IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SFX ENTERTAINMENT, INC., et al.[1]	Case No. 16-10238 (MFW)
Debtors.	(Jointly Administered)
	Hearing Date: 11/9/16 @ 10:00 a.m. (ET)
	Re: Docket Nos. 1078 & 1092

MASTERCARD EUROPE SA'S OBJECTION WITH RESPECT TO CONFIRMATION OF FIFTH AMENDED JOINT PLAN OF REORGANIZATION OF SFX ENTERTAINMENT, INC., *ET AL.* UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

MasterCard Europe SA f/k/a MasterCard Europe sprl ("MasterCard") hereby submits this objection (the "Objection") to confirmation of the *Fifth Amended Joint Plan of Reorganization of SFX Entertainment, Inc., et al. under Chapter 11 of the Bankruptcy Code* [D.I. 1078] (the "Plan")[2] of the above-captioned debtors (the "Debtors"). In support of this Objection,[3] MasterCard respectfully states as follows:

[1] The Debtors in these Chapter 11 Cases, along with the last four (4) digits of each Debtor's federal tax identification number, if applicable, are: 430R Acquisition LLC (7350); Beatport, LLC (1024); Core Productions LLC (3613); EZ Festivals, LLC (2693); Flavorus, Inc. (7119); ID&T/SFX Mysteryland LLC (6459); ID&T/SFX North America LLC (5154); ID&T/SFX Q-Dance LLC (6298); ID&T/SFX Sensation LLC (6460); ID&T/SFX TomorrowWorld LLC (7238); LETMA Acquisition LLC (0452); Made Event, LLC (1127); Michigan JJ Holdings LLC (n/a); SFX Acquisition, LLC (1063); SFX Brazil LLC (0047); SFX Canada Inc. (7070); SFX Development LLC (2102); SFX EDM Holdings Corporation (2460); SFX Entertainment, Inc. (0047); SFX Entertainment International, Inc. (2987); SFX Entertainment International II, Inc. (1998); SFX Intermediate Holdco II LLC (5954); SFX Managing Member Inc. (2428); SFX Marketing LLC (7734); SFX Platform & Sponsorship LLC (9234); SFX Technology Services, Inc. (0402); SFX/AB Live Event Canada, Inc. (6422); SFX/AB Live Event Intermediate Holdco LLC (8004); SFX/AB Live Event LLC (9703); SFX-94 LLC (5884); SFX-Disco Intermediate Holdco LLC (5441); SFX-Disco Operating LLC (5441); SFXE IP LLC (0047); SFX-EMC, Inc. (7765); SFX-Hudson LLC (0047); SFX-IDT N.A. Holding II LLC (4860); SFX-LIC Operating LLC (0950); SFX-IDT N.A. Holding LLC (2428); SFX-Nightlife Operating LLC (4673); SFX Perryscope LLC (4724); SFX-React Operating LLC (0584); Spring Awakening, LLC (6390); SFXE Netherlands Holdings Cooperatief U.A. (6812); SFXE Netherlands Holdings B.V. (6898). The Debtors' business address is 902 Broadway, 15th Floor, New York, NY 10010.

[2] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Plan.

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PRELIMINARY STATEMENT

1. The Plan cannot be confirmed because its executory contract, injunction, and discharge provisions improperly strip MasterCard and similarly-situated contractual counterparties of their rights while permitting the Debtors to evade the issue of such counterparties' definitive treatment under the Plan until after confirmation or even after the Effective Date. The Plan amounts to an improper leverage tactic, and should be rejected as such.

2. As discussed further herein, MasterCard is currently engaged in a dispute with SFX Entertainment, Inc. ("SFX") regarding the parties' respective rights under a prepetition sponsorship agreement. While MasterCard has negotiated in good faith with SFX, to date those efforts have not resulted in a consensual resolution. In the absence of such resolution, MasterCard is compelled to file this Objection to prevent the improper and impermissible impairment of its rights under the Plan.

3. This Court should deny confirmation of the Plan for at least two reasons.[4] First, the Plan impermissibly extends the deadline for the Debtors to decide to assume or reject executory contracts beyond the date of plan confirmation and deprives counterparties to assumed executory contracts of their right to adequate assurance in violation of sections 365 and 1129(a)(1) of the Bankruptcy Code. By permitting the Debtors (and the Reorganized Debtors) to effectively hold contractual counterparties hostage to their whims on an indefinite basis, the Plan unfairly impairs MasterCard's and other similarly-situated contractual counterparties' rights. Second, although the Debtors characterize the Plan release provisions as voluntary, the Plan's

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[3] Pursuant to Del. Bankr. L.R. 9013-1(f), MasterCard does not consent to the entry of a final order by this Court in connection with this Motion if it is later determined that this Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

[4] MasterCard reserves the right to amend, supplement, or otherwise modify its objection and to object to any other plan filed by the Debtors or any other plan proponents.

injunction provisions effectively constitute an involuntary release and otherwise improperly impair the rights of non-consenting third parties.

4. Additionally, MasterCard objects to the Debtors' proposed assumption of any or all of their agreements with MasterCard on the grounds that (i) the Debtors have failed to adequately identify the executory contract or contracts proposed to be assumed, and (ii) the proposed assumption does not comply with section 365 of the Bankruptcy Code.

