

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

B E T W E E N:

GROSVENOR PARK MEDIA FUND L.P.

Plaintiff

-and-

ARC PRODUCTIONS LTD., ARC HOLDINGS INC., ARC INVESTMENTS LTD.,  
ARC/DARK CRYSTAL PRODUCTIONS INC., KICK PRODUCTIONS LTD., IN THE  
JUNGLE PRODUCTIONS INC., TF I PRODUCTIONS INC., BL II PRODUCTIONS  
INC., ARCADIA PRODUCTIONS LTD., EGGS LTD., PRINCESS PRODUCTIONS  
INC., UNDERZOO PRODUCTIONS INC., HOLE IN THE BELLY PRODUCTIONS  
LTD., SIR SIMON PRODUCTION LTD., SAMURAI PRODUCTIONS LTD., THOMAS  
MURRAY, KALLAN KAGAN and PETER KOZIK

Defendants

**REPLY FACTUM OF THE RESPONDING PARTY SPIN MASTER LTD.  
(RE: Motion for Distribution Approval)**

July 17, 2020

**TORKIN MANES LLP**  
Barristers & Solicitors  
151 Yonge Street, Suite 1500  
Toronto ON M5C 2W7

**S. Fay Sulley (24257D)**  
Direct Tel: 416-777-5419  
Direct Fax: 1-888-587-5769  
fsulley@torkinmanes.com

**Marco P. Falco (51275K)**  
Tel: 416-777-5421  
Fax: 1-888-463-8131  
mfalco@torkinmanes.com

Tel: 416-863-1188  
Fax: 416-863-0305

Lawyers for Spin Master Ltd.

TO: **GOODMANS LLP**  
Barristers & Solicitors  
333 Bay Street, Suite 3400  
Toronto, ON M5H 2S7

L. Joseph Latham (32326A)  
jlatham@goodmans.ca@gsnh.com  
Jason Wadden (467575M)  
jwadden@goodmans.ca@gsnh.com

Tel: 416-979-2211  
Fax: 416-979-1234

Lawyers for the Plaintiff

TO: **GOLDMAN SLOAN NASH & HABER LLP**  
480 University Avenue, Suite 1600  
Toronto, ON M5G 1V2

Mario Forte (27293F)  
forte@gsnh.com

Tel: 416-597-6477  
Fax: 416-597-3370

Lawyers for the Deloitte Restructuring Inc., in its  
Capacity as the Court appointed Receiver of Arc  
Productions Ltd. et al.

AND TO: **MARKS & CLERK LAW LLP**  
Barristers and Solicitors  
100 Simcoe Street, Suite 200  
Toronto, ON M5H 3G2

Andrew R. O. Jones (26234D)  
ajones@marks-clerk.ca  
Nathan Fan (62173A)  
nfan@marks-clerk.ca

Tel: 416-595-1155  
Fax: 416-595-1163

Lawyers for BK2BRAC Holdings Inc.

AND TO: **GOLDENBERG NAHMIAS LLP**  
468 Queen Street E.  
Toronto, ON M5A 1T7

Daniel Goldenberg  
daniel@goldbergnahmias.com

Tel: 416-479-1630  
Fax: 888-950-4916

Lawyers for Blazing Productions Ltd.

