 11 U.S.C. § 365(b)(1)(B). SCHOOL SPECIALTY has neither compensated SDSURF for the actual pecuniary losses nor provided any adequate assurance that it will promptly compensate SDSURF for such losses. To the contrary, SCHOOL SPECIALTY has breached the covenant of good faith and fair dealing by never expressing even a scintilla of doubt or inquiry as to the scope of the SPARK License. Instead, SCHOOL SPECIALTY made the executive decision to suppress the material fact that although it marketed all of the SPARK Works as an integrated physical education curriculum with the SPARK trademark prominently displayed on each one, it would only report revenue and pay royalty on the Printed Curriculum. Until May 28, 2013, SCHOOL SPECIALTY continually and systematically suppressed the revenue earned and royalty due on the On-Line Curriculum, SPARK CD, and SPARKfolio. Even today, SCHOOL SPECIALTY continues to suppress the revenue derived from the sale of SPARK Works and related SPARK trademark materials through PREMIER.

E. SCHOOL SPECIALTY HAS NOT PROVIDED ADEQUATE ASSURANCE OF FUTURE PERFORMANCE UNDER THE SPARK LICENSE.

45. Prior to and throughout the pendency of this proceeding, SCHOOL SPECIALTY has continually refused to perform under the SPARK License by, *inter alia*, failing to: (1) pay SDSURF all royalties due; and (2) provide true and accurate accountings for all SPARK Works sold. SCHOOL SPECIALTY is required to provide SDSURF with adequate assurance of future

performance under the SPARK License as a prerequisite to assuming the SPARK License. 11 U.S.C. § 365(b)(1)(C). SCHOOL SPECIALTY's failure to perform prior to and during the pendency of this matter should preclude assumption.

46. Section 365 does not define precisely what is meant by "adequate assurance of future performance." The legislative history to the Bankruptcy Code reveals that the Commission on the Bankruptcy Laws of the United States adopted the phrase from Section 2-609 of the Uniform Commercial Code ("U.C.C."). The Commission's report stated:

The language quoted is adapted from Uniform Commercial Code § 2-609(1). What constitutes . . . "adequate assurance of future performance" must be determined by consideration of the facts of the proposed assumption. Cf. Official Comment 4 to Commercial Code § 2-609 (1972 Ed.). It is not intended, however, that any non-debtor party should acquire greater rights in a case under the Act than he has outside the Act. (Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc., No. 137, 93d Cong., 1st Sess. [1973] Pt. II at 156-7 ["Commission Report"].)

47. Official Comment 4 to U.C.C. § 2-609 (referred to in the Commission Report) provides:

What constitutes "adequate" assurance of due performance is subject to the same test of factual conditions [used to determine whether there are grounds for insecurity]. For example, where the buyer can make use of a defective delivery, a mere promise by a seller of good repute that he is giving the matter his attention and that the default will not be repeated, is normally sufficient. Under the same circumstances, however, a similar statement by a known cornercutter might well be considered insufficient without the posting of a guaranty or, if so demanded by the buyer, a speedy replacement of the delivery involved. By the same token where a delivery has defects, even though easily curable, which interfere with easy use by the buyer, no verbal assurance can be deemed adequate which is not accompanied by replacement, repair, money-allowance, or other commercially reasonable cure.

48. *Kunian v. Development Corp.*, 165 Conn. 300, 334 A.2d 427 (1973), is a case widely cited for its application of U.C.C. § 2-609. The defendant-buyer owed the plaintiff-seller money for goods he had purchased. The parties met to discuss the problem of the defendant's nonpayment. The seller demanded assurance from the buyer that he would pay the outstanding indebtedness before the seller would make future deliveries. The buyer promised to make these payments; however, he failed to follow through and repeatedly broke his promise. The Court

concluded that the seller had reasonable grounds for insecurity and was justified in his later stringent demand that the buyer deposit in escrow the entire amount due under the contract before he would make future deliveries.

49. Much like the anecdotal accounts in the Comments to Section 2-609 of the Uniform Commercial Code, SCHOOL SPECIALTY has demonstrated a degree of untrustworthiness demanding “adequate assurance of future performance” beyond merely promising not to suppress revenue on the past and future sales of SPARK Works and SPARK trademarked materials. Even more to the point, SCHOOL SPECIALTY’s approach of “catch me, if you can” in the reporting of revenue and payment of royalties is neither part of good contractual performance nor the bargain reached under the SPARK License with SDSURF. SCHOOL SPECIALTY should properly be precluded from assuming the SPARK License.

F. SCHOOL SPECIALTY’S HISTORIC NONMONETARY BREACHES OF THE SPARK LICENSE PRECLUDE ASSUMPTION OF THE SPARK LICENSE.

50. The cure requirements under Section 365(b)(1) are moderated by Section 365(b)(2), which recognizes that certain nonmonetary defaults are not curable and thus render an otherwise executory contract unassumable as a matter of law. Section 365(b)(1) enumerates a limited exception to the requirement for curing prepetition defaults. *In re Escarent Entities, L.P.*, 423 Fed. Appx. 462, 465 (5th Cir. 2011).

51. SCHOOL SPECIALTY’S refusal to provide SDSURF with true and accurate accountings of all SPARK Products sold between 2002 and the present should render the SPARK License unassumable. Similarly, SCHOOL SPECIALTY’S refusal to either account for or pay the royalties due on the sale of SPARK Works and SPARK trademarked materials through PREMIER renders the SPARK License unassumable. Indeed, the SPARK License itself says that the “[f]ailure of [SCHOOL SPECIALTY] to account ... to SDSURF as provided herein shall be considered a material breach.” *See* Exhibit A to Schwerdtfeger Declaration at ¶ 4.3.

52. Although SCHOOL SPECIALTY will may claim that it can now account for the literally years of unreported revenue and unpaid royalties, such inexcusable and belated reporting and payment of royalties would be inconsistent with the intent of the Bankruptcy Code in

precluding assumption of executory contracts for nonmonetary defaults. The point only becomes more acute when one considers that the issue of the underreported revenue was discovered and raised by SDSURF, not SCHOOL SPECIALTY. But for SDSURF discovering the underreported revenue, SCHOOL SPECIALTY would assuredly have **neither**: (1) disclosed the underreporting; nor (2) attempted to cure the delinquent royalties due thereon. Instead, SCHOOL SPECIALTY would be telling this Bankruptcy Court and SDSURF that only the \$2,523.02 identified in its cure notice is due SDSURF in order to assume the SPARK License. Such approach, of course, is deceptive on its face.

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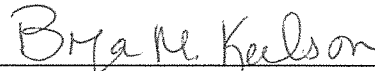
IV.

CONCLUSION

For the aforementioned reasons, SDSURF respectfully requests that the Court deny assumption or assignment of the SPARK License, and grant it such other relief as this Court deems just and proper.

Date: August 21, 2013

**GELLERT SCALI BUSENKELL &
BROWN, LLC**



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Exhibit A

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

SCHOOL SPECIALTY, INC., et al.,
Debtors.

Chapter 11

Case No. 13-10125-KJC
(Jointly Administered)

**DECLARATION OF SEAN SCHWERDTFEGER IN SUPPORT OF SAN DIEGO STATE
UNIVERSITY RESEARCH FOUNDATION'S OBJECTION TO SCHOOL
SPECIALTY, INC.'S PROPOSED ASSUMPTION OF EXECUTORY CONTRACT**

I, Sean D. Schwerdtfeger, declare as follows:

1. I am an attorney duly licensed to practice before all courts of the State of California. I have been retained by the San Diego State University Research Foundation ("SDSURF") to represent its interest in connection with the copyright and trademark license for SPARK, a physical education curriculum ("SPARK License"). In such capacity, I have been actively involved in negotiating with SCHOOL SPECIALTY, INC.¹ personnel and their counsel. I, therefore, have personal knowledge of the facts stated herein, so that if called and sworn as a witness, I could and would testify competently thereto.

2. On or about September 30, 2002, SDSURF granted SCHOOL SPECIALTY, the SPARK License to market, use, demonstrate, sell, and commercialize the following intellectual property: (1) copyrighted SPARK works; (2) all derivatives of those works; (3) any SPARK works, present or future, created with any assistance from SDSU faculty or staff; (4) all derivatives of those works; and (5) any SPARK works, present or future, bearing the SPARK Trademark (collectively "SPARK Products"). The SPARK License further defined "derivative work" to mean "a work derived from and based on a pre-existing copyrighted work." The SPARK License also defined "work" to mean "any instructional text used in the SPARK

¹ SPORTIME, LLC is the licensee under the SPARK License. However, SPORTIME is a wholly owned subsidiary of SCHOOL SPECIALTY, INC. ("SCHOOL SPECIALTY") and is entirely controlled by SCHOOL SPECIALTY. At all times during my involvement in this matter, I have dealt with representatives of SCHOOL SPECIALTY, and thus, all references herein are to SCHOOL SPECIALTY.

Program that is sold, leased, distributed or otherwise transferred to SPARK Customers, in any media format.” **Exhibit “A.”**

3. The On-Line Curriculum, Printed Curriculum, SPARK CD and SPARKfolio all prominently display the SPARK trademark, and are all marketed by SCHOOL SPECIALTY as components of the SPARK educational program. The SPARK Works are marketed and sold both individually and in bundles. Attached hereto as **Exhibit “B”** is a current exemplar of the on-line marketing conducted by SCHOOL SPECIALTY to sell the SPARK Works in a manner consistent with their integrated use in the SPARK educational program.

4. At the time of my retention by SDSURF, neither SDSURF nor I had any knowledge of SCHOOL SPECIALTY’s failure to: (1) report revenue derived and royalties due SDSURF from the sale of the On-Line Curriculum, SPARK CD, and SPARKfolio; or (2) report revenue derived and royalties due SDSURF from the sale of SPARK trademarked materials through PREMIER, an apparent subsidiary of SCHOOL SPECIALTY. Our primary concern was the damage being done by SCHOOL SPECIALTY to the SPARK brand along with its effect on the reputation of SDSURF and San Diego State University (“SDSU”).

5. Prior to discovering any concealed revenue and failure to pay the contractually required royalties thereon, I had been negotiating with SCHOOL SPECIALTY personnel and their counsel, Lauren Shumejda, to obtain adequate assurances of future performance in an effort to avoid filing an objection to SCHOOL SPECIALTY’s proposed assumption of the SPARK License. As a direct and proximate result of those negotiations, SCHOOL SPECIALTY included paragraph 32 in the April 24, 2013 order of this Court establishing, *inter alia*, the deadlines for objection to the assumption of executory contracts by SCHOOL SPECIALTY (“Objection Order,” Docket No. 902). The Objection Order extended the standard objection deadline of May 16, 2013 to May 31, 2013 for SDSURF (“Extended Objection Deadline”).

6. On or about May 9, 2013, I received a copy of the cure notice issued by SCHOOL SPECIALTY in the sum of \$2,523.02. A true and correct copy of such cure notice is attached hereto as **Exhibit “C.”**

7. Upon receipt of the cure notice, SDSURF and I began critically assessing the basis of such cure notice along with the accuracy of the prior revenue reporting and royalty payments. By May 15, 2013, we had discovered that SCHOOL SPECIALTIES had neither reported nor paid SDSURF royalties on the sales of the On-Line Curriculum, SPARK CD, and SPARKfolio.

8. On May 15, 2013, I along with Michael Rondelli, director of technology transfer and commercialization for SDSURF, attended a conference call with SCHOOL SPECIALTY personnel in which we confronted SCHOOL SPECIALTY with the underreporting of revenue and failure to pay royalties due on the sale of the On-Line Curriculum, SPARK CD, and SPARKfolio. Curtis Rohr of SCHOOL SPECIALTY admitted that there had never been any reporting of the revenue from such sales or the payment of any royalties thereon. He explained that royalties had only been paid on the sales of the Printed Curriculum.

9. I asked many times both in writing and orally for an accounting of the sales for each SPARK product marketed and sold by SCHOOL SPECIALTIES, as well as an accounting of any royalties paid thereon. On May 28, 2013--just three (3) days before what was then the Extended Objection Deadline --I received an e-mail with two Excel matrices attached from Nicholas A. Kees, counsel for SCHOOL SPECIALTY, purporting to account to SDSURF ("SPARK Accounting"). None of the accounting predates 2007, even though I understand that some of the SPARK products in question were marketed and sold before such date. A true and correct copy of said Excel matrices are attached hereto as **Exhibit "D."**

10. The SPARK Accounting revealed that SCHOOL SPECIALTY owes SDSURF **\$489,708.93** in past due royalties for the unaccounted sales of the On-Line Curriculum, SPARK CD, and SPARKfolio. That figure includes interest on the past due royalties in the amount of ten percent (10%) per annum as allowed by California law, which applies pursuant to a choice of law provision in the SPARK License. Cal. Civ. Code, § 3289.