BACKGROUND

I. The Dispute under the Master Framework Documents

5. SFX is currently engaged in an ongoing dispute with MasterCard whereby SFX seeks to recover payments allegedly due under certain sponsorship agreement documents. MasterCard disputes any obligation to make further payments to SFX, both because the document on which SFX relies for its purported payment rights is a non-binding draft and because SFX is not entitled to payment in any event in light of SFX's breaches of the sponsorship agreement documents.

6. On July 30, 2014, MasterCard, on its own behalf and on behalf of its Affiliates,[5] and SFX, on its own behalf and on behalf of its Affiliates (collectively, the "Parties") entered into the Master Framework Agreement, which was amended by that certain Amendment No. 1 to Master Framework Agreement, effective as of December 3, 2014 (as amended, the "Original Agreement"). A copy of the Original Agreement is attached hereto as **Exhibit I**. The Original Agreement included [redacted] including a Schedule C entitled [redacted] Schedule C provided, among other things, for MasterCard to make certain Installment Payments (as defined therein) to

[5] As used herein, "Affiliates" has the meaning ascribed to such term in the Master Framework Documents (defined below).

SFX in exchange for sponsorship rights and other marketing- and sponsorship-related projects with SFX in accordance with the following schedule: (i) [redacted] on or before December 31, 2014; (ii) [redacted] on or before June 30, 2015; (iii) [redacted] on or before December 31, 2015; (iv) [redacted] on or before June 30, 2016; and (v) [redacted] on or before September 30, 2016. [redacted]

7. Pursuant to the then-operative version of Schedule C, MasterCard made the December 31, 2014 and June 30, 2015 Installment Payments to SFX.

8. On August 14, 2015, the Parties entered into the Amended and Restated Master Framework Agreement, a copy of which was attached as Exhibit I to the declaration attached as Exhibit B to the Debtors' sealed Claim Objection (the "Amended Agreement"), which amended, replaced, and superseded the Original Agreement, including Schedule C, in its entirety. *See* Amended Agreement § 16.1. The Amended Agreement attached a draft version of Schedule C identical to the Schedule C attached to the Original Agreement. In Section 1.1 of the Amended Agreement, the Parties expressly acknowledged that [redacted] and that [redacted] *Id.* § 1.1. The Parties further agreed to [redacted]

[redacted] *Id.*

9. On September 3, 2015, the Parties entered into the Binding Term Sheet, a copy of which was attached as Exhibit II to the declaration attached as Exhibit B to the Debtors' sealed Claim Objection (the "Term Sheet," and together with the Original Agreement, the Amended Agreement, and any exhibits thereto, the "Master Framework Documents").[6] Although the Term Sheet provided updated terms and conditions for [redacted] it did not provide updated terms and conditions for Schedule C or [redacted] Instead, the Term Sheet provided, among other things, that [redacted] *see* Term Sheet at 1, and that [redacted] *id.* at 5 (addressing Schedule C and [redacted]. The Parties have since engaged in periodic negotiations, but have yet to agree upon a final version of Schedule C.

10. The Term Sheet also contained a [redacted] providing that [redacted]

[6] The Debtors have taken the position that the Master Framework Documents are confidential, and MasterCard agrees. Accordingly, references thereto are being redacted and the Original Agreement is being filed under seal, subject to an order of this Court approving the redactions or an agreement between the Parties waiving the confidential nature of the Master Framework Documents. This Court may take judicial notice of the Amended Agreement and the Term Sheet filed with the Debtors' Claim Objection pursuant to Federal Rule of Evidence 201. *See* Fed. R. Bankr. P. 9017 (incorporating, *inter alia*, Federal Rule of Evidence 201); *see also, e.g.*, *Maritime Elec. Co., Inc. v. United Jersey Bank*, 959 F.2d 1194, 1200 n.3 (3d Cir. 1991).

[redacted] *See* Term Sheet at 5 (discussing [redacted]. While SFX apparently believes that this boilerplate language means that the draft version of Schedule C was intended to be operative; *see* Claim Obj. at 5 n.5 (quoting Term Sheet), the Term Sheet's [redacted] merely reaffirms the fact that the Parties intended to enter into future final versions of the Schedules. Nothing in the Term Sheet expressed that the Parties had agreed to the draft version of Schedule C and nothing in the [redacted] was intended to do so either. Thus, nothing in the various Master Framework Documents rendered operative the expressly-non-final draft version of Schedule C attached to the Amended Agreement.

11. MasterCard negotiated with SFX both before and after the bankruptcy filing of SFX and its affiliated Debtors, including, among other things, through the submission to SFX of MasterCard's mark-up of a draft [redacted] on April 11, 2016 and MasterCard's discussion of that mark-up with SFX shortly thereafter. Although there were discussions after the last mark-up, SFX never responded to MasterCard's proposed edits and has thus far refused to submit a counterproposal or engage in substantive negotiations about the Parties' business relationship.

12. On or about April 27, 2016, SFX invoked the dispute resolution provisions of the Amended Agreement for purposes of asserting claims against MasterCard for failing to make the December 31, 2015, June 30, 2016, and September 30, 2016 Installment Payments, which SFX alleges are due and owing under Schedule C.[7]

[7] For the avoidance of doubt, while MasterCard was compelled to file this Objection to preserve its rights under the Amended Agreement, MasterCard does not waive, and hereby expressly reserves, the right to submit the Parties' dispute to arbitration pursuant to the exclusive dispute resolution provisions set forth in Section 13.3 of the Amended Agreement.

