UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
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In re:	Chapter 11
CINEMEX HOLDINGS USA, INC.,	Case No. 20-14696-LMI
Reorganized Debtor.	(Formerly Jointly Administered Under Lead Case: Cinemex USA Real Estate Holdings, Inc., Case No. 20-14695-LMI)
_____/	

REORGANIZED DEBTORS' NOTICE OF FILING (A) THE REORGANIZED DEBTORS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND (B) THE REORGANIZED DEBTORS' RESPONSE TO THE KHAN PARTIES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PLEASE TAKE NOTICE that Cinemex Holdings USA, Inc., and Cinemex USA Real Estate Holdings, Inc. (collectively, the "Reorganized Debtors") hereby file (a) the Reorganized Debtors' Proposed Findings of Fact and Conclusions of Law, originally submitted to the Court on August 16, 2021, a redacted copy of which is attached hereto as **Exhibit A**, and (b) the Reorganized Debtors' Response to the Khan Parties' Proposed Findings of Fact and Conclusions of Law, originally submitted to the Court on August 31, 2021, a redacted copy of which is attached hereto as **Exhibit B**. These redacted versions are hereby filed in accordance with the Court's Order Denying the Reorganized Debtors' Ex-Parte Motion For Leave to File Under Seal Reorganized Debtors' Proposed Findings of Fact and Conclusions of Law and Reorganized Debtors' Response to the Khan Parties' Proposed Findings of Fact and Conclusions of Law (ECF No. 308).

Submitted this 18th day of November, 2021.

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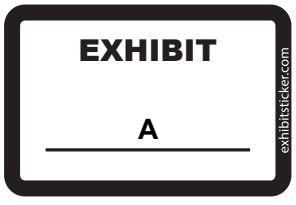
FINDINGS OF FACT AND CONCLUSIONS OF LAW



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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for evidentiary hearings on May 20, June 18, and July 9 2021 (collectively the "Trial"),upon the Amended Objection to Amended Claim Nos. 28 and 85 of Omar Khan, Amended Claim Nos. 29 and 87 of S.C.G.C. Inc., Amended Claim Nos. 30 and 89 of S.C.G.M. Inc., Amended Claim Nos. 31 and 91 of SCG-B Inc., Claim Nos. 39 and 94 of SCG-VP Inc., Claim Nos. 50 and 109 of District Theaters Inc., Claim Nos. 49 and 110 of SCG-WR LLC, Claim Nos. 51 and 108 of SCG-CS Inc., Claim Nos. 45 and 102 of SCGK Inc., Claim Nos. 46 and 103 of SCG-SW Inc., Claim Nos. 47 and 104 of SCG-WL Inc., and Claim Nos. 48 and 105 of SCG-N Inc. (ECF No. 756) (the "Amended Objection") filed by Cinemex Holdings USA, Inc. and Cinemex USA Real Estate Holdings, Inc. (collectively, the "Reorganized Debtors") and the Response to Amended Objection to Claims (Doc. No. 816) (the "Response") filed by the Khan Parties[1] in connection with the Proofs of Claim (the "Claims") filed by the Khan Parties. The Court, having reviewed the Amended Objection, the Response, heard the arguments of the Parties, and considered the evidence presented, the Amended Objection is **GRANTED** for the reasons stated herein.

I. FINDINGS OF FACT

A. The Khan Parties Solicited Cinemex to Bid For The Acquisition Of The SCG Theatres On The Basis That They Are An "Upscale Dine-In Theatre Circuit"

1. In December 2019, on behalf of the Khan Parties, Rich Brail of PJ Solomon, an investment bank acting as agent to the Khan Parties for the sale of the SCG Theatres,[2] contacted

[1] The Khan Parties are S.C.G.C., Inc., S.C.G.M. Inc., SCG-B Inc., SCG-VP, Inc., District Theaters, Inc., SCG-WR LLC, SCG-CS Inc., SCGK Inc., SCG-SW Inc., SCG-WL Inc., SCG-N Inc. (the "Companies") and Omar Khan, The Khan Parties and the Reorganized Debtors are referenced collectively as the "Parties" and each a "Party."

[2] The term "SCG Theatres" refers to the ten theatres located in Texas and the one theatre located in Illinois that were the properties subject to acquisition under the EPAs, which were collectively owned by the Companies. *See* Debtors Exs. 51 (Texas EPA), 52 (Illinois EPA). Each of the Companies owned one of the theatres. *See* Ex. 205 (Khan Deposition Tr. 130:21–131:10).

José Martí, then President and CEO of Cinemex Holdings USA, Inc. and Cinemex Real Estate Holdings, Inc. (together "Cinemex"), to inquire whether Cinemex would be interested in acquiring what Mr. Brail described as "an upscale dine-in movie theatre circuit offering scratch-made food and plush recliners." Joint Stip. ¶ 4; Debtors' Ex. 21.

2. Mr. Brail asserted that such a theatre circuit was an "opportunity that . . . fits [Cinemex's] acquisition criteria perfectly." Debtors' Ex. 21.

3. The Khan Parties characterize their theatres as "upscale dine-in movie theatres" because they claim that their theatres provide the customer a "luxury feel" and "perfect date night experience" with "better services and operations than any other cinema" and "expanded food and beverage" options with "high value products," "tasty food," and "comfortable chairs.". *See* May 20 Hearing Tr. 189:09–196:22 (Khan trial testimony); June 18 Hearing Tr. 364:16–365:01, *id.* at 371:19–372:15 (Brail trial testimony); July 9 Hearing Tr. 499:17–23, *id*. at 520:20–521:02 (Martí trial testimony).

4. Cinemex understood that Mr. Brail was claiming that Cinemex was "being offered a movie theater that was a high-end dine-in theater with extraordinary service." July 9 Hearing Tr. 499:21–23 (Martí trial testimony).

5. Based on that understanding, Cinemex executed a Non-Disclosure Agreement provided by PJ Solomon so that Mr. Brail could provide it with additional information. *See* Debtors' Ex. 21. Shortly thereafter, PJ Solomon provided Cinemex: (1) a "Phase I Process Letter" providing potential bidders with an explanation of the first phase of the bidding process and soliciting non-binding offers by January 14, 2020; as well as (2) a confidential information memorandum ("CIM") providing an "executive summary of . . . the assets," including their location, the food and beverage menus, vendor summaries, and overviews of the operations and

financials. Joint Stip. ¶ 5; *See* Debtors' Ex. 33 (Phase I Process Letter); Debtors' Ex. 91 (CIM); *see also* May 20 Hearing Tr. 76:23–78:22 (Khan trial testimony).

6. On January 14, 2020, based only on its review of the CIM, and with the understanding that its offer would be non-binding, Cinemex made a non-binding offer of $[redacted] for the equity purchase of the SCG Theatres. Joint Stip. ¶ 6; Debtors' Ex. 30 (Non-Binding Offer); May 20 Hearing Tr. 199:15–18 (Khan trial testimony); July 9 Hearing Tr. 486:16–20 (Martí trial testimony) ("Q. At the time you made your nonbinding offer, did Cinemex have any information about the Star Cinema Grill Theaters beyond the confidential information memorandum? [Mr. Martí]: No.").

B. The Khan Parties Offered for Cinemex to Tour, Not Physically Inspect, the SCG Theatres Before Making A Binding Offer

7. On January 15, 2020, PJ Solomon invited Cinemex to participate in the second phase of the bidding process. Debtors' Ex. 22 (the "Second Phase Invitation").

8. The Second Phase Invitation requested that Cinemex provide dates on which Cinemex could attend "management meetings and tours" of the Houston theatres. Debtors' Ex. 22.

9. PJ Solomon indicated that at the management meetings and tours they would discuss "recent positive developments" in the theatres. *See* Debtors' Ex. 22 ("In the management meeting we will touch upon some developments since the CIM was released."); July 9 Hearing Tr. 488:01–07 (Marti trial testimony).

10. Cinemex understood that the "management meetings and tours" were for marketing purposes, not to allow them to inspect the theatres. July 9 Hearing Tr. 490:06–11 (Mr. Martí testified that he understood the "objective of the management meetings and tours" to be "a sort of marketing tool that [the Khan Parties] use to further sell the company.").

11. The Khan Parties' position was that "to the extent the parties wanted to have inspections, they could not occur prior to the signing of the agreement." June 18 Hearing Tr. 362:06-11 (Brail testimony);[3] May 20 Hearing Tr. 207:06–208:01 (Mr. Khan agreed at trial that "inspections are expected to occur after signing of the EPA.").

12. In advance of the management meeting and tours, PJ Solomon expressly asked that Cinemex inform its team not to engage with the employees in the SCG Theatres because the "GMs and theatre level people do not know about the process" and stated that the Khan Parties would present them only as a "possible investor." *Id*; *see* June 18 Hearing Tr. 345:11–21 (Mr. Brail testified at trial that they "instructed [Cinemex] not to identify themselves as an acquiror."); Debtors' Ex. 205 (Khan Dep. Tr. 197:07–12 ("Q. Were they permitted to speak to anybody else? A [Mr. Khan]. We had a general consensus that we would not make that announcement to the rest of the staff until further notice or until we had both agreed."); July 9 Hearing Tr. 492:17–493:25 (Mr. Martí testified at trial that the Khan Parties "specifically indicated to us in writing and verbally that we could not talk to people from the movie theater because they were not aware of the process. And, specifically in the release, they said that we could not talk to the GMs, the general managers, and nor with the staff because they were not aware of the process.").

13. Cinemex wanted its IT team to visit each theatre so that they could examine the hardware and software, but in advance of the management meeting and tours, Cinemex was instructed by PJ Solomon to instead have their IT questions answered over the phone. *See* June 18 Hearing Tr. 347:23–348:3 ("Q. . . . [D]id Cinemex request to have its IT personnel visit each

[3] In his testimony, Mr. Brail attempted to limit the word "inspections" to only include HVAC and roof inspections. June 18 Hearing Tr. 384:01–07. However, the Court finds that limitation to be inconsistent with the plain language of the letter, the terms of the EPAs (as described *infra*), as well as the course of conduct of the Parties (as described *infra*). Accordingly, the Court finds that "inspections" is not limited to inspecting the HVAC and roof, but rather encompass any and all inspections of any aspect of the theatre operations.

theater? [Mr. Brail]. Yes. Q. Were they instead encouraged to . . . have their questions answered over a conference call? A. Yes."); Debtors' Ex. 26 (Email from Mr. Brail to Cinemex stating that he needed "to check with [Mr. Khan] to see how to best handle IT – perhaps we organize a call with IT.").

14. On February 5 and 6, six Cinemex employees travelled to Houston for the management meeting and tours of the Houston theatres (the "February tours"). Joint Stip. ¶ 10; *see* May 20 Hearing Tr. 200:19–201:11 (At trial, Mr. Khan agreed that "Cinemex attended the management meetings and tours on February 5th and 6th"); July 9 Hearing Tr. 487:22–25 (Mr. Martí testified at trial that "the presentation and the tour of the theaters was carried out on February 5th and 6th); *id*. at Tr. 489:02–12 (Mr. Martí identified which six Cinemex employees attended the management meeting and tours).

15. The Cinemex representatives who attended the management meeting were limited to senior management members: Rogelio Velez (CEO); Luis Castelazo (CFO); Javier Ezquerro (COO); Alejandro Muhech (head of construction); Ximena Carreño (legal counsel); and Mr. Martí. *See* July 9 Hearing Tr. 489:04–12 (Martí trial testimony); *See* Debtors' Ex. 26 (Email chain discussing proposed schedule for February meeting and tours); May 20 Hearing Tr. 84:19–85:07 (Khan trial testimony).[4]

[4] At trial, Mr. Khan stated that two additional individuals that attended the management meeting (and tours) on behalf of Cinemex: Freddie Dobbs and an unnamed Cinemex employee from the IT department. *See* May 20 Hearing Tr. 84:19–85:07. At trial, Mr. Khan couched his response by stating "if I remember correctly, to the best of my knowledge." *Id*. However, during Mr. Khan deposition, Mr. Khan recalled that there were only "five or six" members who attended the February visit on behalf of Cinemex. *See* Debtors' Ex. 205 (Khan Dep. Tr. 186:15–187:17). When showed a list of potential attendees (from what is marked as Debtors' Ex. 26), during his deposition, Mr. Khan did not name Mr. Dobbs or any member of IT. *See* Debtors' Ex. 205 (Khan Dep. Tr. 191:06–193:13). That is consistent with Mr. Brail's testimony that Cinemex's IT was encouraged to speak by phone. See, *supra* at 5. Given Mr. Khan's prior testimony, that Mr. Martí testified that six members attended and identified them (July 9 Hearing Tr. 489:02–12), and that Mr. Martí testified unequivocally under oath that Mr. Dobbs did not attend (*id* at Tr. 489:22–24), the Court finds that Mr. Dobbs nor IT attended the management meeting and tours.

16. A limited group of SCG representatives were present at the management meeting: Mr. Khan (CEO), Jason Ostrow (VP of Operations), John Walsh, (CFO), and Michael Pawlowski (culinary director). *See* July 9 Hearing Tr. 580:21–24 (At trial, Mr. Martí identified which SCG representatives attended the management meeting); 488:11–22 (same); Debtors' Ex. 26 at 6. Rich Brail and Adam Jaffe attended from PJ Solomon. *See* July 9 Hearing Tr. 488:23–489:01 (Martí trial testimony). No other SCG or PJ Solomon employees were present at the management meeting. *See Id*. at Tr. 488:21–489:01 (Martí trial testimony).

17. During the management meeting, SCG presented what they described as positive developments since the CIM was distributed. *See* July 9 Hearing Tr. 488:01–07 (Mr. Martí testified at trial that the management meeting touched upon what SCG described as "positive developments since the CIM was released.").

18. After the management meeting, Mr. Khan and Mr. Ostrow led guided tours of the Houston theatres, including walking around the exterior of the still-in-construction Woodlands theatre. *See* July 9 Hearing Tr. 490:23–491:04 (Mr. Martí testified at trial that the tours "were guided. . . .mainly [by] Mr. Khan and Mr. Ostrow"); May 20 Hearing Tr. 201:04–11 (Mr. Khan testified at trial that Cinemex "toured the nine [theatres] that were operating, as well as the one that was in construction in Woodlands, Texas. . . . The tenth one, we didn't have access to inside the building, but we toured the exterior of the building and it was the hollow shell at that point.").

19. The February tours roughly followed the agenda that PJ Solomon had sent Cinemex, which provided a four-hour management presentation followed by one-hour tours of the nine operating Houston-area theatres, between February 5 and 6, allowing for fifteen to forty-five minutes of travel time between theatres. *Id*.; *see* Debtors' Ex. 26 (Email reflecting proposed agenda for February tours).

20. The tour of each theatre ended up lasting approximately 45 minutes to an hour. *See* June 18 Hearing Tr. 406:22–407:02 (Brail trial testimony); July 9 Hearing Tr. 491:22–492:01 (Martí trial testimony); Debtors' Ex. 26.

21. The theatres range from 22,000 to 55,000 square feet in size, averaging around one acre in size. *See* Debtors' Ex. 91 (CIM); May 20 Hearing Tr. 201:24–202:11 (Mr. Khan testified at trial that "They range from 22,000 square feet, up to 55, 000 square feet. So, if you're looking for an average, yes [around 35,000 square feet] . . . only three are less than 25,000 square feet . . . and the rest are over 40,000 square feet."); July 9 Hearing Tr. 491:29–17 (Mr. Martí testified at trial that each theatre on average was approximately "an acre of land").[5]

22. Mr. Khan and Mr. Ostrow took the group through the theatre lobby, box office, concession area, auditoriums, kitchens, bathrooms, and projection rooms. *See* July 9 Hearing Tr. 490:23–491:04; *id.* at 492:04–11 (Mr. Martí testified at trial that "[initially] we would visit the parking lot, then we would visit the lobby. After the lobby, we would go to see the box office and the concession stands, the concession area. Then we went to the auditoriums. We visited all the auditoriums. Then we reviewed the bathrooms . . . then we would go to the projection rooms.").

23. The group thus spent an average of "two to three minutes tops" in each space. *See* July 9 Hearing Tr. 492:12–16 (Martí trial testimony).

24. Not every individual from Cinemex's senior management team that had attended the management presentation attended every tour of the theatres. July 9 Hearing Tr. 490:18–22. For example, Mr. Martí only attended four of the tours. July 9 Hearing Tr. 490:18–22. No one from Cinemex's IT department participated in any of the tours. July 9 Hearing Tr. 489:02–12 (Mr.

[5] An acre is 43,560 square feet. *See Acre*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/acre (last visited Aug. 14, 2021).

Martí identified the six Cinemex employees that attended the management meeting and tours, which did not include someone from Cinemex's IT department).

25. During the February tours, following the Khan Parties' instructions, Cinemex did not ask general managers and staff about a potential acquisition of the theatres by Cinemex, the state of the business, or the condition of the theatres. *See* July 9 Hearing Tr. 492:17–493:04 (Mr. Martí testified at trial that "following the instructions . . . we didn't ask much more than just asking about the food and the kitchen."); May 20 Hearing Tr: 203:16–204:21 (Mr. Khan testified at trial that he did not allow Cinemex to discuss with "the rest of the" employees not in the management meetings and tours because Mr. Khan did not "believe that it was necessary for us to share [information concerning the process] with the other thousand people that worked for the company"); June 18 Hearing Tr. 345:11– (Mr. Brail testified at trial that "[PJ Solomon] did not let [Cinemex] do was say [it was] acquiring the company, and then ask a whole bunch of . . . questions.").

26. Given the limitations on the February tours the Khan Parties imposed, Cinemex did not conduct a physical inspection of the theaters during the tours. As described *infra* Section I(C), conducting a physical inspection would have required the ability to speak to SCG theatre employees, involvement by different Cinemex employees with specialized expertise in different areas of theatre operations, and much more time. *See* July 9 Hearing Tr. 494:1–503:06; *id.* at 509:14–17 (Mr. Martí testified at trial that the February tours "cannot be called an inspection. It was just a quick tour.").

C. The Khan Parties Provided Cinemex Written Assurance That, If Cinemex Made A Binding Offer, It Would Have the Opportunity to Physically Inspect the Theatres Before Closing

27. On February 18, 2020, PJ Solomon sent a Phase II Process Letter on the Khan Parties' behalf to Cinemex, soliciting a binding offer by noon on March 3, 2020. Joint Stip. ¶ 11; Debtors' Ex. 23 ("Phase II Letter").

28. The Phase II Letter provided Cinemex the fundamental "terms and conditions" governing Cinemex's submission of a binding offer. Debtors' Ex. 23.

29. Paragraph 8 of the Phase II Letter provided that "[i]nspections are expected to occur after signing of an Agreement." Debtors' Ex. 23.

30. While maintaining their position that a physical inspection could not occur prior to the signing of an agreement, the Khan Parties understood that a physical inspection prior to closing was fundamental to the acquisition, otherwise there would have been no reason to include assurances regarding such an inspection and its timing in the Phase II Letter. *See* June 18 Hearing Tr. 361:25–362:11 (When asked at trial about paragraph 8 of the Phase II Letter, Mr. Brail testified that it was meant to convey that "to the extent the parties wanted to have inspections, they could not occur prior to the signing of the agreement."); July 9 Hearing Tr. 505:11–14 (Mr. Martí testified at trial that conducting a prior to closing physical inspection was "very important" and "fundamental.")

31. Cinemex has acquired over 200 theatres in multiple transactions over recent years and never closed any of those acquisitions without a physical inspection of each and every theatre. *See*. July 9 Hearing Tr. 505:06–10 (Mr. Martí testified at trial that he had never closed "any of the seven acquisitions of over 200 theaters . . . without an inspection of each theater.").

32. As Mr. Martí testified at trial, a physical inspection is "very important [because i]f we don't do that, the only thing we would have is the information from the data room, which is

written information, but what we're buying is an ongoing concern. We're buying a theater in operation, so it's very important to carry out, fundamental to carry out an inspection." July 9 Hearing Tr. 504:23–505:05. This is particularly important where a theatre distinguishes itself from its competitors based on "upscale" service as the SCG Theatres do.

33. A physical inspection of a theatre includes exanimation of the following areas: operations, culinary, projection and sound, maintenance, HR, and IT, as well as meeting with SCG employees and completing other transition tasks. *See* July 9 Hearing Tr. 494:05–19; *id*. at 519:11–521:02 (Martí trial testimony). Each area requires comprehensive evaluation by individuals with expertise in the respective field and discussions with theatre employees. *See id*. at 520:09–13 (Mr. Martí testified at trial that Cinemex intended "to send individuals with expertise in the areas and tasks [he previously described] in regards to the inspection of the SCG Theaters.").