11. Since SCHOOL SPECIALTY only produced the accounting a mere three (3) days before the Extended Objection Deadline, counsel for SCHOOL SPECIALTY agreed in writing


pursuant to the Objection Order to extend the time for SDSURF to file this objection. The Extended Objection Deadline was continued multiple time to the date of August 22, 2013; a true and correct copy of which extension is attached hereto as **Exhibit "E."**

12. I continued negotiating with SCHOOL SPECIALTY personnel and counsel in furtherance of obtaining adequate assurance of future performance under the SPARK License in an effort to avoid filing an objection to SCHOOL SPECIALTY's proposed assumption of the license.

13. On or about August 2, 2013, SCHOOL SPECIALTY disclosed for the first time that it had licensed the royalty covered SPARK materials to PREMIER, a subsidiary of SCHOOL SPECIATY,² without ever notifying SDSURF of the license, reporting the sales revenue generated, or paying the royalties due thereon. To date, SCHOOL SPECIALTY has not accounted for the revenue derived from the sale of royalty covered SPARK materials through PREMIER, despite repeated requests for such accounting.

I declare under the penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this 20th day of August, 2013.



Sean D. Schwerdtfeger

² I believe that PREMIER is a subsidiary of SCHOOL SPECIALTY based on investigation and research conducted in connection with the preparation of this objection.

Exhibit A

COPY

EXCLUSIVE COPYRIGHT LICENSE AGREEMENT

Between
San Diego State University Foundation
and
Sportime, LLC

This Agreement is made this 30th day of September, 2002 ("Commencement Date"), by and between San Diego State University Foundation, duly organized and existing under the laws of California and having a principal place of business at 5250 Campanile Drive, San Diego, CA 92182-1998, United States of America, (hereinafter "SDSUF") and Sportime, LLC having a principal place of business at One Sportime Way, Atlanta, GA 30340-1402, United States of America (hereinafter "Licensee").

1. DEFINITIONS

1.1 **"SPARK Products"** shall mean: (1) the Copyrighted SPARK Works licensed to Licensee herein by SDSUF ("Licensed Copyrighted Works"); (2) all derivatives of those works; (3) any SPARK works, present or future, created with any assistance from San Diego State University faculty or staff; (4) all derivatives of those works; and (5) any SPARK works, present or future, bearing the SPARK Trademark. The SPARK Products are described hereinafter in Exhibit A.

1.2 **"Intellectual Property Rights"** shall mean any and all intellectual property rights pertaining to the SPARK Products.

1.3 **"Derivative Work"** shall mean a work derived from and based on a pre-existing copyrighted work.

1.4 **"Authors"** shall mean the authors of the SPARK Products.

1.5 **"Market", "Marketed" or "Marketing"** shall mean the act of commercialization of SPARK Products by LICENSEE or Sublicensees including, but not limited to, the sublicensing by LICENSEE to Sublicensees.

1.6 **"Sublicensee"** shall mean any party entering into a sublicense agreement with LICENSEE for the purpose of Marketing SPARK Products.

1.7 **"Territory"** shall mean worldwide.

1.8 **"Works"** shall mean any instructional text used in the SPARK Program that is sold, leased, distributed or otherwise transferred to SPARK Customers, in any media format.

2. GRANT OF LICENSE

2.1 Subject to the terms of this Agreement, SDSUF grants an exclusive license to the LICENSEE to make, have made, Market, use, demonstrate, sell, have sold, and otherwise

commercialize to the Consumer, either directly or through a Sublicensee, the SPARK Products in the Territory. For the rights, privileges and license granted under this Agreement, LICENSEE agrees to pay SDSUF the fees set forth in Exhibit B. The license shall include the transfer of all know-how, data and technology necessary for LICENSEE to effectively sell, develop, enhance, and support the SPARK Products, and shall further include any improvements, enhancements or further development of SPARK Products.

2.2 LICENSEE shall have the right to enter into sublicense agreements with Sublicensees and End Users.

2.3 If the Authors at any time create in whole or in part a new product, which new product is competitive in the area of physical education with any of the SPARK Products and which new product is one to which SDSUF owns the copyright (collectively, "New SPARK Product"), they shall be required to first offer any such New SPARK Product to LICENSEE, on terms consistent with existing license agreements between the parties, and the parties shall negotiate an agreement in good faith permitting LICENSEE's use of the New SPARK Product. If no such agreement is reached regarding the New SPARK Product within sixty (60) days after it is offered to LICENSEE, SDSUF shall then have the right to offer the New SPARK Product to any third party (the "Proposed Licensee"), on exactly the same terms as last offered to LICENSEE. If the terms of the license for the New SPARK Product are changed in any substantial way in SDSUF's communications with the Proposed Licensee ("License Offer"), SDSUF shall offer the New SPARK Product to LICENSEE upon the same terms as offered to the Proposed Licensee. LICENSEE shall have the right, exercisable by written notice (an "Acceptance Notice") given to SDSUF within twenty (20) days after delivery of the License Offer, to elect to enter into a license for use of the New SPARK Product upon exactly the same terms as offered to the Proposed Licensee. If LICENSEE does not elect to so license the New SPARK Product within that period of time, then SDSUF shall have the right to license or otherwise transfer the New SPARK Product described in the License Offer to the Proposed Licensee provided that such transfer is made upon exactly the same terms as specified in the License Offer. If the terms of the license for the New SPARK Product are again changed in any substantial way in SDSUF's communications with the Proposed Licensee, SDSUF shall again offer the New SPARK Product to LICENSEE upon the same terms as offered to the Proposed Licensee.

3. FEES AND MONETARY CONVERSIONS

3.1 In addition to the fees set forth in Exhibit B, Licensee shall pay to SDSUF a one-time royalty payment in the amount of Five Thousand Dollars (\$5,000.00). Such one-time royalty payment shall be due within thirty (30) days after the Commencement Date.

3.2 Licensee shall pay all fees due to SDSUF in United States Dollars at the address set forth for notices or to a bank which may be designated by SDSUF from time to time consistent with the laws and regulations of the country controlling such payments. In the event that any currency conversion is required in connection with any fees payable under this Agreement, such conversion shall be made by using the exchange rate prevailing at the Chase Manhattan Bank (N.A.) on the last business day of the calendar quarter reporting period to which said payment relates.

4. REPORTING AND PAYMENT

4.1 LICENSEE shall itself maintain full, clear and accurate books of account with respect to all SPARK Products sold by LICENSEE or Sublicensees and all Revenues received from such Marketing. The books of account shall be kept at the principal place of business of LICENSEE. SDSUF shall have the right to cause an independent, certified public accountant reasonably acceptable to the LICENSEE to audit such records to confirm royalty payments under this Agreement. Such audits may be exercised during normal business hours no more than once in any 12-month period upon at least 30 working days prior written notice to the LICENSEE, and shall be conducted on books and supporting data from no more than the two (2) preceding calendar years. SDSUF shall bear the full cost of such audit unless such audit discloses an underpayment by more than 5% of the amount due under this Agreement. In such case, the LICENSEE shall bear the cost of such audit.

4.2 On or before the forty-fifth (45th) day immediately following each calendar quarter, LICENSEE shall make and deliver a written accounting to SDSUF of all SPARK Products Marketed by LICENSEE and Sublicensees. True and accurate copies of all records for SPARK Products Marketed by LICENSEE or Sublicensees must be reported to SDSUF. Such written accounting shall further include at least the following:

- (a) Total number of sales and gross Revenue received from Customer and/or Sublicensee for the sale of SPARK Products during the preceding calendar quarter;
- (b) Any deductions as set forth in Exhibit B attached;
- (c) Total fees due SDSUF per Exhibit B attached.

4.3 With each such report submitted, LICENSEE shall pay to SDSUF the fees due and payable under this Agreement. If no fees shall be due, LICENSEE shall so report. Failure of LICENSEE to account and/or remit payment to SDSUF as provided herein shall be considered a material breach of this Agreement, subject to the termination provisions of Article 11 of this Agreement.

LICENSEE's obligation to pay SDSUF the license fees shall end upon the termination of this Agreement.

5. REPRODUCTION AND COPYRIGHTS

5.1 LICENSEE acknowledges that the SPARK Products are entitled to protection under the Copyright Laws and Trademark Laws of the countries within the Territory.

5.2 SDSUF owns and maintains the copyrights to the Licensed Copyrighted Works licensed herein, all SPARK Works created with the assistance of an SDSU faculty or staff member, and all intellectual property rights to SPARK Works bearing the SPARK Trademark. LICENSEE herein agrees to provide SDSUF with copies of all Derivative Works of SPARK Products so that SDSUF may register the copyrights to such Derivative Works. These Derivative Works shall be owned and maintained by SDSUF as well.

5.3 Any copies of the Works or portions thereof shall have affixed thereto a copyright notice in such a manner as to give reasonable notice of SDSUF's claim of copyright.

5.4 SDSUF shall retain a perpetual, royalty free right to use the Works and Derivative Works, as well as the SPARK trademark, for its own internal noncommercial, noncompetitive use.

6. TRADEMARK

6.1 SDSUF owns the SPARK Trademark as described in Exhibit A.

6.2 LICENSEE acknowledges that SDSUF is ultimately responsible for the nature and quality of SPARK Products as associated with the SPARK Trademark.

6.3 LICENSEE agrees to allow SDSUF to inspect samples of SPARK Products on an annual basis. SDSUF shall bear the reasonable costs of such inspection. Unreasonable refusal to honor a request by SDSUF to inspect any SPARK Products under the terms of this agreement shall be considered a breach of the agreement.

6.4 If the nature and the quality of future SPARK Products grossly deviate from the nature and quality of the current SPARK Products being licensed, SDSUF shall have the right to request such deviations be cured, or to terminate this agreement for breach. LICENSEE shall follow ARTICLE 13, "Dispute Resolution" if it chooses to challenge such termination.

7. DUE DILIGENCE

7.1 The LICENSEE agrees to work diligently to effect the commercialization of SPARK Products, or other intellectual property covered by this license agreement. If it is determined, for any reason, that the LICENSEE or its assignee is not pursuing these objectives, SDSUF may give written notice to ask for proof of performance and a cure. If a cure is not initiated within ninety (90) days, SDSUF may terminate this license agreement and demand the return of all intellectual property and rights to SDSUF.

8. INFRINGEMENT

8.1 LICENSEE shall inform SDSUF promptly in writing of any alleged infringement of the Intellectual Property Rights by a third party and of any available evidence thereof. SDSUF shall enforce the copyrights and trademark rights licensed to LICENSEE under this Agreement and otherwise act to eliminate infringement of such rights, when, in SDSUF's reasonable judgment, such action is reasonably necessary, proper, and justified. In the event that LICENSEE or its Sublicensee(s) believe there is infringement of any Intellectual Property Rights licensed under this Agreement, which infringement is to LICENSEE'S or its Sublicensee(s)'s substantial detriment, LICENSEE shall provide SDSUF with notification and reasonable evidence of such infringement. In the event that SDSUF does not take action to abate the infringement within ninety (90) days after such notification by LICENSEE, LICENSEE may take action to abate the infringement, at its own expense, joining SDSUF as a party if necessary, in which case the royalty owed on sales of SPARK Products affected by the claim will be suspended until such infringement is abated. Any proceeds

obtained from any such action to abate infringement shall be retained by the party that took the action to abate the infringement.

9. PACKAGING MATERIALS

9.1 The LICENSEE will design the final packaging and documentation with regard to SPARK Products. The LICENSEE will consult with SDSUF to ensure that certain elements are included in the packaging and documentation including the sponsor and production credits and copyright notice.

10. EXPORT CONTROLS

10.1 LICENSEE hereby agrees that it shall not sell, transfer, export or re-export any SPARK Products or related information in any form, or any direct products of such information, except in compliance with all applicable laws, including the export laws of any U.S. government agency and any regulations thereunder, and will not sell, transfer, export or re-export any SPARK Products or information to any persons with regard to which there exist grounds to suspect or believe that they are violating such laws. LICENSEE shall be solely responsible for obtaining all licenses, permits, or authorizations required from the U.S. and any other government for any such export or re-export. To the extent not inconsistent with this agreement, SDSUF agrees to provide LICENSEE with such assistance as it may reasonably request in obtaining such licenses, permits or authorization.

