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

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| In re: | Chapter 11 |
| SCHOOL SPECIALTY, INC., *et al.*,[1] | Case No. 13-10125 (KJC) |
| Reorganized Debtors. | Jointly Administered |
| | **Re: Docket Nos. 902, 1158 & 1421** |

**REORGANIZED DEBTORS' REPLY TO SAN DIEGO STATE UNIVERSITY RESEARCH FOUNDATION'S OBJECTION TO PROPOSED ASSUMPTION OF EXECUTORY CONTRACT**

The above-captioned reorganized debtors (collectively, "School Specialty" or the "company") hereby file this reply (the "Reply") in support of assumption of that certain Exclusive Copyright License Agreement (the "License Agreement") under the *Debtors' Second Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code* (the "Plan") [Dkt. No. 1158], which was previously confirmed by the court on May 23, 2013 [Dkt. No. 1159], as corrected on June 3, 2013 [Dkt. No. 1186]. The objection (the "Objection") filed by San Diego State University Research Foundation ("SDSU") materially misstates the pertinent facts regarding the License Agreement and identifies no legal basis that prevents the company from assuming the License Agreement. Accordingly, it should be overruled.

## PRELIMINARY STATEMENT

1. School Specialty disagrees vehemently with the allegations and statements in the Objection. There is no fraud here, no scheme to deceive, no bad intent, and School Specialty is

[1] The Reorganized Debtors in these cases, along with the last four digits of each Reorganized Debtor's federal tax identification number and state of incorporation, are: School Specialty, Inc. (Del.; 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 Reorganized Debtors' corporate headquarters is W6316 Design Drive, Greenville, Wisconsin 54942.

dismayed by SDSU's decision to level such unsupportable allegations to the contrary. The true facts are far different.

2. Since late March of this year, the company has worked diligently and in good faith to ensure that SDSU receives the proper cure amount in connection with assumption of the License Agreement by investigating how one of its subdivisions, SPARK, had historically calculated royalty payments due to SDSU. As a result of this investigation, the company has determined that SDSU is correct, and that while printed curriculum materials were included in the sales figures on which the royalties were calculated, related non-printed materials (for example, the parallel sale of online or electronic versions of the same printed materials) were not included. The company acknowledges that this represents a significant error, and has therefore agreed to correct this error by curing those amounts ***in full – plus interest***.

3. But neither the fact that this error was made nor the fact that it has taken time to fully understand and reconcile the scope of this mistake is indicative of bad faith or bad acts by the company. These royalty calculations were based upon the sales information provided by SPARK – the head of which is a former member of the SDSU team that developed the very SPARK Products at issue and who, as a result, receives a percentage of the royalties that are generated. The SPARK team is the most knowledgeable about the SPARK Products, has existing relationships with SDSU, and, in at least one instance, has a financial interest in the royalties that are paid; in sum, they have absolutely no incentive to intentionally underreport royalty-bearing sales. Moreover, when the company's senior management became aware of this error, they agreed to fully compensate SDSU for this error – including by paying interest on past due amounts. The company submits that these facts are strong indications of an honest mistake by the company and good faith efforts to correct it.

4. The company further submits that its efforts over the past few months to consensually revise the terms of the License Agreement to clarify its terms and, hopefully, prevent similar errors and misunderstandings in the future are additional indications of its good faith in this matter. The company believes that SDSU's failure to mention the extensive (though, admittedly, to date, unsuccessful) negotiations that have occurred in this respect is misleading as to the parties' interactions and the progress that had been made. That SDSU is frustrated that these good faith, arm's length negotiations have not been ultimately successful is understandable. That it chooses to express its frustration through allegations of bad faith and fraudulent actions that it knows are false is not.[2]

5. In light of the Objection, the company is prepared to assume the License Agreement as currently drafted and cure all monetary defaults as required by section 365 of the Bankruptcy Code. It is not late in doing so, since – by virtue of prior agreement between the parties – the issue of assumption of this License Agreement is still live. However, the company hopes that it will not be necessary to proceed with assumption over SDSU's objection, and that ongoing discussions between the parties will result in agreement on the terms of the company's assumption of the License Agreement.[3] Nevertheless, the company files this Reply to correct the factual record and confirm its willingness and ability to assume the existing License Agreement over the objection of SDSU, if that indeed proves necessary.

