UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

E2W, LLC, a Delaware limited liability company, Plaintiff, v. KIDZANIA OPERATIONS, S.A.R.L., a Luxembourg corporation. Defendant.	Docket No. 1:20-cv-02866-ALC

PLAINTIFF'S MEMORANDUM OF LAW
IN FURTHER SUPPORT OF ITS APPLICATION FOR A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

POLSINELLI PC
Gabriel Levinson, Esq.
Darnell S. Stanislaus, Esq.
600 Third Avenue, 42nd Floor
New York, New York 10016
Telephone: (212) 684-0199
Facsimile: (212) 684-0197
glevinson@polsinelli.com
dstanislaus@polsinelli.com

Leonard H. MacPhee, Esq.
1401 Lawrence Street, Suite 2300
Denver, Colorado 80202
Telephone: (303) 572-9300
Facsimile: (303) 572-7883
lmacphee@polsinelli.com

Attorneys for Plaintiff E2W, LLC

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Plaintiff E2W, LLC ("E2W") respectfully submits this memorandum of law in support of its application for a Temporary Restraining Order and Preliminary Injunction (the "Motion").[1]

PRELIMINARY STATEMENT

Although the **sole basis** asserted for Franchisor's attempted termination of the Franchise Agreement is the alleged non-payment of the Settlement Payment, Franchisor tellingly has attempted to reject E2W's payment of the Settlement Payment. Franchisor's purported rejection of the Settlement Payment (and concessions in its own papers) makes clear its true motivation: Franchisor wrongfully seeks to terminate the Franchise Agreement in an attempt to exploit and retain for itself all the benefits of E2W's massive investments in Franchisor's brand in the United States, including the goodwill and extensive business relationships that E2W has developed over the years. Franchisor's opposition brief (ECF Doc. No. 24 (the "Opposition Brief" or "Opp'n Br.")) attempts to distract the Court from its baseless purported termination of the Franchise Agreement and further wrongful conduct, by setting forth a false narrative based on irrelevant and fabricated assertions about E2W's business, all of which are belied by Franchisor's own conduct as well as Franchisor's intimate involvement with (and approval of) the very aspects of E2W's business about which Franchisor now purports to take issue.

To prevent Franchisor from obtaining a commercial windfall, E2W merely seeks to maintain the "status quo" until E2W can present its full case in the arbitration proceeding mandated by the Franchise Agreement. The limited (and temporary) injunctive relief E2W seeks here is the only way to preserve E2W's business, and prevent irreparable harm, until an arbitrator can rule on the merits of the dispute. Accordingly, the Court should grant E2W's Motion.

[1] Capitalized terms used but not defined herein have the same meaning as set forth in E2W's initial moving memorandum of law, dated April 9, 2020 (ECF Doc. No. 6-7 (the "Opening Brief" or "Opening Br.")).

ARGUMENT

I. E2W WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF THE REQUESTED PRELIMINARY RELIEF PENDING ARBITRATION

Franchisor's Opposition Brief fails to rebut E2W's showing of irreparable harm (*see* Opening Br. at 5-9) if Franchisor is not temporarily enjoined pending arbitration. Significantly, Franchisor does not dispute that the total loss of a franchised business and/or the loss of goodwill constitute irreparable harm, or that franchisees are entitled to a preliminary injunction pending arbitration when they demonstrate they stand to lose their businesses and/or goodwill absent the injunction pending arbitration. *See, e.g.*, *Roso-Lino Beverage Distributors, Inc. v. Coco-Cola Bottling Co. of N.Y., Inc.*, 749 F.2d 124, 125-26 (2d Cir. 1984); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970); *see also*, *Janmort Leasing, Inc. v. Econo-Car Intern, Inc.*, 475 F. Supp. 1282, 1288 (E.D.N.Y. 1979) (granting preliminary injunction preventing franchisor from terminating franchise agreement pending arbitration where the franchisee's business location of less than 1 year would be lost without the franchise rights, and franchisor's statements concerning franchisee's "precarious fiscal state" bolstered franchisee's claims that it would lose its business without franchise affiliation).

Franchisor concedes—indeed advocates—that without the injunction E2W will lose its rights and the business. Yet while conceding that the loss of a franchise relationship or goodwill pending a final determination constitutes irreparable harm (*see* Opp'n Br. at 17), Franchisor claims that there can be no irreparable harm here because E2W's business was only open a short period, and thus any losses suffered by E2W from not issuing a preliminary injunction "can [sic] easily be quantif[ied in a] monetary award." (*Id.*) Franchisor is wrong on the facts and law.