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Defendants

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## **PART I - OVERVIEW**

1. In reply to GP's Factum on this Motion, Spin Master submits the following:

- (a) ***The PPSA Does not Apply to Defeat Spin Master's Trust Interest in the Tax Credits.*** On this Motion, GP conveniently ignores the fundamental nature of the Tax Credits as trust property in favour of Spin Master in order to give primacy to its interests under the *PPSA*. However, GP's position is inconsistent with Canadian case law which makes it clear that proprietary trust interests are not "security interests" or "collateral" for the purposes of provincial *PPSA* legislation. Rather, they constitute "property held by the bankrupt in trust" under section 67(1)(a) of the *BIA*. In any event, Ontario law is clear that equity can intervene to impose a trust in order to advance the principle of commercial morality, even if to do so would defy the ordinary statutory ranking of creditors. In this case, Spin Master does not stand on the same footing as an ordinary creditor of Arc. The law of trust and equity is not an "archaic form of security", as GP alleges. To the contrary, equity in this case would ensure that creditors such as GP do not undermine Arc's and Spin Master's clear intent to treat the Tax Credits as trust property.
- (b) ***The Tax Credits are Held in Trust and are not "Disguised" Security Interests.*** Throughout its factum, GP repeatedly attempts to cast the Tax Credits in favour of Spin Master as a "disguised security interest" for which there is no "certainty of subject matter" so as to constitute a trust. With respect, GP attempts to create uncertainty where there is none. Section 6(a) of the Spin Master PSA expressly identifies the applicable Tax Credits. The fact that the exact amounts that would be

received by Arc could not be determined with exact precision until production work was carried out does not lead to a fatal uncertainty of subject-matter, as GP suggests. All parties understood what the Tax Credits were. They remain clear and ascertainable;

- (c) ***GP's Reliance on Deemed Statutory Trusts is Misplaced.*** In its factum, GP places extensive reliance on the law governing priorities with respect to statutory deemed trusts under subsections 67(2) and (3) of the *BIA*. It is not entirely clear why GP relies on these subsections. The issue is not whether the Tax Credits give rise to a statutory deemed trust, but whether the Tax Credits are trust property for the purposes of subsection 67(1) of the *BIA*. To the extent that Spin Master relies on any case law concerning a statutory deemed trust, it is to illustrate the requirements of a trust at common law;
- (d) ***There is a Clear Equitable Wrong leading to GP's Unjust Enrichment.*** Contrary to GP's position, if GP is awarded the Tax Credits on this Motion, it would allow them to be used as collateral for secured creditors, an outcome never envisioned by Arc or Spin Master and contrary to the express intention by the parties to hold the Tax Credits in trust. GP's effort on this Motion to cast the Tax Credits as an ordinary security interest would undermine their very purpose, which is to incentivize the employment of Canadian and Ontario labour in film production, not act as collateral for secured creditors. The equities clearly favour recognizing the relationship between Arc and Spin Master *vis-à-vis* the Tax Credits for what it truly is—a trust relationship.

2. Accordingly, Spin Master seeks an Order that the Tax Credits are trust property to be distributed to Spin Master in these proceedings.

3. For ease of reference, Spin Master relies in this Factum on all terms as defined in the Responding Factum of Spin Master Ltd., dated June 19, 2020.

## **PART II - ARGUMENT**

### **i. PPSA Does Not Apply. There is No Security Interest or Collateral in the Tax Credits as Trust Property.**

4. Section 2(1) of Ontario's *PPSA* states that the *Act* applies to every transaction that "in substance creates a security interest...".<sup>1</sup>

5. A "security interest" is defined under the *PPSA* as:

...an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation,

(a) the interest of a transferee of an account or chattel paper, and

(b) the interest of a lessor of goods under a lease for a term of more than one year.<sup>2</sup> [**emphasis added**]

6. GP argues that the Tax Credits constitute an interest of a "transferee of an account", such that they amount to a "security interest" for the purposes of the *PPSA*, whether or not that interest is "premised on the payment of an obligation".<sup>3</sup> This argument could have merit, but for the fact that it ignores the fundamental nature of the Tax Credits as the subject-matter of a an express, implied, resulting or constructive trust, not the "transfer of an account".

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<sup>1</sup> *PPSA, supra* at s.2(1).

<sup>2</sup> *PPSA, supra* at s.1(1).

<sup>3</sup> Factum of the Plaintiff, undated ("**GP Factum**"), at paras. 40 & 42.

7. The Tax Credits do not meet the definition of “security interest” or “collateral” under the *PPSA*. The proper analysis is to understand them as trust property for the purposes of subsection 67(1)(a) of the *BIA*. This analysis accords with Canadian case law that excludes trust property from the application of provincial *PPSA* legislation where “security interests” are not at issue.