34. A physical inspection of a theatre's operations requires evaluation of the customer experience from beginning to end, and thus must be done while each theatre is open and "operating." July 9 Hearing Tr. 494:21–25; *id.* at 497:02–06 (Martí trial testimony). An operations inspection thus begins in the parking lot, evaluating its condition and the quality of valet service if available. *Id*. at 495:01–05. It then proceeds to examine the lobby to determine whether it is "attractive and entices people to come in." *Id*. at 495:07–10. Next, it would evaluate the ticket-buying process, focusing on "how efficient the box office is, how well the customer can choose . . . the proper seat" and evaluating whether "the credit card process is fast. . . and the customer can leave quickly with his ticket. *Id*. at 495:11–17. An operations inspection next evaluates the customer experience in entering the auditorium to watch a movie, including inspecting the condition of the seats and the support the theatre provides in the event a problem with the seat arises. *Id*. at 495:25–496:06 (Mr. Martí testified at trial that an operation inspection would include

evaluating the customer experience from "what the customer does once the customer is in the auditorium, and what we want to see is that he gets there and he can go easily to his seat . . . if there's some problem with his seat, if it's not connected and it doesn't recline electronically, there needs to be someone there who can solve that problem."). The operations inspection will then evaluate the movie experience, namely the quality and sound of the film projection, which requires sitting in the theatre with patrons while a movie is playing. *Id*. at 496:07–09 (Mr. Martí testified at trial that the operations inspection also looked to "once the projection starts, we want to see that it's projecting well and that it has good sound."). Mr. Martí highlighted at trial that during the physical inspection, Cinemex would "want to see the experiences of sitting in an auditorium. . . [and] see the projection and the movie and the sound." *Id*. at 576:17–577:03.

35. The operations inspection further evaluates the dine-in service to ensure that customers can place orders without issue and that staff can fulfill the orders efficiently and without disrupting other customers in the auditorium. *Id*. at 496:10–24 (Mr. Martí testified at trial that service should be rendered "without interrupting the experience, making a good sale of the products that the customer can buy and taking their order efficiently, that's a very important part."). This process is critical, as it distinguishes a dine-in theatre from a traditional theatre. *Id*. at 496:15–24.

36. Overall, the operations inspection would take "at least 10 to 15 minutes in each auditorium" to complete. *Id*. at 497:07–11.

37. An inspection of a theater's culinary department examines the food preparation and service provided to theater customers. A dine in movie theatre is like a restaurant but still "much more complicated," because of the service needing to extend from the kitchen to the auditoriums

(which "that distance is generally longer" than restaurants), in the dark, "without interrupting the experience of the customers who are already in the auditorium." *Id*. at 498:14–499:06.

38. A culinary inspection would evaluate the food ordering service from start to finish—from the customer's placement of an order in the theatre to the kitchen's fulfillment of that order and the staff's delivery of the order to the customer in the auditorium. *See Id*. 497:14–499:05. The order needs to be processed accurately by the electronic system in place when sent to the kitchen. *Id*. The food needs to be high quality and prepared well. May 20 Hearing Tr. 194:14–15 (Mr. Khan testified at trial that the food at a luxury dine in theatre should be tasty). It then needs to be delivered while hot (or cold, as the case may be) efficiently and with minimal disturbance. While certain tests could be done outside of operating hours, a full culinary inspection could not be completed without direct observation of the food service process with customers in the theatres. *See* July 9 Hearing Tr. 499:07–15. It is critical that this area function efficiently and with high quality food and service, as that is perhaps the single most important aspect of the experience high-end dine in theatres are endeavoring to provide to theatre-goers. *Id*. at Tr. 499:17–23.

39. A projection and sound inspection would include examining the maintenance of the projectors and quality of the speakers in the auditoriums. *Id*. at 500:02–14. This includes making sure that "each one of the speakers is working well, the sound is well equalized, and the screen [is] the right size." *Id*. The screen "shouldn't have stains, [and] it shouldn't be ripped." *Id*. To fully evaluate the customers' experience, this examination also needs to be conducted while the theatre is operating, and customers are in the auditorium. *See id*. at 500:15–501:02. For example, an inspection of the projectors should be done after they have been "on and working for several hours [to] see that the projector is still projecting at the same quality." *Id*.

40. An inspection of a theatre's maintenance involves an examination of the hydraulic and electric installations, as well as the bathrooms and hallways to ensure that they are properly cared for and well-functioning, particularly after intensive use by customers. *See* July 9 Hearing Tr. 501:6–13. This evaluation also cannot be adequately completed if the theaters are not in operation and devoid of customers. *See id*. at 501:14–502:02. For example, an inspection of the bathrooms is done after there has been "intensive use" to confirm that the facilities are "working well" and are "clean." *Id*. at 501:17–22.

41. An HR inspection involves talking to employees about the theatres because to offer "amazing service, you need to have the right people" who are "well-trained" and "motivated" July 9 Hearing Tr. 502:5–11. The HR inspection is also important to uncover any defects or problems that would not otherwise be revealed in a management presentation because the presenters are "not going to tell you that." *Id*. at 502:24–503:06.

42. In view of the Khan Parties' assurances that Cinemex would be able to physically inspect the theatres after signing, on March 3, 2020, Cinemex submitted a formal binding offer of $[redacted] to purchase the SCG Theatres. Joint Stip. ¶ 12; Debtors' Ex. 38 (Binding Offer from Cinemex); *see* July 9 Hearing Tr. 507:22–508:03 (Mr. Martí testified at trial that Cinemex "interpreted [paragraph 8 of the Phase II Letter] to mean that [the Khan Parties] were giving this to use so that [Cinemex] could do the signing or feel sure about doing the signing without having done the inspections, but that these inspections would be carried out afterwards. So [the Khan Parties] wanted to give us the [comfort] that – that we would, indeed, do the inspection before closing."); *id*. at 505:15–18 (when asked at trial whether "Cinemex believe[d] it would have the opportunity to conduct an inspection of the SCG Theaters during operating hours prior to closing?" Mr. Martí responded "Yes, we always [had] that expectation."); *id*. at 506:04–07 (Mr. Martí

testified at trial that Cinemex's "expectation" was that Cinemex "would then be able to do the inspections, after the signing, but before the closing."); *id*. at 508:25–509:05 (Mr. Martí testifying that "Cinemex believe[d] it would have the opportunity to conduct an inspection of the SCG Theatres during operating hours prior to closing.").

D. The Khan Parties Pushed Cinemex to Increase Its Binding Offer In Part By Claiming That The Effects Of COVID-19 Would Be Short Term

43. Cinemex's $[redacted] offer was the only binding offer the Khan Parties received. May 20 Hearing Tr. 255:21–23 ("Q. No one else made a binding offer, is that right? [Mr. Khan]: That is correct."). Yet, immediately after receiving that offer, Mr. Khan "instructed Mr. Brail to advise Cinemex that their bid was too low," and to inform Cinemex that he was "seeking more than $[redacted]" for the equity sale of the SCG Theatres. *See* May 20 Hearing Tr. 255:10–17 (Khan trial testimony).

44. That same day, Mr. Brail contacted Mr. Martí to try and persuade him to increase Cinemex's offer. *See* June 18 Hearing Tr: 369:06–23 (Mr. Brail testified that his communication with Mr. Martí "was to increase his bid from [redacted]. I was still talking about [redacted]. . . . But, yes, it was to increase his bid above the reduced [redacted]."); July 9 Hearing Tr. 513:21–514:03 (Mr. Martí testified at trial that "what [Mr. Brail] was trying to do, and I think that it is his – his function, was for us to increase the price of our binding offer.").

45. Cinemex explained that it's offer reflected its view of the SCG Theatres' value based on the information it had analyzed from the data room, as well as the recent downturn in the stock market due to the emerging development of the COVID-19 situation. *See* July 9 Hearing Tr. 512:09–520:16 (Mr. Martí testified at trial that "the $[redacted] valuation that [Cinemex] had come to was based first on the due diligence that [it] had done of the data room; and second, on the

market conditions."); *id*. at 594:18–24 (When asked at trial about the initial bid being higher than the binding offer, Mr. Martí responded that "that's what normally happens in these processes.").

46. In response, Mr. Brail represented to Mr. Martí that the downturn in the stock market was temporary and did not impact the long-term valuation of the SCG Theatres. *See* July 9 Hearing Tr. 513:01–16 ("Q. "[D]uring that relatively extensive conversation with Mr. Brail, did he express a view as to whether the downturn in the stock market was related to COVID? [Mr. Martí]. Yes, we spoke about that, and Mr. Brail said, no, that it was not a permanent issue . . . . And it was not related to a long-term valuation of the companies, and that it was going to pass by quickly because it was just a short-term effect due to some trading problems . . .and that it wasn't because of COVID, nor was it a permanent fall in the valuation of these companies"); June 18 Hearing Tr. 367:23–368:12 (Mr. Brail testified at trial that "we did not believe that a short-term impact of COVID on the stock market over those days, having AMC trading down and Cineworld and Cinemark, would fundamentally change the value of attendance in the theater circuit in Houston that's in the dine-in space. . . The whole stock market traded off significantly and we did not believe, and we were therefore advocating, that the fundamental value of the cashflows that they were buying in Star Cinema Grill were unchanged by what was happening in the stock market.").

47. In an email he sent to Mr. Martí following the call, Mr. Brail explained that PJ Solomon "did not believe the current dislocation in the stock market and the impact to trading levels of theatre stocks represents any change the fundamental valuation of Star Cinema Grill." Debtors' Ex. 24. Mr. Brail attached to that email a market analysis he had prepared reflecting the same. Debtors' Ex. 25.

48. Mr. Brail and Mr. Khan had several additional calls with Mr. Martí during which they continued to represent to Mr. Martí that the COVID-19 situation would only be temporary and would not have a long-term impact on the stock market or the valuation of the Companies. *See* July 9 Hearing Tr. 515:16–516:19 (Mr. Martí testified at trial that "after that call with Mr. Brail, I had some other calls with Mr. Brail, and then after that directly with Mr. Khan. . . we discussed [COVID-19] again."); *id*. at 516:05–516:09 (Mr. Martí testified at trial that during those discussions, Mr. Brail "told us, that it was going to be something – that the market downfall wasn't because of a valuation problem because of COVID, but rather because of trading. And on the other hand, COVID could be very short term given – that it could be very short term . . . it was never discussed that it could be a long-term issue.").

49. During the calls between the Khan Parties and Cinemex demanding a price increase, no one asserted that the COVID-19 situation "could be a long-term issue." *See* July 9 Hearing Tr. 516:14–19.

50. Following these calls, on March 6, 2020, Cinemex ***increased*** its binding offer to $[redacted] in the belief that the COVID-19 situation would be a short-term issue and theatres would continue operating. Debtors' Ex. 75 (Martí Decl. ¶ 20 ("Our offer assumed that the SCG theaters would be operating when they were acquired, as was set out in the draft EPA, and would continue to operate after the acquisition.")); *id* (Carreño Decl. ¶¶ 11–12 ("During none of those calls—or any other call I was on—did any of the participants express any view that the Star Cinema Grill theaters could or would be shut down for an extended period by government order, as later occurred.")); Joint Stip.¶ 13; May 20 Hearing Tr. 256:10–16 (Mr. Khan agreed at trial that "on March 6th, Cinemex did increase its binding offer from [redacted] to [redacted]."); Debtors' Ex. 56 (Exclusivity Letter).

51. In fact, when Cinemex submitted its offer, there were no restrictions in place concerning businesses or gatherings. Debtors' Ex. 75 (Martí Decl. ¶ 21 ("At the time of the March 3–6 discussions described above, I was not aware of any restrictions in place concerning the operation of movie theaters or, for that matter, restricting U.S. business of any sort.")); *id*. (Carreño Decl. ¶ 11 ("as of March 6, there were no such [government] orders in place anywhere in the U.S., and we neither believed, nor had any reason to believe, that U.S. businesses, including movie theaters, would be effectively shut down shortly thereafter")).

52. And, Cinemex had no indication, at that time, that government officials would eventually shut down businesses across the United States and order people to stay home for an extended period of time. *See* Debtors' Ex. 75 (Martí Decl. ¶ 21 ("Neither I nor anyone else at Cinemex involved in this transaction believed, or had any reason to believe, that state and local governmental officials in the U.S. would issue the sort of bans that were issued in late March, which shut down non-essential businesses like movie theaters and ordered people to stay at home for an extended period of time. To the contrary, these comprehensive bans were a complete surprise to Cinemex.")); *id.* (Carreño Decl. ¶ 11 ("as of March 6, there were no such [government] orders in place anywhere in the U.S., and we neither believed, nor had any reason to believe, that U.S. businesses, including movie theaters, would be effectively shut down shortly thereafter")).

53. Accordingly, Cinemex's revised binding offer, which was an $[redacted] ***increase*** over its initial binding offer of $[redacted], obviously did not reflect any discount due to the COVID-19 situation—nor did anyone at the time say that it did. *See* July 9 Hearing Tr. 517:08–14 ("Q. . . . [W]ere you ever offered by the sellers a discount on the purchase price due to COVID? A [Mr. Martí]. No, quite the contrary. We increased the price from $[redacted], which was our binding offer, we increased that to [redacted]. There was no discount, there was only an increase

of $[redacted] on our part."); Debtors' Ex. 75 (Carreño Decl. ¶ 12 ("At no time before the Equity Purchase Agreement ("EPA") was signed on March 10 did Cinemex ask for any sort of discount for the COVID-19 situation, and at no time did Plaintiffs offer such a discount.")); *compare* Debtors' Ex. 38 (Non-Binding Offer) with Debtors' Ex. 56 (Exclusivity Letter); *see also* May 20 Hearing Tr. 256:10–16 (Mr. Khan agreed at trial that Cinemex's bid was an "increase of [redacted].").

E. Consistent With The Signed EPAs, The Khan Parties Begin Coordinating A Physical Inspection With Cinemex

54. On March 10, 2020, SCG, Cinemex USA Real Estate Holdings, Inc., and Cinemex Holdings USA, Inc. entered into two equity purchase agreements with the Khan Parties whereby Cinemex would purchase 100% of the equity held by Mr. Khan in the Companies (the "EPAs") for $[redacted]. Joint Stip. ¶ 14; Debtors' Ex. 51 (Texas EPA), 52 (Illinois EPA).

55. The EPAs provided for Cinemex to inspect the theatres while in operation. Debtors' Exs. 51 § 7.2 (Texas EPA) and 52 § 7.2 (Illinois EPA); *see* July 9 Hearing Tr. 541:15–19 (Mr. Martí testified at trial that "[i]n the agreement it had been established or it was established that we had the right to perform inspections of the movie theaters, go to the movie theaters, visit the movie theaters, inspect them and talk with the people."). To accommodate that inspection, among other activities, the EPAs provided that the Parties had until April 30, 2020 ("Texas Closing Date") to close the transaction for the ten Texas theatres and until May 31, 2020 ("Illinois Closing Date") to close the transaction for the one Illinois theatre. Debtors' Exs. 51 § 9.1(F) (Texas EPA), 52 § 9.1(F) (Illinois EPA). For the avoidance of doubt, nothing in either EPA required Closing to occur by March 31, 2020. Debtors' Exs. 51 § 9.1(F) (Texas EPA), 52 § 9.1(F) (Illinois EPA); July 9 Hearing Tr. 526:14–16 (At trial, Mr. Martí testified that it was not his "understanding that the deadline for closing in the EPA was March 31st."); June 18 Hearing Tr. 386:09–17 (Mr. Brail

testified that April 30th" was significant to the Parties because it was "the outside date by which the parties must otherwise have closed.").

56. Immediately after signing the EPAs, the Khan Parties began coordinating with Cinemex to obtain the items necessary to close and transition the theatres into Cinemex's ownership. *See* July 9 Hearing Tr. 518:02–07; *see also* Debtors' Ex. 127.

57. On March 12, 2020, Mr. Khan reached out to Cinemex, copying PJ Solomon, and asked when it would be conducting its physical inspection of the theatres. Debtors' Ex. 127 (On March 12, 2020, Mr. Khan emailed Cinemex "Have you guys nailed down any travel plans [f]or next week?"); May 20 Hearing Tr. 210:06-09 (At trial, Mr. Khan agreed that "two days after executing the EPA, [he] asked Cinemex about its plans to travel to Houston related to the closing."); July 9 Hearing Tr. 518:02–18 (At trial, Mr. Martí was asked whether he had the "impression at this time [after signing the EPAs] that Mr. Khan was surprised that Cinemex was coordinating an inspection?"—to which Mr. Martí responded ,"No, [Mr. Khan] even said – well he sent us information saying – asking when are you going to come and when are you going to coordinate the trips, so I didn't see any surprise on his part.").

58. That same day, Cinemex responded, informing Mr. Khan and PJ Solomon of its tentative plan to travel to Houston on March 17, 2020 to inspect the theatres. *See* Debtors' Ex. 118 (Email from CMX re Inspection). And the next day, March 13, 2020, Cinemex confirmed to Mr. Khan and PJ Solomon that its operations and HR teams would travel to Houston on March 17, 2020 to inspect the Houston-area SCG Theatres. *See* Debtors' Ex. 127 at 1.

59. In those same responses, Cinemex made several requests of the Khan Parties in anticipation of the March 17 inspections, including: (1) Operations requesting a location so that Cinemex can show its "Presentation about CMX and embrace the opportunity to meet some of the

Star Cinema Team-members;" (2) Human Resources requesting to "meet Ramón on Tuesday in Houston;" and (3) IT requesting a point of contact because the "team will need to conduct an onsite visit (each location) and complete a SAQ-D for PCI Compliance." *Id*. at 1–3.

60. In response, Mr. Khan requested that Cinemex resend its inspection requests in an excel format, confirmed that "Tuesdays works fine" to proceed with the inspections, and asked "[w]hat airport will [you] be coming in to, Hobby or Bush?" Debtors Ex. 212.

61. Also, that same day, Mr. Ostrow, an SCG executive, emailed Cinemex employees asking for a call to discuss "scheduling next week so that [the Khan Parties] can ensure [it has] the right resources available for you and your team." Debtors' Ex. 80. Mr. Ostrow noted that he was running point on "coordinat[ing] the meetings to ensure everything goes smoothly and the right people are at the right places." *Id*.

62. During the planned March 17 trip to Houston, Cinemex intended to conduct a multi-day full physical inspection of the theatres during operating hours, including in the following areas: operations, culinary, projection and sound, maintenance, HR, and IT, as well as meeting with SCG employees and completing other transition tasks. *See* July 9 Hearing Tr. 494:05–19 (Martí trial testimony) 519:11–521:02 (Martí trial testimony).

63. Cinemex expected to complete a full physical inspection of all the areas described above before closing the transaction. July 9 Hearing Tr. 520:04–08. At no time did Cinemex agree to limit the physical inspection of the SCG Theatres, including only to the theaters' roofs and HVAC systems. July 9 Hearing Tr. 508:25–509:21 (At trial, when asked whether "an inspection [is] limited to a review of HVAC or theater roofs," Mr. Martí testified "[n]o, in this case clearly not. In this case we had not done an inspection. We had done a very superficial tour of the theaters. We needed to do an inspection."); June 18 Hearing Tr. 439:06–19 (Mr. Brail testified

at trial that Mr. Martí never "sa[id] to [him] that he was not going to cause an inspection after the – after the definitive agreement on March 10th with respect to non-HVAC and non-roof issues" and that "[i]n fact, we specifically did talk about a visit by the CMX team, and I believe the date was supposed to be March 17th . . . Similar to how we organized the tours, we were going to organize a whole series of activities and meetings with HR, with marketing, to ensure a smooth transition from signing to closing. . . ."). There is no evidence that Cinemex ever said that it would not complete the full physical inspection. July 9 Hearing Tr. 527:22–25 (At trial, when asked whether "Cinemex ever agree[d] orally or in writing to close by March 31st even without a physical inspection," Mr. Martí testified "No, never.").

F. The Khan Parties Closed Their Theatres And Cinemex Postponed Its Physical Inspection

64. On March 12, 2020, the same day Cinemex informed the Khan Parties of its plans to visit the Houston theatres, the Khan Parties imposed travel restrictions on its employees. *See* Debtors' Ex. 219 (Email re Travel Restrictions); May 20 Hearing Tr. 213:25–215:21 (Mr. Khan at trial confirmed that the Khan Parties imposed quarantine measures on employees for those who travelled outside of Texas). These restrictions required "[a]ny team member that has traveled or plans to travel out of state between March 10 and April 30 must disclose this information to the General Manager," who might require that team member to quarantine for "up to one week out of the building upon return to state, prior to returning to work." *See* Debtors' Ex. 219. Cinemex was not consulted on this decision.

65. On March 14, 2020, the Khan Parties requested that guests leave empty seats between parties to socially distance. *See* Debtors' Ex. 218 (Email re COVID Precautions); May 20 Hearing Tr. 216:13–217:16 (Mr. Khan agreed at trial that by March 14, 2020, the SCG theatres

"posted requests that guests leave empty seats between parties to socially distance in light of COVID on [its] website, app, and ticket kiosk"). Cinemex was not consulted on this decision.

66. On March 15, 2020, Mr. Khan informed Mr. Martí that "attendance has dropped a lot on the last shows of the day" and as such, Mr. Khan is considering "taking them out as a[sic] effort to be financially [r]esponsible." Debtors' Ex. 137. Mr. Khan asked whether Cinemex would support such a decision, to which, Mr. Martí responded the following day that he should "according to the EPA, [] make any operational changes you decide are beneficial for SCG." *Id.*

67. Between March 15 and 16, Cinemex informed the Khan Parties that it would postpone its planned March 17 inspection of the Houston theatres to learn more about the risks of COVID-19 before asking their employees to travel. *See* Debtors' Ex. 206 (Khan Tr. 407:16–25); July 9 Hearing Tr. 523:17–20; Debtors' Ex. 36. Mr. Martí testified at trial that "[n]o matter how important the business is, if -- if one of our people is going to have their health at risk, we'll never do that [and] that's why we decided . . . to postpone the trips and not carry out the inspection that week." July 9 Hearing Tr. 522:05–13.