13. MasterCard disputes SFX's claims and allegations. Contrary to SFX's stated position, SFX is not entitled to the disputed December 31, 2015, June 30, 2016, and September 30, 2016 Installment Payments because there is no final and binding version of Schedule C in effect, as expressly required by the Amended Agreement. The version of Schedule C attached to the Original Agreement was expressly amended, restated, replaced, and superseded in its entirety by the Amended Agreement. The draft version of Schedule C attached to the Amended Agreement was included among other non-binding, non-final draft Attachments to the Amended Agreement to serve as a placeholder pending the Parties' agreement on a to-be-negotiated final version, but, in contrast to the version of Schedule C attached to the Original Agreement, was expressly non-final. *Compare* Original Agreement § 1.1 [redacted] *with* Amended Agreement § 1.1 [redacted]. Thus, the version of Schedule C attached to the Amended Agreement similarly cannot serve as a basis for SFX's claims against MasterCard because it is an expressly non-binding, non-final draft document that does not provide SFX with a valid contractual right to payment from MasterCard.

14. Additionally, SFX has itself committed various breaches of the Amended Agreement.

15. Despite their continued disagreement with each other's positions, MasterCard and SFX have continued their efforts to reach a mutually-acceptable resolution of their dispute under Amended Agreement, but have thus far been unsuccessful.

II. The Chapter 11 Cases

16. On February 1, 2016 (the "Petition Date"), the Debtors commenced the above-captioned cases (the "Chapter 11 Cases") by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Court").

17. On April 5, 2016, the Bankruptcy Court entered the *Order (A) Fixing Deadlines for Filing Proofs of Claim and (B) Designating Form and Manner of Notice Thereof* [D.I. 351] establishing deadlines for the filing of proofs of claim. MasterCard timely filed a proof of claim asserting contingent and/or unliquidated claims under the Master Framework Documents.

18. On April 13, 2016, SFX filed the Schedules of Assets and Liabilities for SFX Entertainment, Inc. (Case No. 16-10238) [D.I. 382]. The Master Framework Documents were identified as executory contracts and included in SFX's Schedule G (Executory Contracts and Unexpired Leases). *See* [D.I. 382] Sched. G at 13-14. Additionally, SFX's Schedules A/B (Real and Personal Property) listed a potential claim against MasterCard for MasterCard's alleged breach of the Amended Agreement. *Id.* Scheds. A/B at 11.

19. On July 26, 2016, SFX filed a disclosure statement and plan of reorganization, which were amended various times, *see* [D.I. 847], [D.I. 848], [D.I. 932], [D.I. 949], [D.I. 950], [D.I. 1009], [D.I. 1011], [D.I. 1061], [D.I. 1063], including, most recently, through the filing of the Plan and the *Disclosure Statement with Respect to the Fifth Amended Joint Plan of Reorganization of SFX Entertainment, Inc., et al. under Chapter 11 of the Bankruptcy Code* [D.I. 1079] (the "Disclosure Statement") on September 30, 2016.

20. On October 3, 2016, the Bankruptcy Court entered the *Order Granting Debtors' Motion for Entry of an Order (I) Approving the Disclosure Statement, (II) Establishing Procedures for the Solicitation and Tabulation of Votes to Accept or Reject the Plan, (III)*

Authorizing Electronic Voting for Certain Claims, (IV) Approving Forms of Notices and Ballots, (V) Establishing Notice and Objection Procedures in Respect Thereof, (VI) Setting Confirmation Hearing and Related Deadlines and (VII) Granting Related Relief [D.I. 1092] (the "Solicitation Order").

21. On October 10, 2016, the Debtors filed the *Debtors' Objection to Claim No. 403 Filed by MasterCard Europe SA f/k/a MasterCard Europe sprl* [D.I. 1110] (the "Claim Objection").

22. On October 25, 2016, the Debtors and MasterCard filed the *Certification of Counsel* (the "Stipulation") [D.I. 1168], whereby they stipulated to the postponement of briefing on the Claim Objection and the allowance of MasterCard's claim for voting purposes only in the amount $1.00. The Court approved the Stipulation on October 31, 2016. *See* [D.I. 1186].

23. On October 26, 2016, the Debtors filed the *Notice of Filing of Plan Supplement* [D.I. 1174] (the "Plan Supplement"), which included, among other things, a Schedule of Executory Contracts and Unexpired Leases To be Assumed with Respective Cure Amounts and a Form Notice (the "Schedule"). *See id.* Ex. I. The Schedule listed a "Master Framework Agreement" with MasterCard among the list of Executory Contracts proposed to be assumed under the Plan, with a proposed cure amount of $0. *See id.* at 7.

24. As of the date hereof, SFX has neither assumed nor rejected the Master Framework Documents.

ARGUMENT

I. The Plan Is Not Confirmable Because Its Executory Contract, Injunction and Discharge Provisions Are Improper

25. As discussed further below, the Plan is not confirmable because (i) the Plan impermissibly extends the deadline for the Debtors to assume or reject executory contracts well

beyond plan confirmation and deprives contractual counterparties of their adequate assurance rights in violation of sections 365 and 1129(a)(1) of the Bankruptcy Code, and (ii) the Plan contains impermissibly broad injunctive provisions constituting non-consensual releases in violation of section 524(e) of the Bankruptcy Code.

