**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| E2W, LLC, a Delaware limited liability company,<br>Plaintiffs,<br><br>v.<br><br>KIDZANIA OPERATIONS, S.A.R.L., a Luxembourg corporation.<br>Defendant. | Case No. 1:20-cv-02866 (ALC) |

**DEFENDANT'S SUR-REPLY IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION**
**(FILED BY LEAVE OF COURT ISSUED ON MAY 1, 2020)**

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**TABLE OF CONTENTS**

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**



**Other Authorities**

Defendant KidZania Operations, S.A.R.L. ("KidZania") submits this Sur-Reply pursuant to this Court's May 1, 2020 Order permitting KidZania to respond to evidence submitted by Plaintiff E2W LLC ("E2W") with its reply brief. KidZania has filed concurrently herewith the declaration of its Founder and CEO Xavier Lopez Ancona ("Lopez Sur-Reply Decl.") and the declaration of its COO Hernan Barbieri ("Barbieri Sur-Reply Decl."), which address the new evidence in more detail.

## I. INTRODUCTION

Whether E2W is entitled to relief turns on two issues: (1) can E2W show by *clear and convincing* evidence that KidZania should be estopped from terminating its franchise agreement with E2W based on purported oral communications between KidZania and E2W in February and March 2020, and (2) can E2W show that it is likely to suffer irreparable harm in the absence of injunctive relief? Although E2W attempted to bolster its position on both grounds by submitting new evidence with its reply brief, that evidence falls far short of the showing necessary to entitle E2W to the extraordinary remedy it seeks, and E2W's Application must be denied.

This Sur-Reply does not address E2W's arguments that it is entitled to relief under a *force majeure* term in the Franchise Agreement because the new evidence E2W submitted with its Reply focuses on its estoppel and equitable arguments, and thus KidZania does not repeat the arguments set forth in KidZania's Opposition. Further, E2W has made no effort whatsoever to explain how COVID-19 caused E2W to fail to pay the $750,000 in royalties at issue (the "Minimum Guaranteed Royalties"), when it later wired $750,000 to KidZania at the height of COVID-19, weeks after KidZania had terminated and shortly after it filed this lawsuit.

## II. E2W HAS NOT ESTABLISHED ESTOPPEL BY CLEAR AND CONVINCING EVIDENCE

KidZania established in its Opposition that the Franchise Agreement contains both an integration clause (Section 19.10) and a specific term stating that the "Cure Period shall not be extended nor the breach waived, unless expressly agreed to by the non-breaching Party in writing." (Section 17.2). Even with the additional evidence submitted on reply, E2W cannot point to any writing by KidZania in which KidZania extended the Cure Period or waived E2W's breach—and certainly not under the applicable clear and convincing evidence standard. *Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. V. Coventry First LLC*, 280 F.R.D. 147, 163 (SDNY 2012); *see also* 57 N.Y. Jur. 2d Estoppel § 78 ("Each element [of equitable estoppel] must be established by clear, convincing and satisfactory evidence, leaving nothing to inference or speculation. The doctrine should be applied only when the grounds supporting it are clearly and satisfactorily established.").

### *A. E2W Fails to Show Any Agreement to Extend the Cure Period*

E2W does not dispute that, on February 6, 2020, KidZania sent a notice of grounds for termination. Instead, E2W now claims that KidZania only sent the letter at the request of Gevork Sarkisyan to encourage funding by Winter Capital and that KidZania did not actually intend to provide notice. Not so. As Mr. Barbieri explains, he called Mr. Sarkisyan before the February 6, 2020 letter was sent to give him a heads up that the notice was coming—*after* the KidZania Board had already approved that the notice be sent—and on that call Mr. Barbieri asked Mr. Sarkisyan if Alexey Bashkirov of Winter Capital should be copied on the correspondence. (Barbieri Reply Decl, ¶¶ 21-23.)

Mr. Baribieri did not then, or ever, tell Mr. Sarkisyan or anyone else at E2W that the February 6 Breach Notice would not be enforced. (*Id.*, ¶ 24.)

The email and text communications on which E2W relies do not establish any such agreement to send a "sham" notice. (*See* Sarkisyan Reply Decl., Exs. D & E.) A fair and full reading of Exhibit D—consisting of WhatsApps texts in January 2020—shows that *Mr. Sarkisyan* was reluctant to move forward with Winter Capital, whereas both Mr. Lopez and Mr. Barbieri of KidZania just wanted to be sure that KidZania and E2W's other creditors were paid. (Lopez Reply Decl., ¶¶ 12-16.) There is no discussion about tricking Winter Capital into providing funding; if anything, Mr. Sarkisyan was hoping to get other funding to avoid Winter Capital entirely.