68. As of March 16, Cinemex and the Khan Parties were only postponing the inspection of the Houston theatres until the following week—not cancelling them. *See* Debtors' Ex. 36 (March 16 email from Mr. Ostrow, an SCG executive, explaining to IT vendor that Cinemex's IT "team will be intown next week" and requesting that the vendor provide "field support next week as they start installing some of their software and infrastructure."); *see also* July 9 Hearing Tr. 522:14–523:20 (Mr. Martí testified at trial that he shared "Mr. Ostrow's understanding that the inspection schedule for March 17th would be postponed until the following week."); *id* at 637:19–21 (Mr. Martí testified at trial that Cinemex "postponed [the physical inspections, [they] never cancelled them.").

69. On the evening of March 16, 2020, the local governments of the City of Houston and Harris County (which encompasses Houston and its surrounding areas) announced that, as of midnight that day, all bars and nightclubs had to close and restaurants could only offer delivery, take-out or drive-through services. Debtors' Ex. 39. The Harris County order indicated that it would only be effective "for the next 15 days." *Id*.

70. The same day, after the order was released, the Khan Parties "informed studios and vendors that the SCG theatres would be closing business until further notice, starting at the close of business that day." *See* May 20 Hearing Tr. 218:14–21; *See e.g.*, Debtors' Ex. 222. Cinemex was not consulted on this decision.

71. On March 17, 2020, the Khan Parties publicly announced that they would be temporarily closing all Star Cinema Grill locations and District Theatres "in accordance with local government direction and recommendations." *See* May 20 Hearing Tr. 217:21–218:5; Debtors' Exs. 41, 216.

72. The SCG Theatres were thus closed beginning on March 17—the week that Cinemex had planned to visit the theaters in Houston to perform a physical inspection. May 20 Hearing Tr. 217:21–218:05.

73. As of that date, Cinemex did not believe it could conduct an inspection because "it wouldn't have made any sense to do the inspection. We needed to inspect a functioning theater, movie theater, in operations to evaluate, like I said before, that they offer an extraordinary service and an extraordinary experience for customers." July 9 Hearing Tr. 524:09–19 (Martí trial testimony).

74. On March 19, Mr. Walsh advised Mr. Martí that "following the state of IL directives" they were "closing Hollywood Palms after today's business." Debtors' Ex. 224. Mr. Martí responded by advising Mr. Walsh to "take any decision according to the EPA." *Id.*.

75. That same day, the state of Texas ordered a prohibition on gatherings of more than ten individuals. Debtors' Ex. 142.

76. Also, on March 19, a Cinemex employee asked Mr. Walsh whether the Khan Parties had "closed all your theatres?", to which Mr. Walsh responded "[y]es, just for a short period. Your team is aware." Debtors' Ex. 211.

77. With assurance from the SCG team that the theatres would be closed "just for a short period" and given that there was more than a month before the deadline for closing under the EPAs, Cinemex wanted to wait a short while to ensure that the circumstances were safe for their employees. July 9 Hearing Tr. 524:11–14. On this point, Mr. Martí testified at trial that "the contract was going to expire on April 30th in the . . . Houston theatres, and for the Illinois theater, it was going to expire on May 31st. So, we said it doesn't make sense to put people at risk if we had all that time remaining [] to close. So we said, yes, let's postpone the [] inspections and the closing until they can be carried out without any kind of risk." *Id*. at 525:07–15. At the time, Cinemex believed that the COVID-19 situation would be similar to Cinemex's experience with the H1N1 flu ("swine flu") in Mexico, which involved the short-term closure of certain of Cinemex's Mexico theaters for between a few days and two weeks. *See Id*. (Mr. Martí testified at trial that he "referenced the swine flu in Mexico that had happened 10 or 11 years before that where the effect was relatively short term. We had to close all the theaters for a few days, some for up to two seeks, but it was really a short-term effect.").

G. The Khan Parties Pressured Cinemex to Close Without a Physical Inspection Despite Having More Than A Month Remaining To Close Under the EPAs

78. The day after Texas prohibited gathering of more than ten individuals, Mr. Khan began pressuring Cinemex to close immediately. *See e.g.*, Debtors. Exs. 64, 32. Mr. Khan did so despite that, at that point, there was a great deal of uncertainty about COVID-19 and there was a month and a half before the Texas Closing Date and two months and a half before the Illinois Closing Date. Debtors' Exs. 51 § 9.1(F) (Texas EPA), 52 § 9.1(F) (Illinois EPA).

79. Effectively acknowledging that Cinemex had a right to a physical inspection, Mr. Khan proposed a price discount along with four supposed alternatives to a physical inspection: (1) a private plane, (2) a virtual inspection, and (3) an inspection by a third-party, and (4) a transition agreement, to attempt to persuade Cinemex not to conduct a physical inspection. *See* July 9 Hearing Tr. 528:3–532:20; May 20 Hearing Tr. 227:02–05, *id.* at 227:21–23, Debtors' Ex. 206 (Khan Dep. Tr. 419:17–420:16); *see* July 9 Hearing Tr. 534:17–535:02 (At trial when asked whether "Mr. Khan ever sa[id] to [Mr. Martí] that Cinemex did not have a right under the EPA to inspect the theaters," Mr. Martí testified "[n]o, not only did he not say that, he also offered us a discount, which implies that he was in agreement with that we had to do the inspections.").

80. Mr. Khan's offer of a discount on the purchase price was not a reasonable alternative to a physical inspection. *See e.g.,* Debtors' Ex. 31 (offering discount). There was no way to quantify the potential risk that could arise from a purchase without a physical inspection. July 9 Hearing Tr. 529:09–23 (Mr. Martí testified at trial that Cinemex did not consider a discount viable because "[the Khan Parties] were asking us to do something that we had never done. . . How are we going to evaluate something or of paying for a theater that we can't see in operation? We don't know the service that it has. How much could it be reduced? Probably by the total price

because we didn't even know what we were buying. We didn't understand, nor were we able to evaluate that risk, so that's why we didn't accept the discount.").

81. The private plane proposal was not a reasonable, or even viable, alternative to a physical inspection by Cinemex. As a preliminary matter, it is not clear that it was an actual proposal since Mr. Khan had not determined any logistics necessary to secure a private plane. May 20 Hearing Tr. 227:17–20 (Mr. Khan testified at trial that he did not know how the private plane would be paid for); *see also* Debtors' Ex. 306 (Khan Dep. Tr. 414:25–415:08). In any event, a private plane would still risk the health of Cinemex employees given the COVID-19 pandemic. *See* July 9 Hearing Tr. 529:24–530:12 (Mr. Martí testified at trial that "the fact that it was a private plane didn't guarantee that there was no risk of contagion. Even if it were private, [Cinemex employees] would have to go to the theaters. It wasn't known if private planes at the time would eliminate the risk of contagion."). Moreover, even if they could fly privately, Cinemex employees would still not be able to inspect the theaters while they were in operation due to government shutdown orders and limits on gatherings of ten or more people—since at least that many people would have been sent to conduct the inspection efficiently. *See* Debtors' Ex. 142. As such, Cinemex would not be able to evaluate the customer experience or services provided while the theaters were in operation. *See id*. at 529:24–530:12 (Mr. Martí testified at trial that another reason the private plane was not a viable option was that "the [Cinemex employees] would get there and the – and the theaters would be closed. So we wouldn't be able to carry out the inspections that we required of the movie theaters being in operation, and nor would we be able to evaluate what it was we were buying.").

82. A virtual inspection was likewise not a reasonable or viable alternative to a physical inspection by Cinemex because it would not allow Cinemex to evaluate the customer experience

or services provided because the theaters were not open and operating at the time. July 9 Hearing Tr. 530:19–531:03 (Mr. Martí testified at trial that a virtual inspection would not work because "the movie theaters wouldn't be operating, so we would only be seeing assets, that's it, and we weren't buying assets, we were buying an ongoing concern. No matter how much [Mr. Khan] could show us each asset, the seats, the [projectors], that's not all that we were evaluating. We were evaluating that and other things, mainly to see the theaters in operation and to see the training that the people had, the services, the service that was offered, et cetera."). Considering the importance of an inspection to ensure that Cinemex would be acquiring "upscale dine-in theaters" of the quality and with the level of service represented to it by the Khan Parties, it was critical that Cinemex employees were on the ground, and not dependent upon others. *Id.*; *see also id* at 531:12–14 (Mr. Martí testified at trial that Cinemex had "never" "closed an acquisition virtually."). Moreover, the idea was that Khan employees would be on the ground facilitating the inspection, but unbeknownst to Cinemex, between March 19 and April 1, Mr. Khan furloughed 100% of the Khan Parties' employees—despite previously representing that the theatres would be closed "just for a short period."[6] May 20 Hearing Tr: 219:18–220:18, 222:9–18; *see* Debtors' Ex. 206 (Khan Tr. 345:23–346:11); Debtors' Ex. 216 (Email re Temporary Closure due to COVID-19).

83. A third-party inspection was not a reasonable or viable alternative to a physical inspection for similar reasons. As an initial matter, Cinemex is not aware of anyone who provides such a service, and if it were available, it would require Cinemex to rely on unaccountable

[6] During his deposition, Mr. Khan testified that he had furloughed 100% of his employees no more than 10 days after closing the SCG theatres. *See* Debtors' Ex. 206 (Khan Tr. 345:23–346:11). At trial, when asked, Mr. Khan changed his answer, claiming that the furloughing of his employees "did not happen until –I believe almost March – April 1st or after the month was over." May 20 Hearing Tr. 219:18–222:18. Whether Mr. Khan furloughed 100% of his employees by March 27 or April 1st or even later in April makes no difference to the Court's decision because those dates were prior to the required closing of both EPAs during which time, Mr. Khan had an obligation to keep his employees, see *infra* Sections II(B)(2)(b)(i) & (iii). Thus, the Court finds that Mr. Khan furloughed his employees between March 19 and April 1st.

inspectors with whom Cinemex was unfamiliar. *See* July 9 Hearing Tr. 531:18–532:04 (Mr. Martí testified at trial that third-party inspections were not viable because Cinemex would not "know anyone who gives that kind of service" and if the "service was poorly rendered or it failed" it was not clear "who would [Cinemex] then seek accountability from afterwards,"). Moreover, it would still not allow Cinemex to evaluate the customer experience or services provided while the theaters were in operation. *See* Debtors' Ex. 142.

84. A transition agreement was also not a reasonable or viable alternative to a physical inspection by Cinemex. As a preliminary matter, there was no transition agreement in existence, nor even any detailed discussion concerning its terms. *See* July 9 Hearing Tr. 532:10–15 (Mr. Martí testified at trial that he "never actually saw a proposal for a transition agreement. It was just a verbal comment. I never saw a written agreement for a transition agreement that would allow us to make a – a decision about whether it was a possible solution or not."); May 20 Hearing Tr. 299:07–10 (Mr. Khan testified at trial that the "details of the transition services agreement [had not] been worked out."). In any event, the nature of a transition agreement, however, is to address issues that arise during a transition, e.g., the status of inventory, cash on hand, etc.—it is not intended to address a scenario where what was represented turned out to not be accurate. *See* July 9 Hearing Tr. 532:16–20 (Mr. Martí testified at trial that the transition agreement had risks, such as "If we were to pay on the 31st of March and the transitional agreement kept going, and then we found major problems, how would we recover the money that we would have already paid?"). Any proposed transition agreement would not have adequately addressed the risks Cinemex faced if Cinemex was not satisfied with the theatres when it received them at closing, which could be substantial. *See Id.* In any event, such a proposal would not have allowed Cinemex to view the theaters while they were in operation.

85. At trial, Mr. Khan pointed to the "$8.1 million escrow" as a means for handling any "shortfalls in aesthetics, equipment, contracts, or anything of that nature." May 20 Hearing Tr. 233:16–25. The escrow amount of $8.1 million is around 10% of the purchase price. However, as explained by Mr. Martí at trial, that amount would not "have been sufficient to cover [Cinemex's] risk" of closing without a physical inspection because it was impossible to quantify the risk of closing without a physical inspection. July 9 Hearing Tr. 532:24–534:10. At trial, Mr. Martí explained the problem in the context of another bidding process Cinemex underwent in Europe. *Id*. In that process, Cinemex had made a non-binding offer of $900 million. *Id*. After inspecting the theatres, Cinemex realized that they would have to invest $200 million in maintenance and remolding. *Id*. That was "something more than 20 percent" of the purchase price. *Id*. In short, issues amounting to more than 20 percent of the purchase price, which could arise upon completion of a physical inspection, would not have been covered by the proposed escrow agreement.

86. Notwithstanding the reports regarding COVID, or perhaps because of them, Mr. Khan became frantic in his insistence that Cinemex agree to close immediately without a physical inspection.

87. On March 20, 2020, Mr. Khan emailed Mr. Martí stating "I hope you are on track to close on 31st?? can please call me or provide a[n] update asap." Debtors. Ex. 64. Half an hour later, Mr. Khan emailed Mr. Martí asking whether Cinemex "accept[ed] the discount??" *See* Debtors' Ex. 32. In response to Mr. Martí indicating that he presented Mr. Khan's proposal, Mr. Khan responded that he "need[s] to know ASAP." *Id*.

88. Mr. Khan followed up the very next day (a Saturday) stating "I'm willing to work with you on the price like I said. So please take this very serious, it could turn in the very bad situation and neither one of us want that. Good luck!!" Debtors' Ex. 31.

89. Mr. Martí understood the email to be a threat. *See* July 9 Hearing Tr. 535:12–536:14 (Mr. Martí testified at trial that he interpreted Debtors' Ex. 31 "as being a threat to close" and the "tone of those conversations with Mr. Khan . . . became more threatening.").

90. On that following Monday, March 23, Mr. Khan again followed up asking Mr. Martí to call him because he had "lots of decisions to make." Debtors' Ex. 85. Mr. Martí understood that to be an allusion to a lawsuit that Mr. Khan was considering filing. *See* July 9 Hearing Tr. 535:12–536:14.

91. Mr. Khan emailed Mr. Martí shortly thereafter demanding an update. Debtors' Ex. 84. An hour later, Mr. Khan followed up demanding "a solution tonight." Debtors' Ex. 83. Mr. Martí responded that he would call the following day. Mr. Khan again responded that he needed an answer because again he reiterated that he had "lots of decisions to make." *Id.*

92. Mr. Khan admitted that his insistence on closing was because he believed it was his "God-given right to do so." May 20 Hearing Tr. 249:13–16; Debtors' Ex. 206 (Khan Dep. Transcript at Tr. 439:12–14). Among the motivating reasons, Mr. Khan explained that he "wanted to invest in a real estate project" but at its core he "wanted the money" and he "wanted the cash." *Id*. at 439:05–10. Mr. Khan acknowledged under oath that he did not ***need*** the $20 million to satisfy any obligation, but rather wanted it by March 31 and believed it was his "right." *See* Debtors' Ex. 206 (Khan Dep. Tr. 432:10–433:10 (Mr. Khan testified during his deposition that he wanted to close on March 31, 2020 partially because he was hoping to invest the proceeds, and partially because "as a seller, in my belief, it is my right" to decide the "time frame."); Debtors'

Ex. 205 (Khan Dep. Tr. 146:09–151:09) (Mr. Khan wanted to close by March 31, 2020 because he was interested in investing in a possible real estate venture that would require at least three to five additional investors, and only had secured one potential investors); Debtors' Ex 206 (Khan Dep. Tr. 464:11–468:02).

H. The Khan Parties Attempted to Force Cinemex To Close Without A Physical Inspection, Despite The Illinois Contract Prohibiting It And The Khan Parties Failing To Satisfy The Conditions Precedent To Closing

93. Throughout this time, and notwithstanding Mr. Khan's threats, Cinemex never stopped attempting to close. To the contrary, Cinemex continued to collect information and coordinate items necessary to close. Mr. Khan and Mr. Brail knew this.

94. On March 24, 2020, Mr. Khan received a message from Mr. Ostrow forwarding a request he received from Cinemex for additional information and to schedule an introductory phone call. Debtors' Ex. 34. Mr. Khan forwarded that message to PJ Solomon that same morning, noting that Cinemex was "still communicating with [the SCG] team asking for things." *Id.*; *see also* May 20 Hearing Tr. 226:05–08 (At trial, Mr. Khan agreed that Cinemex was still collecting information related to the close, and trying to arrange calls related to the close as of March 24,"); June 18 Hearing Tr. 393:13–21 ("Q. So they continued to get information as if they were working towards a closing even after cancelling the visit? A [Brail]. Yeah, like I said, there were -- there were lease consents and other documents that I believe were still travelling back and forth up until, you know, the morning of the 25th.); July 9 Hearing Tr. 546:14–18 (Mr. Martí testified at trial that the March 24 email requesting additional information was sent because Cinemex was "still having conversations with the different areas of Star Cinema Grill to carry out this trip, these inspections and the closing of the transaction.").

95. Despite Mr. Khan knowing Cinemex was still working towards closing, on March 24, 2020, Mr. Khan directed SCG's counsel to send counsel for Cinemex an email claiming that

all the Closing Conditions had been met, and that Cinemex was required to close in two business days—i.e., by March 26, 2020, which SCG's counsel did. Debtors' Ex. 154; *see* May 20 Hearing Tr. 237:08–12 (At trial, Mr. Khan agreed that "on March 24, [he] instructed [] counsel to advise Cinemex that all closing conditions had been met, and Cinemex had until March 26, 2020 to close.").

96. Among the conditions precedent to closing required by the EPAs was the requirement that Cinemex be able to physically inspect the theatres and that the Khan Parties deliver to Cinemex an escrow agreement signed by the Khan Parties and the escrow agent. *See* Debtors' Exs. 51 § 8.1(D)(4) (Texas EPA) and 52 § 8.1(D)(4) (Illinois EPA). As described *supra* at 9, a physical inspection had not (and has never) occurred. In addition, the Khan Parties had not then (and have not ever) delivered to Cinemex a signed escrow agreement. *See* July 9 Hearing Tr. 532:21–23 ("Q. Was there a signed and executed escrow agreement? A. I never saw it signed or executed."); 541:13–22 ("Q. Did you believe the closing conditions had been met as of that date [March 24, 2020]? A. No, for two reasons. . . another condition was to have the escrow agreement executed, signed, and it hadn't been signed."); June 18 Hearing Tr. 388:05–09 ("[THE COURT] So the question was: Did Mr. Brail ever *See* an executed escrow agreement? What's your answer? [Mr. Brail]: I don't remember."). The Khan Parties did not produce an executed Escrow Agreement. *See* Debtors' Ex. 111 (unexecuted Escrow Agreement).

97. Cinemex's counsel responded to the Khan Parties' counsel's March 24, 2020 email that same day, informing the Khan Parties and their counsel that the Khan Parties had not met all the Closing Conditions at that time, including among other things, a physical inspection by Cinemex of the SCG Theaters and meeting with and interviewing the Khan Parties' corporate employees. Debtors' Ex. 45. Cinemex's counsel further informed the Khan Parties in their

response that Cinemex was not obligated to close under the circumstances but that the parties were in communication to try to resolve the situation. *See id*.

98. On March 25, 2020, Mr. Khan nonetheless instructed his counsel to serve Cinemex with a breach letter, asserting Cinemex was in breach of the EPAs—which they did. May 20 Hearing Tr. 247:16–21 (At trial, Mr. Khan agreed that "[o]n March 25th, [he] instruct[ed] [his] counsel to serve Cinemex with a breach letter."); Debtors' Ex. 160 (Breach Notice); *See* Joint Stip. ¶ 17.

99. The next day, on March 26, 2020, Cinemex's counsel responded to that letter (the "March 26 Letter"), Joint Stip. ¶ 18, stating that "Cinemex is not required to close at this time." Debtors' Ex. 46. They explained that contrary to Mr. Khan's assertion, the Closing Conditions had not been met, and identified specific provisions of the EPAs that had not been satisfied, including that the closing take place in Houston and that Cinemex have reasonable access to and the right to conduct a physical inspection of the properties and assets. *See id*. Cinemex's counsel further noted that "we are certainly open and willing to discuss solutions that would be acceptable to both parties." *Id*. at 3.

100. Even after being accused of breach, Cinemex continued its efforts to close, and on March 27, 2020, Cinemex requested contracts from the Khan Parties that were represented as being in the data room, but were not. Debtors' Ex. 47. Later that evening, the Khan Parties provided certain of the requested contracts, and notified Cinemex that they were "waiting on a copy [of a remaining contract] from our rep," effectively confirming that their prior representations about the completeness of the data room were false. *Id*.

101. Between March 28 and March 30, Mr. Khan demanded immediate payment of more than $20 million dollars to consider waiting to close and allowing Cinemex the opportunity to

inspect the theatre, Debtors Ex 206 (Khan Dep. Ex. 428:02–25 (Mr. Khan testified that talks about a deposition "started at 20 [million]")—even though the Texas Closing was not required for another month, and the Illinois closing was not required for another two months, and could not close before April 10, 2020, Debtors' Exs. 51 (Texas EPA), 52 (Illinois EPA). *See also* May 20 Tr. 248:23–249:01.

102. On March 28, 2020, Cinemex offered to postpone the closing and provide Mr., Khan with a $20 million loan. Debtors' Ex. 48 (Email re Loan). "[O]ffended" and "disappointed." Mr. Khan rejected Cinemex's loan offer and asked that Cinemex provide him a non-refundable deposit in that amount. Debtors' Ex. 49 (Email re Rejecting Deposit/Proposing Interest Free Loan).