Contrary to Franchisor's assertions, E2W has been in business for years. E2W hired employees in 2017 devoted solely to building the brand and goodwill and, with Sarkisyan and

Stevens, this team promoted KidZania throughout the United States. Notwithstanding KidZania's prior lack of name recognition in the United States, due to Sarkisyan's "gevorking" (as Lopez coined the phrased) with prominent businesses and celebrities, E2W was able to build and establish the goodwill for the brand that Franchisor attempted to obtain on its own with no success. *See* Declaration of Gevork Sarkisyan in Further Support of E2W's Application for a Preliminary Injunction (the "Sarkisyan Reply Decl."), dated April 27, 2020, 6-17; Declaration of Greg Stevens in Further Support of E2W's Application for a Preliminary Injunction (the "Stevens Reply Decl."), dated April 27, 2020, 13-14.

Accordingly, Franchisor's cases, which it cites for the proposition that there is no irreparable harm where a business "has only been in operation for a short time" (Opp'n Br. at 18-19), are distinguishable and inapposite because the franchisees in those cases could continue operating their businesses under a different name and easily step back in if they received a ruling in their favor, and/or had only conducted preparation activities with no contract for the rights. *See, e.g.*, *Truglia v. KFC Corporation*, 692 F. Supp. 271 (S.D.N.Y. 1988) (applying Kentucky law and holding that franchisee was not precluded from operating its business because it could continue operating under different name); *PDL Vitari Corp. v. Olympus Industries, Inc.*, 718 F. Supp. 197, 204 (S.D.N.Y. 1989) (holding that plaintiff had no business to destroy because its "only activities were preparatory to an expected business" and plaintiff could still operate a similar business); *see also Dunkin' Donuts, Inc. v. Liu*, Nos. CIV.A. 99-3344, 2000 WL 1868386, at *4-5 (E.D.Pa. 2000) (applying Pennsylvania law on *franchisor's* motion to enjoin former franchisee's trademark infringement, court agreed that lost goodwill is irreparable and stated that franchisor's harm outweighed franchisee's harm); *Loveridge v. Pendleton Woolen Mills*, 788 F.2d 914, 916-17 (2d Cir. 1986) (reversing trial court's granting of preliminary injunction to independent contractor salesman seeking to keep his job on the basis that, unlike a dealer, plaintiff owned no inventory

and had made no substantial investments in a factory).

II. E2W HAS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON ITS CLAIMS IN THIS ACTION, OR AT THE LEAST, SUFFICIENTLY SERIOUS QUESTIONS GOING TO THE MERITS

E2W has demonstrated that it is likely to prevail on its claims in arbitration that Franchisor's purported reason for terminating the Franchise Agreement was baseless and wrongful. Alternatively, serious questions go to the merits of E2W's claims, and (as demonstrated below, *see infra* at 9-10) the balance of hardships tips decidedly in E2W's favor.

A. Franchisor Had No Basis to Terminate the Franchise Agreement Because of Alleged Non-Payment of the Settlement Payment

Franchisor's sole purported basis for terminating the Franchise Agreement was E2W's non-payment of the Settlement Amount. But Franchisor cannot rely on that ground to terminate because: (1) E2W was excused from making the payment (a) under the Franchise Agreement's Force Majeure Clause and (b) due to Franchisor's affirmative conduct, which misled E2W to believe that Franchisor would not terminate the Franchise Agreement; and (2) E2W has cured the alleged breach.

1. The Franchise Agreement's Force Majeure Clause Precludes Franchisor's Attempted Termination of the Franchise Agreement

Franchisor does not dispute (and therefore concedes)[2] that the COVID-19 pandemic is a force majeure event under the Force Majeure Clause. Franchisor rather contends that E2W cannot rely on the Force Majeure Clause because the Settlement Payment was originally owed before the COVID-19 crisis and that the Force Majeure Clause carves out payment obligations from its protection. (*See* Opp'n Br. 11-14.) Franchisor's contentions are baseless and unavailing.

[2] *See Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 539 (1975) (Where a defendant fails to oppose some or all matters advanced on a motion, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists). Further, it has agreed to provide its franchisees relief with respect to royalties for the first two quarters of 2020 due to COVID-19. Stevens Reply Decl., 27.