Exhibits E-1 and E-2 are no more helpful to E2W. Exhibit E-1 merely shows that Mr. Bashkirov was copied on the email sending the February 6, 2020 notice letter, which was as a result of Mr. Sarkisyan's request to Mr. Barbieri after the Board had already approved sending the notice. In Exhibits E-2, Mr. Sarkisyan responds to questions from his business colleagues, Greg Stevens and Keith Rubenstein. Mr. Stevens writes to ask whether he should forward the notice to the E2W board and expresses concern because "USAA due diligence team is asking about this . . . I am wary of sending it to them because I think it could blow things up . . . ." (ECF No. 35-5 at p. 5.) In response, Mr. Sarkisyan advises Mr. Stevens not to forward the notice to anyone, claiming that "I asked Hernan to send it so we could push things." (*Id.*) Notably, Mr. Sarkisyan does not say that the notice is a sham and will not be enforced—because it was not. The second communication is even less illuminating. In response to a question from Mr. Rubenstein as to whether he is worried, Mr. Sarkisyan simply replies, "No." (ECF No. 35-5 at p. 6.)

These communications show only that E2W was seeking to hide its default from its Board and potential funders—not that E2W and KidZania colluded to draft a fake notice.

E2W next claims that KidZania agreed to not seek to terminate so long as E2W was engaged in negotiations with potential funders, USAA and Brookfield. While E2W *argues* as much, again, there was never any agreement, whether written or oral, that would excuse E2W's payment of the Minimum Guaranteed Royalties during the negotiation of the Term Sheet. (Lopez Reply Decl., ¶¶ 17-22.) Any such agreement would have to be in writing and approved by the KidZania Board of Directors, and no such approval was asked for or provided. (*Id*., ¶ 22.) It would make no sense for KidZania to grant such an (oral) open-ended extension, particularly because the Term Sheet with USAA/Brookfield was hardly a done deal. The Term Sheet that E2W submitted to the Court was not signed by USAA/Brookfield (and KidZania has not seen a fully executed copy), it expressly contained provisions saying that the Term Sheet did not impose any obligations, and on March 17-18, 2020, KidZania continued to discuss payments that it needed to receive in order to support the deal. (*Id*, ¶¶ 17-22.)

KidZania was willing to support E2W in its efforts to obtain financing. That has never been in dispute, and it is shown in the many exhibits that E2W has submitted with its Reply Declarations. Put simply, KidZania wanted to get paid. But KidZania never said or did anything that would reasonably lead E2W to believe that its payment deadline was being waived or extended if it did not come up with the money. Section 17.3 of the Franchise Agreement expressly forecloses that argument.[1]

[1] E2W's reference to KidZania's forgiveness program for franchisees does not save it. First, the program is only focused on royalties generated in 2020 and so would not cover the Minimum Guaranteed Royalties from 2019. (Lopez Reply Decl., ¶¶ 29-31.) Second, it shows that, when KidZania intends to agree to delay royalty payments, it does so in writing, not in oral conversations that contradict written agreements.

### *B. E2W's New Case Law Is Inapposite Because KidZania Neither Accepted Any Partial Payments, Nor Was Its Notice Vague*

Given these facts, E2W's citation to new case law in its Reply is similarly unavailing. First, in *LaGuardia Assocs. v. Holiday Hospitality Franchising Inc.*, 92 F.Supp.2d 119 (E.D.N.Y. 2000), the court found that a franchisor had waived its right to terminate the agreement because, after giving notice in April 1999, it continued to accept partial payments and grant further extensions of time to pay over a ten-month period. *Id.* at 122-23. Here, E2W did not attempt to make any payments before it was terminated and KidZania rejected the attempted payment E2W made in mid-April 2020, after this lawsuit was filed and the temporary restraining order was in place. Nor did KidZania give any extensions of time after the February 6, 2020 notice was sent.

The second case, *In re 4Kids Entertainment, Inc.*, 463 B.R. 610 (S.D.N.Y. 2011), is no more persuasive. There, the parties disputed the *amount* of licensing fees owed by a licensee of the popular Japanese anime *Yu-Gi-Oh!* and engaged in lengthy pre-dispute negotiations to attempt to resolve the issue. *Id*. at 628-665. The Court concluded that there were no written communications sufficient to constitute adequate notice of breach during this time. *Id.* at 689. Given the ongoing negotiations and inadequate written notice, the court held that an additional notice and opportunity to cure must be given prior to termination. *Id.* at 688-89. Here, in contrast, there has never been a debate about how much E2W owed: it agreed in the Second Addendum to pay $750,000 (a discounted amount), and there can be no legitimate question that the February 6, 2020 letter both provided adequate notice and a time to cure.