11. REPRESENTATIONS AND WARRANTIES

11.1 SDSUF represents and warrants that:

- (a) SDSUF has the right to enter into this License Agreement and that all necessary approvals and rights have been secured from third parties as necessary to enable the formation of this Agreement.
- (b) The Authors are the sole authors of the Works.
- (c) The Works are original works.
- (d) The Intellectual Property Rights have not been licensed or distributed within the Territory.
- (e) The SPARKS Products do not infringe upon any statutory copyright, trademark right, or upon any common law trademark right, privacy right, publicity right, proprietary right or any other right whatsoever, or contain any obscene, indecent, scandalous, libelous, defamatory, or unlawful matter.
- (f) All statements contained in the Works purporting to be facts are true.
- (g) Any recipe, formula or instruction contained in the Works will not be injurious to reasonably prudent user.
- (h) SDSUF and the Authors are not aware of any infringement, or any basis for a claim of infringement, by third parties, of any of the copyrights or trademark rights licensed to LICENSEE under this Agreement.

11.2 LICENSEE represents and warrants that:

(a) LICENSEE is duly established in the state of Georgia and has the legal capacity to enter into this Agreement.

(b) LICENSEE has the right to enter into this License Agreement and that all necessary approvals and rights have been secured from third parties as necessary to enable the formation of this Agreement.

11.3 All representations and warranties contained in Article 11 are made by the party making the warranty or representation for the benefit of the other party and are acknowledged as being material to this Agreement.

12. TERM AND TERMINATION

12.1 The term of this Agreement shall be from the date of the signing of this agreement until the expiration of the last to expire of the copyrights, regardless of whether the Works are Marketed by Sportime or not. When and if the Works and/or Derivative Works are no longer being Marketed by Sportime, the royalty obligation of Sportime shall continue regarding SPARK Products per their association with the SPARK trademark.

12.2 This Agreement may terminate after written notice of termination by one party or the other for any material breach of any obligation of this Agreement, unless such breaching party remedies or otherwise cures such breach before the end of the notice period set forth in Section 7.1 or upon mutual written agreement by both parties. LICENSEE's failure to pay fees due under the Agreement shall be a material breach of this Agreement and, at SDSUF's option, this Agreement and all rights and licenses granted to LICENSEE thereunder shall terminate upon notice and failure to remedy within thirty (30) days after the notice. Disputes between the parties as to whether a material breach has occurred shall be resolved as provided in "13. Dispute Resolution."

12.3 This Agreement shall terminate immediately if an assignment is made of LICENSEE's business for the benefit of creditors, if a receiver, trustee in bankruptcy or like official is appointed to take all or part of LICENSEE's property, or if LICENSEE ceases doing business in the ordinary course.

12.4 LICENSEE shall make a diligent effort to Market SPARK Products during the period of this agreement. Should LICENSEE cease to Market the products and services, or if it is determined by SDSUF that LICENSEE is not making a reasonably diligent effort to commercialize the products and services, SDSUF will terminate the license. Actively Marketing or enhancing SPARK Products would be considered 'reasonably diligent effort.'

12.5 Upon termination, SDSUF shall permit LICENSEE to sell any remaining inventory, in existence at the date of termination, for a period of up to one year after the date of termination, after which time LICENSEE shall discontinue the Marketing of SPARK Products, destroy all remaining inventory, and transfer all Service Contracts in its possession or control under this Agreement to SDSUF.

12.6 Expiration or termination of this agreement shall not relieve the parties of any obligation accruing prior to such expiration or termination, including, without limitation, payment of accrued

royalties. The provisions of Articles 5, 6, 10, 11 and 13, and those provisions which by their nature extend beyond the life of this Agreement, shall survive expiration or termination of this agreement.

13. DISPUTE RESOLUTION

13.1 If any dispute arises between the parties relating to the interpretation, breach or performance of this Agreement or the grounds for the termination thereof and the parties cannot resolve the dispute within 30 days of a written request by either party to the other party, the parties agree to hold a meeting, attended by individuals with decision-making authority regarding the dispute, to attempt in good faith to negotiate a resolution of the dispute prior to pursuing other available remedies. If, within 60 days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, such dispute shall be submitted to final and binding arbitration under the then current commercial rules and regulations of the American Arbitration Association (the "AAA") relating to voluntary arbitration. The arbitration shall be held in San Diego, California. The arbitration shall be conducted by one arbitrator who is knowledgeable in the subject matter at issue in the dispute and who will be selected by mutual agreement of the parties within 30 days or, failing such agreement, shall be selected in accordance with AAA rules. Each party shall initially bear its own costs and legal fees associated with such arbitration. The prevailing party in any such arbitration shall be entitled to recover from the other party's actual attorneys' fees, costs and expenses incurred by the prevailing party in connection with such arbitration. The decision of the arbitrator shall be final and binding on the parties. The arbitrator shall prepare and deliver to the parties a written, reasoned opinion conferring its decision. Judgment on the award so rendered may be entered in any court having competent jurisdiction thereof.

14. GENERAL TERMS

14.1 This Agreement, its Exhibits and Schedules, and Warranty Bill Of Sale And Transition Services Agreement set forth the entire agreement and understandings between the parties as to the subject matter hereof and merges all prior discussions between them, and neither of the parties shall be bound by any conditions, definitions, warranties, understandings or representations with respect to such subject matter other than as expressly provided herein, or as duly set forth on or subsequent to the effective date hereof in writing and signed by a proper and duly authorized representative of the party to be bound thereby. No provision appearing on any form originated by LICENSEE or a third party customer of LICENSEE with respect to SPARK Products other than as expressly set forth in this Agreement shall be applicable to SDSUF unless such provision is specifically accepted by SDSUF in writing.

14.2 This Agreement shall be governed by the laws of the State of California.

14.3 This Agreement, the licenses granted hereunder, or any of the terms and conditions as set forth in this Agreement may not be assigned or otherwise transferred in whole or part by the LICENSEE without the prior written consent of the SDSUF, which consent shall not be unreasonably withheld, provided, however, that either party may, by prior written notice to the other party, but without the requirement of consent, assign its rights and obligations under this Agreement to any entity acquiring all or substantially all of the business or assets of such assigning party. Any

attempt to transfer such rights except as specifically set forth in this Agreement or without the prior written consent of SDSUF shall be void.

14.4 LICENSEE shall not be liable to SDSUF for any delay or failure by LICENSEE to perform its obligations under this Agreement or otherwise if such delay or failure arises from any cause or causes beyond the reasonable control of LICENSEE, including but not limited to labor disputes and acts of God. If a delay or failure that LICENSEE anticipates will cause an excusable delay, LICENSEE, by written notice, shall inform SDSUF of the anticipated effect of such delay as soon as possible and in any event shall give written notice within twenty (20) days of such a delay or failure. Such written notice shall include the steps that LICENSEE is taking to alleviate the problem.

14.5 SDSUF shall not be liable to LICENSEE for any delay or failure by SDSUF to perform its obligations under this Agreement or otherwise if such delay or failure arises from any cause or causes beyond the reasonable control of SDSUF, including but not limited to labor disputes and acts of God. If a delay or failure that SDSUF anticipates will cause an excusable delay, SDSUF, by written notice, shall inform LICENSEE of the anticipated effect of such delay as soon as possible and in any event shall give written notice within twenty (20) days of such a delay or failure. Such written notice shall include the steps that SDSUF is taking to alleviate the problem.

14.6 Any payment, notice or other communication pursuant to this Agreement shall be sufficiently made or given on the date of receipt of mailing if sent to such party by certified first class mail, postage prepaid, addressed to it at its address below or as it shall designate by written notice given to the other party, return receipt requested. Notice may be given by FAX or email, with confirmation of receipt from the receiving party.

In the case of SDSUF:

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Director, Technology Transfer Office
San Diego State University Foundation
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Telephone: (619) 594-0516
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In the case of LICENSEE:

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With a copy to:

Joseph F. Franzoi, IV
Franzoi & Franzoi, S.C.
514 Racine Street
Menasha, WI 54952
Telephone: (920) 725-3916
FAX: (920) 725-0998
Email Address: jffiv@franzoi.com

14.7 If a provision of this Agreement shall be held to be unenforceable, such holding shall not affect the enforceability of any other provisions hereof.

14.8 LICENSEE is an independent contractor and not an agent of SDSUF. LICENSEE has no authority or power by any act to grant any sublicense or distribution rights in any way related to SPARK Products to any entity, government or organization of any sort, except as expressly provided herein.

14.9 LICENSEE agrees to indemnify, defend and hold harmless SDSUF, its officers, agents and employees from any and all claims and losses accruing or resulting to any person, firm or corporation who may be injured or damaged by the negligent, tortious, or otherwise unlawful acts or omissions of the LICENSEE in direct relation to this agreement.

SDSUF agrees to indemnify, defend and hold harmless LICENSEE, its officers, agents and employees from any and all claims and losses accruing or resulting to any person, firm or corporation who may be injured or damaged by the negligent, tortious, or otherwise unlawful acts or omissions of SDSUF in direct relation to this agreement.

14.10 SDSUF shall allow LICENSEE to use SDSUF's name in its Marketing activities. Such Marketing materials that contain SDSUF's name shall be approved, in writing, in advance by SDSUF.

14.11 LICENSEE shall be free to set pricing for SPARK Products based on its knowledge of the market for such products and services.

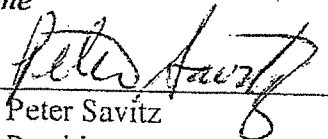
14.12 Failure of SDSUF or LICENSEE to seek a remedy for the breach of any portion of this Agreement shall not constitute a waiver of its rights with respect to the same or any subsequent breach. No waiver shall be effective unless transmitted in writing and in accordance with the provisions herein for notice requirements.

15. EXECUTION

IN WITNESS THEREOF, the parties hereto have set their hands and seals by an officer duly authorized as of the date first above written.

Sportime

By: _____

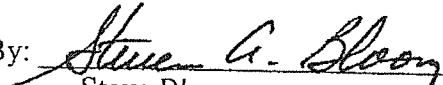

Peter Savitz
President

Date: _____

9/30/02

San Diego State University Foundation

By: _____

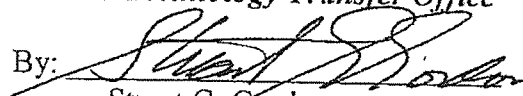

Steve Bloom
Chief Operating Officer

Date: _____

9/30/02

SDSUF Technology Transfer Office

By: _____


Stuart G. Gordon
Director, Technology Transfer Office

Date: _____

9/30/02

EXHIBIT A

DESCRIPTION OF INTELLECTUAL PROPERTY

1. **SPARK K-2 Physical Education Teacher Manual:** The SPARK K-2 (3-ring) Binder is designed to be a comprehensive tool and practical aide for all physical education providers, including both specialists and classroom teachers. SPARK lessons are designed to be highly active, inclusionary, and enjoyable for children. More than 400 pages are divided into 17 separate chapters (designated by tabs) focused on delivering developmentally appropriate activities to Kindergarten through second grade students. Seven chapters focus on reference and resource materials, 10 are instructional units (lesson plans) written in scope and sequence. Special features include lesson diagrams and visuals, academic integration tips, and assessment tools for each instructional unit. Book sections are color coded for easy access and to simplify preparation. Individual lesson format consists of objectives, equipment needs, organizational tips, and scripted teacher cues.
A SPARK K-2 lesson consists of a SPARK Starter (5-7 minute warm-up) and a themed main activity (e.g., Lesson 1, Bean Bag Boogie). Teachers combine these two parts and add a cool-down to complete a 30+ minute session.
2. **SPARK 3-6 Physical Education Teacher Manual:** The SPARK 3-6 (3-ring) Binder is designed to be a comprehensive tool and practical aide for all physical education providers, including both specialists and classroom teachers. More than 400 pages are divided into 31 separate chapters (designated by tabs), focused on delivering developmentally appropriate activities to third through sixth grade students. SPARK lessons are designed to be highly active and health promoting, inclusionary, and enjoyable for children. Seven chapters focus on reference and resource materials, 24 are instructional units (lesson plans) written in scope and sequence. Special features include lesson diagrams and visuals, academic integration tips, a Personal Best Day (fitness assessment), social skills instruction, and tournament organization. Individual lesson format consists of objectives, equipment needs, organizational tips, and scripted teacher cues.
A SPARK 3-6 lesson consists of a Type 1 activity (Health Related Fitness unit) and a Type 2 activity (skill related fitness). Teachers combine these two parts and add a cool-down to complete a 30+ minute session.
3. **SPARK 6-8 Physical Education Teacher Manual:** The SPARK 6-8 (3-ring) Binder is designed to be a comprehensive tool and practical aide for all physical education providers, including both specialists and classroom teachers. More than 400 pages are divided into 21 separate chapters (designated by tabs), focused on delivering developmentally appropriate activities to sixth through eighth grade students. SPARK lessons are designed to be highly active and health promoting, inclusionary, and enjoyable for children. Six chapters focus on reference and resource materials, 15 are instructional units (lesson plans) written in scope and sequence. Special features include lesson diagrams and visuals, academic integration tips, a Personal Best Day (fitness assessment), social skills instruction, and a variety of assessment

tools. Lesson format consists of objectives, equipment needs, organizational tips, and scripted teacher cues.