[2] Perhaps indicative of SDSU's true intentions with respect to the Objection is the additional objection that SDSU recently filed to an unrelated administrative motion (concerning the closing of the subsidiaries' bankruptcy cases). While the company believes this additional objection is without merit since the cases were deemed substantively consolidated under the Plan, this additional objection is noteworthy because it effectively contradicts SDSU's stated opposition to assumption: the recent pleading seems to have no issue with the company assuming the License Agreement, so long as assumption occurs in a timely manner.

[3] The company hopes to be able to submit to the Court an agreed-upon stipulation concerning the terms of its assumption of the License Agreement prior to the hearing that is scheduled on this matter.

## BACKGROUND[4]

### A. The License Agreement

6. Sportime, LLC ("Sportime"), a subsidiary of School Specialty, Inc. and a Reorganized Debtor, entered into the License Agreement with SDSU on September 30, 2002. Under the License Agreement, SDSU granted "an exclusive license to [Sportime] 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 [*i.e.*, worldwide]." Agmt. at 2.1. (The SPARK Products are, generally speaking, physical education curriculum materials, sold in a variety of media including print, CD, and online.) In exchange for this exclusive license, Sportime agreed to pay SDSU royalties equal to 11% of "all Revenue derived from any SPARK Products paid to [Sportime]." *Id.*, Exh. B.2 (also providing for royalties equal to 22% of Revenues derived from any Sublicensee, *i.e.*, 22% of the gross amounts invoiced by Sportime in respect of such a Sublicense).

7. The SPARK Products are sold by a small division of Sportime known as SPARK. Historically, SPARK has enjoyed a close relationship with SDSU through the affiliation of many of its employees with SDSU; in fact, the head of SPARK, Mr. Paul Rosengard, was one of the three original developers of the SPARK Products, and was hired by Sportime when it entered into the License Agreement with SDSU. *See* Rosengard Decl. at ¶ 3; *see also* Declaration of Thomas McKenzie, dated May 27, 2013, at ¶¶ 5 and 10 (attached to Objection) (explaining that "Prior to SDSUF exclusively licensing SPARK to SPORTIME, LLC, James F. Sallis, Ph.D., Paul Rosengard, and I disseminated the SPARK program through coordinated marketing and

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4 Support for the facts set forth herein may be found in the *Declaration of Paul Rosengard in Support of Reorganized Debtors' Reply to San Diego State University Research Foundation's Objection to Proposed Assumption of Executory Contract* (the "Rosengard Declaration"), attached as Exhibit A hereto.

sales efforts" and that "Upon issuance of the SPARK License, my colleague, Paul Rosengard, became the executive director of SPARK for SCHOOL SPECIALTY."). It is these individuals at SPARK – who had the greatest familiarity about the SPARK Products and the terms of the License Agreement – who provided the company's corporate finance department with the information concerning which sales were royalty-eligible, which formed the basis upon which royalty payments were then processed. *See* Rosengard Decl. at ¶ 4. Accordingly, to suggest that Mr. Rosengard and the SPARK employees under his direction intentionally underreported royalty-eligible sales to shortchange the authors and developers of the SPARK Products (of which Mr. Rosengard is himself one) is absurd; to suggest that the company's finance department knew that the information provided by these individuals was materially incorrect, or that their reliance upon this information was somehow unreasonable, is similarly unavailing.

**B. Request for Information regarding Royalty Calculations**

8. As SDSU notes, during the pendency of the company's chapter 11 cases, SDSU requested a full financial reconciliation of royalties paid and revenues earned from the SPARK Products. This request was made due to their stated belief that they had not received all the royalties to which they were entitled. Notably, while the License Agreement specifically authorized SDSU to retain an independent, certified public accountant to review Sportime's records and its royalty calculations once a year if it had concerns on that front, *see* Agmt. at 4.1, to the best of the company's knowledge, SDSU had never availed itself of this option. Moreover, with only exception, the company is not aware of SDSU or authors Sallis and McKenzie ever expressing such concerns to Mr. Rosengard or any other individuals at SPARK, even as new products were brought online. *See* Rosengard Decl. at ¶ 5 (noting only one such request made a number of years ago). Thus, until this request was made during the chapter 11 cases, the company had no reason to believe that any current issue might exist with respect to

royalty calculations. Nevertheless, because the company wished to assume the License Agreement, they agreed to provide such information to SDSU and to work with SDSU to consensually determine the proper cure amount.