26. Section 1129 of the Bankruptcy Code governs confirmation of a plan of reorganization and sets forth the requirements that the plan proponent must satisfy in order for a plan to be confirmed. The plan proponent bears the burden of establishing that each of the requirements for plan confirmation has been satisfied. *In re Exide Techs.*, 303 B.R. 48, 58 (Bankr. D. Del. 2003); *In re Lernout & Hauspie Speech Prods., N.V.*, 301 B.R. 651, 656 (Bankr. D. Del. 2003). Section 1129(a)(1) of the Bankruptcy Code requires that the Plan comply with all applicable provisions of title 11 of the United States Code. *See* 11 U.S.C. § 1129(a)(1). The Debtors have not met their burden of establishing confirmability under section 1129, nor can they, given that the Plan provisions governing executory contracts, injunctions and releases are inappropriate and unsupportable under the Bankruptcy Code and other applicable law. The Bankruptcy Court should therefore deny confirmation of the Plan.

A. The Plan's Executory Contract Provisions Are Improper

27. The Plan's convoluted executory contract provisions offer little to no resolution for contractual counterparties such as MasterCard. Instead, these provisions give the Debtors the freedom to assume or reject, or to change their minds as to whether to assume or reject, executory contracts well after the Confirmation Date or even the Effective Date, as well as the freedom to unilaterally change positions as to whether a given contract is an Executory Contract whenever the Debtors see fit. These one-sided terms vitiate the statutory protections afforded to contractual counterparties under the Bankruptcy Code and should be rejected as improper.

28. The Plan impermissibly extends the deadline for the Debtors to assume or reject executory contracts well beyond Plan confirmation, contrary to the requirements of section 365(d) of the Bankruptcy Code. Section 7.01(a) of the Plan provides that, on the Effective Date, Executory Contracts not previously assumed or rejected shall be deemed rejected as of the Effective Date, except for an Executory Contract that (i) "is listed, either specifically or by category, on the schedule of assumed Executory Contracts and Unexpired Leases in the Plan Supplement"; (ii) was previously assumed or rejected pursuant to a Court order on or prior to the Confirmation Date; (iii) previously expired or terminated according to its terms; or (iv) is the subject of a motion to assume, assume and assign, or reject filed by the Debtors on or before the Confirmation Date, "except as otherwise provided in the Plan." Plan § 7.01(a). Although the Plan provides that the Plan Supplement shall be "filed with the Bankruptcy Court at least seven (7) days prior to the Voting Deadline," *id.* § 1.149, the Debtors elsewhere "reserve the right to alter, amend, modify, or supplement the schedule of assumed Executory Contracts in their discretion and with the consent of the Required DIP Lenders, prior to *the Effective Date* on no less than three (3) days' notice to the counterparty thereto," *id.* § 7.01(a) (emphasis added).

29. Thus, under the Plan, the Debtors are entitled to assume or reject Executory Contracts (through modification of the Plan Supplement) after the Confirmation Date and, notably, after the deadline for objections to assumption/assignment and confirmation of the Plan. *See id.* § 7.01(a) ("Each party to an Executory Contract or Unexpired Lease that does not File and serve upon counsel to the Debtors and the Required DIP Lenders by the deadline set for objections to Confirmation an objection to the Debtors' assumption and/or assignment of such Executory Contract or Unexpired Lease, will be deemed to consent to the assumption and/or assignment of such Executory Contract or Unexpired Lease"); Solicitation Order ¶ 27 (setting

November 2, 2016 as deadline for confirmation objections). These provisions are contrary to both the terms and purpose of section 365 of the Bankruptcy Code.

30. Section 1123(b)(2) of the Bankruptcy Code provides that a chapter 11 plan of reorganization may "*subject to section 365 of this title,* provide for the assumption, rejection or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section." 11 U.S.C. § 1123(b)(2) (emphasis added). Section 365 of the Bankruptcy Code, governing executory contracts and unexpired leases, provides that, in a Chapter 11 case, unless the court orders the debtor to assume or reject earlier, the debtor may assume or reject an executory contract "at any time before the confirmation of a plan." 11 U.S.C. § 365(d)(2) (emphasis added). According to its legislative history, section 365 was designed to "prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate." H. Rep. No. 595, 95th Cong., 1st Sess. 348 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978).

31. The Bankruptcy Code does not permit a debtor to defer its decision to assume or reject an unassumed executory contract until after a chapter 11 plan has been confirmed. Rather, by its plain terms, section 365(d)(2) provides that a debtor has until confirmation of a plan to decide, in the first instance, whether to assume or reject an executory contract. *Compare* 11 U.S.C. § 1114(e)(2) (granting administrative expense treatment to payments for retiree benefits required to be made "before a plan confirmed under section 1129 of this title is effective"). It is well-established that a statute's plain meaning should be conclusive, except in rare circumstances not applicable here. *See, e.g., U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 243 (1989).