8. In *Re Ellingsen*, a 2000 decision of the British Columbia Court of Appeal,<sup>4</sup> a purchaser obtained possession of a truck from a dealership, before financing for the truck was arranged. The purchase agreement was conditional on the arrangement of financing for the truck. No security interest was registered in the vehicle under the B.C. *PPSA*. Ultimately, financing was never arranged and the purchaser made an assignment into bankruptcy. The dealership claimed a beneficial interest to the truck. It claimed that the purchaser only held bare legal title to the truck and that the purchaser was a trustee of the beneficial interest in favour of the dealership. The dealership argued that the *PPSA* had no application because the purchaser never held a “security interest” in the truck.

9. Citing both the B.C. *PPSA* and section 67(1) of the *BIA*, the British Columbia Court of Appeal agreed with the dealership and imposed a constructive trust. In so doing, the Court rejected the Trustee in Bankruptcy’s argument that the constructive trust in this case amounted to a “security interest” as defined under the *PPSA*:

The Trustee submits, in the alternative, that any equitable interest supporting a trust in the circumstances amounts to a security interest for the purposes of the *PPSA*, in the sense that that interest only existed as a method for securing payment of the truck.

...

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<sup>4</sup> [\(2000\), 1 P.P.S.A.C. \(3d\) 307 \(B.C.C.A.\), per Donald J.](#)

**...I do not know how it could be said that a constructive trust secures a payment or the performance of an obligation; rather its purpose is to prevent an unjust outcome.**<sup>5</sup> [emphasis added]

10. The Court further held that the *PPSA* did not provide a “juristic reason” for the enrichment. There was never anything to register under the *PPSA* as there was no “security interest” in the truck and the truck did not amount to “collateral”:

If [the dealership’s] interest is a security interest the consequences of not registering the interest are prescribed by s. 20(b)(i) of the *PPSA*. The collateral goes into the general estate by operation of statute and hence a juristic reason exists for the enrichment. **It is necessary to repeat, in order to deal with this point, that in my opinion [the dealership’s] interest was not a security interest within the meaning of the Act. There was nothing to register. The truck was not collateral to any enforceable contract.** The substance of the transaction, not its form, must determine whether a security interest was created...It follows that s. 20(b)(i) does not provide a juristic reason in answer to a claim of unjust enrichment.<sup>6</sup> [emphasis added]

11. Moreover, the Court concluded that the imposition of a constructive trust would not re-order the priority of other creditors, because the dealership, as the beneficiary of a constructive trust, did not have the same status as an “ordinary creditor”. This is the same argument advanced by GP on this Motion.<sup>7</sup> The Court in *Re Ellingson* expressly rejected it:

...In my judgment, for the reasons I have given, [the dealership] **does not stand on the same footing as the general creditors and as a result I do not think the remedy I would impose unfairly deprives other creditors of an asset to which they have any reasonable entitlement.**<sup>8</sup> [emphasis added]

12. A similar line of reasoning was applied by Saskatchewan Court of Queen’s Bench in Bankruptcy in the 1991 case, *Graff v. Bitz Estate (Trustee of)*.<sup>9</sup>

<sup>5</sup> *Re Ellingsen, supra* at paras. 27 & 28. Note that “security interest” for the purposes of Ontario’s *PPSA* is similarly defined as “an interest in personal property **that secures payment or performance of an obligation,** and includes, whether or not the interest secures payment or performance of an obligation...”: see *PPSA, supra* at s.1(1).

<sup>6</sup> *Re Ellingsen, supra* at para. 30.

<sup>7</sup> GP Factum, at para. 64.

<sup>8</sup> *Re Ellingsen, supra* at para. 37.

<sup>9</sup> [1991] S.J. No. 605 (Q.B.), per Hunter J.

13. In *Graff*, Bitz operated a specialty car business. Bitz purchased a Porche and the applicant advanced him money to purchase the Porche for himself. The vehicle remained registered in Bitz's name. Bitz declared bankruptcy. The Trustee in Bankruptcy claimed that the applicant's advance was simply a loan and that the applicant was merely an unsecured creditor. The Trustee argued that the applicant's interest in the Porche was therefore subordinate to that of the Trustee under the Saskatchewan *PPSA*. The applicant argued that Bitz held the Porche in trust for the applicant.

