

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

BETWEEN:

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

**RESPONDING FACTUM OF BLAZING PRODUCTIONS LTD.
(RE: MOTION FOR DISTRIBUTION APPROVALS)**

Date: June 19, 2020

GOLDENBERG NAHMIAS LLP
468 Queen St E., Suite 301
Toronto, ON M5A 1T7

Daniel Goldenberg (LSO#54276Q)
Tel: (416) 479-1630
Fax: (888) 950-4916

Lawyers for Blazing Productions Ltd.

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

Mario Forte (LSO#:27293F)
Tel: 416-587-6477
Fax: 416-597-3370
Email: forte@gsnh.com

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

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

L. Joseph Latham (LSO#32326A)
Email: jlatham@goodmans.ca
Jason Wadden (LSO#467575M)
Email: jwadden@goodmans.ca
Tel: 416-979-2211
Fax: 416-979-1234

Lawyers for the Plaintiff

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

Andrew R. O. Jones (LSO#26234D)
Email: ajones@marks-clerk.ca
Nathan Fan (LSO#62173A)
Email: nfan@marks-clerk.ca
Tel: 416-595-1155
Fax: 416-595-1163

Lawyers for BK2BRAC Holdings Inc.

AND TO: **TORKIN MANES LLP**
Barristers and Solicitors
151 Yonge Street, Suite 1500
Toronto, ON M5C 2W7

S. Fay Sulley (LSO#24257D)
Email: fsulley@torkinmanes.com
Marco P. Falco (LSO#51275K)
Email: mfalco@torkinmanes.com
Tel: 416-863-1188
Fax: 416-863-0305

Lawyers for Spin Master Ltd.

**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**

Defendant

**RESPONDING FACTUM OF BLAZING PRODUCTIONS LTD.
(RE: MOTION FOR DISTRIBUTION APPROVALS)**

PART I - OVERVIEW

1. Blazing Productions Ltd. ("**BPL**") is a third party claimant in this proceeding. BPL is a party to a September 21, 2015 Production Services Agreement (the "**BPL PSA**") with Arc Productions Ltd. ("**Arc**"). Under the BPL PSA, Arc undertook to provide animation production services, including the furnishing of all necessary facilities, materials, and personnel in connection with the production of an animated feature film then-entitled "Blazing Samurai" (the "**Film**").

2. Under the BPL PSA, Arc contracted to prepare and submit applications for the Ontario Computer Animation and Special Effects Tax Credit ("**OCASE**"), and qualified to receive certain portions of the Ontario Production Services Tax Credit ("**OPSTC**"), and the federal Film or Video Production Services Tax Credit ("**PSTC**", and together with the OCASE and OPSTC, the "**Tax Credits**"). Arc acknowledged in the BPL PSA that BPL was to be entitled to all of the Tax Credits.

3. Applications for the Tax Credits were submitted by Kay & Warburton Chartered Professional Accountants ("**K&W**"), the specialist consultants retained by Deloitte Restructuring Inc. (the "**Receiver**"), in the name of Arc. At the time of such application, neither K&W nor the Receiver had received, or had

knowledge of, the fully executed amended and restated production services agreement dated as of April ____, 2016, with effect as of September 21, 2015 between BPL and its now-wholly-owned subsidiary Blazing Samurai Productions Inc. (an Ontario corporation) ("**BSPI**") on the one hand, and Arc and its wholly-owned subsidiary Samurai Productions Ltd. ("**SPL**") on the other hand (the "**ARPSA**"). In filing the tax credits, the Receiver relied only upon the BPL PSA and a partially executed amended and restated production services agreement dated as of April ____, 2016, with effect as of September 21, 2015 between BSPI on the one hand, and Arc and SPL on the other hand (the "**Unexecuted ARPSA**"). At such time, BPL regarded the Unexecuted ARPSA as being the only amended and restated version of the production services agreement, which such Unexecuted ARPSA was not compliant with the requirements for either the OPSTC or PSTC tax credits and would not have qualified any party to it to receive such tax credits. Had the ARPSA been available to the Receiver at the time of application, approximately CDN\$497,892 of proceeds (related to services provided under the ARPSA from and following April 18, 2016) from the OPSTC and PSTC tax credits (the "**BSPI Tax Credits**") would have been subject to application directly by BSPI. The applications for OPSTC and PSTC submitted by the Receiver are factually inaccurate and must be corrected so as to enable BPSI and BPL to make application directly for the BSPI Tax Credits.

