

BY JOHN D. FIERO

## Music Festival Insolvencies: What Happens When the Music Stops?

Although we might be deep into this era of digital music streaming, it appears that our appetite for live music events has not diminished. Indeed, the music festival business has experienced substantial growth, with some events such as Coachella and Lollapalooza becoming live music institutions. Daily attendance at Coachella now averages 125,000 people for six festival days in the desert, with Lollapalooza reporting 99,000 daily attendees for its annual four-day run in Chicago.

How hard could running a music festival be? What could go wrong? As it turns out, plenty. This article will use recent festival bankruptcies as case studies, including examinations of the Ni-Fi festival (which never took place),<sup>1</sup> the Fyre festival (which almost took place),<sup>2</sup> the Bottlerock 2013 festival (which took place once before filing)<sup>3</sup> and an established festival company that succeeded in reorganizing (SFX Entertainment).<sup>4</sup>

Although the corporatization of popular music has never been more complete, many elements of the music-performance business have not changed much since the dawn of rock, when dinosaurs like Led Zeppelin walked the earth and began demanding 90 percent of the gate proceeds in cash in exchange for an evening's performance. Today, a festival promoter trying to book bands for a new festival with no track record will be met with demands for full nonrefundable payment in advance or (at the very minimum) a substantial prepaid nonrefundable deposit. Headliners for larger music festivals can command close to \$2 million for a one-night two-hour performance.

The basic rule of thumb for festival promoters is that the spending on talent should roughly approximate the promotion's total ticket revenues, with the rest of the operating expenses and profit to be derived from sponsorships, food and beverage sales, and merchandise. Since all or most of that money will need to be paid well in advance of the show date, the capital demands on a festival entrepreneur are substantial. Obviously, all the other expenses of permitting, site preparation, advertising and promotion will have to be paid with other sources of money.

### The Festival that Never Took Place: Ni-Fi

After his involvement in the ill-fated first Bottlerock Festival (discussed in more detail herein), neophyte concert promoter Sean Knight developed a business plan to promote large-scale, multi-day festivals at auto racetracks throughout the U.S. The first such festival attempted was planned for three days in late August 2015 at Kentucky Speedway and was named the "Ni-Fi Music Fest."

By all accounts, the optimistic principals anticipated that the planned weekend of sun, food, booze and music would generate millions of dollars of income and draw hundreds of thousands of people. To produce and promote the Ni-Fi Music Fest, 43 bands were booked at a combined cost of more than \$6 million. As previously discussed, most of this musical talent required substantial cash deposits, and many required 100 percent prepayments, all of which were tendered months before the planned festival kick-off date. In addition to the musical talent, the promoters needed millions of additional dollars up front to pay facility fees and governmental permit fees, security and other site costs, wage and benefit expenses payable to stage hands and technicians, massive marketing and promotional expenses, and overhead. According to the chapter 7 trustee who later tried to pick up the pieces, the total incurred and reasonably anticipated indebtedness necessary to produce the Ni-Fi Music Fest exceeded \$15 million.

Not long after the Ni-Fi promoters paid the band Green Day \$1.8 million in cash up front, the festival was cancelled for lack of ticket sales (only \$200,000 in tickets had been sold by July 1, 2015 — seven weeks prior to the event). No performance was ever provided by the band, which retained the payment based on the terms of its contract. Specifically, the agreement provided that the band "must be paid in full in the event of cancellation for any reason."

When all was said and done, the chapter 7 trustee sought to recoup approximately \$5 million worth of prepayments as constructive fraudulent transfers from approximately 20 artists. Green Day was one of six festival performers who were sued in adversary proceedings brought by the chapter 7 trustee. While none of those cases went to trial, it bears noting that the defenses offered by the artists included the fact that the artists had provided their names, likenesses and other intellectual property (IP) to



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1 *In re Ni-Fi Festivals LLC*, Case No. 15-10759 (AJ) (Bankr. N.D. Cal. 2015).

2 *In re Fyre Festival LLC*, Case No. 17-11883 (MG) (Bankr. S.D.N.Y. 2017).

3 *In re BR Festivals LLC*, Case No. 14-10175 (AJ) (Bankr. N.D. Cal. 2014). The author represented the creditors' committee in this chapter 11 case.