14. Relying on subsection 67(1) of the *BIA*, the Court concluded that Bitz held the Porche in a resulting trust for the applicant. The Court rejected the argument that, as the beneficiary of a resulting trust, the applicant was simply an unsecured creditor:

**The Trustee argues that in the instant case, Mr. Graff [the applicant] could have protected himself by registering a security interest under The Personal Property Security Act. He did not do so and he, therefore, ranks as an unsecured creditor.**

I do not agree with the Trustee that the receipt for the \$6,300.00 U.S. executed by Mr.'s Graff and Bitz evidences a loan. It is very clear from the receipt that the funds were to be used by Mr. Bitz for the purchase of a specific article, namely, a "1985 1/2 Porsche 944". Furthermore, it was specified that this vehicle was to be purchased from "MPLS Auto Auction". In this respect, there is a clear description of the article to be purchased, absent only the serial number of the vehicle. Further, it is clear that Mr. Graff supplied the funds for the specific purpose of purchasing the Porsche and that Mr. Graff was the "owner" of the vehicle. It is true that once Mr. Bitz had completed the purchase on behalf of Mr. Graff, he did not register ownership in the vehicle to Mr. Graff. The evidence of a contractual relationship between Mr. Bitz and Graff was not in the purchase of the vehicle, it was the agreement to share any net profit that in the event the Porsche was sold and Mr. Bitz would then receive 40% as the selling agent.

So far as the requirements necessary to establish an express trust, it is clear that the elements of certainty of subject and certainty of object are satisfied. The issue is whether there is certainty of intent. There is no question but that the parties did not use "trust" language. However, as noted by Registrar Ferron in *Re 389179 Ontario Limited, supra*, all three elements need only be satisfied for the purpose of an express trust but not for a resulting trust. **I am satisfied that the elements have been established to find that the Porsche belonged to Mr. Graff and that Mr. Bitz had possession and registered ownership of the vehicle (as to the later, not with the express permission of Mr. Graff) and that the Porsche was held by Mr. Bitz on a resulting trust for Mr. Graff.**

Because the elements of a resulting trust have been satisfied, this case is clearly distinguishable from the situation of an inventory financier and **I find that the arrangement between Mr. Bitz and Mr. Graff did not constitute a security interest (purchase-money or otherwise) within the meaning of the Personal Property Security Act, supra,** as suggested by the trustee in bankruptcy.<sup>10</sup> [**emphasis added**]

15. The reasoning in the *Ellingsen* and *Bitz Estate* cases, *supra*, is consistent with Ontario authority which has made it clear that it is appropriate for equity to intervene to impose a remedial trust, despite the reality that to do so defy the formal statutory process of, for example, the *BIA*.<sup>11</sup>

16. Accordingly, GP's emphasis on the Tax Credits as amounting to nothing more than a security interest or unsecured obligation under the *PPSA*<sup>12</sup> ignores:

- (a) The fundamental nature of the Tax Credits as an express, implied, constructive, resulting, *Quistclose* trust or an absolute assignment;
- (b) That the trust created between Spin Master and ARC under Spin Master PSA or otherwise means that the Tax Credits could not constitute a "security interest" or "collateral" under the *PPSA*;
- (c) That as the beneficiary of a trust relationship, Spin Master does not stand on the same footing as a general creditor of Arc; and
- (d) Ontario law is clear that equity may intervene to impose a remedial trust, despite the fact that to do so could defy the ordinary statutory ranking of creditors under the *PPSA* or the *BIA*.

<sup>10</sup> [Graff v. Bitz Estate, supra.](#)

<sup>11</sup> [See Wilson Estate \(Re\), \[2019\] O.J. No. 1067, per Chiappetta J. at paras. 45-47, citing Re Ascent, 9 P.P.S.A.C. \(3d\) 176 \(Sup. Ct.\), per Deputy Registrar Whittie at para. 17.](#)

<sup>12</sup> GP Factum, at para. 39.