First, as it concedes in its Opposition Brief, Franchisor granted "numerous" extensions of the date for the Settlement Payment and those extensions continued into March, 2020. Opp'n Br. at 13; *see also* Stevens Reply Decl., 25; Sarkisyan Reply Decl. 31. Franchisor was fully aware, endorsed and agreed that the Financing Transaction would be the source of funding for E2W to pay the Settlement Payment, **and as late as March 17, 2020**, confirmed its agreement that the Settlement Payment would be paid at the closing of the Financing Transaction. *Id.* Thus, late March 2020 is the time to assess the application of the Force Majeure Clause.

At the time the Settlement Payment was due in late March 2020, COVID-19 was a national emergency and numerous governors had issued executive orders to shut down non-essential businesses, including E2W's business. (*See* Opening Br. at 13-14.) It is undisputed that Brookfield withdrew from the Financing Transaction due to COVID-19 on March 23. E2W was therefore *at that time* prevented by COVID-19 from making the Settlement Payment because it needed to assess its immediate obligations, being careful not to pay some creditors over others.[3]

Second, Franchisor's argument that the Force Majeure Clause did not apply to payment obligations is based on a flawed reading of the Franchise Agreement. Franchisor first misreads the Franchise Agreement's definition of "Force Majeure." The Franchise Agreement states that: "Notwithstanding the foregoing, any government imposed restriction or exchange control **that prevents Licensee from…paying any sums** …**in the time and manner required hereunder** shall not be construed as an event of Force Majeure, except as expressly provided in Section 18.5." Stevens (prior) Decl., Ex. A at p. 4 (definitions) (emphasis added). But that provision is inapplicable and does not implicate a force majeure event like COVID-19. It relates to a

[3] It understood that when there are multiple creditors and limited funds, officers cannot pay one creditor over another without breaching duties and creating liability. Stevens (prior) Decl., 31, See *Fed. Deposit Ins. Corp. v. Sea Pines Co*., 692 F.2d 973, 977 (4th Cir.1982) (holding that when a corporation is insolvent the officers and directors no longer represent the stockholders, but become trustees for the creditors and cannot by payment of cash prefer themselves or other creditors, but should treat creditors equally).

government-imposed restriction or exchange control that, by its terms, prevents the Licensee from making payment ***in the manner required*** in the Franchise Agreement. It ensures that such a government action will not relieve the Licensee from its payment obligations and requires the Licensee to find other currency or method to make the payments. None of this has happened here; while government orders resulting from COVID-19 prevent the Frisco Facility from operating, there are no governmental restrictions restricting the manner of cross-border payments.

Franchisor then cites to § 18.5(c) of the Franchise Agreement in support of its argument of a carve-out. Franchisor's citation is misplaced. The carve-out from the Force Majeure Clause in § 18.5(c) applies only to two situations. The first sentence in § 18.5(c) applies only where the force majeure event causes "delay in the Commercial Opening of any Licensee KZ Facility" thereby triggering E2W's obligation "to make all payments due under Section 7.5(c)" (*i.e.*, the Minimum Guaranteed Royalties). (Franchise Agreement, § 18.5(c).) This situation is inapplicable here since it is uncontroverted that force majeure did not delay the opening of the Frisco Facility.

The second sentence in § 18.5(c) is applicable here since the force majeure event "follow[ed] the Commercial Opening [of] any one or more Licensee KZ Facilities causing the closure of all such Licensee KZ Facilities." However, this sentence relates to the "Minimum Guaranteed Royalty" and provides that it continues to accrue "***under the provisions of Section 7.5(a)*** and Licensee shall be obligated to make payment ***as set forth therein***." (Emphasis added.) E2W therefore only is obligated to make payment as set forth in ***§ 7.5(a)*** of the Franchise Agreement – not § 7.5(c) – and § 7.5(a) clearly, unequivocally, and solely requires payment of an "Annual Minimum Guaranteed Royalty Differential" that is due and payable within 30 days following December 31 of the current calendar year. (*Id.* at §§ 7.5(a), 18.5(c).) Hence, under § 18.5(c) of the Franchise Agreement, the only financial obligation that E2W retains during a force majeure event is payment of the Annual Minimum Guaranteed Royalty Differential, and that

obligation does not become due until 30 days after December 31, 2020, or in January 2021. Accordingly, no payments are currently due or required to be paid by E2W under § 18.5(c).