4. **SPARK Active Recreation Youth Leader Manual:** The SPARK Active Recreation program is designed to be a comprehensive and practical aide to after school program providers, recreation leaders, camp counselors, and anyone who works with children and adolescents (ages 5-14) to promote and/or provide physical activity opportunities. The 3-ring binder is divided into 5 color coded sections: white pages = reference and resource chapters; yellow = cooperative, aerobic, and cultural games; green = dances of all styles, types and origins; blue = modified sports and tournaments; and tan = supplemental activities (e.g., parachute, jogging based units, obstacle course, etc.). Each chapter is designated by a tab. A Table of Contents is located at the beginning of each section for easy reference. There are more than 450 pages in the document. To instruct an Active Recreation session, the youth leader selects an activity page from any unit theme. Each activity is written to be approximately 15 minutes in length. Combining sessions (e.g., a game, a dance, a sport) allows leaders to adjust for class length and address the day's objectives. Unique features of the book include an easy to use and teach format, youth focus group surveys, ideas on how to make equipment, and strategies on maintaining appropriate behavior.
5. **SPARK Self-Management Program Level I:** The SPARK Self-Management (SM) Program was written to be used by physical education specialists or classroom teachers of students in grades 4 or 5. The primary goal of SM is to help children become regularly physical active outside of school. Lessons utilize behavior change principals in an interactive, not lecture format. SM is instructed in the classroom in addition to a quality physical education (movement) class. The SM book consists of five chapters, Introduction (rationale, objectives, behavior change principals and strategies; Copy Masters, Text (scripted lesson plans); Supplemental Lessons, and Outline (Text lessons shortened). A SPARK SM class is designed to be 30 minutes in length, and instructed once per week. A core unit of 10 lessons is taught, then monthly follow up sessions (6). Session topics include many lessons related to nutrition and making healthy food choices, goal setting, obtaining social support, positive self-talk, scheduling time to be active, and many others.
6. **SPARK Self-Management Program Level II:** The SPARK Self-Management (SM) Program was written to be used by physical education specialists or classroom teachers of students in grades 5 or 6. The primary goal of SM is to help children become regularly physical active outside of school. Lessons utilize behavior change principals in an interactive, not lecture format. SM is instructed in the classroom in addition to a quality physical education (movement) class. The SM book consists of five chapters, Introduction (rationale, objectives, behavior change principals and strategies; Copy Masters, Text (scripted lesson plans); Supplemental Lessons, and Outline (Text lessons shortened). A SPARK SM class is designed to be 30 minutes in length, and instructed once per week. A core unit of 10 lessons is taught, then monthly follow up sessions (6). Session topics build upon the activities and lessons taught in Level I and include additional lessons related to calories and food fats, self reward, healthy and unhealthy ways to change the body, how to reduce time watching TV and playing video games, and many more.

7. **SPARK Early Childhood Program:** The SPARK Early Childhood (EC) Program (ages 3-5) is designed to be comprehensive and practical tool for public and private pre-school instructors, Head Start, WIC, and day care and childcare providers. The SPARK EC curriculum is designed to increase gross motor development, physical activity levels, and social skills, while integrating effective school readiness strategies.

The SPARK manual (three-ring binder) contains more than 450 pages of reference and resource chapters (each designated by a tab) and 13 instructional units (lesson plans). Some of these include: Fancy Feet, Movin' Magic, and Up, Up and Away. To instruct a SPARK EC session, teacher removes a lesson plan from any instructional unit, place it on a clipboard, and follow the cues. Each lesson has objectives, equipment needs, and teaching cues. Academic integration tips, clear diagrams, and assessment tools are included. A typical EC class is 20 minutes in length, but can be easily modified to be shorter or longer.

EXHIBIT B

FEES AND MILESTONES

1. Definitions

"Net Sales" shall mean LICENSEE's gross Revenues from the sales, licensing or other distribution of SPARK Products less the Deductions listed below.

"Revenue" shall mean the gross amounts invoiced by LICENSEE from the sales, licensing or other distribution of SPARK Products.

"Deductions" shall mean the specific expenses listed below that are subtracted from the total (gross) revenue to calculate amount of Net Sales Revenue. The specific expenses are:

- a) Discounts allowed in amounts customary to the trade;
- b) Sales taxes, tariff duties, and/or use taxes that are directly imposed and are with reference to particular sales;
- c) Outbound transportation prepaid or allowed;
- d) Third party discounts or commissions;
- e) Amounts allowed or credited on returns;
- f) Bad debts.

2. Fee Amounts and Schedule of Payments

LICENSEE agrees to pay SDSUF a royalty equal to eleven percent (11%) of all Revenue derived from any SPARK Products paid to LICENSEE. If LICENSEE sublicenses SPARK Products to another company for commercialization, LICENSEE will pay SDSUF twenty (22%) of the Revenues derived from the Sublicensee.

Exhibit B

After School Physical Activity Curriculum

sparkpe.org

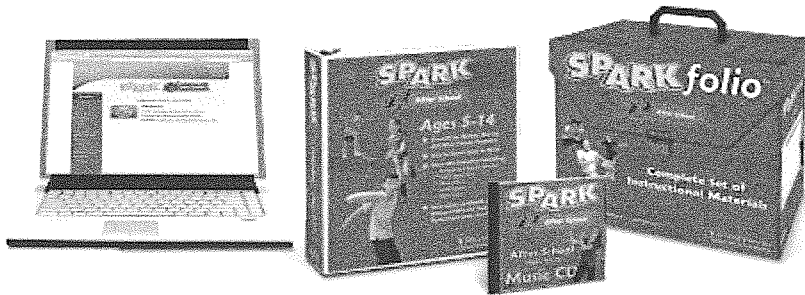
- SPARK Certification
- What is a SPARK Certified Instructor?
- Physical Education Equipment



After School Activity Equipment, Training and Curriculum

Curriculum Set Options:

Details on each component in section below



SPARK AS

- New “Ready, Set, GO!” format on color-coded pages
- Over 230 activities – a new activity each day of the school year!
- STEM Academic Connections

- Holds and organizes teaching materials provided on SPARKfamily.org
- Laminated cards divided by tabs for easy access
- Save time and \$ downloading, copying, and

lan

Purchase Online

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Cli
He

to watch a short video explaining how the SPARKfolio works!

- © 2009-2013 SPARK, All Rights Reserved

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Purchase Online

[Purchase Online](#)

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[Download Order Form](#)

Set 1
\$199

SPARKfamily.org (Digital Edition)
3 Year Membership

Includes complete e-Manual, activity videos, music, assessment tools, & more! All Content Optimized for your iPad!

set1-AS

Set 2
\$299

SPARKfamily.org 3 Yr. Membership + Manual + Music CD



Includes Set #1 components plus printed Manual and Music CD


set2-AS


Set
3
\$399


SPARKfamily.org
3 Yr. Membership

+ Manual + Music CD + SPARKfolio










Includes Set #2 components plus SPARKfolio

set3-AS



SPARKfamily.org Membership

AS-header-SForG



Manual

AS-header-manual



Music CD

AS-header-music



SPARKfolio

AS-header-folio



Countering Childhood Obesity With Spark | Solutions

sparkpe.org



Countering Childhood Obesity With Spark Solutions

**SPARK:
Countering
Childhood
Obesity
Since
1989**

SPARK is
a
research-based
public

health organization dedicated to creating, implementing, and evaluating programs that promote lifelong wellness.

SPARK strives to improve the health of children, adolescents, and adults by disseminating evidence-based Physical Education, After School, Early Childhood, and Coordinated School Health programs to teachers and recreation leaders serving Pre-K through 12th grade students.

Each SPARK program fosters environmental and behavioral change by providing a coordinated package of highly active curriculum, on-site teacher training, extensive follow-up support, and content-matched equipment.

A Healthy Beginning:

The SPARK team began studying elementary physical education in 1989, and today, the name SPARK represents a collection of exemplary, research-based physical activity/nutrition programs. The original SPARK study was supported by the Heart, Lung, and Blood Institute of the National Institutes of Health and San Diego State University.

Results:

Numerous refereed publications (over 45 to date) have reported SPARK physical education (PE) program effects, including papers showing evidence of achievement in the following variables (the number refers to the citation listed on the bottom of the page):

- Physical activity (1, 4, 5, 6)
- Physical fitness (5)
- Lesson context and teacher behavior (4)
- Academic achievement (7)
- Motor skill development (2)
- Student enjoyment of the program (3)
- Adiposity (6)
- Long term effects/institutionalization (4, 8)
- Process measures (parent behavior, teacher acceptance of program) (1)

Awards and Honors:

- SPARK has been honored as an Exemplary Program of the U.S. Department of Education; featured in the Surgeon General's Report as a "School-based solution to our nation's healthcare crisis;" earned a "Governor's Commendation;" and in 2005, was awarded "Gold" (highest ranking) for their elementary and middle school PE programs in an independent study commissioned by the Cooper Institute. SPARK is the ONLY program to earn "PE Gold" grades K-8.
- SPARK was recently identified as a successful model for combating childhood obesity in the report, "

Fighting Obesity: What Works, What's Promising" by the HSC Foundation. The report speaks of SPARK's history, practice, and methods. SPARK was the ONLY program recommended for physical education AND physical activity. Click Herefor the full report.

- SPARK was identified by the Center for Disease Control (CDC) as a national model for programs designed to increase physical activity and combat childhood obesity in their report School-Based Physical Education: An Action Guide.
- SPARK was chosen as a "Selected School-Based Intervention" in the report Preventing Childhood Obesity: Health in the Balance by the National Academy of Sciences

Sharing Good News and Growing:

Following the research phase, the elementary PE program was expanded to focus on dissemination. Over the years, additional research has led to the creation and development of:

- Early Childhood (ages 3-5)
- Middle School PE (grades 6-8)
- After School (ages 5-14)
- High School PE
- Ignite a Healthy Environment
- Wellness for Staff
- Nutrition Services
- Health Education

SPARK Certified Trainers bring SPARK to you, working with a single site, a cluster of sites, or entire districts/cities in an effort to improve the quantity and quality of physical activity/education. The SPARK Programs also offer Institutes in the summer to give educators in-depth training in sunny San Diego.

Selected references:

1. Marcoux, M.F., Sallis, J. F., McKenzie, T. L., Marshall, S., Armstrong, C. A., & Goggin, K. (1999). Process evaluation of a physical activity self-management program for children: SPARK. *Psychology and Health*, 14, 659-677.
2. McKenzie, T. L., Alcaraz, J. E., Sallis, J. F., & Faucette, F. N. (1998). Effects of a physical education program on children's manipulative skills. *Journal of Teaching in Physical Education*, 17, 327-341.
3. McKenzie, T. L., Alcaraz, J., & Sallis, J. F. (1994) Assessing children's liking for activity units in an elementary school physical education curriculum. *Journal of Teaching in Physical Education*, 13, 206-215.
4. McKenzie, T. L., Sallis, J. F., Kolody, B., & Faucette, N. (1997). Long term effects of a physical education curriculum and staff development program: SPARK. *Research Quarterly for Exercise and Sport*, 68, 280-291.
5. Sallis, J. F., McKenzie, T. L., Alcaraz, J. E., Kolody, B., Faucette, N., & Hovell, M. F. (1997). The effects of a 2-year physical education program (SPARK) on physical activity and fitness in elementary school students. *American Journal of Public Health*, 87, 1328-1334.
6. Sallis, J. F., McKenzie, T. L., Alcaraz, J. E., Kolody, B., Hovell, M. F., & Nader, P. R. (1993). Project SPARK:

Effects of physical education on adiposity in children. Annals of the New York Academy of Sciences, 699, 127-136.

7. Sallis, J. F., McKenzie, T. L., Kolody, B., Lewis, M., Marshall, S., & Rosengard, P. (1999). Effects of a health-related physical education on academic achievement: Project SPARK. Research Quarterly for Exercise and Sport, 70, 127-134.

8. Dowda, M. C., Sallis, J. F., McKenzie, T. L., Rosengard, P. R. & Kohl, H. W. (2005). Evaluating the sustainability of SPARK physical education: A case study of translating research into practice. Research Quarterly for Exercise and Sport, 76, 11-19.

Our new Grant Finder Tool will help you find grants specific to your state and type of program. New grants updated daily!

> details

So many great ideas for teachers to do more gross motor with students-the information is so well organized plus well presented-terrific...

> details



SPARK™ ORDER FORM Easy as 1-2-3!