9. After this initial request was made, SDSU filed a proof of claim against Sportime relating to the License Agreement in the amount of $150,000.00 [Claim No. 1549]. That claim specified that these amounts were for "royalties owed pursuant to intellectual property licensing agreement."

10. Gathering and reconciling SPARK's historic sales information and royalty payments took time; thus, in late April 2013, counsel to the company agreed to extend SDSU's deadline to object to assumption of the License Agreement, to save SDSU from the need to file an objection to a cure amount that the parties already knew was likely to change once the historical financial data was gathered and analyzed. *See* Conditional Disclosure Statement Order, dated April 24, 2013 [Dkt. No. 902] at ¶ 32 (extending SDSU's objection deadline to May 31, 2013, or such later date as the parties agree).[5] Because the parties had agreed on the need for due diligence and further discussions to fix the proper cure, the company understood (and believed that SDSU also understood) that the number contained in the cure notice – which was based on the records of the company's corporate finance department – was likely subject to change as information was obtained.

**C. Establishing the Proper Cure Amount**

11. In May of this year, the company provided SDSU with a full accounting of the royalty payments and the revenues earned by SPARK on the SPARK Products from 2007

[5] That deadline was subsequently extended by counsel on a rolling basis (generally, bi-weekly) as negotiations continued, through and including August 22, 2013; the company and its counsel had anticipated further extending that deadline as the parties finalized the agreements.

through 2012 (which was the full extent of information available to the company under its current accounting system). Based on that information, the company's senior management determined that SDSU was correct, and that certain non-printed curriculum products had erroneously been excluded from SPARK's royalty calculations. To correct this error, the company agreed to pay a cure amount to $410,339.92; it also agreed to pay interest that had accrued on those unpaid amounts, resulting in an agreed proposed cure amount of $490,000.00 in respect of these miscalculations. *See* Rosengard Decl. at ¶ 6. Notably, this figure represents the total amount of unpaid royalties, plus the full amount of interest due on those payments under applicable state law, and has been rounded to the nearest full figure – there is no discount applied on the amount owed.

12. To the best of the company's knowledge, the parties are in agreement with respect to the cure amount required with respect to the non-printed curricula sold by SPARK, and the sole outstanding issue concerns a question that has only recently come to management's attention: whether royalties are due to SDSU from sales by another affiliate of the company, Premier Agendas, Inc., of school planners in which the SPARK logo and certain SPARK information appeared. However, the company understands that this arrangement arose as a means of utilizing the wide distribution of Premier Agendas' healthy living-themed planners to promote brand awareness of SPARK. To aid its affiliate's sales, Premier Agendas included certain information and references relating to SPARK and its curriculum in its healthy living planners. Importantly, the inclusion of these SPARK references did not increase the value of the planners or generate additional revenue for Premier Agendas: that was not its purpose. Rather, this was a form of advertising for SPARK, designed to increase sales of the SPARK Products. *See generally* Rosengard Decl. at ¶¶ 8-9.

13. Consistent with this understanding, Sportime did not receive any royalties from Premier Agendas on account of these products. As such, Sportime realized no revenue from these sales on which to pay a royalty to SDSU. *Id*. And the company has not identified any terms in the License Agreement that prohibit this type of arrangement:

- the License Agreement specifies that royalties are to be calculated based upon *the revenues received by Sportime*, either directly from a customer, or indirectly through a sublicense arrangement, from the SPARK Products; upon information and belief, no such revenues were received by Sportime through this arrangement; and
- the License Agreement permits Sportime to enter into sublicenses, does not require SDSU's consent with respect to such sublicenses, and does not set restrictions on the terms of such sublicenses; thus, it appears that nothing prohibited Sportime from entering into such an arrangement with an affiliate or from granting that affiliate a royalty-free sublicense.

As such, the company does not believe that royalty payments were due – or now are due – to SDSU in respect of these planners.