103. Cinemex indicated that it was not comfortable with a non-refundable deposit and instead offered an interest-free loan for $20 million. Debtors' Ex. 50 (Email re Rejecting Deposit/Proposing Interest Free Loan); July 9 Hearing Tr. 553:09–16. Mr. Khan did not respond to Cinemex's loan offer.

104. Instead, on April 1, 2020—two days after receiving the offer from Cinemex—Mr. Khan instructed his counsel to file a lawsuit, which they had no doubt been working on for days prior, if not weeks. May 20 Hearing Tr: 249: 05–09.

105. On April 1, 2020, the Khan Parties filed a verified complaint in the U.S. District Court for the Southern District of Texas (the "Texas Action"). Joint Stip.¶ 19; Debtors' Ex. 73.

106. As of the date the lawsuit was filed, the Parties still had 29 days remaining to close the Houston EPA and 60 days remaining to close the Illinois EPA.

107. The only justification Mr. Khan has provided for why he filed the Texas Action on April 1 is that he "felt that [Cinemex was] playing games and they were not going to close" and

that he "also felt that they were intentionally doing it to get the April 30th drop-dead date." Debtors' Ex. 206 (Khan Dep. Tr. 522:22–523:10).

108. When asked "[r]ecognizing that you – that the –they were bound by the deal through April 30th, why not give it a few more weeks and then decide to sue", Mr. Khan testified: "I don't know why anyone or anyone thinks that they would have the right to make that decision for me.· I just felt like it was·the right time." *Id*. at 523:18-524:03.

109. When directly asked "[w]hat was the rush," Mr. Khan responded "I don't know what the rush was." *Id*. at 524:15–24. And when asked for clarification as to why he could not wait until the 29th of April, Mr. Khan simply stated "Because I didn't want to. I don't know. I just did not want to." *Id*. at 524:25–525:06.

110. When pressed as to why Mr. Khan wanted to file, Mr. Khan stated that he "felt like [Cinemex] was noncooperative," he "felt like their proposals were not fair," he "felt like they were unreasonable," and he "felt like they were just prolonging time." *Id*. at 526:03–14. Ultimately, Mr. Khan concluded that he was "frustrated," "going through an emotional roller coaster," and "when someone's upset and they're angry and frustrated and they're emotional, [they] take action when [they] feel like taking it." Debtors' Ex. 206 (Khan Dep. Tr. 527:25–528:19).

II. CONCLUSIONS OF LAW

111. The Khan Parties' proofs of claim allege damages[7] arising from a breach of contract claim brought by the Khan Parties in the Texas Action. Debtors' Ex. 73 (S.D. TX. Verified Complaint).

A. Legal Standard

112. The burden of proof for claims brought in the bankruptcy court under section 502(a) of the Bankruptcy Code rests on different parties at different times. *In re Mayne*, 556 B.R. 651, 654 (Bankr. M.D. Pa. 2016). However, the "[t]he burden of persuasion is always on the claimant." *Id*. (citing *In re Allegheny International, Inc*., 954 F.2d 167, 173 (3rd Cir. 1992)); *See also In re*

[7] The Proofs of Claim include:

(a) Amended Claim Nos. 28 in Case No. 20-14696 (for $82,970,000) and 85 in Case No. 20-14695 (for $82,970,000) of Omar Khan,

(b) Amended Claim Nos. 29 in Case No. 20-14696 (for $26,079,214.65) and 87 in Case No. 20-14695 (for $26,079,214.65) of S.C.G.C., Inc.,

(c) Amended Claim Nos. 30 in Case No. 20-14696 (for $26,079,214.65) and 89 in Case No. 20-14695 (for $26,079,214.65) of S.C.G.M., Inc.,

(d) Amended Claim Nos. 31 in Case No. 20-14696 (for $26,079,214.65) and 91 in Case No. 20-14695 (for $26,079,214.65) of SCG-B, Inc.,

(e) Claim Nos. 39 in Case No. 20-14696 (for $26,079,214.65) and 94 in Case No. 20-14695 (for $26,079,214.65) of SCG-VP, Inc.,

(f) Claim Nos. 50 in Case No. 20-14696 (for $26,079,214.65) and 109 in Case No. 20-14695 (for $26,079,214.65) of District Theaters, Inc.,

(g) Claims Nos. 49 in Case No. 20-14696 (for $26,079,214.65) and 110 in Case No. 20-14695 (for $26,079,214.65) of SCG-WR, LLC,

(h) Claim Nos. 51 in Case No. 20-14696 (for $26,079,214.65) and 108 in Case No. 20-14695 (for $26,079,214.65) of SCG-CS, Inc.,

(i) Claims Nos. 45 in Case No. 20-14696 (for $26,079,214.65) and 102 in Case No. 20-14695 (for $26,079,214.65) of of SCGK, Inc.,

(j) Claim Nos. 46 in Case No. 20-14696 (for $26,079,214.65) and 103 in Case No. 20-14695 (for $26,079,214.65) of SCG-SW, Inc.,

(k) Claim Nos. 47 in Case No. 20-14696 (for $26,079,214.65) and 104 in Case No. 20-14695 (for $26,079,214.65) of SCG-WL, Inc., and

(l) Claim Nos. 48 in Case No. 20-14696 (for $26,079,214.65) and 105 in Case No. 20-14695 (for $26,079,214.65) of SCG-N, Inc.

Lampe, 665 F.3d 506, 514 (3d Cir. 2011) ("[T]he claimant always has the burden of persuasion in a contested proceeding.").

112. "[A] claim that alleges facts sufficient to support a legal liability to the claimant satisfies the claimant's initial obligation to go forward" because it would thus meet the prima facie validity requirement under Rule 3001(f) of the Federal Rules of Bankruptcy Procedure. *In re AVN Corp*., 248 B.R. 540, 547 (Bankr. W.D. Tenn. 2000) (quoting *In re Allegheny International, Inc*., 954 F.2d 167, 173–74 (3rd Cir. 1992)).

113. A filed proof of claim is "deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). If the party in interest objects, the burden "then shifts to the objector to produce evidence sufficient to negate the prima facie validity of the filed claim." *In re Mayne*, 556 B.R. 651, 654 (Bankr. M.D. Pa. 2016). The objector must produce evidence "refut[ing] at least one of the allegations essential to the claim's legal sufficiency." *In re Oneida Ltd*., 500 B.R. 384, 389 (Bankr. S.D.N.Y. 2009).

114. "If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence." *In re Sheed*, 607 B.R. 470, 477 (Bankr. E.D. Pa. 2019) (quoting *In re Allegheny Int'l, Inc*., 954 F.2d 167, 173–74 (3d Cir. 1992)); *See also In re Sacko*, 394 B.R. 90, 97 (Bankr. E.D. Pa. 2008) (collecting cases).

113. Under Delaware law, to establish a breach of contract, the plaintiff must demonstrate: (1) the existence of the contract, whether express or implied; (2) the breach of an obligation imposed by that contract; and (3) the resultant damage to the plaintiff. *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

114. In this case, the first element is not disputed. The Trial addressed the second element alone.

115. A party is liable for breach of contract where it wrongly concludes that its counterparty has repudiated the agreement and himself ceases to complete the transaction. *Frontier Oil v. Holly Corp.*, No. CIV.A. 20502, 2005 WL 1039027, at *32 (Del. Ch. Apr. 29, 2005), *judgment entered sub nom. Frontier Oil Corp. v. Holly Corp.* (Del. Ch. 2005).

116. Under Delaware law, repudiation is "an outright refusal by a party to perform a contract or its conditions entitling 'the other party to treat the contract as rescinded.'" *CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 758 A.2d 928, 931 (Del. 2000) (quoting *Sheehan v. Hepburn*, 37 Del. Ch. 90, 94, 138 A.2d 810, 812 (1958)); *see* Restatement (Second) of Contracts § 250 (1981) ("A repudiation is [ ] a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach . . ."). To constitute a repudiation, a party "must give an 'unequivocal statement' that is 'positive and unconditional' about its intent not to perform its contractual obligation." *Veloric v. J.G. Wentworth, Inc.*, No. CIV.A. 9051-CB, 2014 WL 4639217, at *15 (Del. Ch. Sept. 18, 2014) (quoting *Carteret Bancorp, Inc. v. Home Grp., Inc.*, No. CIV.A. 9380, 1988 WL 3010, at *5–6 (Del. Ch. Jan. 13, 1988)). The repudiating statement concerning nonperformance must be "clear and precise." *In re Broadstripe, LLC*, 435 B.R. 245, 262 (Bankr. D. Del. 2010). An "expression of doubt" about the ability to perform does not suffice. *Veloric*, 2014 WL 4639217, at *16.

B. <u>The Khan Parties' Allegations that Cinemex Breached the EPAs Fail</u>

117. The Khan Parties have alleged that Cinemex breached Section 3.1 of the EPAs by not closing on March 26, 2020, two business days after the date the Khan Parties claim that the conditions precedent to Closing were satisfied. *See* Debtors' Ex. 73 ¶¶ 62–70 (Verified Complaint) .

118. As discussed below, the Khan Parties' claim fails (1) as to the Illinois EPA because, as set forth in the Illinois EPA, the Illinois EPA could not close before April 10, 2020; and (2) as to both the Illinois and Houston EPAs because the Khan Parties did not satisfy all conditions precedent to Closing as required by Section 3 of the EPAs; and (3) as to both the Illinois and Houston EPAs because the Khan Parties obviated Cinemex's obligations under both EPAs by wrongly claiming a repudiation and refusing to perform, thereby breaching the EPAs themselves.

1. The Illinois EPA Could Not Close Before April 10, 2020

119. The Court finds that Cinemex did not breach the Illinois EPA because, based on its plain language, the Illinois EPA could not close prior to April 10, 2020, and Cinemex did not repudiate the Illinois EPA (if at all) prior to April 1, 2020—the date the Khan Parties filed the Verified Complaint.

120. Section 3.1 of the Illinois EPA expressly states that Cinemex is obligated to close "no later than the second Business Day after satisfaction (or waiver) of the conditions set forth in ARTICLE 8. . . (but ***in no event shall Closing take place prior to April 10, 2020***), . . ." *See* Debtors' Ex. 52 § 3.1 (Illinois EPA). (emphasis added). Absent ambiguity in the contract, "the Court interprets the contract based on the plain meaning of the language on the face of the contract." *Phunware, Inc. v. Excelmind Grp. Ltd.*, 117 F. Supp. 3d 613, 625 (D. Del. 2015) (citation omitted). Here, the Court finds that there is no ambiguity in the contract and holds that the contract forbade a closing of the Illinois EPA prior to April 10, 2020.

121. Even if there were an ambiguity in Section 3.1 of the Illinois EPA (which there is not), in the Verified Complaint filed in the Texas Action, the Khan Parties acknowledged that under the Illinois EPA "the Closing must occur on or after April 10, 2020." *See* Debtors' Ex. 73 n. 6, 9 (Verified Complaint); *see also* Debtors' Ex. 205 (Khan Dep. Tr. 238:08–20 ("Q. And, in fact that – the Illinois deal provided that a closing couldn't happen prior to April 10th; is that right?

A. That is correct.")). Thus, the Court finds that the Illinois EPA could not have closed prior to April 10, 2020.

122. I therefore find no merit to the Khan Parties' claim that Cinemex breached the Illinois EPA by not Closing on March 26, 2020—15 days prior to the first date of Closing available under the Illinois EPA.

123. Moreover, the Court finds meritless any claim by the Khan Parties that Cinemex repudiated the Illinois EPA prior to April 1, 2020—the date on which the Khan Parties filed the Texas Action—because the Khan Parties are unable to point to any "clear and precise" statement of refusal to perform made by Cinemex, as required under Delaware law. *See Broadstripe,* 435 B.R. at 262. Indeed, the evidence shows that Cinemex was continuing to try to close the EPAs, even after the Khan Parties had declared a breach.

124. Mr. Martí testified that Cinemex did not ever convey to the Khan Parties that Cinemex never intended to close the EPAs. *See* July 9 Hearing Tr. 543:22–544:22; ; *see also id*. at 552:02–06. The Court finds Mr. Martí's testimony credible, as Mr. Khan's testimony confirms this understanding. *See* May 20 Hearing Tr. 219:07–09 ("Q. They didn't say they were never coming [to Houston to perform the inspections], is that correct? A. No, sir."); Debtors' Ex. 206 (Khan Dep. Tr. 489:04–09 ("I do believe there was communication from the 26th or 24th asking Jose what they were going to do and when they were going to close, and maybe even at that point we had a good – good-faith understanding that it would be the 31st.")). Mr. Brail's testimony further confirms Mr. Marti's testimony. *See* June 18 Hearing Tr. 393:13–21 ("Q. So they continued to get information as if they were working towards a closing even after cancelling the visit? A [Brail]. Yeah, like I said, there were -- there were lease consents and other documents that I believe were still travelling back and forth up until, you know, the morning of the 25th.).

125. Moreover, Mr. Martí testified that Cinemex continued attempting to close the EPAs even after the Khan Parties accused Cinemex of breaching the EPAs. *See* July 9 Hearing Tr. 554:07–09 ("Q. During the time these negotiations were ongoing, was Cinemex continuing to move towards closing? A. Yes, those conversations never stopped.").

126. The emails between the Parties admitted into evidence confirm that Cinemex was still trying to close the EPAs on and even after March 24, 2020—the date the Khan Parties contended the conditions precedent to closing had been met and demanded that Cinemex close within two business days, on March 26, 2020. *See* Debtors' Ex. 34; Debtors' Ex. 47.

127. For example, on the morning of March 24, 2020, the day the Khan Parties purported to have satisfied all of their Closing conditions, a Cinemex employee emailed SCG employees requesting information and an initial call "on how to proceed moving forward.". *See* Debtors' Ex. 34. After receiving this email, the SCG recipient forwarded the email to Mr. Khan, who then forwarded it to PJ Solomon, stating "[t]hey are still communicating with our team asking for things." *Id*.

128. Even after receiving the March 25th notice of alleged breach, a Cinemex employee emailed SCG employees on March 27th requesting contracts that were missing from the data room. Debtors' Ex. 47. Later that evening, SCG employees provided most of these contracts, and notified Cinemex that they were "waiting on a copy [of a remaining contract] from our rep." *Id*.

129. In addition, between March 28, 2020 and March 30, 2020, a series of emails between the Parties admitted into evidence contemplate potential solutions to Mr. Khan's desire for $20 million prior to closing the EPAs. *See e.g.*, Debtors' Exs. 48, 49, 50.

130. Based on the foregoing, the Court finds that Cinemex did not repudiate the Illinois (or Texas) EPA and was still in fact attempting to close the Illinois EPA up until the day the Khan Parties filed the Texas Action.

131. Accordingly, Cinemex did not breach the Illinois EPA.

2. The Khan Parties Did Not Satisfy the Conditions Precedent to Closing Pursuant to Either EPA.

132. The Court finds that the Khan Parties failed to establish that any breach occurred because the Khan Parties have not proven that they satisfied all applicable Closing Conditions. In choosing to unilaterally declare that all Closing Conditions were met, the Khan Parties must bear the consequences of being wrong.

133. Under Delaware law, a "condition precedent" is "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises." *Cato Cap. LLC v. Hemispherx Biopharma, Inc.*, 70 F. Supp. 3d 607, 619 (D. Del. 2014), *aff'd*, 625 F. App'x 108 (3d Cir. 2015) (citation omitted); *See* Restatement (Second) of Contracts § 224 (1981).

134. Section 3.1 of the Texas EPA provides that Cinemex is obligated to close "no later than the second Business Day after satisfaction (or waiver) of the conditions set forth in ARTICLE 8 (not including conditions which are to be satisfied by actions taken at the Closing), in Houston, Texas. . . ." *See* Debtors' Ex. 51 § 3.1 (Texas EPA).

135. And, as referenced *supra*, Section 3.1 of the Illinois EPA expressly states that Cinemex is obligated to close "no later than the second Business Day after satisfaction (or waiver) of the conditions set forth in ARTICLE 8 (not including conditions which are to be satisfied by actions taken at the Closing), in Houston, Texas (but in no event shall Closing take place prior to April 10, 2020), . . ." *See* Debtors' Ex. 52 § 3.1 (Illinois EPA).

136. Section 8.1 of the EPAs provides the "Buyer's Closing Conditions" which are described as "[t]he obligations of the Buyer to consummate the purchase of the Equity Interests" being "subject to the satisfaction (or waiver by Buyer) of" a list of conditions "as of the time of Closing." *See* Debtors' Exs. 51 § 8.1 (Texas EPA) and 52 § 8.1 (Illinois EPA).

137. From the explicit language of the contracts, the Court finds that each of the conditions set forth in Article 8 of the EPAs was a condition precedent to closing, and that Cinemex only had an obligation to close if all of the Article 8 conditions precedent were met. The Khan Parties do not contend to the contrary, alleging that Cinemex breached Section 3.1 of the EPAs by refusing to close within two business days of the Khan Parties "satisfy[ing] all applicable Closing Conditions as of March 24, 2020." *See* Debtors' Ex. 73 ¶¶ 65–67.

138. For the reasons stated below, the Court finds that the Khan Parties failed to meet the conditions precedent in Sections 8.1(B) and (D). Accordingly, under the EPAs, Cinemex was not required to close on March 26, 2020 and therefore did not breach the EPAs by refusing to close by that date.

a) The Khan Parties Did Not Provide All Deliverables Required By Section 8.1(D)

139. Section 8.1(D)(4) of the EPAs requires that "[o]n or prior to the Closing Date, the Equityholder will have delivered (or cause to be delivered) to Buyer . . . [t]he Escrow Agreement, duly executed by the Equityholder and the Escrow Agent." Debtors' Exs. 51 § 8.1(D)(4) (Texas EPA) and 52 § 8.1(D)(4) (Illinois EPA).

140. From the plain language of the contracts, the Court holds that the EPAs' requirement that the Khan Parties provide Cinemex with the Escrow Agreement, duly executed by itself and its escrow agent Wells Fargo, was a condition precedent to closing.

141. The record demonstrates that the Khan Parties did not provide Cinemex with an Escrow Agreement executed as provided by the EPAs prior to demanding that Cinemex close in two business days.

142. There is no Escrow Agreement executed by the Khan Parties and Wells Fargo in the record. The only Escrow Agreement in the record is unexecuted. *See* Debtors' Ex. 111 (unexecuted Escrow Agreement).

143. No witness has testified that an Escrow Agreement executed by the Khan Parties and Wells Fargo exists. *See* June 18 Hearing Tr. 388:05–09 ("[THE COURT] So the question was: Did Mr. Brail ever see an executed escrow agreement? What's your answer? [Mr. Brail]: I don't remember."); July 9 Hearing Tr. 532:21–23 (Marti Testimony) ("Q. Was there a signed and executed escrow agreement? A. I never saw it signed or executed."); 541:13–22 (Martí Trial Testimony) ("Q. Did you believe the closing conditions had been met as of that date [March 24, 2020]? A. No, for two reasons. . . another condition was to have the escrow agreement executed, signed, and it hadn't been signed.").

144. Accordingly, the Court finds that the Khan Parties did not satisfy Section 8.1(D)(4), a condition precedent that would obligate Cinemex to close. On that basis alone, the Court finds that the Khan Parties did not satisfy the Closing conditions under Article 8.1(D)(4) and therefore that Cinemex did not breach either EPA by not closing on March 26, 2020.

b) <u>The Khan Parties Failed to Perform Their Covenants As Required By Section 8.1(B)</u>

145. Section 8.1(B) of the EPAs require that "the Equityholder will have performed and complied (or shall have cured any non-performance or non-compliance) with all of the covenants and agreements required to be performed by the Company and the Equityholder, as the case may

be, hereunder or under any of the Transaction Documents at or prior to the Closing." Debtors' Exs. 51 § 8.1(B) (Texas EPA) and 52 § 8.1(B) (Illinois EPA).

146. From the plain language of the contracts, the Court finds that the EPAs' requirement that the Khan Parties comply with all covenants and agreements was a condition precedent to closing.

147. The record demonstrates that the Khan Parties failed to comply with all covenants and agreements prior to demanding that Cinemex close in two business days—specifically, Sections 7.1, 7.2, 7.4 and 7.9.

(i) Covenant to Use Commercially Reasonable Efforts to Conduct Business in the Ordinary Course & Keep Available the Services of Directors, Officers, and Employees

148. Under Section 7.1(A) of the EPAs, the Khan Parties covenanted to use "commercially reasonable efforts" to "conduct the Business in the Ordinary Course," and to "keep available the services of their respective directors, officers and employees" from the signing of EPAs (March 10) until the closing or termination of the EPAs. Debtors' Ex. 51 § 7.1(A) (Texas EPA) and 52 § 7.1(A) (Illinois EPA).

149. Delaware courts interpret "commercially reasonable efforts" to mean "reasonable best efforts," which requires "tak[ing] all reasonable steps to solve problems and consummate the transaction." *Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *87 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018) (quoting *Williams Companies v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 272 (Del. 2017)).

150. Where a party obligated to use commercially reasonable efforts chooses not to take action that is "both commercially reasonable and advisable to enhance the likelihood of consummation of the [transaction]," and instead "pursued another path designed to *avoid* the

consummation of the [transaction], [that party] knowingly and intentionally breached this covenant." *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715, 749 (Del. Ch. 2008) (emphasis in original).