17. The law of trust and equity is not an “archaic form of security” that allows Spin Master to circumvent the *PPSA* regime, as GP suggests.<sup>13</sup> To the contrary, equity in this case ensures that creditors such of GP do not undermine Arc’s and Spin Master’s clear intent to treat the Tax Credits as trust property.

18. Accordingly, GP’s submission that the *PPSA* regime governs this dispute at the expense of equity is misplaced and ought to be rejected.

**ii. The Tax Credits, as Trust Property, are not “Disguised” Security Interests**

19. Throughout its factum, GP attempts to cast the Tax Credit trust in favour of Spin Master as a “disguised security interest”.<sup>14</sup> GP argues that the Spin Master PSA does not create a trust in the Tax Credits because there was allegedly no “certainty of subject[-matter]” at the time the contracts were entered into.<sup>15</sup> GP states because no tax credits could be applied until eligible expenses were incurred, it would not be known exactly what amounts would be received by Arc.<sup>16</sup> With respect, this argument misses the mark. It tries to create “uncertainty” where there is none.

20. In *Royal Bank of Canada v. A-1 Asphalt Maintenance*, the Ontario Court of Appeal held that language as broad as “all amounts, owing to a contractor or subcontractor, whether or not due or payable” was sufficient to create certainty of subject-matter for the purposes of a trust.<sup>17</sup> In this case, the Spin Master PSA is even more specific. Section 6(a) of the Spin Master PSA expressly identifies the applicable credits as the Ontario File and Television Tax Credit, the OCASE Tax

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<sup>13</sup> GP Factum, at para. 46.

<sup>14</sup> GP Factum, at para. 54.

<sup>15</sup> GP Factum, at para. 56.

<sup>16</sup> GP Factum, at para. 56.

<sup>17</sup> [\*Royal Bank of Canada v. A-1 Asphalt Maintenance Ltd.\*, 2019 ONCA 9, per Sharpe J.A. at para. 84.](#)

Credit as well as the federal Tax Credits. The fact that the exact amounts that would be received by Arc could not be determined with exact precision until work was carried out does not lead to an uncertainty of subject matter, as GP suggests.<sup>18</sup>

**iii. The Law Regarding Statutory Deemed Trusts is Irrelevant**

21. In its Factum, GP's places extensive reliance on the law governing priorities with respect to statutory deemed trusts under subsections 67(2) and (3) of the *BIA*.<sup>19</sup> It is not entirely clear why GP is relying on these subsections. GP's argument is misplaced and misconstrues Spin Master's position.

22. Sections 67(2) and (3) of the *BIA* largely concern "statutory deemed trusts" as set out in other statutes and have nothing to do with the express language of subsection 61(1)(a) of the *BIA*, on which Spin Master relies, which provides that the property of a bankrupt divisible among its creditors shall not comprise...property held by the bankrupt in trust for any other person".<sup>20</sup> To the extent that GP relies on the statutory deemed trust provisions under the *BIA*, its argument should be dismissed.

23. The cases on which Spin Master relies<sup>21</sup> which involve deemed statutory trusts, such as trusts under the *Construction Lien Act* (the "*CLA*"), are not being cited because Spin Master is taking the position on this Motion that the Tax Credits are the subject-matter of a deemed statutory trust under the *CLA*, for example. Rather, these cases are material to the extent they deal generally

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<sup>18</sup> GP Factum, at para. 56.

<sup>19</sup> GP Factum, at para. 55.

<sup>20</sup> *BIA*, *supra* at s.67(1)(a).

<sup>21</sup> [\*See, for example, Royal Bank of Canada v. A-1 Asphalt Maintenance, 2019 ONCA 9, per Sharpe J.A. at para. 9.\*](#)

with “trusts” and the requirements of a trust for the purpose of the exemption under section 61(1)(a) of the *BIA*. This is why GP cites no authority to substantiate its position in this regard.<sup>22</sup>

**iv. There is Clear Equitable Wrong Leading to GP’s Unjust Enrichment**

24. GP argues that Spin Master cannot point to a “separate, free-standing equitable wrong that occurred” such that Spin Master is entitled to a constructive trust.<sup>23</sup> This position misconstrues the test for a constructive trust which requires that Spin Master show the absence of a juristic reason for the retention of the Tax Credits by GP. It does not require Spin Master to show that an equitable wrong occurred.