**D. Revisions to the License Agreement**

14. The company believes that its efforts to resolve its disputes with SDSU are not in any way in bad faith. Rather, upon becoming aware of a problem, the company's senior management has taken steps to resolve it and preserve the SDSU relationship. In fact, a major component of the company's efforts in this regard has been its negotiations with SDSU regarding revisions to the poorly drafted License Agreement.

15. Though SDSU does not mention these negotiations in its Objection, the company believes that these extensive discussions underscore its willingness and desire to provide SDSU with comfort that the mistakes of the past would not occur again. While these discussions were not ultimately successful, the parties did in fact make material progress in revising the License Agreement in a way that would have greatly reduced the risk of further disputes between the

parties. *See* Rosengard Decl. at ¶ 10. Nevertheless, in light of the Objection, the company is prepared to assume the License Agreement as written, if that is necessary.

**ARGUMENT**

16. Under section 365(a) of the Bankruptcy Code, a debtor-in-possession may assume an executory contract, including one that is in default, so long as the debtor cures such default, to the extent it is possible to do so, and provides adequate assurance of future performance. 11 U.S.C. §§ 365(a), (b). Under section VII.A of the Plan, School Specialty assumed all executory contracts and unexpired leases that were not specifically rejected. The License Agreement falls within this provision, and was identified as a contract to be assumed. *See* First Amended Plan Supplement, filed May 15, 2013 [Dkt. No. 1044].

17. Here, the License Agreement is executory and the company is prepared to cure monetary defaults in full and provide SDSU with adequate assurance of its future performance. Because SDSU's other objections are without merit, the only issue before the Court concerns the amount of the cure.

**A. The License Agreement Is Executory and Has Not Been Terminated.**

18. SDSU objects to assumption on the grounds that the License Agreement is not executory because Sportime is in material breach of the agreement. Obj. at III.A. This argument is without merit: the Bankruptcy Code requires that the debtor cure defaults as a condition to assuming a contract. *See* 11 U.S.C. § 365(b). By doing so, it specifically envisions that contracts are capable of assumption even when the debtor is in breach thereof. To hold otherwise would be to render almost every contract to which a financially-troubled debtor is party not executory and, therefore, not capable of being assumed.

19. Putting this argument aside, the License Agreement is clearly executory. Consistent with the Countryman definition of an executory contract, the License Agreement is a

contract where both sides have material unperformed obligations: Sportime must, among other things, market the SPARK Products for sale and pay royalties resulting from such sales; SDSU, in turn, is obligated to, among other things, enforce the copyrights licensed to Sportime in the event of any infringement by a third party. There also exists a mutual indemnification obligation between the parties. *See* Agmt. at 2.1, 8.1, 14.9.

20. SDSU further objects to assumption on the grounds that the License Agreement has been terminated by virtue of Sportime's material breach thereof. Obj. at III.A. This argument falls flat in the face of the language of the License Agreement itself: it provides that, in the event Sportime does not pay royalties when due, SDSU may terminate the agreement after providing Sportime with written notice of termination, subject to a grace period. Agmt. at 12.2. To the best of the company's knowledge, no such written notice was ever given—other than, arguably, the Objection; moreover, even assuming that the Objection constitutes proper notice of SDSU's intention to terminate the License Agreement, the basis for that termination notice is the payment of past-due prepetition royalties – in other words, a cure amount. As noted below, debtor's obligation to pay such amounts is governed by section 365 of the Bankruptcy Code.

**B. The Company is Prepared and Able to Cure All Defaults and Provide Adequate Assurances of Future Performance When It Assumes the License Agreement.**

21. SDSU alleges that the company cannot cure – and has not cured – defaults, and that it cannot provide – and has not provided – adequate assurance of its future performance. Obj. at III.C, D, E. This is incorrect.

22. As an initial matter, SDSU misconstrues the Bankruptcy Code's requirement regarding cure and adequate assurance. Those are conditions to assumption: they arise when the debtor assumes the contract. 11 U.S.C. § 365(b) (prohibiting assumption of a contract or lease "unless, *at the time of assumption of such contract*", the debtor cures defaults and provides

adequate assurance of future performance under the contract) (emphasis added). Since the issue of the company's assumption of the License Agreement is still live – as the Objection makes clear – the company's obligation to pay the cure or provide such assurances has not yet been triggered. Rather, the company must cure defaults and provide adequate assurance of future performance when the court authorizes its assumption. It is fully prepared and able to do so.