Instead, this case is more similar to *Ixe Banco, S.A. v. MBNA Am. Bank, N.A.*, 2008 U.S. Dist. LEXIS 19806, * 33-34 (S.D.N.Y. 2008 Mar. 7, 2008). Like E2W, the plaintiff in *Ixe* claimed that continued negotiations about reviving a joint venture agreement after a notice of breach estopped the defendant from enforcing a termination deadline. Citing *Rose v. Spa Realty Ass'n,* 42 N.Y.2d 338 (1977), and *Towers Charter & Marine Corp. v. Cadillac Ins. Co.,* 894 F.2d 516 (2d Cir. 1990), the Court stated that the continued negotiations were not inconsistent with the terms of the contract, and therefore could not form the basis for an estoppel. "As New York courts have recognized, parties continuing to take steps towards closing a contract after the date upon which they could terminate is insufficient to establish that they waived or forfeited their right to exercise the option to cancel." *Id.* at * 26. This rule, unlike the one E2W espouses, makes good policy sense: parties should be encouraged to seek a joint solution short of termination, without fear that such efforts will waive their rights to terminate.

## III. E2W'S NEW EVIDENCE HAS NOT ESTABLISHED IT WILL SUFFER IRREPARABLE HARM

In its opposition, KidZania established that, in order to show irreparable harm, E2W must demonstrate that it stood to suffer the loss of good will, and that E2W had presented *no* evidence of that whatsoever given that the Frisco Facility had been open for just four months, had underperformed, and was the subject of multiple creditor liens.

Recognizing its deficient showing, E2W focused in its new reply evidence on efforts that it put into launching the Frisco Facility before the facility opened. However, the years that E2W spent flailing about trying to find sponsors and financing resulted in no positive goodwill for E2W—or for KidZania for that matter.

Both Mr. Sarkisyan and Mr. Stevens discuss meetings in their Reply Declarations with potential Industry Partners (Sponsors). Yet, of the 84 meetings they cite, just 18 led to sponsorships at the opening and 25 as of today. (Barbieri Reply Decl., ¶¶ 2-5 & Ex. 1.) Mr. Sarkisyan apparently takes pride in the fact that his efforts led to a coined term of "gevorking." He is wrong when he says that the term came from Mr. Lopez. (Lopez Reply Decl., ¶ 3.) More importantly, E2W fails to explain what the term means: Mr. Sarkisyan was good at establishing contacts, but not good at closing actual deals. (*Id.*)

Indeed, as Mr. Lopez attested in his initial declaration, E2W projected it would attract 40 Industry Partners, but secured just 18 IPs, generating IP revenues of just 20 percent of what it had projected. (ECF No. 25, ¶ 38.) Moreover, E2W has no response to the facts that it was far below its projection on the other two relevant rubrics: attendance (38 percent less) and revenues (65 percent less). (*Id.*) Nor does E2W have a response for the shortcomings that Mr. Lopez pointed out: (1) never finishing the facility in the manner it had been designed, (2) inadequate advertising and promotion of the facility, (3) offering discounted tickets and package deals, (4) simply not having sufficient financing to make the facility attractive to visitors and IPs.[2] (*Id.*, ¶ 38.)

E2W relies on the fact that KidZania provided it a Soft Opening Certificate as somehow excusing its poor performance. E2W misrepresents the purpose of the certification. KidZania provided the Soft Opening Certificate to E2W so that the Frisco Facility could open as an official KidZania facility, but that does not mean that all issues associated with the completion of the Frisco Facility had been resolved at that time.

[2] E2W's claim that the time it took to open the Frisco Facility in in line with that of other franchisees is completely off base. As Mr. Barbieri explains, the average time to open is 18 months from having access to a finished shell on an approved location. (Barbieri Reply Decl, ¶¶ 16-19.)