32. Courts have read section 365(d)(2) in accordance with its clear text and concluded that the decision to assume or reject a contract must be made by the confirmation date. The

Supreme Court has explained that "[i]n a Chapter 11 reorganization, a debtor-in-possession has until a reorganization plan is confirmed to decide whether to accept or reject an executory contract, although a creditor may request the Bankruptcy Court to make such a determination within a particular time." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 (1984) (citing 11 U.S.C. § 365(d)(2)); *see also Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008) ("We agree with *Bildisco*'s commonsense observation that the *decision* whether to reject a contract or lease must be made before confirmation."). Other courts have reached similar conclusions. *See University Med. Ctr. v. Sullivan*, 125 B.R. 121, 124 (E.D. Pa. 1991) ("A debtor under Chapter 11 must elect to assume or reject any executory contract by the time a reorganization plan is confirmed, or, upon motion by the creditor, at an earlier time specified by the court."); *In re Resource Tech. Corp.*, 254 B.R. 215, 221 (Bankr. N.D. Ill. 2000) (in chapter 11 cases, "assumption or rejection must take place prior to confirmation of a plan, unless the court sets an earlier deadline"); *see also, e.g.*, *In re Physician Health Corp.*, 262 B.R. 290, 292 (Bankr. D. Del. 2001) ("Section 365(d)(2) permits a debtor to assume or reject an executory contract at any time *before confirmation* of a plan of reorganization." (emphasis added)); *In re Wheeling-Pittsburgh Steel Corp.*, 54 B.R. 385, 388 (Bankr. W.D. Pa. 1985) ("As [section 365(d)(2)] clearly states, the debtor may wait *until the plan confirmation date* to make a decision to assume or reject an unexpired lease." (emphasis added)).

33. Accordingly, the Plan does not comply with Code section 365(d)(2) because it allows SFX to decide whether to assume or reject the Amended Agreement after Plan confirmation. Moreover, the meager three-day "notice" that the Debtors propose to provide to MasterCard with respect to such post-confirmation changes is wholly ineffective to protect

MasterCard's interests, as evidenced by the fact that the Plan does not even contemplate a mechanism for asserting or resolving objections raised in response to such notice.

34. Nor can these issues be avoided through MasterCard's filing of a pre-confirmation motion to assume or reject because the Plan grants the Debtors (or Reorganized Debtors) broad discretion to change their stance post-Effective Date – regardless of their previously-asserted positions – as to both whether the Amended Agreement is executory and whether the Amended Agreement is assumed or rejected.

35. Section 7.03 of the Plan provides that in the event of a disputed motion to assume an Executory Contract, "the Debtors or the Reorganized Debtors, as applicable, shall be authorized to reject any Executory Contract or Unexpired Lease to the extent that the Debtors or Reorganized Debtors, in the exercise of their sound business judgment and with the approval of the Required DIP Lenders, conclude that the amount of the Cure obligation as determined by such Final Order, renders assumption of such Executory Contract or Unexpired Lease unfavorable to the Debtors or Reorganized Debtors." Plan § 7.03. Similarly, Section 7.10 of the Plan provides that "[i]f there is any objection filed to the rejection of an Executory Contract or Unexpired Lease, the Debtors (with the consent of the Required DIP Lenders) or the Reorganized Debtors, as applicable, shall have forty-five (45) days after entry of a Final Order resolving such objection to alter their treatment of such contract or lease to any such alteration." *Id.* § 7.10. Finally, the Plan provides that "[n]either the exclusion of any contract or lease in the Plan Supplement, nor anything contained in the Plan, shall constitute an admission by the Debtors that any such contract or lease is in fact an Executory Contract or Unexpired Lease or that any Reorganized Debtor has any liability thereunder," and that "[n]otwithstanding anything to the contrary in the Plan, the Debtors and the Reorganized Debtors reserve the right to assert

that any license, franchise and partially performed contract is a property right and not an Executory Contract," *id.* §7.01(b); *see also id.* § 11.01(iii) (providing that the Court shall retain jurisdiction post-Effective Date to, among other things, "hear and determine any matters related to Executory Contracts or Unexpired Leases, including: . . . (c) the Reorganized Debtors' amendment, modification, or supplement, after the Effective Date of the list[8] of Executory Contracts and Unexpired Leases to be rejected; and (d) any dispute regarding whether a contract or lease is or was executory or expired").

36. Thus, under the Plan, MasterCard and other similarly-situated parties are forced to choose between (i) blindly accepting whatever treatment the Debtors ultimately deign to provide, or (ii) having to prove up their rights to adequate assurance of future performance under an already-confirmed plan on a mere three days' notice or extensively litigate cure costs, only to have the Reorganized Debtors eventually declare that the contract is not executory and simply "rode through" the bankruptcy case. This is precisely the sort of "doubt concerning their status vis-a-vis the estate" that section 365 was meant to protect against. *See* H. Rep. No. 595, 95th Cong., 1st Sess. 348 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978).

37. Rather than providing for the straightforward assumption or rejection of Executory Contracts, the Plan seeks to unfairly keep contractual counterparties like MasterCard in limbo by indefinitely delaying the Debtors' decisions on assumption and rejection. This is particularly harmful to contractual counterparties like MasterCard whose contracts with the

[8] It is unclear what "list of Executory Contracts and Unexpired Leases to be rejected" Section 11.01(iii) is referring to, as the Plan only contemplates that the Plan Supplement will list Executory Contracts to be assumed, not those to be rejected. *See* Plan §1.149 (defining the "Plan Supplement" as including, among other things, "a list of Cure amounts for Executory Contracts and Unexpired Leases to be assumed"). Regardless, to the extent Section 11.01(iii) purports to entitle the Reorganized Debtors to reject Executory Contracts, such provision is improper under section 365.