4 *In re SFX Entm't Inc.*, Case No. 16-10238 (MFW) (Bankr. D. Del. 2016).

advertising and promotional efforts. The artists also took the position that they had blocked out the time and agreed to not perform within a substantial geographic circumference of the festival, making it impossible for them to “cover” by booking another performance after the promoter’s breach.

Based on a calculation derived from a review of the docketed motions to approve compromises under Federal Rule of Bankruptcy Procedure 9019, it appears that the trustee recouped approximately \$1.1 million in the aggregate. After payment of administrative expenses, the case produced a 14-cent dividend to general unsecured creditors. The case closed in April 2017.

## The Festival that Almost Took Place: Fyre

The Fyre Festival was conceived as a unique festival experience to take place at Great Exuma Island, The Bahamas, over two weekends in April and May 2017. Ticket packages were advertised as “exclusive” and cost between \$1,200 and \$12,000 a piece (certain packages with premium housing cost substantially more). In promotional materials, the festival was called “the cultural experience of the decade” and offered private jet travel from Miami to Exuma, along with VIP accommodations and the chance to see performers such as Blink-182, Major Lazer and Migos.

In late April 2017, thousands of festival attendees began arriving, but they did not find what they had been promised. Instead, contemporary news accounts described visitors’ luggage being thrown out of trucks, feral dogs running around the festival site, and very few security guards or other on-site employees available to assist. The promised VIP accommodations turned out to be disaster-relief tents. The tents and their contents were wet as a result of a downpour the day before. Instead of gourmet food, visitors were provided cheese sandwiches. One publication quoted a festival attendee as saying, “No one knew what was going on. The most alarming part was, they had hired all these models to walk around giving people tequila shots. This was a recipe for disaster, everyone young and drunk, with no information.”

The promoters initially blamed growing pains for the troubles, but eventually issued a notice on social media postponing the festival and promising refunds. After multiple ticketholder class-action lawsuits were filed, petitioning creditors initiated an involuntary chapter 7 case on July 7, 2017, and an order for relief was entered on Aug. 29, 2017. About the same time, the promoter, Billy McFarland (who was 25 years old at the time), found himself indicted by a federal grand jury. He recently pleaded guilty to two counts of wire fraud, both of which carry a maximum sentence of 20 years in prison. Under a plea deal that is not binding on the sentencing judge, both sides are reported to have agreed that McFarland would receive a sentence of eight to 10 years and a fine of as much as \$300,000. In addition, McFarland agreed to pay restitution to the defrauded ticket buyers.

The chapter 7 case is still in its early stages. An omnibus 2004 application seeking to examine co-promoter Jeffrey Atkins (a.k.a. American rapper “Ja Rule”), McFarland and festival attorneys Wilson Sonsini Goodrich & Rosati (among others) is on file, but no other discovery or adversary proceedings are yet on the docket.

## The Festival that Happened, Then Filed for Chapter 11: Bottlerock 2013

In 2013, the California festival calendar featured no event dates in late spring or early summer. Coincidentally, this was also a time of relatively slack demand in Napa Valley’s lodging and restaurant industries. Aiming to create a sort of “Coachella in the wine country” experience, the founders of the first Bottlerock festival sought to capitalize on these synergies by bringing 60 bands, together with Napa Valley’s famous food and wine, from May 8-12, 2013.

Expectations for the inaugural production were so high that two weeks before the event was set to begin, one of the LLC’s managers decided to exercise a mandatory buyout right of another 35 percent investor. As a result, the festival was depleted of \$3 million in cash on the eve of the event. This cash broke down into three buckets: approximately \$1 million as a repayment of an unsecured loan, \$1 million as a buyback of the member’s equity investment and \$1 million as guaranteed profit.

The inaugural event was widely considered to be a great artistic success and fan experience, but the activities behind the scenes painted a different picture. For example, as the performances got underway, the electric utility threatened to turn off the power unless it received an immediate cash payment to cover its charges. This prompted an all-hands cash-collection effort throughout the festival. In the midst of the festival, the cash registers at the food and beverage stations ceased working, causing the operators to go on a cash-box basis and rendering record-keeping practices effectively nonexistent.