23. *First*, School Specialty is prepared to cure all defaults, consistent with section 365(b)(1)(A). Specifically, as noted above, School Specialty has already agreed to pay SDSU a cure in the amount of $490,000.00 to cure previous errors in how royalty payments were calculated – the same amount specified in the Objection. The company has also provided SDSU with financial information relating to sales by SPARK for the relevant period. *See* Obj. at ¶ 16. Furthermore, the company has spoken with SDSU about the Premier Agendas arrangement and is in the process of answering SDSU's questions on that matter; it expects that process will be completed before any hearing on this matter.

24. Nothing more is required in respect of past defaults: the Bankruptcy Code recognizes that certain breaches cannot be cured after the fact. *See* 11 U.S.C. § 365(b). Such is the case here: School Specialty cannot now go back in time and prevent the miscalculations from occurring, or have the SPARK employees reach out to SDSU to discuss what implications, if any, might arise from asking an affiliate to do some free advertising for SPARK. In connection with assumption, the company will pay SDSU the money that is owed in respect of these events. That fulfills its requirements under the Bankruptcy Code with respect to defaults.

25. *Second*, School Specialty is prepared to include in its cure amount interest at the rate specified by applicable California law. School Specialty submits that, consistent with

section 365(b)(1)(B), this interest appropriately compensates SDSU for any pecuniary harm resulting from past-due payments.

26. *Third*, School Specialty is prepared to provide adequate assurance of its future performance under the License Agreement, consistent with section 365(b)(1)(C). While the exact parameters of such assurances are not specified in the Bankruptcy Code, generally speaking, proof of a debtor's financial wherewithal and ability to pay amounts due under the contract will suffice. *See In re Dura Automotive Sys., Inc.*, 2007 WL 7728109, at * 97-8 (Bankr. D. Del. Aug. 15, 2007) (concluding that proof of an assignee's financial health fulfills this requirement in the context of assigning an executory contract). Here, this Court has already confirmed the Plan and found that the Plan was feasible. *See* Confirmation Order [Dkt. No. 1159], at ¶ Y. At confirmation, the Court also concluded that the company had provided adequate assurance of future performance with respect to the contracts to be assumed in the Plan – and no party, including SDSU, objected to confirmation on that basis. *Id.* at ¶ 45(i).

27. Moreover, the company has agreed to pay the full cure amount of $490,000.00 to SDSU promptly after the order authorizing assumption of the License Agreement is entered. The company believes that, taken together, the company's financial wherewithal and its promise to promptly pay the full cure amount suffice as proof of its ability to perform under the License Agreement. Having thus fulfilled the requirements of section 365, the company seeks to assume the License Agreement over SDSU's Objection.

WHEREFORE, School Specialty respectfully request that this Court overrule the Objection and authorize assumption of the License Agreement on the terms set forth herein.

Dated: September 5, 2013
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

*/s/ Morgan L. Seward*

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*Counsel to the Reorganized Debtors*

**<u>Exhibit A</u>**

Rosengard Declaration

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

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| In re:<br><br>SCHOOL SPECIALTY, INC., *et al.*,<br><br>Reorganized Debtors. | Chapter 11<br><br>Case No. 13-10125 (KJC)<br><br>Jointly Administered |

**DECLARATION OF PAUL ROSENGARD**
**IN SUPPORT OF REORGANIZED DEBTORS' REPLY TO**
**SAN DIEGO STATE UNIVERSITY RESEARCH FOUNDATION'S**
**OBJECTION TO PROPOSED ASSUMPTION OF EXECUTORY CONTRACT**

PAUL ROSENGARD, pursuant to 28 U.S.C. § 1746, declares:

1. I am the Vice President – SPARK at Sportime, LLC ("Sportime"), which is a subsidiary of School Specialty, Inc., and a Reorganized Debtor in these cases. In this capacity, I am responsible for, and familiar with, the operations, business and financial affairs of Sportime's SPARK division ("SPARK"), including that certain Exclusive Copyright License Agreement (the "License Agreement") between San Diego State University Research Foundation ("SDSU") and Sportime under which SDSU granted Sportime – through the SPARK division – an exclusive license to market and sell the SPARK products. I submit this declaration in support of the Reorganized Debtors' reply to the objection (the "Objection") filed by SDSU regarding assumption of that License Agreement.