151. For the reasons explained below, the Court finds that the Khan Parties did not use *commercially reasonable efforts* in both conducting the business of the SCG Theatres in the ordinary course and keeping available the services of their respective directors, officers, and employees, as required by the EPAs.

Conducting Business in the Ordinary Course

152. The EPAs define "Ordinary Course" to mean "in the ordinary course of that Person's business consistent with past practice." Debtors' Exs. 51 § 1.1 (Texas EPA) and 52 § 1.1 (Illinois EPA).

153. As is the case here, where an "ordinary course" provision includes the phrase "consistent with past practice," under Delaware law, a court must examine how the specific seller company has "routinely operated" in the past. *See AB Stable VIII LLC v. Maps Hotels and Resorts One LLC*,2020-CV-0310-JTL, 2020 WL 7024929, at *70 (Del. Ch. Nov. 30, 2020).

154. Specifically, the court "must evaluate the company's operations 'before and after entering into' the transaction agreement to determine whether those operations are 'consistent.'" *Id.* at *71 (quoting *Mrs. Fields Brand, Inc. v. Interbake Foods, LLC*, 2017 WL 2729860, at *32 (Del. Ch. June 26, 2017)). The reason being that "ordinary course" covenants "exist to 'help ensure that the business the buyer is paying for at closing is essentially the same as the one it decided to buy at signing.'" *Snow Phipps Grp., LLC v. Kcake Acquisition, Inc.*, No. CV 2020-0282-KSJM, 2021 WL 1714202, at *38 (Del. Ch. Apr. 30, 2021) (quoting *Akorn*, 2018 WL 4719347, at *83).

155. The evidence demonstrates that the Khan Parties departed from the normal and ordinary routine of conducting the SCG Theatres' business, as established by past practice, between the time the Parties signed the EPAs on March 10, 2020 to the date the Khan Parties declared that all closing conditions had been met on March 24, 2020.

156. It is undisputed that:

- On March 12, 2020, SCG changed its standard operating procedures regarding employee travel. *See* Debtors' Ex. 219; *see also* May 20 Hearing Tr. 213:25–215:21 (Mr. Khan testified that Debtors' Ex. 219 demonstrates "a change to the standard operating procedures at the theater"). After March 12, 2020, the new procedures required that SCG employees who traveled or planned to travel "between March 10 and April 30 must disclose this information to the General Manager" and provided that any such travel may require employees "to spend up to one week out of the building upon return to state, prior to returning to work." Debtors' Ex. 219.

- On March 14, 2020, the Khan Parties reduced the capacity of the SCG theatres by 50 percent. *See* Debtors' Ex. 218 ("Beginning tomorrow, we will be requesting that guests leave at least one seat between parties."); *see also* Debtors' Ex. 41 at 3 ("Prior to the closure, the Houston chain reduced theater capacity by 50 percent to ensure buffer seating between moviegoers . . "); May 20 Hearing Tr. 216:13–217:16 (Mr. Khan agreed at trial that by March 14, 2020, the SCG theatres "posted requests that guests leave empty seats between parties to socially distance in light of COVID on [its] website, app, and ticket kiosk").

- On March 16, 2020, the Khan Parties "informed studios and vendors that the SCG theaters would be closing business until further notice, starting at the close of business that day." May 20 Hearing Tr. 218:14–21 (Khan trial testimony); *see e.g.*, Debtors' Ex. 222. And, on March 17, 2020, the Khan Parties closed the operations of all of its Houston and Illinois theatres. *See* Debtors' Ex. 41 (SCG Closure Announcement); May 20 Hearing Tr. 218:22–24; *see also* Debtors' Ex. 216.

157. While there is a dispute regarding the timing of what happened next, it is uncontroverted that SCG furloughed its employees. Mr. Khan testified in his deposition that somewhere between a week to ten days after the theatre closures on March 17, one hundred percent of employees were furloughed. Debtors' Ex. 206 (Khan Dep. Tr. 344:02–346:08) ("Q. And so were a hundred percent of the Khan Company employees furloughed or just a portion? A. At some

given point, all of them . . . [s]o a few days after the – all the theaters closed on March 17th. A few days after, a hundred percent of the people were furloughed. . . . I think it was probably a week or ten days later.")). However, during cross examination in trial, Mr. Khan recanted his testimony on this point and claimed, "I clearly stated in the deposition, that I wasn't exactly sure how long after that was, it says that in the deposition. That [furloughing of employees] actually did not happen until – I believe until almost March – April 1st, or after the month was over, after the breach had occurred. So, to clarify, that, yes, people were furloughed, but they were furloughed after the month of March, and as well as it was after there was a breach that occurred, or in my opinion the breach had occurred." May 20 Hearing Tr. 219:18–224:16. Although Mr. Khan was unable to provide any evidence to support his new found recollection, it makes no difference for my analysis. There is no dispute that Mr. Khan did in fact furlough his employees prior to the April 30 and May 31 termination dates of the respective Texas and Illinois EPAs.

158. Based on the foregoing, the Court finds that the SCG Theatres were not "essentially the same" as what Cinemex "decided to buy at signing." *See Snow Phipps Grp.*, 2021 WL 1714202, at *38 (quoting *Akorn*, 2018 WL 4719347, at *83).

159. Significantly, the Court finds no merit in any argument that the Khan Parties' departure from their "ordinary course" of business was commercially reasonable or excused because it was in response to the COVID-19 pandemic. Even if the COVID-19 pandemic "warranted those changes, and the changes were reasonable responses to the pandemic," a party nevertheless breaches the "ordinary course" covenant when the changes are not in "the normal and ordinary routine of the business" as established by past practice. *AB Stable VIII LLC v. Maps Hotels and Resorts One LLC*,2020-CV-0310-JTL, 2020 WL 7024929 * 75 (Del. Ch. Nov. 30, 2020) (the "*Maps* Opinion"). In *Maps*, a leading on-point Delaware opinion, the Delaware

Chancery Court found that the seller of 15 luxury U.S. hotels breached the "ordinary course" covenant because, among other things, in response to the COVID-19 pandemic, it closed two of its hotels entirely, severely limited operations at the other thirteen—including stopping nearly all food and beverage service and limiting all other amenities—and "slashed" its workforce through lay-offs, furloughs, and reduced hours down to "skeleton staffing." *Id.* at *75–76. The court found that the changes were "wholly inconsistent with past practice" and could reasonably be viewed as "having significantly altered the operation of the business." *Id*. at *76.

160. Lest there be doubt, the *Maps* opinion is clear that "ordinary course" covenants ***did not*** permit a company to do whatever such companies "ordinarily would do when faced with a global pandemic."[8] *Id*. at *70. Rather, "precedents compare the company's actions with how the company has routinely operated and hold that a company breaches an ordinary course covenant by departing significantly from that routine." *Id*. And where the parties choose to define "ordinary course" as being "consistent with past practice," as is the case here, "the court cannot look to how other companies responded to the pandemic or operated under similar circumstances." *Id*. at *71. Thus, the ordinary course covenant "'impose[s] an unconditional obligation' to operate in the ordinary course consistent with past practice." *Id*. (quoting *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, No. CIV.A. 8980-VCG, 2014 WL 5654305, at *15 (Del. Ch. Oct. 31, 2014)).

161. The foregoing applies with even more force here where the Khan Parties attempted to force a closing while the Companies were not operating in the ordinary course despite that there

[8] The court also noted that even though there were questions as to whether the company had legal obligations to make changes to its business due to government stay-home orders, this argument did not "enable[] Seller to carry its burden of demonstrating that [the company's] deviations from the ordinary course of business were excused." *Id*. at *81.

were still 37 days left to consummate the Texas EPA, and 68 days to consummate the Illinois EPA, including by improperly declaring all Closing conditions satisfied.

162. Accordingly, the Khan Parties had departed from their ordinary course of business prior to the purported closing date, and in doing so, breached their covenant under Section 7.1(A)(a) of the EPAs and therefore failed to perform a condition precedent to closing under Section 8.1(B) of the EPAs. Debtors' Exs. 51 §§ 7.1(A)(a) & 8.1(B) (Texas EPA) and 52 §§ 7.1(A)(a) & 8.1(B) (Illinois EPA).

Keep Available the Services of their Respective Directors, Officers, and Employees

163. Under Section 7.1(A)(d), the Khan Parties covenanted to use commercially reasonable efforts to "keep available the services of their respective directors, officers and employees." Debtors' Exs. 51 § 7.1(A)(d) (Texas EPA) and 52 § 7.1(A)(d) (Illinois EPA).

164. As discussed above, although there is some dispute as to when SCG furloughed its employees, there is no dispute that the Khan Parties furloughed one hundred percent of SCG employees prior to the termination date of the EPAs. *See* Debtors' Ex. 206 (Khan Dep. Tr. 344:02–346:08); May 20 Hearing Tr. 219:18–224:16.

165. The decision to furlough employees was not discussed with Cinemex, nor was it for any other reason than to save costs.

166. The record demonstrates that the Khan Parties failed to satisfy the covenant to keep available the services of their respective directors, officers and employees, as required under Section 7.1 of the EPAs and therefore failed to perform a condition precedent to closing under Section 8.1(B) of the EPAs.

(ii) Provide Reasonable Access to and the Right to Inspect All Property, Assets, Premises, Books, Records, Contracts, Etc.

167. Under Section 7.2 of the EPAs, the Khan Parties covenanted to provide Cinemex "reasonable access to and the right to inspect all of the properties, assets, premises, books and records, contracts, agreements and other documents and data related to the Company Group" from the signing of the EPAs to the closing date or termination of the EPAs. Debtors' Exs. 51 § 7.2 (Texas EPA) and 52 § 7.2 (Illinois EPA).

168. At the date of signing, March 10, 2020, the Khan Parties covenanted to provide Cinemex with reasonable access to the SCG theatres for 51 days for the Texas theatres (as the termination date was April 30) and 82 days for the Illinois theatre (as the termination date was May 31), if Closing of the respective EPAs did not happen prior to those respective dates.

169. The record demonstrates that the Khan Parties failed to satisfy the covenant to provide reasonable access, as required under Section 7.2, by failing to provide Cinemex with all of the contracts it asked for and failing to provide for a physical inspection by Cinemex prior to declaring that all the conditions precedent had been met.

Reasonable Access and the Right to Inspect Contracts

170. From the plain language of the EPAs, the Court finds that in order to have fulfilled the conditions precedent to close under Section 8.1(B) of the EPAs, by the time of closing, the Khan Parties would have had to provide Cinemex with reasonable access to and the right to inspect contracts related to all vendors of the SCG Theatres as required under Section 7.2 of the EPAs.

171. The evidence shows that the Khan Parties failed to do so.

172. It is undisputed that PJ Solomon populated the data room with what should have included "the actual contracts with all the vendors." June 18 Hearing Tr. 297:23–299:09 (Mr. Brail testified that "[t]he data room ha[d] thousands of pages, including more detailed financial

information, the actual contracts with all the vendors" and included "everything somebody would need to know to purchase a business.").

173. However, the evidence shows that the actual contracts for all vendors were not included in the data room. On March 19, 2020, a Cinemex employee, Loretta Thomas, emailed Mr. Walsh, of SCG Theatres, copying Mr. Ostrow and Mr. Khan, also of SCG Theatres, requesting that the SCG Theatres provide "copies of the contracts relating to theatre operations." Debtors' Ex. 47. In response, Mr. Ostrow asserted that "[a]ll contracts are in the [data room]." Having not found copies of all contracts requested, on March 27, 2020, Ms. Thomas followed up with Mr. Ostrow, asking for a copy of five specific contracts because Cinemex "checked the data room and could not find [them.]" Debtors' Ex. 47. Mr. Ostrow replied shortly after, attaching several contracts and calling out the contract with Vistar as one for which "we are waiting on the copy from our rep." *Id*. The email exchange goes on to say that "any other company not listed here is comparable to Conroe agreement." *Id*.

174. Despite the Khan Parties having represented that all contracts were provided to Cinemex, the evidence shows that even as of March 27, three days *after* the Khan Parties claimed "the satisfaction (or waiver) of the closing conditions set forth in Article 8 of the EPA," the Khan Parties had still not provided all contracts.

175. Accordingly, the Court finds that the Khan Parties did not provide Cinemex reasonable access to and the right to inspect their contracts prior to the purported closing date, March 26, 2020, and in doing so, breached their covenant under Section 7.2 of the EPAs and therefore failed to satisfy a condition precedent to closing under Section 8.1(B) of the EPAs. Debtors' Exs. 51 §§ 7.2 & 8.1(B) (Texas EPA) and 52 §§ 7.1(2) & 8.1(B) (Illinois EPA); *see ECB USA,, v. Savencia*, No. CV 19-731-RGA-CJB, 2021 WL 3187495, at *14 (D. Del. July 28, 2021)

(concluding that the failure to provide requested documents under a contract requiring "reasonable access to and the right to inspect all of the … books and records, contracts, agreements and other documents and data" would amount to breach) (applying Florida law).

Reasonable Access and the Right to Inspect the Properties and Premises

176. From the plain language of the EPAs, the Court finds that in order to have fulfilled its conditions precedent to close under Section 8.1(B) under the EPAs, at the time of closing, the Khan Parties would have had to provide Cinemex with reasonable access to and the right to inspect properties and premises of the SCG theatres as provided by Section 7.2 of the EPAs.

177. For the reasons set forth below, the Court finds that the Khan Parties failed to provide Cinemex reasonable access to and the right to inspect the properties and premises of the SCG theatres prior to declaring that all the conditions precedent had been met.

178. It is undisputed that:

- The Khan Parties were aware that Cinemex would be exercising its right to inspect the properties and premises after the EPAs had been signed on March 10, 2020 and prior to Closing. The Khan Parties assured in the Phase II Letter that they would be able to inspect the theatres prior to closing. Debtors' Ex. 23. On March 12, 2020, two days after the Parties signed the EPAs, Mr. Khan asked when Cinemex planned to schedule its inspection. *See* Debtors' Ex. 127 (On March 12, Mr. Khan wrote, "Have you guys nailed down any travel plans [f]or next week?."); July 9 Hearing Tr. 518:08–18 (Mr. Marti testified at trial that Mr. Khan did not seem surprised that Cinemex was coordinating an inspection and that Mr. Khan asked "when are you going to come and when are you going to coordinate the trips.").

- Cinemex responded by scheduling the inspection to begin on March 17, 2020. *See Id.* (On March 13, Mr. Castelazo responded that Cinemex's "VP of HR. . . is planning to go on Tuesday together with the Operations Team." And, Mr. Ezquerro confirmed Mr. Castelazo's statement that "the Operations team along . . . with HR will travel on Tuesday to Houston."); May 20 Hearing Tr. 213:14–24 (Mr. Khan agreed on cross examination that "on March 13th, 2020, Cinemex confirmed that its operations team and human resources would travel to Houston on Tuesday, March 17th.").

- The Khan Parties coordinated preparations for the physical inspection with Cinemex. *See e.g.*, Debtors' Ex. 212 (Mr. Khan requested that Cinemex resend its inspection requests in an excel format; confirmed with Cinemex that "Tuesday works fine" for a Houston inspection and asked "What airport will you be coming in to, Hobby, or Bush?"); Debtors' Ex. 80 (Email from Mr. Ostrow to Cinemex coordinating meetings and resources for March 17 inspections).

- Cinemex did not go forward with the inspection of the SCG Theatres on March 17 due to safety concerns related to the COVID-19 pandemic. *See* July 9 Hearing Tr. 521:03–522:12 (Mr. Martí testified that the March 17 inspection was "postponed" for "concern about coronavirus and we were worried about the health of – of our people."); May 20 Hearing Tr. 149:12–20 (Mr. Khan testified that Cinemex cancelled its March 17 trip "for the safety of their -- their staff . . . [and] I believe it was because they said that travel was restricted . . by the government.").

- Cinemex attempted to reschedule the inspection for the following week. *See* Debtors' Ex. 36 (March 16 email from Mr. Ostrow stating that Cinemex's Chief Technology Officer and his team "will be intown [sic] next week" and will be "installing some of their software and infrastructure."); July 9 Hearing Tr. 522:3–523:20 (Mr. Martí agreed at trial concerning Debtors' Ex. 36 that he "share[d] Mr. Ostrow's understanding that the inspection schedule for March 17th would be postponed until the following week.").

- The Khan Parties modified SCG theatre operations on March 12 and 14, 2020 and shut down all of the SCG theatres by March 17, 2020. *See* Debtors' Ex. 41 (SCG Closure Announcement); May 20 Hearing Tr. 218:22–24; *See also* Debtors' Exs. 216 (modifying deliveries from vendors), 218 (modifying capacity to 50%), 219 (implementing employee travel restrictions).

- The Khan Parties represented to Cinemex that the shutdown would only be for a short period. *See* Debtors' Ex. 211 (In response to an email asking whether SCG theatres had closed all of their theatres, the VP of Operations at SCG, Mr. Ostrow, responded, "Yes, just for a short period. Your team is aware."); May 20 Hearing Tr. 219:14–17.

- Cinemex never waived their right to a physical inspection. *See* July 9 Hearing Tr. 527:22–25 (When asked, "Did -- did Cinemex ever agree orally or in writing to close by March 31st even without a physical inspection?" Mr. Marti testified "No, never"); *id.* at 534:11–14, 17–19 (When asked, "In the context of these conversations regarding alternatives and discounts, did Mr. Khan ever say to you that Cinemex did not have a right under the EPA to inspect the theaters? Mr. Marti testified that, ". . . No, he didn't say that. He offered us a discount, which indicated that he was in agreement that we

had to carry out the inspections"); *see also id.* at 505:11–18; *id.* at 638:17–21.

179. There is a dispute, however, as to whether an inspection of the SCG theatres while they were closed would satisfy Section 7.2 of the EPAs.

180. The Khan Parties argue that Cinemex could have conducted the inspection while the SCG theatres were closed. *See* May 20 Hearing Tr. at 227:2–228:1. Cinemex, on the other hand, maintains the position that in order to perform its inspection, the SCG theatres had to be in operation. *See* July 9 Hearing Tr. 520:20–521:02 (At trial, when asked whether Cinemex was "planning to conduct the inspection during operating hours of the SCG Theaters," Mr. Martí testified "[y]es, it would have to be. Like I said, we were buying a business in operation, an ongoing concern, where it was very important for us where we were buying – to be buying a high-end dine-in theater with very good service, with extraordinary service. That's what we had to review before carrying out the closing."); see also id. at 530:19–24 (Mr. Martí at trial explained that inspecting a closed theatre would not work because "we would only be seeing assets . . . and we weren't buying assets, we were buying an ongoing concern. No matter how much he could show us each asset, the seats, the [projectors], that's not all that we were evaluating. We were evaluating the other things, mainly to see the theaters in operation and to see the training that the people had, the services, the services that was offered etc."). In support of its position, Cinemex cites numerous aspects of inspections that would require the theatres be in operation, emphasizing that it was purchasing a going concern business in operation, not just assets. *See, e.g.,* July 8 Hearing Tr. 494:20–497:11 ("operations"); *id.* at 497:12–499:23 ("culinary"); *id.* at 499:24–501:02 ("projection and sound"); *id.* at 501:03–502:02 ("maintenance"); *id.* at 502:03–504:20 ("human resources"); *id.* at 504:21–505:5 ("[w]e're buying a theater in operation"); *id.* at 530:19–531:03 ("we weren't buying assets").

181. The Court finds that the plain language of the EPAs supports Cinemex's reading of the EPAs.

182. Specifically, Section 7.2 of the EPAs provides that "[f]rom the date hereof until the Closing . . . the Companies shall. (and shall cause each member of the Company Group to): (A) afford . . . reasonable access to and the right to inspect all of the properties, assets, premises, books and records, contracts, agreements and other documents and data related to the Company Group; . . . provided that ***any such investigation shall be conducted during normal business hours*** upon reasonable advance notice to the Company Group, under the supervision of the Company Group's personnel. . . ." Debtors' Exs. 51 § 7.2 (Texas EPA) and 52 § 7.2 (Illinois EPA) (emphasis added). To understand the final clause cited above, the Court looks to Delaware case law on contract interpretation.

183. Delaware courts interpret the phrase "'provided that' as the express creation of a condition." *Munro v. Beazer Home Corp*., CIV. U608-03-081, 2011 WL 2651910, at *5 (Del. Com. Pl. June 23, 2011). Delaware courts also have interpreted the word "any" to be all encompassing, and "shall" to be a mandatory condition. *See Ashall Homes Ltd. v. ROK Ent. Group Inc*., 992 A.2d 1239, 1250 (Del. Ch. 2010); *see also In re Bay Hills Emerging Partners I, L.P.*, No. CV 2018-0234-JRS, 2018 WL 3217650, at *5 n.43 (Del. Ch. July 2, 2018) ("explaining 'a provision stating that a court shall have jurisdiction over any dispute [is] a mandatory, rather than permissive, grant of jurisdiction'") (citing *Prestancia Mgmt. Gp., Inc. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at *7 (Del. Ch. May 27, 2005)). With that in mind, the Court holds that under Section 7.2, the inspection occurring during normal business hours is a condition to the Khan Parties' provision of reasonable access to and a right to inspect the SCG theatres. The EPAs

therefore contemplated that the inspection be conducted in the theatres while they were in operation.

184. Even if the Court were to consider parol evidence, assuming *arguendo* there was an ambiguity in Section 7.2 (which there is not), the Parties' conduct suggests that there was agreement that Cinemex had a right to a physical inspection of operating theatres under the EPAs.