2. Franchisor is Equitably Estopped from Terminating the Franchise Agreement Based on Non-Payment of the Settlement Payment

As set forth in E2W's Opening Brief (*see* Opening Br. at 16-22), Franchisor's conduct and statements created a justified and reasonable belief in E2W that the Settlement Payment was not immediately due, but rather was extended while E2W and Franchisor secured alternative funding after the Financing Transaction fell through. Franchisor relies on boiler-plate provisions in the Franchise Agreement, purporting to prevent waiver of terms unless the change is reflected in a signed writing. (*See* Opp'n Br. at 14.) But that is not the law. Franchisor completely ignores and fails to address New York's Court of Appeals decision in *Rose v. Spa Realty Associates*, 397 N.Y.S.2d 922 (1977), which was cited with numerous other New York cases in E2W's Opening Brief (*see* Opening Br. at 16-22), that expressly hold an agreement ***can*** be orally modified notwithstanding any requirement that modifications must be in writing. 397 N.Y.S.2d at 926-27.

Moreover, E2W's assertions concerning Franchisor's conduct and statements are neither vague[4] nor false (as Franchisor contends), and while there are some sharp factual disputes about certain of the interactions and statements,[5] E2W has met its burden to show that Franchisor created a reasonable belief—through its pattern and practice—that it was again extending the Settlement Payment. Indeed, notwithstanding over 40 pages of declarations, Franchisor does not dispute, and therefore concedes, the following key facts from March 23 through March 30:

- After Brookfield withdrew from the Financing Transaction, Centennial/USAA remained willing to restructure the Financing Transaction; Lopez and Barbieri, indicated support of this on March 25 and March 26. Original Br., p 19; Sarkisyan Reply Decl., 33-35.

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[4] Franchisor's evidentiary challenges are without merit in numerous respects, as set forth in E2W's contemporaneously filed Response to Evidentiary Objections, which is incorporated herein.

[5] While unnecessary to resolve at this time, the Franchisor's claims regarding its words and conduct are not credible and refuted by the evidence. See Sarkisyan Reply Decl., 24-29; 31-35; Stevens Reply Decl., 20; 23-26.

- During the week of March 23, when discussing the alternative Centennial/USAA deal, Stevens told Barbieri E2W planned to wait to pay the Settlement Payment given COVID-19, the new Centennial/USAA deal, and E2W's debts to multiple creditors; Barbieri only responded that he and Franchisor supported E2W's pursuing that alternative Centennial/USAA deal. Stevens (prior) Decl., 30-31.
- At no time before March 30, 2020 did Franchisor tell E2W it was even considering attempting to terminate the Franchise Agreement. Sarkisyan Reply Decl. 36-37; Stevens Reply Decl. 24.

On the facts, Franchisor's conduct and statements were more than enough to establish equitable estoppel and/or waiver under New York law. (*See* Opening Br. at 16-17.) In addition to the above and evidence included with the Opening Brief, E2W would have made arrangements to pay the Settlement Payment immediately if Franchisor had provided notice that it changed its mind regarding the Settlement Payment. Stevens Reply Decl., 24, 26. As a matter of equity and sensible business practices, if Franchisor decided to change its position and require the Settlement Payment, it was required to advise E2W of such (whom it knew was relying on its conduct), and provide the notice and opportunity to cure. *In re 4Kids Entm't, Inc.,* 463 B.R. 610, 688–89 (Bankr. S.D.N.Y. 2011) (finding licensor's pre-bankruptcy notice of termination ineffective because licensor waived its right to terminate through its conduct in negotiating the payment obligation after it sent the notices); *LaGuardia Assocs. v. Holiday Hosp. Franchising, Inc.*, 92 F. Supp. 2d 119, 130 (E.D.N.Y. 2000) (granting franchisee injunction preventing prior effort to terminate because as a matter of equity and "sensible business practice" franchisor was estopped from terminating—it had previously allowed an unwritten additional grace period for payments after notices and then abruptly discontinued the practice without additional notice)[6].

[6] Relatedly, the notice of default was ineffective, bolstering the reasonableness of E2W's understanding. Under New York law, a default notice must specify the default, it must state that failure to cure will result in termination, and must be sent in the manner required in the notice provision. *In re 4Kids Entm't, Inc.,* 463 B.R. 610, 688–89 (Bankr. S.D.N.Y. 2011) (finding licensor failed to send the notices by overnight carrier as required). See also, Br. pp 22.

B. <u>E2W Has Cured the Alleged Breach</u>

After its emergency application for a temporary restraining order (the "TRO") was granted, E2W embarked on efforts to settle its various obligations. E2W reached settlements to satisfy the various creditors associated with the Frisco Facility, including the landlord and has been able to extinguish the liens. Stevens Reply Decl., 26. **And E2W paid Franchisor the Settlement Payment**. *Id.,* 24. While Franchisor has endeavored to refuse the payment, that payment prevents it from now terminating. *LaGuardia Assocs. v. Holiday Hosp. Franchising, Inc.*, 92 F. Supp. 2d 119, 130 (E.D.N.Y. 2000) ("Plaintiffs having essentially brought their payments current on those defaults, Holiday is now foreclosed from relying on those as a basis for termination in the absence of earlier notice of default on them").