1 Choose the Instructional Materials you want, and multiply by the quantity to find the subtotal

Item Number	Description	Price	Qty.	Subtotal
Early Childhood				
9-1453049-201	Set #1 (EC SPARKfamily.org 3 year membership) (email required — Login info. will be emailed to you within 5 business days)	\$199	x	
9-1453240-201	Set #2 (EC SPARKfamily.org 3 yr. membership + EC Manual + EC Music CD)	\$299	x	
9-1453235-201	Set #3 (EC SPARKfamily.org 3 yr. membership + EC Manual + EC Music CD + EC SPARKfolio)	\$399	x	
K-2 Physical Education				
9-1453050-201	Set #1 (K-2 PE SPARKfamily.org 3 year membership) (email required — Login info. will be emailed to you within 5 business days)	\$199	x	
9-1453241-201	Set #2 (K-2 PE SPARKfamily.org 3 yr. membership + K-2 PE Manual + K-2 PE Music CD)	\$299	x	
9-1453236-201	Set #3 (K-2 PE SPARKfamily.org 3 yr. membership + K-2 PE Manual + K-2 PE Music CD + K-2 PE SPARKfolio)	\$399	x	
3-6 Physical Education				
9-1453051-201	Set #1 (3-6 PE SPARKfamily.org 3 year membership) (email required — Login info. will be emailed to you within 5 business days)	\$199	x	
9-1453242-201	Set #2 (3-6 PE SPARKfamily.org 3 yr. membership + 3-6 PE Manual + 3-6 PE Music CD)	\$299	x	
9-1453237-201	Set #3 (3-6 PE SPARKfamily.org 3 yr. membership + 3-6 PE Manual + 3-6 PE Music CD + 3-6 PE SPARKfolio)	\$399	x	
Middle School Physical Education (MS PE)				
9-1453052-201	Set #1 (MS PE SPARKfamily.org 3 year membership) (email required — Login info. will be emailed to you within 5 business days)	\$199	x	
9-1453243-201	Set #2 (MS PE SPARKfamily.org 3 yr. membership + MS PE Manual + MS PE Music CD)	\$299	x	
9-1453238-201	Set #3 (MS PE SPARKfamily.org 3 yr. membership + MS PE Manual + MS PE Music CD + MS PE SPARKfolio)	\$399	x	
High School Physical Education (HS PE)				
9-1453053-201	Set #1 (HS PE SPARKfamily.org 3 year membership) (email required — Login info. will be emailed to you within 5 business days)	\$199	x	
9-1453244-201	Set #2 (HS PE SPARKfamily.org 3 yr. membership + HS PE Manual + HS PE Music CD)	\$299	x	
9-1453239-201	Set #3 (HS PE SPARKfamily.org 3 yr. membership + HS PE Manual + HS PE Music CD + HS PE SPARKfolio)	\$399	x	
After School				
9-1453054-201	Set #1 (AS SPARKfamily.org 3 year membership) (email required — Login info. will be emailed to you within 5 business days)	\$199	x	
9-1385685-201	Set #2 (AS SPARKfamily.org 3 yr. membership + AS Manual + AS Music CD)	\$299	x	
9-1385682-201	Set #3 (AS SPARKfamily.org 3 yr. membership + AS Manual + AS Music CD + AS SPARKfolio)	\$399	x	

ADDITIONAL MATERIALS

Item Number	Description	Price	Qty.	Subtotal
9-1385259-201	Early Childhood Music CD	\$49	x	
9-1288447-201	K-2 PE Music CD	\$49	x	
9-032323-201	3-6 PE Music CD	\$49	x	
9-1387851-201	Middle School PE Music CD	\$49	x	
9-1415198-201	High School PE Music CD	\$49	x	
9-1439722-201	After School Music CD	\$49	x	
9-1385144-201	Early Childhood SPARKfolio of Instructional Materials (this product is a supplement to the curriculum sets above)	\$179	x	
9-1301930-201	K-2 PE SPARKfolio of Instructional Materials (this product is a supplement to the curriculum sets above)	\$179	x	
9-1272204-201	3-6 PE SPARKfolio of Instructional Materials (this product is a supplement to the curriculum sets above)	\$179	x	
9-1387852-201	MS PE SPARKfolio of Instructional Materials (this product is a supplement to the curriculum sets above)	\$179	x	
9-1415197-201	HS PE SPARKfolio of Instructional Materials (this product is a supplement to the curriculum sets above)	\$179	x	
9-1448765-201	After School SPARKfolio of Instructional Materials (this product is a supplement to the curriculum sets above)	\$179	x	

MERCHANDISE SUBTOTAL

SHIPPING & HANDLING

Contiguous 48 States: Add 15% for Shipping & Handling (minimum of \$9.95).
HI, AK, & US Territories: Parcel only shipping (7 & 9 Prefix); 20% or \$15 minimum charge, whichever is greater.
NO SHIPPING CHARGES FOR CURRICULUM SET #1.

Add Applicable Sales Tax or if tax exempt, please provide tax exemption # or attach your State Tax Exemption Certificate. Following states are exempt: AK, DE, MT, NH, OR

ORDER TOTAL

Continued on Reverse Side

SPARK™ ORDER FORM (cont.)

2 Choose your Method of Payment

☐ Check or Money Order made payable to: **The SPARK Programs (Tax ID#: 39-0971239)**
 Check Number _____

☐ Purchase Order Number _____

☐ Type of Credit Card _____
 Credit Card # _____
 Expiration Date _____
 Exact Name on Card _____
 Signature _____

Ordering Information

Questions? 1-800-SPARK-PE

By Fax: 920-993-4375

By E-mail: spark@sparkpe.org

By Mail: Send order & payment to:
The SPARK Programs
438 Camino Del Rio South, Suite 110
San Diego, CA 92108

Prices include lifetime consultation and support from SPARK!

3 Enter your Billing and Shipping Addresses

Billing Address

Name _____

Agency Name _____

Address _____

City _____

State _____

Zip _____

Daytime Phone # _____

E-Mail Address _____

Shipping Address (if different than Billing)

Name _____

Agency Name _____

Address _____

City _____

State _____

Zip _____

Daytime Phone # _____

E-Mail Address _____

- Once instructional materials are purchased in the quantity requested, SPARK cannot take them back and provide refund.
- Please allow up to 5 business days for delivery of Set #1 (you will receive an email with login info.) and up to 3 weeks for delivery of Sets #2 or #3.
- Please supply an e-mail address; once your order is processed you will receive an order confirmation by e-mail. If you do not receive an email please check your "Junk" folder and then contact SPARK.
- Please provide physical shipping address; will not deliver to PO boxes
- If shipping to International destinations, contact SPARK for current shipping rates.
- Please do not provide a credit card number in your e-mail message!! The internet can be a wonderful tool, but unencrypted e-mail is not secure enough to protect your credit card number. We want you as a customer, but we don't want you in a position where you might give up important, private data like your credit card number.

For Internal Use Only

Order #: _____

Customer #: _____

Early Childhood Physical Activity Curriculum | Pre School Curricula

sparkpe.org

- SPARK Certification
- What is a SPARK Certified Instructor?
- Physical Education Equipment



Pre School PE Equipment, Teacher Training and Curriculums

Curriculum Set Options:

Details on each component in section below



SPARK Early Childhood Set

- Holds and organizes teaching materials provided on SPARKfamily.org
- Color-coded and laminated cards divided by tabs for easy access
- Save time and \$ downloading, copying, and laminating

Click Here to watch a short video explaining how the SPARKfolio works!

Set 1
\$199

SPARKfamily.org (Digital Edition)
3 Year Membership

Includes complete e-Manual, activity videos, music, assessment tools, & more! All Content Optimized for your iPad!

EC set1

Purchase Online

[Purchase Online](#)

Download Order Form

[Download Order Form](#)

Set 2
\$299

SPARKfamily.org 3 Yr. Membership + Manual + Music CD

Includes Set #1 components plus printed Manual and Music CD

EC set2

Purchase Online

[Purchase Online](#)

Download Order Form

[Download Order Form](#)

Purchase Online


[Purchase Online](#)

Download Order Form

[Download Order Form](#)

Set 3
\$399

SPARKfamily.org
3 Yr. Membership + Manual + Music CD + SPARKfolio



Includes Set #2 components plus SPARKfolio

EC set3



SPARKfamily.org Membership

EC SForg



Manual

EC Manual



Music CDs

EC Music



SPARKfolio

EC SPARKfolio



Elementary School Physical Education Curriculum | PE Curricula | Kindergarten - Grade 2

sparkpe.org



School PE Equipment, Training and Curriculum

Curriculum Set Options:

Details on each component in section below





SPARK K-2 Physical Education Set

- Contains the music you need to teach SPARK PE Grades K-2 and 3-6
- Includes warm-up music, long and short music intervals for skill/fitness circuits, and all the songs (cultural, current, country and more) needed to instruct SPARK dances!
- Holds and organizes teaching materials provided on SPARKfamily.org
- Over 450 color-coded and laminated cards

Set 1
\$199

SPARKfamily.org (Digital Edition)
3 Year Membership



Includes complete e-Manual, activity videos, music, assessment tools, & more! All Content Optimized for your iPad!

K2 set1

Purchase Online
[Purchase Online](#)





Download Order Form
[Download Order Form](#)

to watch a short video explaining how the SPARKfolio works!

Our new Grant Finder Tool will help you find grants specific to your state and type of

Set 2
\$299

SPARKfamily.org 3 Yr. Membership + Manual + Music CD



Includes Set #1 components plus printed Manual and Music CD

K2 set2

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[Purchase Online](#)

Download Order Form
[Download Order Form](#)






daily!

> details

I will be totally honest. I was very against

Set 3
\$399

SPARKfamily.org 3 Yr. Membership + Manual + Music CD + SPARKfolio



Includes Set #2 components plus SPARKfolio

K2 set3

Purchase Online
[Purchase Online](#)

Download Order Form
[Download Order Form](#)

resistant to SPARK thinking it was too juvenile for middle schoolers. But then I taught my basketball unit out of SPARK...

> details



SPARKfamily.org Membership

K2 SForg



Manual

K2 Manual



Music CDs

K2 Music



SPARKfolio

K2 SPARKfolio

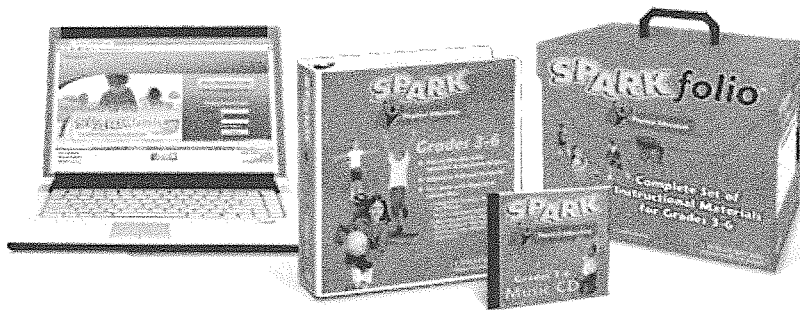
Elementary School Physical Education Curriculum | PE Curriculum | Grades 3 - 6 sparkpe.org



School PE Equipment, Training and Curriculum

Curriculum Set Options:

Details on each component in section below





SPARK 3-6 Physical Education Set

- Contains the music you need to teach SPARK PE Grades K-2 and 3-6
- Includes warm-up music, long and short music intervals for skill/fitness circuits, and all the songs (cultural, current, country and more) needed to instruct SPARK dances!
- Holds and organizes teaching materials provided on SPARKfamily.org
- Over 450 color-coded and laminated cards

Set 1
\$199

SPARKfamily.org (Digital Edition)
3 Year Membership



Includes complete e-Manual, activity videos, music, assessment tools, & more! All Content Optimized for your iPad!

3-6 set1

Purchase Online
Purchase Online

Download Order Form
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Cli
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to watch a short video explaining how the SPARKfolio works!

Our new Grant Finder Tool will help you find grants specific to your state and type of

Set 2
\$299

SPARKfamily.org 3 Yr. Membership + Manual + Music CD



Includes Set #1 components plus printed Manual and Music CD

3-6 set2

Purchase Online
Purchase Online

Download Order Form
Download Order Form

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daily!






> details

" We have implemented SPARK in all of our
70
sch
for
the
last five years now. The concepts of movement for all, no standing in line, small teams etc have made a huge impact on our students MVPA....