185. Specifically, it is undisputed that:

- The Khan Parties did not offer Cinemex an inspection prior to entering into the EPAs. June 18 Hearing Tr. 362:06–11 (Mr. Brail testified at trial that "to the extent the parties wanted to have inspections, they could not occur prior to the signing of the agreement."); *see also*, Debtors' Ex. 26 (PJ Solomon instructed Cinemex that the "GMs and theatre level people do not know about the process"); June 18 Hearing Tr. 345:11– (Mr. Brail testified at trial that they "instructed [Cinemex] not to identify themselves as an acquiror . . . What [PJ Solomon] did not let [Cinemex] do was say [it was] acquiring the company, and then ask a whole bunch of . . . questions."); July 9 Hearing Tr. 494:1–503:06; 509:14–17 (Mr. Martí testified at trial that the February tours "cannot be called an inspection. It was just a quick tour.").

- The Khan Parties assured Cinemex in writing that it would be able to conduct inspections after executing the EPAs. Debtors' Ex. 23 (Paragraph 8 of the Phase II Letter provided that "[i]nspections are expected to occur after signing of an Agreement."); *see* July 9 Hearing Tr. 507:22–508:03 (Mr. Martí testified at trial that Cinemex "interpreted [paragraph 8 of the Phase II Letter] to mean that [the Khan Parties] were giving this to use so that [Cinemex] would feel sure that [it] could feel sure about doing the signing without having done the inspections, but that these inspections would be carried out afterwards. So [the Khan Parties] wanted to give us the [comfort] that – that we would, indeed, do the inspection before closing.").

- The Khan Parties coordinated preparations for the physical inspection with Cinemex. *See e.g.*, Debtors' Ex. 212 (Mr. Khan requested that Cinemex resend its inspection requests in an excel format; confirmed with Cinemex that "Tuesday works fine" for a Houston inspection and asked "What airport will you be coming in to, Hobby, or Bush?"); Debtors' Ex. 80 (Email from Mr. Ostrow to Cinemex coordinating meetings and resources for March 17 inspections.

- Mr. Khan offered a discount on the purchase price in exchange for Cinemex closing without a physical inspection. *See* May 20 Hearing Tr. 228:02–04 (Mr. Khan agreed on cross examination that he "offered a discount on the

purchase price"); July 9 Hearing Tr. 534:17–535:02 (At trial when asked whether "Mr. Khan ever sa[id] to [Mr. Martí] that Cinemex did not have a right under the EPA to inspect the theaters," Mr. Martí testified "[n]o, not only did he not say that, he also offered us a discount, which implies that he was in agreement with that we had to do the inspections."); *id* at 528:01–529:07 (Mr. Martí testified at trial that "Mr. Khan offered us – offered us distinct alternatives. One was if there was a risk in closing on the operation without the visits, that we could save the value of that risk, the amount of that risk and he could give us a discount on the price that reflected that risk."); Debtors' Ex. 32 (March 20 Email from Mr. Khan stating "I need a a[sic] update, did you guys accept the discount?"); Debtors' Ex. 31 (March 21 Email from Mr. Khan stating "I'm willing to work with you on the price like I said. So, please take this very serious, it could turn in the very bad situation and neither one of us want that. Good luck!!").

- Mr. Khan offered Cinemex alternatives, albeit not viable, to a physical inspection. *See* July 9 Hearing Tr. 528:3–532:20; May 20 Hearing Tr. 227:2–5, 227:17–20, Debtors' Ex. 206 (Khan Tr. 420:02–25); *see supra*.

186. Accordingly, the Court holds that Section 7.2 of the EPAs provided Cinemex a right to inspect the theatres while they were in operation.

187. The Khan Parties insist that they never denied Cinemex a request to inspect the theatres, and as such they are in compliance with their obligations under Section 7.2. May 20 Hearing Tr. 141:25–142:14; 142:16–18; 265:04–06.

188. But the record shows that the Khan Parties did effectively deny Cinemex's request to inspect the theatres by declaring satisfaction of the conditions precedent to closing on March 24, 2020 (thereby purporting to require Closing on March 26, 2020), prior to Cinemex inspecting the theatres despite the Khan Parties knowing intended to exercise its right to inspect the theatres and that under the Texas EPA, Cinemex had until April 30, 2020 to request access to and inspect the SCG theatres located in Houston, Debtors' Ex. 51 (Texas EPA), and until May 31, 2020 under the Illinois EPA, Debtors' Ex. 52 (Illinois EPA).

189. The Khan Parties' attempt to close prior to Cinemex's rescheduling of the inspection when both EPAs provided additional time before Closing was required constitutes an

impermissible restriction of access on Cinemex's right to inspect the SCG theatres. *See Frontier Oil*, 2005 WL 1039027, at *32 (after seller wrongly declared repudiation and sued, seller would be liable to buyer for damages for not allowing buyer to complete the transaction).

190. Accordingly, the Court finds that the Khan Parties did not provide Cinemex reasonable access to and the right to inspect its properties and premises prior to the purported closing date, and in doing so, breached their covenant under Section 7.2 of the EPAs and therefore failed to perform a condition precedent to closing under Section 8.1(B) of the EPAs. Debtors' Exs. 51 §§ 7.2 & 8.1(B) (Texas EPA) and 52 §§ 7.2 & 8.1(B) (Illinois EPA).

(iii) Access to Corporate Employees

191. Under Section 7.9 of the EPAs, the Khan Parties covenanted to provide Cinemex "reasonable access to each Corporate Employee (including but not limited to by providing contact information for each such Corporate Employee) and to the personnel record of each Corporate Employee, and Buyer and its Affiliates may conduct interviews and discussions with such Corporate Employees regarding employment. . . ." Debtors' Exs. 51 § 7.9 (Texas EPA) and 52 § 7.9 (Illinois EPA).

192. Under Section 1.1 of the EPAs, "Corporate Employee" is defined "as of the date" the EPAs were executed—March 10, 2020. Debtors' Exs. 51 § 1.1 (Texas EPA) and 52 § 1.1 (Illinois EPA).

193. As discussed *supra*, it is undisputed that the Mr. Khan furloughed one hundred of his employees by April 1, 2020—and necessarily by April 30, 2020. *See* Debtors' Ex. 206 (Khan Dep. Tr. 344:02–346:08) May 20 Hearing Tr. 219:18–224:16.

194. The Court finds that the Khan Parties' furloughing of one hundred percent of his employees necessarily restricted reasonable access to Corporate Employees because, the Corporate Employees that were employed at the time of signing were no longer under the custody and control

of the Khan Parties. This is especially the case with Michael Pawlowski, SCG Theatres former culinary director. Despite Mr. Pawlowski being a Corporate Employee, Mr. Khan asked that Mr. Pawlowski "move on" and did not replace his role due to "COVID, lower performance, [and] theaters [being] closed." Debtors' Ex. 205 (Khan Dep. Tr. 183:20–184:18). Such an act denied Cinemex its right to interview the culinary director a dine-in movie theatre, where the "scratch-made food" was a key selling point. *See* Debtors' Ex. 21.

195. Accordingly, the Khan Parties inappropriately limited Cinemex's access to its Corporate Employees under Section 7.9 of the EPAs and therefore the Khan Parties failed to perform a condition precedent to closing under Section 8.1(B) of the EPAs. Debtors' Exs. 51 §§ 7.9 & 8.1(B) (Texas EPA) and 52 §§ 7.9 & 8.1(B) (Illinois EPA).

(iv) Further Assurances

196. Under Section 7.4 of the EPAs, the Khan Parties covenanted to provide Cinemex "reasonable assurances" that they would use "reasonable best efforts" to satisfy the Closing Conditions and obligations to consummate the Closing. Debtors' Exs. 51 §§ 7.4 & 8.1(B) (Texas EPA) and 52 §§ 7.4(2) & 8.1(B) (Illinois EPA).

197. The Court finds that the Khan Parties did not use reasonable best efforts to cause the Closing to occur. Not only did the Khan Parties *not* meet all closing conditions (*see supra*), they also demanded—and indeed, threatened—that Cinemex give up its contractual rights (e.g., the right to a physical inspection) to meet an arbitrary deadline of closing on March 31, 2020, which is not provided for by the EPAs. *See* Debtors' Ex. 31 (email from Mr. Khan to Mr. Marti stating, "[P]lease take this very serious, it could turn in [sic] the very bad situation and neither of us want that."); July 20 Hearing Tr. 535:12–20 (Mr. Marti: "[Mr. Khan] sent me an e-mail in which he said to me we have to close . . . I interpreted it – interpreted it as being a threat to close."), 535:09–536:14 (Mr. Martí testified at trial that "the tone of those conversations with Mr. Khan"

relating to "what would happen if Cinemex did not accept to close without – an inspection" "became more threatening conversations.").

198. The only justification Mr. Khan offered for his behavior was that he was entitled to a March 31 closing because it was his "God-given right to do so." May 30 Hearing Tr. 249:10–16; Debtors' Ex. 206 (Khan Dep. Transcript at Tr. 439:12–14). It goes without saying that such an explanation is not sound, nor does it constitute reasonable best efforts. *See Frontier Oil*, 2005 WL 1039027, at *31 (by peremptorily declaring a repudiation, the seller denied the buyer the opportunity to resolve contingencies).

199. Mr. Khan's explanation for filing suit during the term of the EPAs is equally unreasonable. Mr. Khan's behavior was driven entirely on his feelings. Debtors' Ex. 206 (Khan Dep. Tr. 522:22–523:10) (Mr. Khan testified that he filed on April 1 because he "felt that they were playing games and they were not going to close" and that he "also felt that they were intentionally doing it to get the April 30th drop-dead date."); *id*. at 523:18-524:03 (when asked during deposition why Mr. Khan did not wait until April 30th to file suit, Mr. Khan responded: "I don't know why anyone or anyone thinks that they would have the right to make that decision for me.· I just felt like it was·the right time."); *id*. at 527:25–528:19 (Mr. Khan testified that was he"frustrated," "going through an emotional roller coaster," and "when someone's upset and they're angry and frustrated and they're emotional, [they] take action when [they] feel like taking it.)

200. Mr. Khan admitted that he had no reason to rush the filing of the lawsuit. *Id*. at 524:15–24 ("I don't know what the rush was.").

201. According to Mr. Khan, it ultimately came down to the simple fact that he "didn't want to" wait. *Id*. at 524:25–525:06. These are not legally justifiable reasons and do not come close to constituting reasonable best efforts.

202. Notably, Cinemex made efforts to accommodate Mr. Khan's demands for $20 million to allow time for a physical inspection before closing, which was a material change to the original terms of the EPAs as they did not provide for such a payment. Cinemex first offered Mr. Khan a $20 million loan that would be disbursed to SCG on March 31 (in exchange for Cinemex having the option and right of first refusal to purchase the SCG theatres). *See* Debtors' Ex. 48. After Mr. Khan rejected this proposal and again demanded $20 million as a "non-refundable deposit," *see* Debtors' Ex. 49; July 9 Hearing Tr. 552:25–553:16, Cinemex made a second offer to loan $20 million interest free. July 9 Hearing Tr. 553:17–554:6. Mr. Khan did not respond to that proposal and instead filed suit on April 1. July 9 Hearing Tr. 554:2–06.

203. Based on such conduct, the Court finds that the Khan Parties did not act with reasonable best efforts to satisfy its closing conditions and obligations to consummate the Closing, and in doing so, breached their covenant under Section 7.4 of the EPAs and therefore failed to perform a condition precedent to closing under Section 8.1(B) of the EPAs. Debtors' Exs. 51 §§ 7.4 & 8.1(B) (Texas EPA) and 52 §§ 7.4 & 8.1(B) (Illinois EPA).

3. Cinemex Did Not Waive Any Of The Closing Conditions.

204. Under Delaware law, waiver is "the voluntary and intentional relinquishment of a known right." *Seidensticker v. Gasparilla Inn, Inc.*, No. CIV.A. 2555-CC, 2007 WL 1930428, at *6 (Del. Ch. June 19, 2007) (citation omitted). The standards for proving waiver are "quite exacting." *Id*. Waiver "implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights." *Id*. (citation omitted).

205. Pursuant to Section 12.1, any amendment or waiver to the EPAs must have been in writing. *See* Debtors' Exs. 51 § 12.1 (Texas EPA) and 52 § 12.1 (Illinois EPA). The writing requirement was absolute, and no part of the EPAs, or any rights or obligations of any party under the EPAs, could be modified, amended, or discharged simply by "course of dealing." *See id*.

206. At no time did Cinemex waive its right to conduct an in-person physical inspection of the theatres or to have the Closing take place in Houston. There is no writing reflecting a waiver in the record. And no testimony was elicited from any witness indicating the existence of such a writing (or even an oral waiver). *See* July 9 Hearing Tr. 527:22–25 (When asked, "Did -- did Cinemex ever agree orally or in writing to close by March 31st even without a physical inspection?" Mr. Marti testified "No, never"); *id.* at 534:11–14, 17–19 (When asked, "In the context of these conversations regarding alternatives and discounts, did Mr. Khan ever say to you that Cinemex did not have a right under the EPA to inspect the theaters? Mr. Marti testified that, ". . . No, he didn't say that. He offered us a discount, which indicated that he was in agreement that we had to carry out the inspections"); May 20 Hearing Tr. 219:04–09 (Khan Trial Testimony) ("Q. They didn't say they were never coming [to Houston to perform the inspections], is that correct? A. No, sir."); Debtors' Ex. 206 (Khan Dep. Tr. 489:04–09 ("I do believe there was communication from the 26th or 24th asking Jose what they were going to do and when they were going to close, and maybe even at that point we had a good – good faith understanding that it would be the 31st.")). Further, Cinemex's conduct after signing the EPAs demonstrates that it fully intended to realize its contractual rights to the physical inspection and a closing in Houston. *See infra*.

207. As the communications from Cinemex to Mr. Khan and others at SCG and PJ Solomon show, Cinemex endeavored to return to Houston after its February visits to conduct full physical inspections of the theaters. And the Khan Parties expressed neither surprise nor

reluctance in assisting with the coordination of the physical inspections. *See* July 9 Hearing Tr. 518:02–18 (At trial, Mr. Martí was asked whether he had the "impression at this time [after signing the EPAs] that Mr. Khan was surprised that Cinemex was coordinating an inspection?" to which Mr. Martí responded "No, [Mr. Khan] even said – well he sent us information saying – asking when are you going to come and when are you going to coordinate the trips, so I didn't see any surprise on his part."). While Cinemex initially planned to travel to Houston on March 17, the developing COVID-19 situation led Cinemex to postpone the trip to the following week when, it believed, it would be safe to travel and the theaters would be open and operational. *See* July 9 Hearing Tr. 521:17–522:13, 524:9–19, 525:07–526:03; Debtors' Ex. 36. Mr. Khan then attempted to entice Cinemex to proceed to Closing without a physical inspection by offering a discount and purported alternatives to a physical inspection. But Cinemex explained to Mr. Khan that neither the discount nor his purported alternatives were viable substitutes for a physical inspection of the theatres in operation, *see supra*. Thus, at no time did Cinemex indicate that it could or would consummate the Closing without completing a physical inspection of the theatres.

208. In addition, there is no evidence that Cinemex waived the condition that the Closing occur in Houston. *See* Debtors' Exs. 51 § 3.1 (Texas EPA) and 52 § 3.1 (Illinois EPA). As Cinemex explained to the Khan Parties in its March 26 letter, the requirement for the closing location was "in place for good reason" so that Cinemex could assess the facilities and perform other actions needed onsite "to ensure an orderly and successful transition of the business." Debtors' Ex. 46.

C. The Khan Parties Breached The EPAs By Wrongly Declaring A Repudiation By Cinemex.

209. A party is liable for breach of contract where it wrongly concludes that its counterparty has repudiated the agreement and itself ceases to complete the transaction. *Frontier* Oil, 2005 WL 1039027, at *32.

210. For the following reasons, the Court finds the Khan Parties breached the EPAs by wrongfully concluding that Cinemex had repudiated the agreement and itself ceasing completion of the transaction. *See id*.

211. It is undisputed that on March 25, 2020, the Khan Parties, through its counsel, sent Cinemex a letter claiming that Cinemex had repudiated the EPAs in providing an "unconditional and unambiguous refusal to close in the timeframe required by the Agreement." Debtors' Ex. 160 at 1.

212. The basis for the Khan Parties claim was that "[a]s of [] March 24, 2020, the Companies and Equityholders have satisfied all remaining Closing conditions and the Agreement requires your clients now to close." *Id*.

213. The Court finds that the Cinemex had not, in fact, repudiated for two reasons.

214. *First*, the Khan Parties cannot point to any statement where Cinemex made clear that it would not perform its contractual obligations. *See Veloric*, 2014 WL 4639217, at *16. Instead, Cinemex made clear, and the Khan Parties understood, that Cinemex would not close on March 26, 2020 specifically—not that it would never close. This is demonstrated by the statements Cinemex made at the time, *see, e.g.*, Debtors' Ex. 46 (March 26 letter from Cinemex's counsel statement that Cinemex "was not obligated to close the transaction *at this time*") (emphasis added), and that Cinemex continued to work towards closing, even after the Khan Parties had accused it

of breach, *see e.g.*, Debtors' Ex. 34 (March 24 Email Requesting Marketing Materials and Call); June 18 Hearing Tr. 393:09–21.

215. *Second*, as explained in *supra* Section II(B), the Khan Parties had not, in fact, satisfied all closing conditions. Accordingly, counter to the Khan Parties' assertion, Cinemex was not required to close on March 26, 2020. In choosing to unilaterally declare that all Closing Conditions were met, the Khan Parties must bear the consequences of being wrong.

216. The Khan Parties, therefore, wrongly claimed in their March 25 letter that Cinemex repudiated. *See* Debtors' Ex. 160 ("Nothing in the Agreement excuses this repudiation by Parent and Buyer.").

217. In that same letter, the Khan Parties made clear that they would cease to complete the transaction by claiming that "if your clients do not close in accordance with the Agreement, our clients have instructed us to pursue all available remedies, including without limitation potentially seeking expedited injunctive relief and specific performance as well as all costs incurred or damages suffered." *Id*. at 3; *see W. Willow-Bay Ct., LLC v. Robino-Bay Ct. Plaza*, LLC, No. CIV.A. 2742-VCN, 2009 WL 458779, at *5 (Del. Ch. Feb. 23, 2009) ("A party may repudiate an obligation through statements when its language, reasonably interpreted, indicates that it will not or cannot perform.").

218. The Khan Parties' refusal to perform its obligations under the EPAs is further demonstrated by their filing suit on April 1, 2020, despite not having satisfied the conditions precedent to closing with 29 days remaining prior to the termination of the Texas EPA and 60 days remaining prior to the termination of the Illinois EPA. Debtors' Ex. 73 (Texas Complaint).

219. Both the threat of filing suit and the lawsuit itself qualify as the Khan Parties' repudiation of the EPAs, which precludes the Khan Parties from claiming the benefit of the

agreement. *See PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014–15 (Del. Ch. 2004) ("Once a party repudiates or breaches a contract, it cannot claim the benefits of that contract.").

D. Conclusion

220. To prevail on their claim that Cinemex breached the EPAs, the Khan Parties were required to prove that the Closing Conditions under the EPAs, which included both covenants and conditions precedent, had been met as of March 24, 2020. They have failed to do so. In choosing to unilaterally declare that all Closing Conditions were met, the Khan Parties must bear the consequences of being wrong.

221. As explained above, closing the Illinois EPA could not occur on March 26, 2020 as the Khan Parties were demanding, numerous Closing Conditions had not been met when the Khan Parties demanded that Cinemex close by March 26, and Cinemex did not repudiate the EPAs. Accordingly, Cinemex had no obligation to close at that time and was not in breach of the EPAs.

III. ORDER

BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

222. The Amended Objection is GRANTED. The Claims are DISALLOWED in their entirety.

223. This Order approves the aforementioned Findings of Fact and Conclusions of Law. The exhibits thereto are incorporated herein by reference, *provided*, *however*, that if there is any direct conflict between the Order and exhibits, the terms of this Order shall control solely to the extent of such conflict.

224. This Order and all exhibits thereto shall be effective and binding as of the Effective Date on all parties in interest including, but not limited to: (a) the Reorganized Debtor; and (b) the Khan Parties.

A. Objections.

225. To the extent that any objections (including any reservations of rights contained therein) to this Order have not been withdrawn, waived, or settled before entry of this Order, are not cured by the relief granted in this Order, or have not been otherwise resolved as stated on the record of the Hearing, all such objections (including any reservation of rights contained therein) are hereby overruled in their entirety on the merits.

B. Findings of Fact and Conclusions of Law.

226. The findings of fact and the conclusions of law set forth in this Order constitute findings and conclusions of law in accordance with Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014. All findings of fact and conclusions of law announced by the Court at the Hearing in relation to this Order, including the Ruling, are hereby incorporated into this Order. To the extent that any of the following constitutes findings of fact or conclusions of law, they are adopted as such. To the extent any finding of fact or conclusion of law set forth in this Order (including any findings of fact or conclusions of law announced by the Court at the Hearing and incorporated herein) constitutes an order of this Court, it is adopted as such.

# # #

Submitted by:

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Counsel for Cinemex Holdings USA, Inc.