25. In any event, if GP is entitled to the Tax Credits, contrary to the trust created by Arc and Spin Master, an equitable wrong has clearly occurred—it would allow the Tax Credits to be used as collateral for secured creditors, an outcome never envisioned or intended by any of the parties. It would further undermine the very purpose of the Tax Credits, which is to incentivize the employment of Canadian and Ontario labour in film production. The equities clearly favour recognizing the relationship between Arc and Spin Master *vis-à-vis* the Tax Credits for what it truly is—a trust relationship.

**PART III - ORDER REQUESTED**

26. Accordingly, for all the foregoing reasons, Spin Master seeks an Order that the Tax Credits constitute trust property in favour of Spin Master and are in no way impressed with GP’s security interest over Arc. Spin Master also seeks an order that the Receiver distribute the proceeds

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<sup>22</sup> GP Factum, at para. 56.

<sup>23</sup> GP Factum, at para. 62.

relating to the Tax Credit to Spin Master. Spin Master further seeks the costs of this Motion, payable by GP and the Receiver, on a substantial indemnity scale.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 17<sup>th</sup> day of July, 2020.

A handwritten signature in blue ink, appearing to be 'S. Fay Sulley / Marco P. Falco', is written over a horizontal line.

S. Fay Sulley / Marco P. Falco, Torkin Manes  
LLP, Lawyers for the Responding Party, Spin  
Master Ltd.

## **SCHEDULE “A”**

### **LIST OF AUTHORITIES**

1. *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd.*, 2000 BCCA 458
2. *Graff v. Bitz* (Trustee in Bankruptcy), 1991
3. In the Matter of the Bankruptcy of The Testamentary Estate of Jeffrey James Wilson, 2019 ONSC 1278
4. *Re Ascent*, 9 P.P.S.A.C. (3d) 176 (Sup. Ct.)
5. *Royal Bank of Canada v. A-1 Asphalt Maintenance*, 2019 ONCA 9

## SCHEDULE “B”

### 1. PERSONAL PROPERTY SECURITY ACT, R.S.O. 1990, C. P.10

1 (1) In this Act,

“collateral” means personal property that is subject to a security interest; (“bien grevé”)

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“security interest” means an interest in personal property that secures payment or performance of an obligation, and includes, whether or not the interest secures payment or performance of an obligation,

(a) the interest of a transferee of an account or chattel paper, and

(b) the interest of a lessor of goods under a lease for a term of more than one year; (“sûreté”)

2. Subject to subsection 4 (1), this Act applies to,

(a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,

(i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, and

(ii) an assignment, lease or consignment that secures payment or performance of an obligation;

(b) a transfer of an account or chattel paper even though the transfer may not secure payment or performance of an obligation; and

(c) a lease of goods under a lease for a term of more than one year even though the lease may not secure payment or performance of an obligation. R.S.O. 1990, c. P.10, s. 2; 2006, c. 34, Sched. E, s. 2.

4 (1) Except as otherwise provided under this Act, this Act does not apply,

(a) to a lien given by statute or rule of law, except as provided in subclause 20 (1) (a) (i) or section 31;

(b) to a deemed trust arising under any Act, except as provided in subsection 30 (7);

(c) to a transfer of an interest or claim in or under any policy of insurance or contract of annuity, other than a contract of annuity held by a securities intermediary for another person in a securities account;

(d) to a transaction under the *Pawnbrokers Act*;

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 4 (1) (d) of the *Act* is repealed and the following substituted: (See: 2019, c. 4, Sched. 2, s. 2)

(d) to a transaction between a pledgor and a person who carries on the business of taking, by way of pawn or pledge, any article for the repayment of money lent on the basis of the pawn or pledge;