> details

Set 3
\$399

SPARKfamily.org 3 Yr. Membership + Manual + Music CD + SPARKfolio



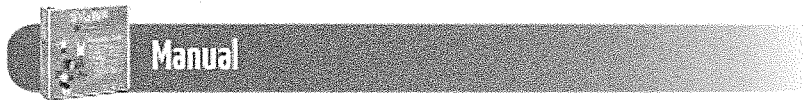
Includes Set #2 components plus SPARKfolio

3-6 set3



SPARKfamily.org Membership

3-6 SForg



3-6 Manual



3-6 Music



3-6 SPARKfolio

High School Physical Education Curriculum | PE HS Curricula | Phys Ed

sparkpe.org

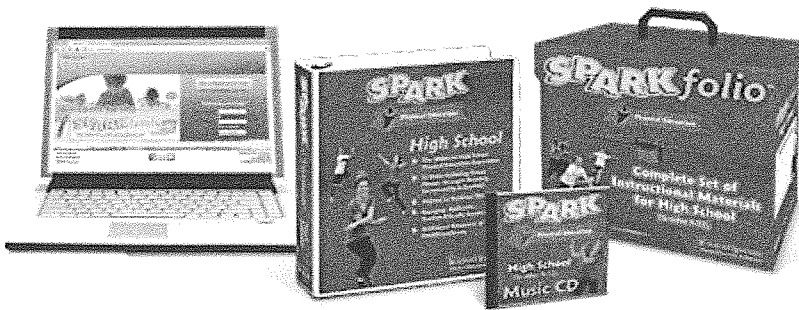
- SPARK Certification
- What is a SPARK Certified Instructor?
- Physical Education Equipment



School PE Equipment, Training and Curriculum

Curriculum Set Options:

Details on each component in section below





SPARK High School Physical Education Set

- All the music needed to teach SPARK HS PE on one CD.
- Every dance from the SPARK manual including warm-up and cool-down music
- Holds and organizes teaching materials provided on SPARKfamily.org
- Hundreds of laminated cards divided by tabs for easy access
- Save time and \$ downloading, copying and

Set 1
\$199

SPARKfamily.org (Digital Edition)
3 Year Membership



Includes complete e-Manual, activity videos, music, assessment tools, & more! All Content Optimized for your iPad!

HS PE set1

Purchase Online
Purchase Online





Download Order Form
Download Order Form

to watch a short video explaining how the SPARKfolio works!

Looking for funds to purchase SPARK?

Set 2
\$299

SPARKfamily.org 3 Yr. Membership + Manual + Music CD



Includes Set #1 components plus printed Manual and Music CD

HS PE set2

Purchase Online
Purchase Online

Download Order Form
Download Order Form

Tool will help you find grants specific to your state and type of program. New grants updated daily!

> details

Purchase Online
Purchase Online






Download Order Form
Download Order Form

great program to promote fitness and participation. I like the organization of the binder-how skills are broken...

http://www.sparkpe.org/physical-education/high-school/curriculum/

Set
3
\$399

SPARKfamily.org
3 Yr. Membership + Manual + Music CD + SPARKfolio



Includes Set #2 components plus SPARKfolio

> details


- © 2009-2013 SPARK, All Rights Reserved

HS PE set3



SPARKfamily.org Membership

HS PE SForg



Manual

HS PE Manual



Music CD

HS PE Music



SPARKfolio

HS PE SPARKfolio

Middle School Physical Education Curriculum | PE Curricula

sparkpe.org

- SPARK Certification
- What is a SPARK Certified Instructor?
- Physical Education Equipment



School PE Equipment, Training and Curriculum

Curriculum Set Options:

Details on each component in section below



SPARK Middle School Physical Education Set

- Every cultural, country, and dance from the SPARK manual
- Warm-up and cool-down music, long and short intervals for circuit training, and more (75 minutes in length).

- Holds and organizes teaching materials provided on SPARKfamily.org
- Hundreds of laminated cards divided by tabs for easy access

Set 1
\$199

SPARKfamily.org (Digital Edition)
3 Year Membership

Includes complete e-Manual, activity videos, music, assessment tools, & more! All Content Optimized for your iPad!

MS PE set1

Purchase Online

Download Order Form

Purchase Online

Download Order Form

to watch a short video explaining how the SPARKfolio works!

Looking for funds to purchase SPARK?

Set 2
\$299

SPARKfamily.org 3 Yr. Membership + Manual + Music CD

Includes Set #1 components plus printed Manual and Music CD

MS PE set2

Purchase Online

Download Order Form

Purchase Online

Download Order Form

Tool will help you find grants specific to your state and type of program. New grants updated daily!

> details

Purchase Online

Download Order Form

Purchase Online

Download Order Form



Set
3
\$399


SPARKfamily.org
3 Yr. Membership


+ Manual


+ Music CD

+ SPARKfolio










Includes Set #2 components plus SPARKfolio

MS PE set3



SPARKfamily.org Membership

MS PE SForg



Manual

MS PE Manual



Music CD

MS PE Music



SPARKfolio

MS PE SPARKfolio

Exhibit C

School Specialty, Inc., et al.
c/o KCC
2335 Alaska Ave
El Segundo, CA 90245

000624

PRF # 57848***
Case No.: 13-10125
Svc: 1

PackID: 662

SAN DIEGO STATE UNIVERSITY FOUNDATION
5250 CAMPANILE DRIVE
SAN DIEGO, CA 92182-1998

*****IMPORTANT*****
CURE NOTICE ENCLOSED

Exhibit A

Contract Counterparty Name and Address	Contract Description(s)	Proposed Cure Amount
SAN DIEGO STATE UNIVERSITY FOUNDATION 5250 CAMPANILE DRIVE SAN DIEGO, CA 92182-1998	1000610 - Licensing Agreement, 1004530 - Trademark or IP Agreement, 1004531 -	\$2,523.02

parties (in each instance, the "Cure Amount").

PLEASE TAKE FURTHER NOTICE that a schedule of rejected Contracts and Leases will be included in the Plan Supplement. The Debtors will file the Plan Supplement on or before May 9, 2013. A copy of the Plan Supplement may be obtained by parties in interest free of charge on Kurtzman Carson Consultants LLC's dedicated webpage related to these cases <http://www.kccllc.net/SchoolSpecialty> or from counsel to the Debtors by request to Troy Bollman (Email: tbollman@ycst.com; Telephone: (302) 571-6600). A copy of the Plan Supplement is also available for inspection during regular business hours at the office of the Clerk of the Court, 824 N. Market Street, 3rd Floor, Wilmington, Delaware 19801 or viewed on the Internet, for a fee, at the Court's website (<http://www.deb.uscourts.gov>) by following the directions for accessing the ECF system on such website.

PLEASE TAKE FURTHER NOTICE that any party objecting to (i) the Cure Amounts, whether or not such party previously has filed a proof of claim with respect to amounts due under the applicable agreement, (ii) the potential assumption of such Contracts and Leases, or (iii) the Debtors' ability to provide adequate assurance of future performance under such Contracts and Leases, shall be required to file and serve an objection, in writing, setting forth with specificity any and all cure obligations that the objecting party asserts must be cured or satisfied in respect of the Contracts and Leases and/or any and all objections to the potential assumption of such agreements, together with all documentation supporting such cure claim or objection. Any objections to the proposed assumption of the Contract(s) and/or the corresponding Cure Amount(s), must be filed with the Clerk of the Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801, and served upon each of the following notice parties so that the objection is received no later than May 9, 2013 at 4:00 p.m. (prevailing Eastern Time) (the "Cure Objection Deadline"), and any objections to the Debtors' ability to provide adequate assurance of future performance under the Contracts and Leases (the "Adequate Assurance Objection Deadline") must be filed with the Clerk of the Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801, and served upon each of the following notice parties so that the objection is received no later than May 16, 2013 at 4:00 p.m. (prevailing Eastern Time):

The Debtors: School Specialty, Inc., Attn: Michael P. Lavelle, Chief Executive Officer (mike.lavelle@schoolspecialty.com), W6316 Design Drive, Greenville, WI 54942, with a copy to (a) Paul, Weiss, Rifkind, Wharton & Garrison LLP, Attn: Jeffrey D. Saferstein & Lauren Shumejda (jsaferstein@paulweiss.com, lshumejda@paulweiss.com), 1285 Avenue of the Americas, New York, NY 10019 and (c) Young, Conaway, Stargatt & Taylor, LLP, Attn: Pauline K. Morgan & Maris J. Kandestin (pmorgan@ycst.com, mkandestin@ycst.com), Rodney Square, 1000 North King Street, Wilmington, DE 19801.

The ABL Lenders: (a) Goldberg Kohn, Attn: Randall Klein & Jeremy Downs (randall.klein@goldbergkohn.com, jeremy.downs@goldbergkohn.com), 55 East Monroe Street, Suite 3300, Chicago, IL 60603, and (b) Richards, Layton and Finger, P.A., Attn: Paul Heath (heath@RLF.com), One Rodney Square, 920 North King Street, Wilmington, DE 19801.

The Ad Hoc DIP Lenders: (a) Stroock & Stroock & Lavan LLP, Attn: Kristopher M. Hansen & Jonathan D. Canfield (khansen@stroock.com, jcanfield@stroock.com), 180 Maiden Lane, New York, NY 10038, and (b) Duane Morris LLP, Attn: Christopher M. Winter (cmwinter@duanemorris.com), 222 Delaware Avenue, Suite 1600, Wilmington, DE 19801.

The Creditors' Committee: (a) Brown Rudnick LLP, Attn: Robert J. Stark (rstark@brownrudnick.com), 7 Times Square, New York, NY 10036, (b) Brown Rudnick LLP, Attn: Steven D. Pohl (SPohl@brownrudnick.com), One Financial Center, Boston, MA 02111, and (c) Venable

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

SCHOOL SPECIALTY, INC., *et al.*,¹

Debtors.

Chapter 11

Case No. 13-10125 (KJC)

Jointly Administered

Cure Objection Deadline: May 16, 2013 at 4:00 p.m. (ET)
Deadline to Object to Adequate Assurance of Future
Performance: May 16, 2013 at 4:00 p.m. (ET)
Voting Deadline: May 16, 2013 at 4:00 p.m. (ET)
Deadline to Object to Approval of Disclosure Statement on a Final
Basis: May 16, 2013 at 4:00 p.m. (ET)
Confirmation Objection Deadline: May 16, 2013 at 4:00 p.m. (ET)
Confirmation Hearing Date: May 20, 2013 at 1:30 p.m. (ET)

**NOTICE OF (I) POSSIBLE ASSUMPTION OF EXECUTORY
CONTRACTS AND UNEXPIRED LEASES (II) FIXING OF CURE
AMOUNTS AND (III) DEADLINE TO OBJECT TO CURE AMOUNTS
AND ADEQUATE ASSURANCE OF FUTURE PERFORMANCE**

PLEASE TAKE NOTICE that on March 19, 2013, School Specialty, Inc. and its affiliated debtors and debtors-in-possession in the above-captioned cases (each a “Debtor,” and collectively, the “Debtors”) filed in the United States Bankruptcy Court for the District of Delaware (the “Court”) the *Motion of the Debtors for Order: (A) Approving Disclosure Statement; (B) Fixing Voting Record Date; (C) Approving Solicitation Materials and Procedures for Distribution Thereof; (D) Approving Forms of Ballots and Establishing Procedures for Voting on Plan; (E) Scheduling Hearing and Establishing Notice and Procedures for Filing Objections to (I) Confirmation of the Plan, and (II) Proposed Cure Amounts Related to Contracts and Leases to be Assumed Under the Plan, and (F) Granting Related Relief* [Docket No. 601] (the “Disclosure Statement Motion”), which the Court approved on a conditional basis by Order on April 24, 2013 [Docket No. 902] (the “Disclosure Statement Order”). The Disclosure Statement Motion sought approval of, among other things, procedures for the fixing of Cure Amounts (as defined below) in connection with the potential assumption of certain executory contracts and unexpired leases (each a “Contract” or a “Lease,” and together, the “Contracts and Leases”) pursuant to the Debtors’ *Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [Docket No. 599] (as the same may be amended, modified, and/or supplemented, the “Plan”), and the deadline to object to such Cure Amounts and assumptions.

PLEASE TAKE FURTHER NOTICE that on the schedule annexed hereto as Exhibit A, the Debtors have indicated the cure amounts that the Debtors believe must be paid to compensate the non-Debtor counterparties to the Contracts and Leases for any actual pecuniary losses arising from any defaults under the Debtors’ Contracts and Leases being assumed under the Plan with such non-Debtor

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number and state of incorporation, are: School Specialty, Inc. (Wisc.; 1239), Bird-In-Hand Woodworks, Inc. (N.J.; 8811), Califone International, Inc. (Del.; 3578), Childcraft Education Corp. (N.Y.; 9818), ClassroomDirect.com, LLC (Del.; 2425), Delta Education, LLC (Del.; 8764), Frey Scientific, Inc. (Del.; 3771), Premier Agendas, Inc. (Wash.; 1380), Sax Arts & Crafts, Inc. (Del.; 6436), and Sportime, LLC (Del.; 6939). The address of the Debtors’ corporate headquarters is W6316 Design Drive, Greenville, Wisconsin 54942.

PLEASE TAKE FURTHER NOTICE that the inclusion of a Contract or Lease herein shall not constitute or be deemed to be a determination or admission by the Debtors that such document is, in fact, an executory contract or unexpired lease within the meaning of section 365 of the Bankruptcy Code (all rights with respect thereto being expressly reserved).