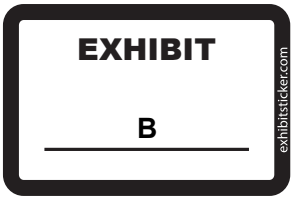
Copies to:

Attorney Patty Tomasco, who shall serve a copy of this order on all interested parties and file a certificate of service reflecting the same.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov

In re:	Chapter 11
CINEMEX HOLDINGS USA, INC.,	Case No. 20-14696-LMI
Reorganized Debtor.	(Formerly Jointly Administered Under Lead Case: Cinemex USA Real Estate Holdings, Inc., Case No. 20-14695-LMI)
_____/	

REORGANIZED DEBTORS' RESPONSE TO THE KHAN PARTIES' FINDINGS OF FACT AND CONCLUSIONS OF LAW



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Pursuant to the July 17 Order (ECF 94), the Reorganized Debtors[1] respectfully submit this Response to the Khan Parties' Proposed Findings of Fact and Conclusions of Law ("Khan's PFC").

I. STATEMENT OF FACTS[2]

A. Cinemex Made a Non-Binding Offer To Acquire The SCG Theatres Relying On The Khan Parties' Representation That They Are An "Upscale Dine-In Theatre Circuit"

1. The Khan Parties do not dispute that the SCG Theatres were marketed to Cinemex as "an upscale dine-in movie theatre circuit offering scratch-made food and plush recliners" that offers a "luxury feel" with "better services and operations than any other cinema." *See* Debtors' PFC ¶¶ 1–4. Nor do they dispute that, based on that characterization, PJ Solomon marketed the SCG Theatres as an "opportunity that . . . fits [Cinemex's] acquisition criteria perfectly." *Id.* ¶ 4.

2. The Parties agree that Cinemex's $[redacted] non-binding offer, made on January 14, 2020, relied on PJ Solomon's representations and the Confidential Information Memorandum ("CIM") the Khan Parties provided to Cinemex. *See* Khan's PFC ¶ 6; Debtors' PFC ¶ 6.

B. The Khan Parties Offered Cinemex The Opportunity to Tour, Not Physically Inspect, the SCG Theatres Before Making A Binding Offer

3. The Khan Parties do not dispute that the management meeting and tours were a marketing tool, highlighting "recent positive developments." *See* Debtors' PFC ¶¶ 9–10.

4. The Parties agree that the management meetings and tours took place on February 5 and 6, and also on which individuals attended. *See* Khan's PFC ¶¶ 9–10; Debtors' PFC ¶¶ 14–16. The Parties agree that no one from Cinemex's IT or projection and sound department attended the management meetings or tours. *See* Khan's PFC ¶¶ 9–10, 13; Debtors' PFC ¶¶ 14–16, 24. Further, the Khan Parties do not dispute that PJ Solomon instructed Cinemex to have their IT

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Reorganized Debtors' Proposed Finding of Fact and Conclusions of Law.

[2] The Debtors Proposed Findings of Fact and Conclusions of Law ("Debtors' PFC") are incorporated by reference.

questions answered over the phone, instead of during the management meeting and tours.[3] *See* Debtors' PFC ¶ 13. Finally, the Parties agree that not every Cinemex employee who attended the management presentation attended every tour; for example, Mr. Martí only attended four tours. *See* Khan's PFC n. 6; Debtors' PFC ¶ 24.

5. The Parties agree that the group, guided by Mr. Khan and Mr. Ostrow, spent on average between 45 minutes to an hour at each theatre, and in that time toured the theatre lobby, box office, concession area, auditoriums, kitchens, bathrooms, and projection rooms of each theatre, *see* Khan's PFC ¶ 12; Debtors' PFC ¶ 22, and the Khan Parties do not dispute that the group spent an average of two to three minutes in each space, *see* Debtors' PFC ¶ 23.

6. The Parties agree that during the management meeting and tours, Cinemex was prohibited from identifying itself as a potential purchaser of the SCG Theatres or asking detailed questions about the business and operations. Khan's PFC ¶ 11; Debtors' PFC ¶ 25. And the Khan Parties do not dispute that Cinemex followed instructions, and did not "ask [SCG employees] much more than just asking about the food and the kitchen." Debtors' PFC ¶ 25

7. Although they repeatedly suggest to the contrary, the Khan Parties never actually assert that the management meeting and tours were a physical inspection. Debtors' PFC ¶ 26.

[3] The Khan Parties argue that no one from Cinemex's IT department participated in the tours because the Khan Parties had "answered all questions" beforehand. Khan's PFC ¶ 13. But there is nothing in the record to support that. On the contrary, Mr. Brail's contemporaneous email with Mr. Marti contemplates a call ***and*** an on-site visit. *See* Debtors' Ex. 26 (email from Mr. Brail to Mr. Marti stating only that "I need to check with Omar to see how to best handle IT—perhaps we organize a call on IT to answer many questions first and then see what is then useful for on site."). Likewise, while Mr. Marti acknowledged that calls had taken place, he also detailed many tasks that an IT professional needs to undertake in person, as part of an inspection. July 9 Hearing Tr. 494:15–19; 519:22–520:03. That is consistent with an email sent more than a month after the tours, March 16, in which an SCG employee, coordinating with SCG's technology provider and Cinemex's IT department for a site visit, acknowledged that Cinemex's IT department had "a lot of questions." Debtors' Ex. 36.

C. Following the Management Meeting and Tours, The Khan Parties Provided Cinemex Written Assurance That, If Cinemex Made A Binding Offer, It Would Be Able To Physically Inspect the Theatres Before Closing

8. The Parties agree that, on February 18, 2020, PJ Solomon sent Cinemex a Phase II Process Letter, providing "terms and conditions" governing Cinemex's submission of a binding offer that included express, written assurance that "[i]nspections are expected to occur after signing of an Agreement." Khan's PFC ¶¶ 14, 16; Debtors' PFC ¶¶ 27–29.

9. The Khan Parties acknowledge that inspections were not defined in the Phase II Process Letter (or anywhere) as limited to HVAC and roofing.[4] *See* Khan's PFC ¶ 16. Further, the Khan Parties do not dispute that Cinemex, at no time, agreed to limit its physical inspection of the SCG Theatres to include only an inspection of the HVAC and roofing.[5] *See* Debtors' PFC ¶ 63. Indeed, the Khan Parties also do not dispute that they began coordinating a physical inspection that was not limited to HVAC and roofing after signing the EPAs. *See* Debtors' PFC ¶¶ 56–61.

10. The Khan Parties do not dispute that the physical inspections would entail careful examination of the parking lot, lobby, box office, auditorium, bathrooms, projection and sound, food service, kitchen, construction, maintenance, IT and technology, and employees. *See* Khan's PFC ¶ 17; Debtors' PFC ¶¶ 33–41. The Khan Parties quibble only with the amount of time required to conduct a physical inspection. They do so, however, relying only on Mr. Brail's opinion that he "personally, [] could [assess a dine-in theatre] in 15 minutes." Khan's PFC ¶19 (citing June 18

[4] Mr. Brail's trial testimony that "inspections" were only intended to encompass HVAC and roofing, *see* Khan's PFC ¶ 16, is contradicted by the record, and should thus be rejected, *see* Debtors' PFC ¶ 63.

[5] The closest the Khan Parties' come to this is claiming that the term "due diligence" encompasses "inspections," such that when Cinemex's asserted in its binding offer that it had "completed the bulk of its due diligence efforts," Khan's PFC ¶ 24, it was somehow also saying it completed the bulk of its inspections. Khan's PFC ¶ 25. But that is belied by the plain language of the Phase II Process Letter, which distinguishes between "due diligence" and "inspections." *See* Debtors' Ex. 23 (Phase II Process Letter). It is also inconsistent with Mr. Martí's testimony that "when we talk about due diligence . . . we're talking about the documents in the data room." *See* July 9 Hearing Tr. 561:14–16.

Hearing Tr. 372:16–19). Setting aside that simply walking through the SCG Theatres during the tours, which average over an acre in size, took between 45 minutes to an hour, Mr. Brail is not an expert witness,[6] and thus his opinion must be disregarded as irrelevant.[7] Moreover, his opinion is contrary to the record, which reflects that Cinemex and the Khan Parties planned a multiple-day inspection. Debtors' PFC ¶¶ 56–61.

11. Additionally, the Khan Parties do not dispute that Cinemex made a binding offer pursuant to the terms and conditions in the Phase II Process Letter, which expressly assured Cinemex it would be able to physically inspect the SCG Theatres subsequent to making its offer. S*ee* Debtors' PFC ¶ 42. The Khan Parties likewise do not dispute that Cinemex viewed an inspection prior to Closing as "fundamental." *See* Khan's PFC ¶ 17 (acknowledging that "[a]ccording to Mr. Marti, an inspection prior to closing was fundamental"); Debtors' PFC ¶ 30.

D. The Khan Parties Pushed Cinemex to Increase Its Binding Offer Claiming That The Effects Of COVID-19 Would Be Short Term

12. The Parties agree that Mr. Khan did not accept Cinemex's March 3, 2020 binding offer of $[redacted] despite it being the only binding offer he received. *See* Khan's PFC ¶¶ 24, 25, 27; Debtors' PFC ¶¶ 42–46.

13. The Khan Parties do not dispute that, on March 3, 2020, Mr. Khan instructed Mr. Brail to call Mr. Martí to persuade Cinemex to increase its offer, and that Mr. Brail did so and followed the call with an email to Mr. Martí attaching a presentation, claiming that "[r]ecent stock market downdraft due to the Covid-19 Virus is driven heavily by technical trading factors and NOT long-term, fundamental valuation analysis." (Debtors' Ex. 25; *see* Debtors' PFC ¶ 47). Yet,

[6] *See* June 18 Hearing Tr. 295:09–10 ([Mr. Seese]: "Mr. Brail is not being tendered as an expert witness.").

[7] *See Lebron v. Sec'y of Fla. Dep't of Child. & Fams.*, 772 F.3d 1352, 1372 (11th Cir. 2014) (affirming inadmissibility of lay witnesses' testimony that would require "specialized knowledge" where witnesses were not offered as expert).

the Khan Parties claim that, contrary to his email (and his goal of persuading Cinemex to increase its bid), Mr. Brail told Cinemex that the COVID-19 situation "could be a long-term issue." Debtors' PFC ¶¶ 46–49. But, the only contemporaneous evidence on this point, is an email Mr. Brail sent on March 22, 2020, ***weeks after*** Cinemex increased its binding offer, and ***well after*** the Khan Parties closed the SCG Theatres.[8] *See* Debtors' Ex. 149.

14. The Parties also agree that on March 6, 2020, when Cinemex increased its binding offer to $[redacted], there were no restrictions concerning business or gatherings. *See* Debtors' PFC ¶¶ 51–52; *see also* Khan's PFC ¶ 35.

E. The Parties Executed the EPAs, Which Preclude A Closing Prior To April 10, 2020, And Provide Until April 30, 2020 And May 31, 2020 To Close

15. The Parties agree that the Illinois EPA could ***not*** close prior to April 10, 2020*, see* Khan's PFC ¶ 31 n.16 ("[T]he Illinois Agreement provided for a closing no earlier than April 10, 2020."); the Khan Parties acknowledge that the Texas EPA provided until April 30, 2020 to close, *see* Khan's PFC ¶ 89; Debtors' PFC ¶ 55, and they do not dispute that the Illinois EPA provided until May 31, 2020 to close. *See* Debtors' PFC ¶ 55.

16. Yet, the Khan Parties persist in asserting that Cinemex was nonetheless required to close the transaction "no later than March 31, 2020." *See* Khan's PFC ¶ 15. The only evidence the Khan Parties offer in support are emails and testimony reflecting the Parties discussing closing by March 31, 2020. *Id*. But a March 31, 2020 Closing is indisputably not what the Khan Parties bargained for in the EPAs, which both contain integration clauses. *See* Debtors' Ex. 51 § 12.5

[8] The Khan Parties' reliance on an email from PwC on this point, *see* Khan's PFC ¶ 26, is baseless. It is clear from the document cited that PwC was not opining on how long Covid-19 would last (which is well outside an accountant's purview), but rather how long the effects of the reduction in cash flow being experienced at the time would be felt."

(Texas EPA) and 52 § 12.5 (Illinois EPA); *see also* Debtors' Ex. 51 § 12.1 (Texas EPA) and 52 § 12.1 (Illinois EPA).[9]

F. Consistent With The Signed EPAs, The Parties Coordinated A Physical Inspection

17. The Khan Parties do not dispute that, upon signing the EPAs, the Parties began coordinating a physical inspection of the SCG Theatres. *See* Debtors' PFC ¶¶ 56–61; Khan's PFC ¶ 20. Nor do they dispute that this coordination included Cinemex sending requests from Operations, Human Resources, and IT requiring on-site assistance, or that an SCG executive was coordinating meetings to ensure that Cinemex had access to SCG employees. Khan's PFC ¶ 20, n. 11; Debtors' PFC ¶¶ 59–61.

18. The Parties agree that they planned for Cinemex to inspect the theatres for multiple days during the week of March 17. Khan's PFC ¶ 20; Debtors' PFC ¶¶ 56–60.

19. The Khan Parties do not dispute that: (1) on March 12, the same day Cinemex informed the Khan Parties of its planned travel, the Khan Parties imposed a travel restriction on its employees (and Cinemex was not consulted), *see* Debtors' PFC ¶ 64; or that (2) on March 14, the Khan Parties requested that SCG Theatre guests leave empty seats between parties to socially distance (and Cinemex was not consulted), *see* Debtors' PFC ¶ 65.

20. The Khan Parties do not dispute that, on March 15 or 16, Cinemex postponed its March 17 inspection until the following week. Khan's PFC ¶ 20; Debtors' PFC ¶¶ 67–68.

21. The Khan Parties do not dispute that, on March 16, 2020, the Khan Parties informed studios and vendors that the Houston SCG Theatres would be closing, or that Cinemex was not

[9] Where, as here, there is an "unambiguous, integrated written contract," the Court "may not use extrinsic evidence to vary or contradict the terms of that contract." *See Bathla v. 913 Mkt*., LLC, 200 A.3d 754, 759–60 (Del. 2018).

consulted. Debtors' PFC ¶ 70. Nor do the Khan Parties dispute representing to Cinemex that the SCG Theatres would only be closed "just for a short period." Debtors' PFC ¶ 76.

22. The Khan Parties do not dispute that, after the theatres were closed, Cinemex postponed its physical inspection both because they were closed and because an inspection would risk its employees' health in light of COVID-19. Khan's PFC ¶¶ 20–21; Debtors' PFC ¶¶ 72–73.

23. Despite their apparent belief that the SCG Theatres would only be closed for a "short period," and their EPA obligations, the Khan Parties do not dispute that they furloughed one hundred percent of SCG employees between March 19 and April 1. Debtors' PFC ¶ 82.

G. The Khan Parties Pressured Cinemex to Close Without a Physical Inspection Despite Having More Than A Month Remaining To Close Under the EPAs

24. The Khan Parties do not dispute that, notwithstanding the growing impact of COVID-19 and the apparent safety measures he had taken with regard to his own employees, on March 20, 2020, Mr. Khan began pressuring Cinemex to close immediately, well before the Closing deadline in either EPA, when information about COVID-19's impact was minimal and contradictory. Debtors' PFC ¶¶ 78–91.

25. The Khan Parties acknowledge that to persuade Cinemex to give up its right to a physical inspection before closing, the Khan Parties offered a price discount, private plane, a virtual inspection, and an inspection by a third-party. *See* Debtors' PFC ¶ 79; Khan's PFC ¶ 49.

26. The Khan Parties now claim that Mr. Khan also offered "to postpone the closing." Khan Parties' ¶ 49. But, setting aside that any "postponement" would be illusory: Closing was not required for more than a month under the EPAs, as detailed in Section I.H., *infra*, the Khan Parties only made that proposal ***after*** they declared that Cinemex breached the EPAs, and conditioned it on receiving $20 million from Cinemex. Debtors' PFC ¶ 101.

27. The Khan Parties do not dispute that each of the purported alternatives offered would not allow Cinemex to inspect a theatre in operation (and in at least one instance would not even eliminate the risk to Cinemex's employees' health from travelling). Debtors' PFC ¶¶ 80–84; Khan's PFC ¶ 49. The Khan Parties claim, however, that a physical inspection need not occur while the theatres are open and operational. Khan's PFC ¶¶ 22–23. As support, the Khan Parties again rely only on Mr. Brail's opinion that "[n]ever in the history of cinema industry is there an easier time to transition ownership than when you don't have to worry about . . . all the flurry of business activity." Khan's PFC¶ 23.[10] They do so even while acknowledging that Mr. Brail was talking about "transition[ing] ownership" not an inspection. *Id.* In any event, as a fact witness, Mr. Brail's opinion is not evidence and thus should be disregarded, leaving the Khan Parties with no admissible evidence in support of their claim. *See supra* n. 5.

28. The Khan Parties do not dispute that Mr. Khan believed it was his "God given right[]" to close when he wanted. Debtors' PFC ¶ 92.

H. The Khan Parties Attempted to Force Cinemex To Close Without A Physical Inspection, Despite The Illinois Contract Prohibiting It And The Khan Parties Failing To Satisfy The Conditions Precedent To Closing

29. The Khan Parties do not dispute that, even on the morning of the day it purported to notify Cinemex that all closing conditions had been met, March 24, 2020, Cinemex was still asking the Khan Parties for information it needed to close, which the Khan Parties had failed to provide. Debtors' PFC ¶¶ 93–95.

[10] In a footnote, the Khan Parties also assert that a physical inspections must immediately precede the Closing, and finish that day. Khan's PFC n. 14. That is not the case. Indeed, this new interpretation is contradicted by the Khan Parties' coordination of an inspection beginning on March 17, 2020 and continuing for multiple days when its asserted target for Closing was March 31, 2020. *See* Debtors' PFC ¶¶ 56–61; *see also* Khan's PFC ¶ 14.

30. Similarly, the Khan Parties do not dispute that, as of March 24, 2020, the Khan Parties had not delivered an executed Escrow Agreement as required by Section 8.1(D) of the EPAs.[11] Khan's PFC ¶ 41; Debtors' PFC ¶¶ 94–95.

31. The Khan Parties also do not dispute that, even after being accused of breach, Cinemex continued to request information it needed to close that the Khan Parties had failed to provide, including in a March 27, 2020 email. Debtors' PFC ¶ 100. Nor do the Khan Parties dispute that, in response, on March 27, 2020, they provided some of the information, but explained that they were "waiting on a copy [of another document] from our rep." *Id*.

32. The Khan Parties do not dispute that, between March 28 and March 30, Mr. Khan demanded an immediate payment of $20 million dollars to consider "postponing" the closing to allow Cinemex to physically inspect the theatres. Debtors' PFC ¶ 101. Nor do they dispute that, to resolve the dispute, Cinemex offered him a $20 million interest-free loan. Debtors' PFC ¶ 103. Notably, Cinemex did so despite that, under the EPAs, there was no need to "postpone" anything.

33. The Khan Parties acknowledge rejecting Cinemex's offer and filing suit. Debtors' PFC ¶ 105. They do not dispute that Mr. Khan did so because he "felt like [Cinemex] was noncooperative," he "felt like their proposals were not fair," and he "felt like they were unreasonable," Debtors' PFC ¶ 110, nor do they dispute that he was "frustrated," "going through an emotional roller coaster," and believed that "when someone's upset and they're angry and

[11] The Khan Parties assert that the "non-execution of the escrow agreement was never before raised by the Debtors . . . ." But, the Parties' Joint Pretrial Statement at ECF No. 177, p. 9 invokes section 8.1 in its entirety as a condition precedent to Cinemex's obligation to close unless waived. *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 474 (2007) ("[A] final pretrial order ... supersede[s] all prior pleadings and control[s] the subsequent course of the action."). Moreover, the Khan Parties introduced and argued evidence on this precise point. *See, e.g.*, June 18 Hearing Tr. 415:09-416:07; July 9 Hearing Tr. 580:4-20; Khan PFC ¶ 15 and n. 8. At all times, the Khan Parties bore the burden of proof that they had satisfied all conditions precedent. *AB Stable*, 2020 WL 7024929, at *49 ("If a condition must be satisfied before a duty of performance arises (formerly known as a condition precedent), then the burden of proof rests with the party seeking to enforce the obligation."). Thus, even if necessary under these facts, Fed. R. Civ. P. 15(b)(2) treats the issue as pleaded. *See United States ex rel. Seminole Sheet Metal Co. v. SCI, Inc*., 828 F.2d 671, 676 (11th Cir. 1987).

frustrated and they're emotional, [they] take action when [they] feel like taking it," *Id.*

II. ARGUMENT

34. The Khan Parties' contention that Cinemex breached the Illinois EPA by not closing on March 26, 2020, *see* Khan's PFC ¶ 113, fails for the reasons stated below and in Debtors' Proposed Findings of Fact and Conclusions of Law.

A. The Illinois EPA Precluded Closing Prior To April 10, 2020

35. The Khan Parties, themselves, acknowledge that "the Illinois Agreement provided for a closing ***no earlier than April 10, 2020***," Khan's PFC ¶ 31, n. 16 (emphasis added); *see also* Debtors' Ex. 52 § 3.1 (Illinois EPA), which obviously precludes Closing on March 26, 2020.

36. The Khan Parties offer no explanation for how Cinemex could have breached the Illinois EPA by allegedly failing to close a full 15 days ***before*** the Illinois EPA permitted a closing, nor could they.[12] Accordingly, the Court should find that Cinemex did not breach the Illinois EPA.