(e) to the creation or assignment of an interest in real property, including a mortgage, charge or lease of real property, other than,

(i) an interest in a fixture, or

(ii) an assignment of a right to payment under a mortgage, charge or lease where the assignment does not convey or transfer the assignor's interest in the real property;

(f) to an assignment for the general benefit of creditors to which the *Assignments and Preferences Act* applies;

(g) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose unless the vendor remains in apparent control of the business after the sale;

(h) to an assignment of accounts made solely to facilitate the collection of accounts for the assignor; or

(i) to an assignment of an unearned right to payment to an assignee who is to perform the assignor's obligations under the contract. R.S.O. 1990, c. P.10, s. 4 (1); 2006, c. 8, s. 124; 2017, c. 2, Sched. 3, 8 (1).

#### Rights under *Sale of Goods Act*

(2) The rights of buyers and sellers under subsection 20 (2) and sections 39, 40, 41 and 43 of the *Sale of Goods Act* are not affected by this Act. R.S.O. 1990, c. P.10, s. 4 (2).

20 (1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or

(ii) a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or

(iii) all persons entitled by the *Creditors' Relief Act, 2010* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has caused seizure of the collateral, or the proceeds of such property;

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;

(c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;

(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest. R.S.O. 1990, c. P.10, s. 20 (1); 2006, c. 8, s. 132; 2010, c. 16, Sched. 4, s. 28.

Idem

(2) The rights of a person,

(a) who has a statutory lien referred to in subclause (1) (a) (i) arise,

(i) in the case of the bankruptcy of the debtor, at the effective date of the bankruptcy, or

(ii) in any other case, when the lienholder has taken possession or otherwise done everything necessary to make the lien enforceable in accordance with the provisions of the Act creating the lien;

(b) under clause (1) (b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect. R.S.O. 1990, c. P.10, s. 20 (2).

Purchase-money security interest

(3) A purchase-money security interest that is perfected by registration,

(a) in collateral, other than an intangible, before or within 15 days after,

(i) the debtor obtains possession of the collateral, or

(ii) a third party, at the request of the debtor, obtains possession of the collateral,

whichever is earlier; or

(b) in an intangible before or within 15 days after the attachment of the security interest in the intangible,

has priority over an interest set out in subclause (1) (a) (ii) and is effective against a person described in clause (1) (b). R.S.O. 1990, c. P.10, s. 20 (3); 2010, c. 16, Sched. 5, s. 4 (2); 2017, c. 2, Sched. 3, 8 (2).

## **2. Bankruptcy Insolvency Act, R.S.C. 1985, c.B-3.**

67(1) (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

(b.1) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or

(b.3) without restricting the generality of paragraph (b), property in a *registered retirement savings plan*, a *registered retirement income fund* or a *registered disability savings plan*, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

Marginal note:Deemed trusts

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

Marginal note:Exceptions

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a “federal provision”) nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the Income Tax Act and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the Income Tax Act, or

(b) the province is a *province providing a comprehensive pension plan* as defined in subsection 3(1) of the Canada Pension Plan, that law of the province establishes a *provincial pension plan* as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the Canada Pension Plan, and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

**GROSVENOR PARK MEDIA FUND L.P.**  
Plaintiff

-and- **ARC PRODUCTIONS LTD., et al.**  
Defendants

Court File No. CV-16-11472-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT  
TORONTO

**REPLY FACTUM OF THE RESPONDING**  
**PARTY SPIN MASTER LTD**

**TORKIN MANES LLP**  
Barristers & Solicitors  
151 Yonge Street, Suite 1500  
Toronto ON M5C 2W7

**S. Fay Sulley (24257D)**  
Direct Tel: 416-777-5419  
Direct Fax: 1-888-587-5769  
fsulley@torkinmanes.com

**Marco P. Falco (51275K)**  
Tel: 416-777-5421  
Fax: 1-888-463-8131  
mfalco@torkinmanes.com

Tel: 416-863-1188  
Fax: 416-863-0305

Lawyers for Spin Master Ltd.

RCP-E 4C (May 1, 2016)