The extent of the dysfunction was further manifested in the festival’s interaction with its food and beverage vendor, CP Cooks Management LLC. The purchase and sale of alcoholic beverages at Bottlerock 2013 required a California liquor license, which the festival did not have. As a result, the festival subcontracted with a Napa Valley caterer to provide most of the food and beverage service at the event. The contract provided that the caterer would purchase most of the food, beer and wine at wholesale, provide the labor, process the payments, deduct and pay over certain funds allocated to charity and then split the net profits (two-thirds to the festival and one-third to the caterer).

At the end of the event, the caterer failed to pay over any monies to the designated charities. Further, the caterer informed the festival that nothing was due because purportedly there was no profit — at an event attended by 120,000 people where sodas were sold for \$5 apiece and draft beers were sold for \$8 apiece. In the bankruptcy case that followed, the estate took the position that the known wholesale beverage purchases suggested that the reported retail beverage servings had been underreported by as much as one-half to two-thirds. The debtor further alleged that the total underpayment was at least \$600,000.

All told, the financial losses for the initial 2013 event were approximately \$8 million. As the size of the losses became apparent in the summer of that year, the festival’s management sought out an experienced, well-funded buyer

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or joint venturer to take over the concept. At one point, the festival thought it had a deal sufficient to pay all 2013 creditors a 75 percent dividend. However, as each prospect performed due diligence, it ultimately concluded that the festival's assets (consisting primarily of the name and contractual right to put on a successor festival on the same site) were of insufficient value and walked away.

By late 2013, the financial situation was dire. The site demanded payment of \$310,000 of unpaid rent and threatened the loss of the annual space reservation unless the back rent was paid by late January 2014. In addition, time was growing short for any promoter to book musical talent for the festival's time window. It was at this point that a group of local, well-capitalized investors stepped forward and agreed to salvage the concept.

After considerable back-and-forth negotiations that concluded on Jan. 24, 2014, an asset-purchase agreement was executed with these third-party investors. Under the agreement, the purchaser acquired limited assets, consisting of the rights to the Bottlerock name and related IP, certain ticket and site prepayments, and festival equipment and fixtures. The seller retained all rights to prosecute claims and causes of action against third parties who formerly did business with the festival.

Not long after the transaction closed, the festival filed a voluntary chapter 11 petition. In the bankruptcy case, the debtor and the committee took discovery to more fully understand where all the money went, then press claims against the lucky investor who was bought out with a \$1 million preferential loan repayment and a \$1 million guaranteed profit, as well as the caterer and other parties.

The ultimate dividend to creditors whose debts were not satisfied by the purchaser in connection with the successful production of Bottlerock 2014 was approximately 25 cents on the dollar. The purchasers who rescued the festival at the eleventh hour have since sold their interests to a nationwide concert promoter, and the annual event sells out almost immediately after tickets are offered to the public.

## The Festival Promoter that Successfully Reorganized: SFX Entertainment

SFX Entertainment Inc. was created in 2012 to roll up and exploit the popularity of dance music festivals such as Tomorrowland, Electric Zoo, Mysteryland and Stereosonic. In 2013, the company went public at a valuation of just over \$1 billion, and thereby raised \$260 million.

By Feb. 1, 2016, the enterprise (an amalgamation of more than 40 debtors) had filed for chapter 11 in Delaware in the wake of a failed takeover bid by its founder, Robert F.X. Sillerman, and the case was assigned to Hon. **Mary F. Walrath**. In their bankruptcy filings, the debtors reported also having 120 nondebtor subsidiaries operating in more than 30 countries. In 2015, the promotion sold more than three million tickets. All told, in 2015, SFX owned or operated more than 100 festivals across the world.

By Sept. 30, 2016, the debtors had proposed their fifth amended joint reorganization plan, which took the company private, eliminated more than \$300 million in debt from its balance sheet and installed a new chief executive to replace the founder. As part of the deal, a group of the company's bondholders agreed to convert their debt into equity and provide \$115 million in financing. According to announcements at the time, the company's many festivals around the world would go on as planned under a new corporate banner as "LiveStyle Inc." However, this has not entirely been the case, as certain festivals (such as Stereosonic) are no longer on the company's calendar.

## Conclusion

The music festival business is like a bright, shiny object to the neophyte festival promoter. Yet the road to a sustainable, successful festival business is littered with the detritus of underfunded, ill-conceived or overleveraged business plans. The ultimate success of Bottlerock and the reorganization of SFX Entertainment tells us that once you have a product with an acknowledged audience, you have something to reorganize. **abi**

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