B. The Khan Parties Failed To Satisfy All Closing Conditions As Of March 24, 2020

37. The Khan Parties' claim that Cinemex was obligated to close by March 26, 2020 is premised on the assumption that, as of March 24, 2020, the Khan Parties had satisfied ***all*** of the closing conditions set forth in Article 8 of the EPAs, thereby triggering Section 3.1 of the EPAs requiring that Closing occur within two days of such satisfaction. *See* Khan's PFC ¶ 113. Yet as of that time, the Khan Parties had failed to satisfy, at least, ***eight*** Closing conditions required by Section 8.1(B) of the EPAs, each of which serves as an independent basis to find that Cinemex was not required to close by March 26, 2020. *See* Debtors' PFC ¶¶ 132–138.

[12] Notably, the Khan Parties do not argue that Cinemex repudiated the Illinois EPA prior to April 1, 2020, the date the Khan Parties filed the Texas Action. Regardless, such an argument would fail. *See* Debtors' PFC ¶¶ 119–131.

1. The Khan Parties Failed To Use Commercially Reasonable Efforts to Conduct Business in the Ordinary Course As Required by Section 7.1(A)

38. The Khan Parties argue that they made commercially reasonable efforts to conduct their business in the ordinary course, in compliance with Section 7.1(A) of the EPAs, "when faced with Covid-19." Khan's PFC ¶ 95. But Delaware law precludes the Court from considering any such facts where, as here, an agreement between the parties expressly defines "ordinary course" to mean consistent with ***past*** practice." Debtors' PFC ¶¶ 148–162; Debtors' Exs. 51 § 1.1 (Texas EPA) and 52 § 1.1 (Illinois EPA) (emphasis added). *See AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, No. CV 2020-0310-JTL, at *70–72 (Del. Ch. Nov. 30, 2020) (explaining that precedents to determine breach of a "consistent with past practice" covenant do not "permit management to do whatever [] companies ordinarily would do when facing a global pandemic" but "compare the company's actions with how the company has routinely operated and hold that a company breaches an ordinary course covenant by departing significantly from that routine"); *see also Snow Phipps Grp., LLC v. Kcake Acquisition, Inc.*, No. CV 2020-0282-KSJM, 2021 WL 1714202, at *38 (Del. Ch. Apr. 30, 2021) ("The court can look to (i) how similar companies have operated or (ii) how the specific seller company has operated. . . .Where an ordinary course provision includes the phrase 'consistent with past practice" . . . the court evaluates the second category ***only***.") (emphasis added); *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Holdings Pvt. Ltd.*, No. CIV.A. 8980-VCG, 2014 WL 5654305, at *16–17 (Del. Ch. Oct. 31, 2014) (finding breach of a company's obligation to operate in the "ordinary course consistent with past practice" based exclusively on a departure from how the company operated in the past).

39. Here, the EPAs expressly define "Ordinary Course" to mean "in the ordinary course of that Parties' business consistent with ***past*** practice." Debtors' Exs. 51 § 1.1 (Texas EPA) and 52 § 1.1 (Illinois EPA) (emphasis added); *see also* Debtors' PFC ¶¶ 148–162. As such, the Khan

Parties' claim that "the Court is not limited in looking ***only*** at the Companies' past business practices," in determining their compliance with Section 7.1(A) of the EPAs, Khan's PFC ¶ 95, is contrary to the EPAs and Delaware law.[13] Instead, the Court must determine whether the Khan Parties complied with Section 7.1(A) ***exclusively*** by comparing "the company's operations before and after entering into the transaction agreement to determine whether those operations are 'consistent.'" *Maps,* 2020 WL 7024929, at *71 (quoting *Mrs. Fields Brand, Inc. v. Interbake Foods, LLC*, 2017 WL 2729860, at *32 (Del. Ch. June 26, 2017)).

40. As detailed in Debtors' PFC (¶¶ 154–158), the Khan Parties' operations were not consistent—nor do they claim otherwise, thereby conceding the issue. Indeed, recognizing that, the Khan Parties argue that their conduct[14] falls within exceptions to Section 7.1(A).

41. The first is Section 7.1(A)(i), which requires the Khan Parties to conduct their business in the ordinary course, "except (i) as otherwise expressly provided in this Agreement." Khan's PFC ¶ 92. But there is no provision in the EPAs that "***expressly*** provide[s]" for the Khan Parties to deviate from the ordinary course of its operations. Debtors' PFC ¶¶ 155–157. They attempt to shoehorn the MAE clause into that exception, claiming that because COVID-19 cannot

[13] The Khan Parties attempt to distinguish MAPS because Section 7.1(A): (1) does not include the word "only" in connection with "consistent with past practices" as the relevant clause did in MAPS; and (2) requires the Khan Parties to use "commercially reasonable efforts" whereas such language did not appear in MAPS. Khan Parties' ¶ 94. As to the first point, while the MAPS opinion recognized that the ordinary course clause in that case contained the word "only" in connection with "consistent with past practices.," it does not assert that where the word "only" does not appear the court may look to actions beyond past practices. *Maps*, 2020 WL 7024929, at *71. On the contrary, the MAPS courts relied on Delaware Courts interpreting "consistent with past practice" as being limited to past practices of that company where the relevant provision did not include the word "only." *Id.* And as to the second point, the Khan Parties did not take "reasonable steps to solve problems and consummate the transaction," required by "commercially reasonable efforts." *See Akorn, Inc. v. Fresenius Kabi AG*, No. CV 2018-0300-JTL, 2018 WL 4719347, at *87 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018) (citation omitted). For example, the Khan Parties voluntarily furloughed one hundred percent of the SCG employees, while pushing for a closing more than a month before the deadline for doing so and before Cinemex was able to physical inspect the properties. *See* Debtors' PFC (¶¶ 154–158).

[14] The Khan Parties do not make clear what specific conduct falls within the two exceptions of Section 7.1. Cinemex assumes these arguments concern the conduct Cinemex has identified in Debtors' PFC (¶¶ 155–157).

be the result of a material adverse effect it cannot be what causes a failure to comply with obligations under the EPAs. *See* Khan's PFC ¶ 92. But the Khan Parties have repeatedly argued that the MAE clause ***prevents*** Cinemex from relying on COVID-19 as a basis to excuse any failure to comply with its obligations under the EPAs. Khan's PFC ¶¶ 67–76. The Khan Parties cannot simply say the opposite when it suits them, using the MAE clause as both sword and shield.

42. The second is Section 7.1(A)(ii), which provides that the Khan Parties are obligated to conduct their business in the ordinary course "except (ii) as described on Schedule 7.1(A)." Khan's PFC ¶ 92. The Khan Parties claim that Supplement No. 1 on Schedule 7.1(A), falls under the exception, relieving them of their obligations under Section 7.1(A). But as a threshold matter, Supplement No. 1 on Schedule 7.1(A), which is a single page with the words "The COVID-19 Response" on it and nothing more, *see id*., does not explain what, if anything, "The Covid 19 Response" will entail, let alone how the SCG Theatres will deviate or have deviated from the ordinary course, such as furloughing all SCG employees. In any event, Supplement No. 1 is "delivered pursuant to Section 7.5" of the EPAs. *See* Debtors' Ex. 147. And Section 7.5 provides that any such supplement "be given effect ***solely*** for the purposes of determining whether there has been a breach of a representation or warranty for purposes of determining the fulfilling of the condition set forth in Section 8.1(A)." *See* Debtors' Exs. 51 § 7.5 (Texas EPA) and 52 § 7.5 (Illinois EPA) (emphasis added). Here, however, Cinemex is not asserting that the Khan Parties failed to provide accurate information due under Section 8.1***(A)***, but that the Khan Parties failed to perform their covenants under Section 8.1***(B)***, which regards the performance of the Khan Parties' covenants. Because Section 8.1(B) is not included in Section 7.5, any supplement to Section 7.1(A) cannot be considered in evaluating whether the Khan Parties complied.

2. The Khan Parties Failed To Use Commercially Reasonable Efforts To Keep Available the Services Of Their Respective Directors, Officers, and Employees As Required by Section 7.1(A)(d)

43. The Khan Parties do not even attempt to establish that they used commercially reasonable efforts to keep the services of their respective directors, officers, and employees; nor could they given their furlough of one hundred percent of their employees, while claiming satisfaction of all closing conditions (including this one), Debtors' PFC ¶¶ 163–166, and pushing for a closing early in the COVID-19 pandemic despite having over a month to close.

3. The Khan Parties Failed To Provide Reasonable Access To And The Right To Inspect All Contracts As Required by Section 7.2

44. The Khan Parties do not even attempt to demonstrate that they provided Cinemex with reasonable access to all of its contracts, as required under the EPAs, Debtors' Exs. 51 § 7.2 (Texas EPA) and 52 § 7.2 (Illinois EPA). On March 19, 2020, prior to the Khan Parties' March 24, 2020 assertion that all closing conditions had been met, Cinemex requested access to "contracts relating to the theatre operations," Debtors' PFC ¶¶ 167–175, which it was required to receive under the EPAs. As of March 27, 2020, two days after the Khan Parties asserted that Cinemex was in breach, the Khan Parties still had not provided Cinemex all of the requested contracts. *See* Debtors' Ex. 127.

4. The Khan Parties Failed To Provide Reasonable Access To And The Right To Inspect The Properties And Premises As Required by Section 7.2

45. The Khan Parties argue that they provided Cinemex "reasonable access [to inspect the properties and premises] in compliance with Section 7.2" because "the Debtors [] spent February 5 and 6, 2020 in Houston, Texas participating in a management presentation and tours of the Companies' theaters" and because the Khan Parties have never ***expressly*** denied a request to visit the theatres. Khan's PFC ¶ 81. This argument fails for several reasons.

46. *First*, the Khan Parties' contractual obligation to provide reasonable access ***started*** "[f]rom the date [the EPA was signed]," March 10, 2020, Debtors' Exs. 51 § 7.2 and 52 § 7.2, i.e., Cinemex's right to physically inspect began well ***after*** the tours took place, such that they cannot be evidence of the Khan Parties' compliance. In any event, as detailed in Debtors' PFC (¶¶ 27–42), incorporated herein, the tours could not be deemed reasonable access because the Khan Parties only provided Cinemex between 45 minutes and an hour in each theatre, prevented them asking SCG Theatre employees questions about the business or its operations, and asked Cinemex not to bring anyone from its IT department, who must be onsite to conduct a physical inspection. Debtors' PFC ¶¶ 20, 41, 24, 15. The Khan Parties, themselves, did not view the tours as reasonable access, assuring Cinemex in writing shortly after the tours that "[i]nspections are expected to occur ***after*** signing of an Agreement." Debtors' Ex. 23 (emphasis added); Khan's PFC ¶¶ 14, 16; Debtors' PFC ¶¶ 27–29.

47. *Second*, the Khan Parties denied Cinemex access to the properties and premises by insisting on closing the sale early in the COVID-19 pandemic while their theatres were closed and after furloughing all of their employees, despite having over a month before the deadline for Closing.[15] As discussed in Debtors' PFC (¶¶ 176–190), incorporated herein, the Khan Parties were aware that Cinemex fully intended on exercising its right to inspect the theatres and in fact, coordinated with Cinemex for it to conduct a physical inspection starting March 17. *Id*. at ¶ 178.

48. *Third*, the Khan Parties attempt to excuse their failure to provide reasonable access to the properties by claiming that the Cinemex is using this as a pretext for challenges arising from

[15] At minimum, the non-occurrence of the physical inspections would qualify as a frustration of purpose, excusing Cinemex from closing. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co*., 901 A.2d 106, 113 (Del. 2006) ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances indicate the contrary.").

COVID-19. But, as the Khan Parties repeatedly point out, the MAE clause precludes relying on COVID-19 to excuse non-compliance with contractual obligations—that includes this one.

5. The Khan Parties Failed To Provide Reasonable Access To Each Corporate Employee As Required by Section 7.9

49. The Khan Parties make the same arguments with respect to its obligations under Section 7.9 as it does under Section 7.2, detailed in Section II.B.4, above. *See* Khan's PFC ¶ 81. The argument fails as to Section 7.9 of the EPA for the same reasons it does as to Section 7.2, including because the Khan Parties expressly prohibited Cinemex from meaningfully engaging with SCG employees, including interviewing them, during the tours, *see* July 9 Hearing Tr. 492:17–493:14, and the Khan Parties furloughed all of their employees, including Mr. Pawlowski, the culinary director, despite the "scratch-made food" was a key selling point, despite having over a month before the deadline for Closing. Debtors' PFC ¶¶ 191–195.

6. The Khan Parties Failed To Use Reasonable Best Efforts To Satisfy Their Obligations to Consummate the Closing As Required by Section 7.4

50. The Khan Parties do not explain how their insisting Cinemex close (1) while their theatres were closed; (2) after furloughing one hundred percent of their employees; (3) before Cinemex was able to exercise its right to inspect the SCG Theatres under the EPAs; (4) when there was still over a month under the Texas EPA and two months under the Illinois EPA; (5) despite representing to Cinemex the SCG Theatres would only be closed for a "short period;" (6) prior to even Mr. Khan's preferred March 31, 2020 closing date; (7) without allowing time to secure an executed Escrow Agreement (*see infra*); and (8) for no other reason than that Mr. Khan felt that it was his "God-given right to do so," could be characterized as anything other than a failure to use reasonable best efforts to close.

7. The Khan Parties Did Not Provide All Deliverables Required by Section 8.1(D)

51. The Khan Parties do not dispute that they never provided Cinemex with an executed escrow agreement as required by Section 8.1(D) of the EPAs. That is dispositive. On that basis alone, the Court should conclude that the Khan Parties did not satisfy Section 8.1(D).

52. What is more, the Khan Parties were well aware that on the date they claimed that all closing conditions had been met, March 24, 2020, they did not have an executed escrow agreement, and that by purporting to trigger a March 26, 2020 Closing, they would make it impossible to have such a document at Closing. On March 18, 2020, targeting a Closing on March 31, 2020, the Khan Parties' counsel sent an email to Cinemex's counsel asserting that "[i]n terms of lead time issues, the Escrow Agent will need Buyer's KYC information ***at least 5 business days*** prior to Closing (3/25)." *See* Khan's Ex. 33 (emphasis added). The Khan Parties thus provided Cinemex seven days' notice to complete the KYC process, recognizing that such processes are complex, especially when they involve multiple entities and a foreign parent. But when, on March 24, 2020, Mr. Khan, suddenly and without warning, insisted on closing by March 26, 2020, the Debtors' time to complete the KYC process was reduced to a single day. In order for the Escrow Agent to have its KYC five business days before a March 26 Closing, Cinemex had to complete it by March 19. That is entirely unreasonable, and indeed impossible.[16] Further, despite knowing on March 24 that Cinemex could not have delivered its KYC documents by March 19, such that the Khan Parties would not be able to provide an executed Escrow Agreement at a March 26, 2020 closing, the Khan Parties falsely declared that it had satisfied all closing conditions and that

[16] To the extent the Court finds that the Khan Parties were not required to provide Cinemex an executed Escrow Agreement prior to the Closing, and that all other closing conditions were met, the doctrine of impossibility would relieved Cinemex of its obligation to close because it was impossible to deliver its KYC to Escrow Agent five business days before March 26. *See Chase Manhattan Bank v. Iridium Afr. Corp.,* 474 F. Supp. 2d 613, 621 (D. Del. 2007).

Cinemex was in breach for not closing on March 26, 2020, and on that basis filed suit, and ultimately asserted Proofs of Claims.

8. The Khan Parties' Representation that SCG Theatres' Permits Were Not Limited By Any Event Was False At The Time Of Closing, In Violation Of Section 5.16 And 8.1(A)

53. The Khan Parties do not dispute that they were required to "hold all . . . authorizations, . . . consents, . . . approvals and orders necessary to operate its business" which is collectively defined as the "Company Group Permits." *See* 5.16 (b). Nor do the Khan Parties dispute that at the time of closing, the Khan Parties were required to represent that the Company Group Permits are all "in full force and effect" and that "no event has occurred that . . . would reasonably be expected to result in the . . . limitation of the Company Group Permit." *Id*. But, as of March 24, 2020, that representation was false. At the time, the SCG Theatres' permits were not in full force and effect. In fact, the SCG Theatres' services, including concerning service of liquor and food, as well as occupancy, were not in effect, or at best, limited.

C. <u>The Khan Parties' Failed To Prove That Cinemex Breached the EPAs</u>

1. Cinemex Used Reasonable Best Efforts to Close The Transaction

54. The Khan Parties' assertion that Cinemex did not use reasonable best efforts to cause closing conditions to be met by March 26, 2020 is a straw man. As detailed above, the Khan Parties did not bargain for the right to close the transaction by March 31, 2020, let alone March 26, 2020. *See* Debtors' PFC ¶¶ 101, 118–121, 135. In contrast, Cinemex did bargain for the right to physically inspect the SCG Theatres. *See* Debtors' Exs. 51 § 7.2 (Texas EPA) and 52 § 7.2 (Illinois EPA). And the Khan Parties' proposal of alternatives to a physical inspection confirms that the Khan Parties believed that Cinemex had indeed bargained for that right—otherwise, there would have no reason for the Khan Parties to propose any alternative. *See* Debtors' PFC ¶¶ 79–84. As a matter of Delaware law, contrary to the Khan Parties' suggestion, Cinemex is not required

to relinquish its contractual rights of physically inspecting the SCG Theatres to close using non-viable alternatives (*see* Debtors' PFC ¶¶ 80–84) on Mr. Khan's non-bargained-for timeline. *See Akorn,* 2018 WL 4719347, at *91 ("the Reasonable Best Efforts Covenant did not require either side of the deal to sacrifice its own contractual rights for the benefit of its counterparty").

55. Notably, the Khan Parties' suggestion that they offered to delay closing is misleading, at best. As an initial matter, there was nothing to "delay." The EPAs closing deadlines were still far off in the future. In any event, the Khan Parties' offer to delay closing was conditioned on Cinemex agreeing to provide the Khan Parties with a $20 million non-refundable deposit not contemplated by the EPAs. *See* Debtors' PFC ¶¶ 101–103. In effect, then, the Khan Parties were proposing a new agreement. That Cinemex did not accept a ***new*** agreement cannot be evidence of whether it used best efforts to close the ***existing*** agreements, i.e., the EPAs.

2. Cinemex Never Abandoned the Transaction Nor Was It Obligated To Close

56. The Khan Parties further contend that because "[t]he Debtors appear to have abandoned the transaction and made no efforts . . . to close from and after March 24, 2020" they are "barred from relying upon any alleged failure of closing conditions as justification for refusing to Close." Khan's PFC ¶ 101. As an initial matter, for the reasons described above and in Sections II.A. and B. *supra*, Cinemex was not obligated to close by March 26, 2020, as the Khan Parties contend. In any event, there is no evidence that Cinemex abandoned the transaction.

57. To the contrary, Mr. Khan admitted that Cinemex never told him that it would no longer be coming to Houston for a physical inspection, May 20 Hearing Tr. 219:07–09 ("Q. They didn't say they were never coming [to Houston to perform the inspections], is that correct? A. No, sir."), or that Cinemex would not ever close the transaction, Debtors' PFC ¶ 124.[17]

[17] Although the Khan Parties half-heartedly claim that Cinemex's counsel's March 24, 2020 letter amounted to a repudiation because it did not say that Cinemex would not close "at this time," they acknowledge that Cinemex did

58. Confirming Cinemex's continued efforts to close, on the morning of March 24, 2020, prior to the Khan Parties' email claiming that they had met all the closing conditions, Mr. Khan received a forwarded message from one of his employees, reflecting Cinemex's request for additional information it needed to close and to schedule an introductory phone call to facilitate same. Debtors' Ex. 34. That same morning, Mr. Khan re-forwarded that message to PJ Solomon, acknowledging that Cinemex was "still communicating with [the SCG] team asking for things." *Id*. At trial, Mr. Khan admitted that at least as of March 24, Cinemex was still requesting information it needed to close. *See* May 20 Hearing Tr. 226:05–08 (Mr. Khan agreed that "Cinemex was still collecting information related to the close, and trying to arrange calls related to the close as of March 24"). And Mr. Brail testified that it was at least as of March 25. June 18 Hearing Tr. 393:13–21 ("Q. So they continued to get information as if they were working towards a closing even after cancelling the visit? A [Brail]. Yeah, like I said, there were -- there were lease consents and other documents that I believe were still travelling back and forth up until, you know, the morning of the 25th.). Mr. Marti confirmed the same. *See* July 9 Hearing Tr. 546:14–18.

59. Further, even after the Khan Parties accused Cinemex of breaching the EPAs on March 25, 2020, and after sending the email that the Khan Parties claim was a repudiation, Cinemex continued its efforts to close. Debtors' Ex. 47. After March 27, 2020, Cinemex continued its efforts to resolve the dispute and complete the transaction. Debtors' PFC ¶¶ 99–103.

III. CONCLUSION

60. For the foregoing reasons, and the reasons provided in Debtors' Proposed Findings of Fact and Conclusions of Law, the Court should find that Cinemex did not breach the EPAs.

include that language in its March 26, 2020 letter, thereby clarifying their position. Khan PFC ¶ 48; *see also* July 9 Hearing Tr. 543:05–544:22.

Respectfully submitted this 31st day of August, 2021.

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