2. Except as otherwise noted, all matters set forth herein are based on (a) my personal knowledge and belief and (b) my review of relevant documents including the License Agreement and the Objection. If called to testify, I could and would testify to the facts set forth herein.

## I. Background

3. I joined Sportime in 2002 when the parties executed the License Agreement through which Sportime would support the SPARK division. As the Vice President - SPARK, I am generally responsible for SPARK's operational performance and its revenues and profitability. Sportime hired me to serve in this role due to, among other things, my involvement with the development of the SPARK products and curriculum for SDSU and the fact that I had served in the same leadership role since I launched the SPARK dissemination effort during the 1993-1994 school year. As one of the three principal individuals who developed SPARK, I continue to earn a percentage of the curriculum royalties paid under the License Agreement. In that capacity, I maintain relationships with my fellow developers and other individuals at SDSU, two of whom have continued to serve on the SPARK Advisory Board and are paid for their consultation.

## II. Calculation of Royalty Payments Due under the License Agreement

4. Since 2008, royalty payments due under the License Agreement have generally been calculated by the company's central corporate finance department based on information provided by SPARK employees under my supervision concerning royalty-bearing sales at SPARK. This information historically has included data regarding printed curriculum sales, and approximately 4 years ago, began including sales of digital products.

5. To the best of my knowledge, I am aware of only one request by SDSU for information concerning how royalties were calculated, which request was made a number of years ago (and in response to which I directed SDSU to the appropriate corporate personnel). Other than that request, to the best of my knowledge, no other concerns had been raised either by SDSU, my fellow developers of the SPARK curriculum, or others, prior to the chapter 11 cases commenced by School Specialty, Inc. and its subsidiaries, regarding how royalties were

calculated. Similarly, to my knowledge, other than that one instance, at no time prior to the chapter 11 cases did SDSU retain or request an audit of these calculations or of SPARK's books and records.

6. However, I am now informed that certain curricular items are also royalty-bearing, resulting in larger royalty amounts being due under the License Agreement. I now also understand the company is prepared to pay a total amount of $490,000.00 to SDSU in respect to unpaid royalty amounts.

7. To the best of my knowledge, there was no intention by anyone at SPARK to underreport royalty-bearing sales or underpay royalties owed under the License Agreement; based on my knowledge of the relevant facts, I strongly dispute the allegations contained in the Objection in this respect.

**III. SPARK's Arrangements with Premier Agendas**

8. I am informed that questions have been raised concerning the inclusion of the SPARK logo and certain limited information about SPARK in certain planners sold by Premier Agendas, Inc., an affiliate of Sportime.

9. On or about 2011, discussions occurred between senior management team members from both SPARK and Premier Agendas regarding how Premier's healthy-living themed planners could be utilized to improve SPARK sales. Specifically, the parties discussed including the SPARK logo and certain related information about SPARK in their new planners. This was intended as a means of promoting brand awareness regarding the SPARK products among the educators and school administrators who utilized those planners – essentially, as a way of advertising SPARK to Premier's existing customers and aiding in the sales of SPARK curriculum, training, and Sportime equipment in Canada. To the best of my knowledge, no royalties have ever been paid by Premier to SPARK or Sportime related to this arrangement and

SPARK has never received any revenue from Premier on the sale of the planners. With no revenue coming in, there was no reason to believe that this arrangement could somehow be flagged as a royalty bearing item.

**IV. Recent Discussions Concerning Revisions to the License Agreement**

10. I am aware that, in conjunction with discussions over past-due royalty amounts over the past few months, discussions have also occurred concerning possible revisions to the terms of the License Agreement. While I was not involved in these negotiations, it is my understanding these conversations were substantially advanced, but did not ultimately result in agreement between the parties on the terms of a revised agreement.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct.

Dated: September 5, 2013
SAN DIEGO, California

PAUL ROSENGARD