Debtors depend on the Debtors' ability to maintain key contractual relationships with third parties (to enable the Debtors to put on successful festivals and other events, for example).

38. Indeed, the Plan violates section 365(b)(1) of the Bankruptcy Code by circumventing the statutory requirement that the Debtors provide adequate assurance that they will cure defaults and/or adequate assurance of future performance to MasterCard and other contractual counterparties. The Debtors and/or the Reorganized Debtors cannot realistically provide adequate assurance to MasterCard with respect to the Amended Agreement because, even at the Confirmation Date, it will be wholly unclear whether key contracts are being assumed or rejected. The Debtors could confirm the Plan based on proposals to assume most or all executory contracts with mutually-acceptable Cure costs and then reject them *en masse* (or vice versa) between the Confirmation Date and the Effective Date, thereby significantly changing the business of the Reorganized Debtors.

39. If the Debtors are truly unable to decide on the appropriate treatment for their executory contracts at this time, they are not ready to confirm a plan. They should not be permitted to use the Plan to shift the risk associated with their persistent indecision onto contractual counterparties whose contracts comprise much of the value of the Debtors' Estates, and who have been waiting for months, if not longer, for the closure to which they are entitled.

B. The Plan's Injunction and Discharge Provisions Are Overbroad

40. The Plan is also unconfirmable because its injunction and discharge provisions are overbroad in that they purport to (i) effectuate an improper non-consensual third-party release; (ii) impair setoff rights; and (iii) discharge valid statutory administrative expense and general unsecured claims for cure costs and rejection damages.

i. The Plan's Injunctions Constitute an Improper Non-Consensual Third-Party Release and Discharge

41. Through certain mechanisms, the Plan purports to immunize third parties from claims brought by non-consenting creditors, providing such third parties with the equivalent of a discharge and non-consensual release.

42. Although the Plan provision governing releases by Holders of Claims and Interests describes itself as a "Consensual Release," *see* Plan § 12.02(c), the Plan's injunction provision nullifies the consensual nature of the release provisions by purporting to bar "all persons that have held, currently hold, may hold, or allege that they hold, a Claim, Interest, or other debt or liability that is discharged pursuant to Section 12.03 of the Plan" from enforcing or otherwise asserting such claims and liabilities "against the Creditor Released Parties," which are broadly defined to include, in addition to the Debtors, a host of non-Debtor parties, including non-Debtor affiliates, *see id.* §§ 1.40 (defining "Creditor Released Parties" as "(i) the Debtor Released Parties, (ii) each Debtor and Reorganized Debtor, and (iii) the other SFX Entities"), 1.183 (defining "SFX Entities" as "collectively SFXE and all direct and indirect domestic and controlled foreign Subsidiaries and controlled Affiliates of SFXE (whether or not wholly owned, regardless of whether such Entities are Debtors in the Chapter 11 Case"), 12.04(i) (injunction provision). While the injunction provision states that creditors who accept Distributions under the Plan "shall be deemed to have specifically consented to the injunctions," it contains no corresponding statement that creditors who do not receive distributions shall not be deemed to have consented to the injunctions, nor any other opt-out mechanism for non-consenting creditors such as MasterCard.[9] *See id.* § 12.04.

[9] Section 12.04(iii) of the Plan provides that "[n]othing in this Section 12.04 shall impair . . . (c) the rights of any party to an Executory Contract or Unexpired Lease that has been assumed by the Debtors pursuant to an order of the Bankruptcy Court or the provisions of the Plan to enforce such assumed Executory Contract or

43. Given that SFX executed the Amended Agreement on behalf of itself and its affiliates, MasterCard may have claims against SFX's non-debtor Affiliates, which MasterCard does not consent to release or discharge under the Plan.

44. Section 524(e) of the Bankruptcy Code expressly provides that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Further, Third Circuit courts have held that non-consensual third-party releases are impermissible absent "extraordinary" circumstances. *See, e.g., Gillman v. Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 212, 214 (3d Cir. 2000) ("non-consensual releases by a non-debtor of other non-debtor third parties are to be granted on in 'extraordinary cases'" where "fairness, necessity to the reorganization, and specific factual findings" support such relief); *In re Exide Techs.*, 303 B.R. 48, 76 (Bankr. D. Del. 2003) (where plan's injunction "further[ed] the non-consensual release of claims against non-debtor third-parties," injunction provision was subject to same stringent test applied to non-consensual third-party releases and could not be approved where it did not satisfy such test). The Debtors have made no showing that such extraordinary circumstances exist here, and, consequently, the Plan's discharge and injunction provisions violate section 524(e).

ii. <u>The Plan's Injunctions Improperly Bar the Exercise of Setoff Rights</u>

45. The Plan provisions governing the treatment of setoff rights are inconsistent and contradictory. Section 12.07 of the Plan provides that "[n]otwithstanding any provision to the contrary in this Plan, the Confirmation Order, and any documents implementing the Plan, nothing shall bar any Creditor from asserting its setoff or recoupment rights to the extent

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Unexpired Lease." *See* Plan § 12.04(iii). However, this provision only applies to the Plan's injunctions, and further applies only to Cure costs under assumed Executory Contracts, and is therefore insufficient to prevent improper impairment of contractual counterparties' rights.

permitted under section 553 or any other applicable provision of the Bankruptcy Code." However, the Plan's injunction provision purports to bar creditors (and entities that "may hold, or allege that they hold" claims against the Debtors) from "asserting a right of setoff, recoupment or subrogation of any kind against any debt, liability, or obligation due to the Creditor Released Parties." Plan § 12.04(i).