Dated: April 24, 2013
Wilmington, Delaware

YOUNG CONAWAY STARGATT &
TAYLOR, LLP

Pauline K. Morgan (No. 3650)

Maris J. Kandestin (No. 5294)

Morgan L. Seward (No. 5388)

Rodney Square

1000 North King Street

Wilmington, Delaware 19801

Telephone: (302) 571-6600

Facsimile: (302) 571-1253

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP

Alan W. Kornberg

Jeffrey D. Saferstein

Lauren Shumejda

Ann K. Young

1285 Avenue of the Americas

New York, New York 10019

Telephone: (212) 373-3000

Facsimile: (212) 757-3990

Counsel to the Debtors and Debtors-in-Possession

LLP, Attn: Jamie L. Edmonson (jledmonson@Venable.com), 1201 North Market Street, Suite 1400, Wilmington, DE 19801.

The Office of the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801, Attention: Juliet Sarkessian (Juliet.M.Sarkessian@usdoj.gov).

PLEASE TAKE FURTHER NOTICE that if an objection is timely filed and the parties are unable to settle such objection, a hearing with respect to the assumption of your Contract or Lease and/or your Cure Amount will be held at the time of the Confirmation Hearing on May 20, 2013 at 1:30 p.m. (prevailing Eastern Time), or such other hearing date that the Court orders, or such other hearing date to which the parties may mutually agree, before the Honorable Kevin J. Carey, Judge of the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, 5th Floor, Courtroom #5, Wilmington, Delaware 19801.

PLEASE TAKE FURTHER NOTICE that in the event that no Cure Objection is timely filed with respect to a Contract or Lease, the counterparty to such Contract or Lease shall be deemed to have consented to the Cure Amount proposed by the Debtors and shall be forever enjoined and barred from seeking any additional amount(s) on account of the Debtors' cure obligations under section 365 of the Bankruptcy Code or otherwise from the Debtors, their estates or the Reorganized Debtors. In addition, if no timely Cure Objection is filed with respect to a Contract or Lease, upon the Effective Date of the Plan, the Reorganized Debtors and the counterparty to such Contract or Lease shall enjoy all of the rights and benefits under the Contract or Lease without the necessity of obtaining any party's written consent to the Debtors' assumption of the Contract or Lease, and such counterparty shall be deemed to have waived any right to object, consent, condition or otherwise restrict the Debtors' assumption of the Contract or Lease.

PLEASE TAKE FURTHER NOTICE that if you agree with assumption of your Contract or Lease and the Cure Amount indicated, you need not take any further action.

PLEASE TAKE FURTHER NOTICE that the inclusion of a Contract or Lease herein is without prejudice to the Debtors' right to modify their election to assume or to reject such Contract or Lease prior to the entry of a final, non-appealable order (which order may be the confirmation order) deeming such Contract or Lease assumed or rejected, and inclusion of a Contract or Lease herein is not a final determination that such Contract or Lease will, in fact, be assumed.

Exhibit D

Case 13-10125-KJC Doc 1421-4 Filed 08/21/13 Page 13 of 17														
Item	Description	Item	Royalty	Kit Base	Item	FOLIO	CD	FLYER	2007	2008	2009	2010	2011	2012
Item	Description	Item	Royalty	Kit Base	Item	FOLIO	CD	FLYER	2007	2008	2009	2010	2011	2012
1278341	KIT 3-6 PE MANUAL + CD + FOLIO + SPARKFAMILY.ORG	K	KIT	N/A	033025	1272204	033233	1379976		\$60,901		\$170,282	\$185,883	\$286,653
1303150	KIT K2 PE MANUAL + CD + FOLIO + SPARKFAMILY.ORG	K	KIT	N/A	1286742	1301930	1288447	1379975				\$121,421	\$200,611	\$287,321
1385679	KIT MIDDLE SCHOOL PE MANUAL + CD + FOLIO + SPARKFAMILY.ORG	K	KIT	N/A	1387850	1387852	1387851	1379978					\$83,470	\$422,209
1288865	KIT K-2 PE MANUAL + CD + SPARKFAMILY.ORG	STK	KIT	N/A	1286742	N/A	1288447	1379975		\$99,347	\$85,869	\$116,607	\$125,056	\$221,314
1414749	KIT HIGH SCHOOL MANUAL + FOLIO + CD + SPARKFAMILY.ORG	K	KIT	N/A	1410277	1415197	1415198	1453041*					\$117,336	\$135,998
1278050	KIT 3-6 PE MANUAL + CD + SPARKFAMILY.ORG	STK	KIT	N/A	033025	N/A	032323	1379976		\$194,064	\$81,257	\$128,972	\$109,895	\$117,336
1383886	KIT SPARK EARLY CHILDHOOD MANUAL + SF.ORG FLYER + MUSIC CD + FOLIO	K	KIT	N/A	1379958	1385144	1385259	1379977					\$108,571	\$108,571
1385684	KIT MIDDLE SCHOOL PE MANUAL + CD + SPARKFAMILY.ORG	STK	KIT	N/A	1387850	N/A	1387851	1379978					\$42,586	\$95,466
1383885	KIT SPARK EARLY CHILDHOOD MANUAL + SF.ORG FLYER + MUSIC CD KIT	STK	KIT	N/A	1379958	N/A	1385259	1379977					\$23,983	\$67,776
1414748	KIT HIGH SCHOOL MANUAL + CD + SPARKFAMILY.ORG	STK	KIT	N/A	1410277	N/A	1415198	1453041*					\$59,272	\$65,646
024446	BATON -MULTICOLOR - SPARK - SET OF 6	STK	KIT	N/A	Vrs. Babins	N/A	N/A	N/A	\$8,942	\$9,987	\$2,125	\$5,926	\$8,175	\$47,006
1385677	KIT K-2 PE FOLIO + SPARKFAMILY.ORG	K	KIT	N/A	N/A	1301930	N/A	1379975					\$8,175	\$7,655
1385678	KIT 3-6 PE FOLIO + SPARKFAMILY.ORG	K	KIT	N/A	N/A	1272204	N/A	1379976					\$12,110	\$2,733
1385680	KIT MIDDLE SCHOOL PE FOLIO + SPARKFAMILY.ORG	K	KIT	N/A	N/A	1387852	N/A	1379978					\$7,155	\$2,033
1385681	KIT EARLY CHILDHOOD FOLIO + SPARKFAMILY.ORG	K	KIT	N/A	N/A	1385144	N/A	1379977					\$3,515	\$1,402
1016673	KIT SPARK MUSIC CD AND 3-6 BINDER	K	KIT	N/A	033025	N/A	032323	N/A	\$44,515	\$7,713			\$330	\$165
1323691	SPARK MIDDLE SCHOOL FITNESS CIRCUIT KIT	K	KIT	N/A	Vrs. Equip.	N/A	N/A	N/A			\$1,499	\$4,167		
1385685	KIT SPARK AFTER SCHOOL PE CURRICULUM SET 2	STK	KIT	N/A	1439844	N/A	1439722	1439723						
1453235	KIT SPARK EARLY CHILDHOOD CURRICULUM SET 3	K	KIT	N/A	1379958	1385144	1385259	1453037						
1453236	KIT SPARK K-2 PE CURRICULUM SET 3	K	KIT	N/A	1286742	1301930	1288447	1453038						
1453237	KIT SPARK 3-6 PE CURRICULUM SET 3	K	KIT	N/A	033025	1272204	032323	1453039						
1453238	KIT SPARK MIDDLE SCHOOL PE CURRICULUM SET 3	K	KIT	N/A	1387850	1387852	1387851	1453040						
1453239	KIT SPARK HIGH SCHOOL PE CURRICULUM SET 3	K	KIT	N/A	1410277	1415197	1415198	1453041*						
1453240	KIT SPARK EARLY CHILDHOOD CURRICULUM SET 2	STK	KIT	N/A	1379958	N/A	1385259	1453037						
1453241	KIT SPARK K-2 PE CURRICULUM SET 2	STK	KIT	N/A	1286742	N/A	1288447	1453038						
1453242	KIT SPARK 3-6 PE CURRICULUM SET 2	STK	KIT	N/A	033025	N/A	032323	1453039						
1453244	KIT SPARK HIGH SCHOOL PE CURRICULUM SET 2	STK	KIT	N/A	1410277	N/A	1415198	1453041*						
1455058	KIT SPARK 3-6 PE CURRICULUM SET 2 GROUP ACCESS	STK	KIT	N/A	033025	N/A	032323	N/A						
1455059	KIT SPARK MIDDLE SCHOOL PE CURRICULUM SET 2 GROUP ACCESS	STK	KIT	N/A	1387850	N/A	1387851	N/A						
1455060	KIT SPARK HIGH SCHOOL PE CURRICULUM SET 2 GROUP ACCESS	STK	KIT	N/A	1410277	N/A	1415198	N/A						
1455061	KIT SPARK AFTER SCHOOL PE CURRICULUM SET 2 GROUP ACCESS	STK	KIT	N/A	1439844	N/A	1439722	N/A						
1455062	KIT SPARK EARLY CHILDHOOD CURRICULUM SET 3 GROUP ACCESS	K	KIT	N/A	1379958	1385144	1385259	N/A*						
027356	BOOK SPARK HIGH SCHOOL GUIDE	DS	NO	NO					\$2,681	\$5,637	\$6,200	\$4,721	\$9,949	\$147
1285138	BINDER SPARK EARLY CHILDHOOD AGES 3-5	P	NO	NO										
1288447	CD SPARK PE PROGRAM GRADES K-2	P	NO	NO-CD						\$45,466	\$22,552	\$14,275	\$31,616	\$18,495
1415198	MUSIC CD SPARK HIGH SCHOOL	P	NO	NO-CD										\$12,073
1439722	MUSIC CD SPARK AFTER SCHOOL	P	NO	NO-CD										\$9,063
1385239	MUSIC CD SPARK EARLY CHILDHOOD	P	NO	NO-CD										\$8,073
1387851	MUSIC CD SPARK MIDDLE SCHOOL	P	NO	NO-CD										\$7,864
032323	CD SPARK 3-6 MUSIC CD	P	NO	NO-CD					\$73,729		\$18,979	\$34,158	\$35,256	\$6,926
1415197	SPARKFOLIO SPARK HIGH SCHOOL	P	NO	NO-FOLIO										\$41,446
1301930	BOX SPARK K-2 SPARKFOLIO	P	NO	NO-FOLIO							\$56,780	\$34,289	\$72,868	\$33,546

\$1,213,735 \$2,050,729 \$1,297,445 \$1,409,025 \$2,201,625 \$2,262,047

Exhibit E

Sean Schwerdtfeger

From: Kees, Nicholas
Sent: Tuesday, August 06, 2013 2:07 PM
To: 'Sean Schwerdtfeger <sds@sdsattorneys.com> (sds@sdsattorneys.com)'
Cc: 'Bose, Shantanu (Shantanu.Bose@schoolspecialty.com)'; 'Kandestin, Maris (MKandestin@ycst.com)'; 'Lauren Shumejda (LShumejda@PAULWEISS.COM)'
Subject: SPARK Extension [GK-Active.FID49470]

Sean,

Further to our phone conversation just now, we have continued to make much progress in negotiating a resolution of the differences between the parties. You're right, though, we should talk tomorrow afternoon, if at all possible, to try to wrap up at least the first two issues. I will send you and Mike a meeting invitation.

School Specialty therefore consents to a further two week extension for your client to file its objection to the assumption of its license agreement. The new deadline is now August 22, 2013. The next hearing date scheduled for the court is still September 10, so the local rules would indicate that our deadline for response would 7 days before that, which is running up against Labor Day weekend, so I think our deadline can still be August 29.

I would hope that we can resolve at least the first two issues in the next few days.

Nick

Nicholas A. Kees
Attorney
GODFREY & KAHN, S.C.
780 North Water Street
Milwaukee, Wisconsin 53202-3590
TEL • 414.273.3500
DIR • 414.287.9223
FAX • 414.273.5198
EMAIL • nakees@gklaw.com
WWW • GKLAW.COM

Exhibit B

1 Sean D. Schwerdtfeger, Esq. (SBN 179521)
2 Justin J. Wieland, Esq. (SBN 255619)
3 **SCHWERDTFEGER LAW GROUP**
4 501 West Broadway, Suite 1700
5 San Diego, CA 92101
6 Tel. (619) 595-3403
7 Fax. (619) 595-3404
8 sds@sdsattorneys.com

9 Attorneys for Creditor and Objector,
10 SAN DIEGO STATE UNIVERSITY FOUNDATION

11 **UNITED STATES BANKRUPTCY COURT**
12 **FOR THE DISTRICT OF DELAWARE**

13 In re:

14 SCHOOL SPECIALTY, INC., et al.,
15 Debtors.

Chapter 11

Case No. 13-10125-KJC

**DECLARATION OF JAMES F. SALLIS,
PH.D. IN SUPPORT OF SAN DIEGO STATE
UNIVERSITY FOUNDATION'S OBJECTION
TO SCHOOL SPECIALTY, INC.'S
PROPOSED ASSET SALE, ASSUMPTION
AND ASSIGNMENT OF ASSUMABLE
EXECUTORY CONTRACTS**

16 I, James F. Sallis, Ph.D., declare as follows:

17
18 1. I am a currently a distinguished professor of family and preventative medicine
19 with the University of California at San Diego. Prior to my employment with the University of
20 California at San Diego, I was a professor in the same field at San Diego State University
21 ("SDSU"). I have personal knowledge of the facts stated herein, so that if called and sworn as a
22 witness, I could and would testify competently thereto.