(Barbieri Reply Decl, ¶¶ 26-27.) Rather, there were many unresolved issues then and remain many unresolved issues today. (*Id.*, ¶¶ 26-34 & Exs. 2-6.) In all, KidZania identified 313 Critical Findings, 242 Non-Critical Findings, and 122 Areas for Improvement that needed to be addressed. (*Id.*, ¶ 29 & Ex. 3.) Despite weeks of communications, of the 313 "Critical Findings" identified by KidZania in December 2019, 276 are still outstanding and need to be addressed. (*Id.*, ¶ 33 & Ex. 6.) Of the 242 "Non-Critical Findings" identified in December 2019, only one has been addressed and 241 are still outstanding. (*Id.*) Of the 122 "Areas for Improvement" identified in December 2019, 119 are still outstanding and unresolved. (*Id.*) This is an unusually high number of issues for a facility that has been in operation for four months. (*Id.*, 34.) What this shows is that, while E2W was given initial permission to have a "soft opening" of the Frisco Facility, there are and were many issues that need to be addressed before the facility is operating in a manner that meets KidZania's quality control standards. (*Id.*)

While it is true that Mr. Lopez gave positive, supportive remarks at the small opening event held at the Frisco Facility, those remarks were part of KidZania's effort to support the success of that facility. (Lopez Reply Decl., ¶ 6.) Nor does it erase the extensive deficiencies in E2W's operation of the Frisco Facility described above.

E2W also seeks to blame the long lines and slow service at the Frisco Facility on KidZania's proprietary FourZ software. In fact, E2W received the software ten months before the Frisco Facility opened, and most of the problems were caused by E2W's own errors—including its failure to ensure that the kiosks contained necessary hardware components. (Barbieri Reply Decl., ¶¶ 6-14.) Not only is E2W mistaken in suggesting that KidZania – as opposed to E2W – was responsible for the customer complaints at the

Frisco Facility, but they also are mistaken in suggesting that the complaints were all related to long lines caused by the FourZ POS software. (*Id.*, ¶ 15.) Exhibit F to Mr. Stevens' Reply Declaration shows that there were customer complaints about issues entirely unrelated to the FourZ software and the POS terminals. (*Id.*)

Quite simply, E2W has never operated at a profit, even though the Frisco Facility should be KidZania's flagship facility in the largest entertainment and educational market in the world. It has been perpetually plagued by lack of funding and shareholder disputes, including allegations and counter-allegations of fiduciary breaches and criminal misconduct made by the shareholders against each other. It has no goodwill; only "badwill." None of the new evidence E2W submitted changes that outcome.

In contrast, KidZania established in its Opposition that it stood to suffer significant harm if E2W were allowed to continue as its franchisee, thus preventing KidZania from finding a new franchisee to right the ship. In particular: (1) KidZania stands to lose $43.7 million over the life of the Franchise Agreement if E2W remains its franchisee, including $746,811 in royalty revenues over the next year alone; and (2) KidZania will suffer extensive reputational harm from the poor performance of the Frisco Facility, the dubious ability of E2W to open three more facilities that will perform better, and the negative impact of E2W's inability to pay its creditors, leading to publicly filed liens and bad press.

Mr. Stevens' vague claim that E2W has now paid off some but not all E2W creditors (Stevens Reply Decl., para. 26) is cold comfort to KidZania. As Mr. Lopez explains, KidZania has been provided no information by E2W about E2W's new capital, where that capital came from, what terms were entered by E2W for these new loans, or

whether the amount of new capital will provide a cash flow sufficient to correct the many problems with the Frisco Facility, much less to open three additional KidZania facilities in Chicago, Los Angeles, and New York. (Lopez Reply Decl., ¶¶ 23-27.) Moreover, public records show that E2W still has liens against it from Turner Construction (almost $8 million) and from three other vendors that amount to almost $550,000. (*Id.*, ¶ 27.) While it is not KidZania's job to secure funding to E2W, or to any of its franchisees, KidZania is entitled to know whether that funding exists and will be adequate. E2W still has not presented any credible evidence that it can (much less that it has) secured sufficient funding to rehabilitate the Frisco Facility and to open three new facilities in a timely and appropriate fashion.

In deciding whether to impose preliminary injunctive relief, this Court must weigh many factors. KidZania has presented incontrovertible evidence that it properly terminated the Franchise Agreement and that it would suffer extensive harm if E2W remains its franchisee for the United States. E2W has not presented evidence, even with a second bite at the apple, to present any substantial question as to whether KidZania will eventually prevail nor that it cannot be made whole for any of its speculative damages by monetary damages.

## IV. CONCLUSION

The evidence submitted by E2W for the first time with its Reply brief has no impact on the proper outcome of this motion. For the reasons stated above and in KidZania's prior pleadings, KidZania respectfully submits that the Court should deny E2W's Application in its entirety.

Dated: May 5, 2020

Respectfully submitted

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