46. As noted in the Proof of Claim, MasterCard expressly reserves its right to set off claims under the Amended Agreement. The Plan should be modified to clarify that it shall not affect valid setoff claims not voluntarily released under the Plan. Absent such clarification, the Plan unfairly deprives claimants of their valid setoff rights in contravention section 553 of the Bankruptcy Code, and should not be confirmed. *See* 11 U.S.C. § 553(a) (subject to limited exceptions, Bankruptcy Code "does not affect any right of a creditor to offset a mutual debt").

iii. The Debtors' Proposed Assumption of the "Master Framework Agreement" Is Improper

47. The Debtors' proposed assumption of the "Master Framework Agreement" with MasterCard under the Plan is also improper because (i) the Debtors have not adequately identified the executory contract or contracts to be assumed, and (ii) the proposed assumption does not comply with section 365 of the Bankruptcy Code for the reasons set forth below.

C. The Debtors Have Not Adequately Identified the Contracts to Be Assumed

48. As described above, there have been various Master Framework Documents, including the Original Agreement, the Amended Agreement, and the Term Sheet. The Debtors cannot assume the Original Agreement because it has been expressly superseded by the Amended Agreement and is no longer operative. Given that MasterCard is currently engaged in an ongoing dispute with SFX regarding the Parties' respective rights under the Amended

Agreement and the Term Sheet, it is imperative that SFX clarify its proposed treatment of each of these specific agreements.

D. The Debtors Have Not Provided Adequate Assurance

49. The Debtors cannot assume the Amended Agreement and the Term Sheet without providing adequate assurance of future performance, which the Debtors have failed to do.[10]

50. To assume an executory contract under which there has been a default pursuant to section 365 of the Bankruptcy Code, the debtor must, at the time of assumption, provide "adequate assurance of future performance under such contract." 11 U.S.C. § 365(b)(1)(C). "A bankruptcy court authorizing assumptions of executory contracts must be sensitive to the rights of the non-debtor contracting party and the policy requiring that the non-debtor receive the full benefit of his bargain." *Chex Sys., Inc. v. MicroBilt Corp. (In re MicroBilt Corp.)*, No. 11-18143, 2013 WL 3270997, at *5 (D.N.J. June 26, 2013).

51. The Amended Agreement and the Term Sheet contemplate a comprehensive, complex contractual relationship that includes, among other things, (i) significant sponsorship and other rights for MasterCard with respect to major festivals and other events; (ii) integration of MasterCard products into SFX's products and technology; and (iii) ongoing relationship management and support from designated personnel at SFX. Given the present uncertainty regarding SFX's post-emergence structure and business (due to, among other things, the Plan's improper treatment of executory contracts as discussed above), as well as SFX's prior defaults under its agreements with MasterCard and the Parties' pending dispute under such agreements,

[10] Although the Debtors have not sought to assign the Amended Agreement and the Term Sheet to any third parties as of the date hereof, for the avoidance of doubt, MasterCard likewise objects to any proposed assignment absent provision of similar adequate assurance of future performance by the assignee.

there is substantial doubt as to the willingness and ability of the Debtors or the Reorganized Debtors to render future performance to MasterCard.

52. Pursuant to section 365(b)(1)(C), the Debtors must demonstrate adequate assurance of future performance as a prerequisite to assumption of the Amended Agreement and the Term Sheet. *See, e.g., Kimmelman v. Port Authority of N.Y. and N.J. (In re Kiwi Int'l Air Lines, Inc.)*, 344 F.3d 311, 318 (3d Cir. 2003) ("[A]s a matter of fairness, before requiring the creditor to perform, courts require the debtor in possession to 'give[] the other contracting party the full benefit of [its] bargain.' In other words, the debtor must cure all defaults, assure future performance, and make the other contracting party whole before it may be permitted to assume the agreement." (quoting, e.g., H.R. Rep. No. 95-595, at 348 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6304-05)); *In re Fleming Cos., Inc.*, 499 F.3d 300, 307 (3d Cir. 2007) (declining to approve assignment of executory contract for lack of adequate assurance of future performance under § 365(f)(2)(B)[11] where assignment would deprive non-debtor party of bargained-for benefits of "a trained staff, a consistent supply of products, and a proven system of record-keeping [at the debtor entity], all of which furthered [the non-debtor counterparty's] marketing and pricing plans"); *Cinicola v. Scharffenberger*, 248 F.3d 110,120 (3d Cir. 2001) ("Under either [§ 365(b)(1)(C) or § 365(f)(2)(B)] , the definition of the term should be generally the same." (quotation omitted)).