C. Franchisor's Claims Concerning the Strength and Viability of E2W's <u>Business are Irrelevant and Baseless</u>

The majority of Franchisor's Opposition Brief focuses on irrelevant arguments claiming that it decided to terminate the Franchise Agreement for reasons other than the failure to pay the Settlement Payment. (*See* Opp'n Br. at 7.) This is demonstrably false. As discussed below, Franchisor's assertions also are untrue and inconsistent with Franchisor's statements and conduct throughout the parties' entire relationship.

III. <u>THE BALANCE OF HARDSHIPS TIPS DECIDEDLY IN E2W'S FAVOR</u>

E2W has demonstrated that its harm in the absence of a preliminary injunction would be pronounced, immediate and irreparable. (*See* Opening Br. at pp. 5-9; *supra* at pp. 2-4). Franchisor's claims of harm from its alleged perception of E2W's performance (*see* Opp'n Br. at 19-23) are false. For example:

- E2W's capitalization and funding plans were disclosed and approved by the Franchisor.
- Financial performance at Frisco was in-line with new KidZania facilities and revised projections. Early projections referenced in Lopez' declaration were based on Franchisor's model and information.

- Franchisor was heavily involved in the site selection, lease, design and construction, training, required vendors, and opening. Indeed, it trained and approved the opening with the configuration and number of establishments and sponsors, and effusively complimented the Frisco Facility and the E2W team, never raising any material issues with operations.[7] There was substantial and positive media coverage of the Frisco opening and positive customer feedback.

- Franchisor demonstrated its opinion of E2W at the time by complements, inviting Sarkisyan to invest with it 50-50 in the London KZ Facility (after it pulled this same move it attempts here and took over at cents on the pound), asking E2W to provide a manager for the London KZ Facility (through its parent, Innova), and inviting all the principles to events in Mexico to promote the brand.

- E2W's sponsors were growing once the facility opened and sponsors could see it.

- E2W's experience with the timing to open and its sponsors, attendance and financial performance was fully consistent with the other KZ Facilities.

- Construction and lease obligations and Franchisor's Settlement Payment have now been resolved and the liens extinguished (after entry of the TRO). As soon as COVID-19 lifts, E2W will be in position to resume operations in Frisco and its development activities. Importantly, Centennial/USAA is prepared to continue the efforts at the deal it was prepared to do with E2W and Brookfield assuming the KidZania franchise remains.

Sarkisyan Reply Dec., 4-5; 17-26; Stevens Reply Decl. 6-12; 15-19; 21-22.

IV. E2W SHOULD NOT BE REQUIRED TO POST A BOND

For the reasons stated above and in the accompanying declarations, there is no risk of harm to Franchisor if the temporary injunctive relief sought here were improperly granted, and the ICC arbitrator determined that Franchisor's termination of the Franchise Agreement was valid. Accordingly, E2W should not be required to post a bond. However, to the extent a bond is required, it should be no more than $750,000 (representing the amount of the Settlement Payment).

CONCLUSION

For the reasons set forth above and in the Brief, E2W respectfully requests that the Court grant the Preliminary Injunction.

[7] The only operational problem noted was the long lines—and that was 100% caused by Franchisor's mandatory POS and software system that it designed and used Frisco as a guinea pig and it was a total failure and a constant complaint lodged by E2W to the Franchisor.

Dated: April 27, 2020

Respectfully submitted,

/s/ Gabriel Levinson
Gabriel Levinson, Esq., #3059243
Darnell S. Stanislaus, Esq., #DS8683
POLSINELLI PC
600 Third Avenue, 42nd Floor
New York, New York 10016
Telephone: (212) 684-0199
Facsimile: (212) 684-0197
glevinson@polsinelli.com
dstanislaus@polsinelli.com

/s/ Leonard H. MacPhee
Leonard H. MacPhee, Esq.
Admitted Pro Hac Vice
POLSINELLI PC
1401 Lawrence Street, Suite 2300
Denver, Colorado 80202
Telephone: (303) 572-9300
Facsimile: (303) 572-7883
lmacphee@polsinelli.com

Attorneys for Plaintiff E2W, LLC