23
24 2. During my service as a professor with SDSU, Thomas McKenzie, Ph.D. and I
25 wrote a series of grant applications on behalf of the San Diego State University Foundation
26 ("SDSUF")¹ to study and develop a research based, physical education program for school aged
27

28 ¹ SDSUF is a non-profit organization chartered to further the educational, research and
community service objectives of SDSU.

1 children. SDSUF received the grants, which Mr. McKenzie, Ph.D. and I used to conduct
2 physical education research and develop SPARK, a research based physical education program.

3 3. SPARK was initiated in 1989 with a 7-year grant to SDSUF from the National
4 Institutes of Health to develop and evaluate a health related physical education program for
5 elementary school students. Following the success of SPARK in elementary schools, SDSUF
6 received a second large grant (MSPAN) from the National Institutes of Health to expand their
7 work into middle schools for purposes of developing and assessing programs for improving
8 physical activity and eating on campus. MSPAN was funded for 5 years (1996-2000) to test a
9 combination of environmental, policy, and social marketing interventions on increasing physical
10 activity and reducing fat intake of students.

11 4. The SPARK physical education program is one of the most thoroughly researched
12 physical education programs in existence, as well as one of the most commercially successful
13 physical education programs on the market.

14 5. Prior to SDSUF exclusively licensing SPARK to SPORTIME, LLC, Thomas
15 McKenize, Ph.D., Paul Rosengard, and I disseminated the SPARK program through coordinated
16 marketing and sales efforts. Those efforts not only developed the marketing for the core
17 educational curriculum, they developed the trademark SPARK and the quality research based
18 curriculum that the trademark represents.

19 6. On or about September 30, 2002, SDSUF granted SPORTIME, LLC an exclusive
20 license ("SPARK License") to market, use, demonstrate, sell, and commercialize the following
21 intellectual property: (1) copyrighted SPARK works; (2) all derivatives of those works; (3) any
22 SPARK works, present or future, created with any assistance from SDSU faculty or staff; (4) all
23 derivatives of those works; and (5) any SPARK works, present or future, bearing the SPARK
24 Trademark (collectively "SPARK Products"). The SPARK License defined "derivative work" to
25 mean "a work derived from and based on a pre-existing copyrighted work." The SPARK License
26 also defined "work" to mean "any instructional text used in the SPARK Program that is sold,
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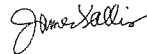
1 Consequently, we retained counsel to represent our collective interest with SDSUF in the
2 SPARK License.

3 16. What began as an effort to obtain responsible administration of the SPARK
4 License by SCHOOL SPECIALTY has uncovered a scheme to deprive SDSUF of royalties due
5 on the On-Line Curriculum, SPARK CD, and SPARKfolio. I have no faith in the ability of
6 SCHOOL SPECIALTY to properly administer the SPARK License on a going forward basis and
7 firmly believe that the interests of SPARK require SCHOOL SPECIALTY to relinquish the
8 SPARK License.

9 17. I respectfully request this Bankruptcy Court to grant the SDSUF's objection to
10 SCHOOL SPECIALTY's proposed assumption of the SPARK License.

11 I declare under the penalty of perjury of the laws of the United States of America that the
12 foregoing is true and correct.

13 Executed this 27____ day of May, 2013.

14
15 
16 _____

17 James F. Sallis, Ph.D.
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Exhibit C

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9 Attorneys for Creditor and Objector,
10 SAN DIEGO STATE UNIVERSITY FOUNDATION

11 **UNITED STATES BANKRUPTCY COURT**
12 **FOR THE DISTRICT OF DELAWARE**

13 In re:

14 SCHOOL SPECIALTY, INC., et al.,
15 Debtors.

16 Chapter 11

17 Case No. 13-10125-KJC

18 **DECLARATION OF THOMAS McKENZIE,**
19 **PH.D. IN SUPPORT OF SAN DIEGO STATE**
20 **UNIVERSITY FOUNDATION'S OBJECTION**
21 **TO SCHOOL SPECIALTY, INC.'S**
22 **PROPOSED ASSET SALE, ASSUMPTION**
23 **AND ASSIGNMENT OF ASSUMABLE**
24 **EXECUTORY CONTRACTS**

25 I, Thomas McKenzie, Ph.D., declare as follows:

26 1. I am a retired professor with San Diego State University ("SDSU") in the health
27 sciences field. I continue to remain actively involved with SDSU, as well as developments in
28 health sciences. I have personal knowledge of the facts stated herein, so that if called and sworn
as a witness, I could and would testify competently thereto.

2. During my service as a professor with SDSU, James F. Sallis, Ph.D. and I wrote a
series of grant applications on behalf of the San Diego State University Foundation ("SDSUF")¹
to study and develop a research based, physical education program for school aged children.

¹ SDSUF is a non-profit organization chartered to further the educational, research and
community service objectives of SDSU.

1 SDSUF received the grants, which Mr. Sallis and I used to conduct physical education research
2 and develop SPARK, a research based physical education program.

3 3. SPARK was initiated in 1989 with a 7-year grant to SDSUF from the National
4 Institutes of Health to develop and evaluate a health related physical education program for
5 elementary school students. Following the success of SPARK in elementary schools, SDSUF
6 received a second large grant (MSPAN) from the National Institutes of Health to expand their
7 work into middle schools for purposes of developing and assessing programs for improving
8 physical activity and eating on campus. MSPAN was funded for 5 years (1996-2000) to test a
9 combination of environmental, policy, and social marketing interventions on increasing physical
10 activity and reducing fat intake of students.

11 4. The SPARK physical education program is one of the most thoroughly researched
12 physical education programs in existence, as well as one of the most commercially successful
13 physical education programs on the market.

14 5. Prior to SDSUF exclusively licensing SPARK to SPORTIME, LLC, James F.
15 Sallis, Ph.D., Paul Rosengard, and I disseminated the SPARK program through coordinated
16 marketing and sales efforts. Those efforts not only developed the marketing for the core
17 educational curriculum, they developed the trademark SPARK and the quality research based
18 curriculum that the trademark represents.

19 6. On or about September 30, 2002, SDSUF granted SPORTIME, LLC
20 ("SPORTIME") an exclusive license ("SPARK License") to market, use, demonstrate, sell, and
21 commercialize the following intellectual property: (1) copyrighted SPARK works; (2) all
22 derivatives of those works; (3) any SPARK works, present or future, created with any assistance
23 from SDSU faculty or staff; (4) all derivatives of those works; and (5) any SPARK works,
24 present or future, bearing the SPARK Trademark (collectively "SPARK Products"). The SPARK
25 License defined "derivative work" to mean "a work derived from and based on a pre-existing
26 copyrighted work." The SPARK License also defined "work" to mean "any instructional text
27
28

1 used in the SPARK Program that is sold, leased, distributed or otherwise transferred to SPARK
2 Customers, in any media format.” A true and correct copy of the SPARK License is filed
3 herewith as Exhibit “A.”

4 7. In exchange for the exclusive right to market and sell the SPARK Products,
5 SPORTIME agreed to (1) pay SDSUF a royalty equal to eleven percent of all revenue derived
6 from the sale of any SPARK Products (“SPARK Royalty”); (2) maintain accurate books of
7 account with respect to the SPARK Products sold along with permitting SDSUF to review and
8 audit such books on an annual basis, and (3) provide SDSUF with written accountings on a
9 quarterly basis of all SPARK Products sold.

10 8. I understand SPORTIME to be a wholly owned subsidiary of SCHOOL
11 SPECIALTY, and I am referencing SCHOOL SPECIALTY and SPORTIME as one in the same
12 in this declaration.

13 9. SCHOOL SPECIALTY markets six lines of SPARK Products each aimed at a
14 separate Pre-K through 12th grade demographic. For each program, SCHOOL SPECIALTY
15 sells (1) on-line access to the SPARK curriculum at SPARKfamily.org (“On-Line Curriculum”),
16 (2) a printed and bound copy of the SPARK curriculum (“Printed Curriculum”), (3) a compact
17 disc containing music specific to the SPARK program (“SPARK CD”), and (4) a teacher’s
18 edition for implementing the SPARK curriculum marketed under the trade name SPARKFolio
19 (collectively “SPARK Works”). All four SPARK Works relate to one another and constitute
20 individual components of an integrated lesson plan, such that each component of the SPARK
21 Works are directly referenced in and incorporated into the other SPARK Works for coordinated
22 use in carrying out the SPARK educational program.

23 10. Upon issuance of the SPARK License, my colleague, Paul Rosengard, became the
24 executive director of SPARK for SCHOOL SPECIALTY. James F. Sallis, Ph.D. and I were
25 retained as independent consultants to attend quarterly review meetings for SPARK, as well as to
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1 contribute to the future development of SPARK educational materials. I have, therefore, been
2 actively involved with SPARK from its inception until current date.

3 11. As one of the original creators of SPARK, I receive from SDSUF a portion of the
4 royalties derived from the SPARK License. I, therefore, have personal knowledge of the
5 royalties received from the SPARK License and the calculations provided by SCHOOL
6 SPECIALTY in support thereof.

7 12. The On-Line Curriculum, Printed Curriculum, SPARK CD, and SPARKfolio all
8 prominently display the SPARK trademark, and are all marketed by SCHOOL SPECIALTY as
9 components of the SPARK educational program. The SPARK Works are marketed and sold both
10 individually and in bundles. Filed herewith as **Exhibit "B"** is a true, correct, and current
11 exemplar of the on-line marketing conducted by SCHOOL SPECIALTIES to sell the SPARK
12 Works in a manner consistent with their integrated use in the SPARK educational program.

13 13. Up until the filing of the above-captioned bankruptcy, I understood that SCHOOL
14 SPECIALTY would remit royalties due SDSUF on a quarterly basis with a purported accounting
15 of revenue from which the royalties were calculated. SDSUF, James F. Sallis, Ph.D., and I
16 always believed that SCHOOL SPECIALTY was paying royalties on the On-Line Curriculum,
17 SPARK CD, and SPARKfolio; although I now understand such was not the case. At no time did
18 SCHOOL SPECIALTY ever notify James F. Sallis, Ph.D., SDSUF, or me that it was neither
19 accounting for nor paying royalties on the On-Line Curriculum, SPARK CD, and/or
20 SPARKfolio. Similarly, no one ever inquired of us as to applicability of the SPARK License to
21 these products, even though we were attending quarterly SPARK board meetings.

22 14. Prior to the filing of the above-captioned bankruptcy, SDSUF, James F. Sallis,
23 Ph.D., and I were concerned with the manner in which SCHOOL SPECIALTY was
24 administering the SPARK License. The royalty calculations seemed suspicious in light of
25 revenue, and members of the educational community were concerned about the continuing
26 financial responsibility of SPARK under SCHOOL SPECIALTY.
27
28

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

SCHOOL SPECIALTY, INC., et al.,
Debtors.¹

Chapter 11

Case No. 13-10125-KJC

(Jointly Administered)

CERTIFICATE OF SERVICE

I, Brya M. Keilson, Esquire, hereby certify that on August 21, 2013 a true and correct copy of *San Diego State University Research Foundation's Objection To School Specialty, Inc.'s Proposed Assumption Of Executory Contract* was caused to be served upon all parties whom have elected to receive electronic notification via the Court's CM/ECF system and upon the parties listed on the attached service list via U.S. First Class Mail, postage pre-paid:

Date: August 21, 2013

**GELLERT SCALI BUSENKELL &
BROWN, LLC**

/s/ Brya M. Keilson

Brya M. Keilson (DE 4643)

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are: School Specialty, Inc. (1239); Bird-In-Hand Woodworks, Inc. (8811); Califone International, Inc. (3578); Childcraft Education Corp. (9818); ClassroomDirect.com, LLC (2425); Delta Education, LLC (8764); Frey Scientific, Inc. (3771); Premier Agendas, Inc. (1380); Sax Arts & Crafts, Inc. (6436); and Sportime, LLC (6939).

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