53. Once adequate assurance has been provided, MasterCard will require sufficient time to review it and, if necessary, to request and review additional information demonstrating

[11] Section 365(f)(2)(B) of the Bankruptcy Code provides that a trustee or debtor in possession may not assign an executory contract unless "adequate assurance of future performance by the assignee of such contract . . . is provided." 11 U.S.C. 365(f)(2)(B).

the ability of reorganized SFX (or any proposed assignee) to perform under the Amended Agreement and the Term Sheet in the future.

E. The Debtors Cannot Assume the Amended Agreement and the Term Sheet without MasterCard's Consent

54. Under the Amended Agreement, MasterCard has granted SFX a [redacted] license to use certain of MasterCard's intellectual property, including trademarks and copyrights. *See* Amended Agreement § 7.1-7.3. The Amended Agreement expressly prohibits assignment without MasterCard's consent, subject to limited exceptions not applicable here. *See id.* § 16.2. Consequently, the Debtors may not assume the Amended Agreement and the Term Sheet without MasterCard's consent, which MasterCard has not provided.

55. Section 365(c)(1) of the Bankruptcy Code prohibits the assumption (or assignment) of a contract if "applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor" and such party does not consent to assumption or assignment." The Third Circuit has adopted the "hypothetical test," under which a debtor may not assume an executory contract if "applicable law" would entitle the non-debtor counterparty to refuse performance from an entity other than the debtor. *See In re West Elecs. Inc.*, 852 F.2d 79, 83 (3d Cir. 1988); *In re Access Beyond Techs., Inc.*, 237 B.R. 32, 48-49 (Bankr. D. Del. 1999).

56. Non-exclusive intellectual property licenses such as those incorporated into the Amended Agreement may not be assumed or assigned without the consent of the non-debtor counter-party to those licenses. *See In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 122-127 (Bankr. D. Del. 2015) (finding that, under hypothetical test, debtors were prohibited from assuming trademark license agreement absent licensor's consent despite fact that debtors had "no

immediate plans to assign the agreement to a third party" because "[t]he general prohibition against the assignment of trademark licenses absent the licensor's consent is equally applicable to both exclusive and non-exclusive trademark licenses"; also noting in dicta that "[n]on-exclusive patent and copyright licenses create only personal and not property rights in the licensed intellectual property and so are not assignable"); *In re Golden Books Family Entm't, Inc.*, 269 B.R. 311, 316 (Bankr. D. Del. 2001) ("Prevailing case law holds that nonexclusive intellectual property licenses do not give rise to ownership rights and are not assignable over the objection of the licensor.").

57. Accordingly, the Debtors may not assume or assign the Amended Agreement without MasterCard's consent because the Amended Agreement incorporates licenses that are not assignable as a matter of law. Before MasterCard can give its consent, it must be satisfied with the qualifications of Reorganized SFX, including its ability to satisfy the obligations under the Amended Agreement. To the extent the Debtors cannot satisfy MasterCard's requirements, MasterCard reserves the right to withhold its consent regardless of the Reorganized Debtors' ability, if established, to meet the adequate assurance obligations imposed by section 365 of the Bankruptcy Code.

NOTICE

Notice of this Objection shall be provided to the following parties: (i) counsel to the Debtors, (a) Greenberg Traurig, LLP, The Nemours Building, 1007 North Orange Street, Suite 1200, Wilmington, Delaware 19801, (Attn: Dennis A. Meloro, Esq.), and (b) Greenberg Traurig, LLP, The MetLife Building, 200 Park Avenue, New York, New York 10166, (Attn: Maria J. DiConza, Esq. and Matthew L. Hinker, Esq.); (ii) counsel to the DIP Lenders and the Ad Hoc Group, (a) Stroock & Stroock & Lavan LLP, 180 Maiden Lane, New York, New York 10038

(Attn: Kristopher M. Hansen, Esq., Jonathan D. Canfield, Esq., and Elizabeth Taveras, Esq.), and (b) Young Conaway Stargatt & Taylor, LLP, 1000 North King Street, Wilmington, Delaware 19801 (Attn: Matthew Lunn, Esq. and Ashley Jacobs, Esq.); (iii) counsel to the Official Committee of Unsecured Creditors, (a) Pachulski Stang Ziehl & Jones LLP, 150 California Street, 15th Floor, San Francisco, California 94111 (Attn: Debra I. Grassgreen, Esq. and Joshua M. Fried, Esq.), and (b) Pachulski Stang Ziehl & Jones LLP, 919 North Market Street, 17th Floor, Wilmington, Delaware 19801 (Attn: Bradford J. Sandler, Esq. and Colin R. Robinson, Esq.); and (iv) the Office of the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware 19801 (Attn: Hannah McCollum, Esq.).

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CONCLUSION

WHEREFORE, for the foregoing reasons, MasterCard respectfully requests that the Court deny confirmation of the Plan.

Dated: November 2, 2016
Wilmington, Delaware

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CERTIFICATE OF SERVICE

I, L. Katherine Good, do hereby certify that on the 2nd day of November, 2016, I caused a copy of the foregoing *redacted* **MasterCard Europe SA's Objection with Respect to Confirmation of Fifth Amended Joint Plan of Reorganization of SFX Entertainment, Inc., et al. under Chapter 11 of the Bankruptcy Code** to be served upon the parties listed on the attached service list in the manner indicated.

/s/ L. Katherine Good
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