4. As to the portion of the OPSTC and PSTC applicable to services provided under the ARPSA and/or PSA prior to April 18, 2016 (the "**Pre April Tax Credits**"), and in respect of the OCASE tax credits, all such amounts, when received, constitute property held in trust by Arc, for the benefit of BPL, and are not subject to the security interests of Arc's creditors, including Grosvenor Park Media Fund L.P.'s ("**Grosvenor Park**"). The Tax Credits are the property of BPL.

5. The Tax Credits are subject to an express, or alternatively, implied trust for BPL's benefit. It was explicit among BPL and Arc that Arc was to collect, hold, and distribute all applicable Tax Credits for BPL. The BPL PSA, the Unexecuted ARPSA, and the ARPSA each expressly provide that BPL "alone shall be entitled to all Tax Credits". Pursuant to the ARPSA, BPL agreed to pre-pay a portion of the Tax Credits with the explicit acknowledgement that, when received by Arc, they would be held in trust and promptly paid to BPL.

6. In the alternative, the Tax Credits are impressed with a constructive or *Quitclose* trust in favor of BPL.

7. The Tax Credits are the property of BPL and should be distributed to BPL when received.

PART II - SUMMARY OF FACTS

8. On or about April 16, 2016, Arc, SPI, BSPI and BPL entered into the ARPSA, wherein Arc agreed to facilitate the application and collection of the OCASE tax credit, and to receive such monies in trust and on behalf of BSPI and BPL (which such agreement is also included in the BPL PSA).

BPL Production Service Agreement dated September 21, 2015 ["BPL PSA"], Appendix "A" to Fifteenth Report of Deloitte Restructuring Inc. (April 9, 2020)

Fully Executed Amended and Restated Production Services Agreement dated as of April __, 2016 ("ARPSA"), Exhibit "A", Oates Affidavit sworn June 19, 2020 ("Oates Affidavit"), Blazing Productions Ltd. factum ("BPL Factum"), Tab 1A

9. In paragraph 17(a) of the ARPSA, Arc acknowledged that the OCASE tax credit was to be held in trust for BPSI and BPL:

*In that regard and with respect to the OCASE Tax Credit, Arc and Samurai agree that Samurai shall claim and collect said OCASE Tax Credit **and shall hold same in trust and on behalf solely of Producer, as a fiduciary of Producer.***

[bold emphasis added]

ARPSA, at para. 17(a) and Exhibit "A", Oates Affidavit, BPL Factum, Tab 1A

10. A portion of the amounts paid by BPL and BSPI to Arc were paid in specific contemplation that such monies were an advance of the anticipated OCASE tax credits and were to be repaid to BPL and BSPI following receipt:

Subject to the terms and conditions of this Agreement, Producer agrees to make one or more advances (the "OCASE Advances") to Samurai to be used by Samurai for the sole and exclusive purpose of paying for the Production Services in accordance with this Agreement. The parties hereto agree that Samurai shall repay to Producer by cheque or wire transfer (and for certainty, not by way of set-off), that portion of the Production Financing equal to the OCASE Tax Credit within ten (10) days of the receipt by Samurai of the OCASE Tax Credit.

ARPSA, at para. 17(a) and Exhibit "A", Oates Affidavit, BPL Factum, Tab 1A

11. In paragraph 17 of the ARPSA, Arc acknowledged that the qualification of their services as eligible for the Tax Credits was a material inducement to the entry into the ARPSA by BPL and BSPI, and that all

of the Tax Credits (including the Pre April Tax Credits and the BSPI Tax Credits), were to be the property of BPL and BSPI:

(a) *The parties mutually acknowledge that **Producer intends to produce the proposed Film** so as to qualify for the federal Canadian Film or Video Production Services Tax Credit (“Federal Credit”) pursuant to the Income Tax Act (Canada) and the guidelines of the Canadian Audio-Visual Certification Office (“CAVCO”). Additionally, the parties mutually acknowledge that **Producer intends to produce the Film** so as to qualify for the Ontario Production Services Tax Credit (“OPSTC Tax Credit”) and the Ontario Computer Animation and Special Effects Tax Credit (“OCASE Tax Credit” together with OPSTC Tax Credit, the “Ontario Credits”) contemplated in Section 43.10 and Section 43.8 respectively of the Corporations Act (Ontario), and all other applicable legislation, regulations, bulletins, guidelines and policies (draft or otherwise) issued in connection therewith (the Federal Credit and the Ontario Credits shall be collectively referred to herein as the “Tax Credits”). **Arc and Samurai agree to cooperate with Producer to the extent necessary for the Film to qualify as set forth above. For the avoidance of doubt, Arc and Samurai acknowledge and agree that Producer alone shall be entitled to all Tax Credits available in respect of the Services and/or the Film.***

[bold emphasis added]

ARPSA, at para. 17(a) and Exhibit “A”, Oates Affidavit, BPL Factum, Tab 1A

12. On or about November 12, 2019, the Receiver received guidance from K&W that BSPI was not in a position to make any claim in respect of any portion of the Tax Credits on account of the fact that the Unexecuted ARPSA did not include BPL (as copyright owner of the Film) as a party. Recommendation was made at that time for applications to be made in the name of Arc, including with respect to the BSPI Tax Credits, and such applications were filed in the name of Arc.

Partially Executed Amended and Restated Production Services Agreement dated as of April ___, 2016, with effect as of September 21, 2015 (“Unexecuted ARPSA”), Exhibit “C”, Oates Affidavit, BPL Factum, Tab 1C

November 12, 2019 email from Kay & Warburton Chartered Professional Accountants (K&W Email”), Exhibit “D-1”, Oates Affidavit, BPL Factum, Tab 1D-1

Ontario Production Services Tax Credit Application, Exhibit “E-2”, Oates Affidavit, BPL Factum, Tab 1E-2

Federal Film or Video Production Services Tax Credit Application, Exhibit “E-3”, Oates Affidavit, BPL Factum, Tab 1E-3

13. Had the Receiver been in possession of the ARPSA, and provided the same to K&W, the decision would have been taken to apply for the BSPI Tax Credits in the name of BSPI as the ARPSA provides the requisite contractual linkage between BPL and BSPI, and the quantum of the OPSTC and PSTC tax credits applied for in the name of Arc would have been reduced by approximately CDN\$497,892.

ARPSA, at preamble, Exhibit “A”, Oates Affidavit, BPL Factum, Tab 1A

Unexecuted ARPSA, Exhibit “C”, Oates Affidavit, BPL Factum, Tab 1C

K&W Email, Exhibit “D-1”, Oates Affidavit, BPL Factum, Tab 1D-1

Kay & Warburton Chartered Professional Accountants Tax Credit Breakdown, Exhibit “D-2”, Oates Affidavit, BPL Factum, Tab 1D-2

14. On or about July 13, 2016, BPL and BSPI executed a notice of assignment and direction to pay dated as of July 13, 2016 (the “**GP NOA**”) directing BPL and BSPI to make payment to Grosvenor Park in the amount of CDN\$1,050,000, which such amount was scheduled to be paid by BSPI to Arc and/or SPL pursuant to the ARPSA, and in respect of which payment was fully or partially made by BPL (on behalf of BSPI) to Grosvenor Park.

Notice of Assignment and Direction to Pay dated as July 13, 2016 (the “GP NOA”), Exhibit “B”, Oates Affidavit, BPL Factum, Tab 1B

15. While the GP NOA includes an acknowledgement from BPL and BSPI that the scheduled payment described therein had been assigned by Arc and SPL to Grosvenor Park, the GP NOA makes no other reference to payments, receivables, or tax credits which had been assigned by Arc or SPL to Grosvenor Park.

GP NOA, Exhibit “B”, Oates Affidavit, BPL Factum, Tab 1B

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

16. The operative language in the BPL PSA and ARPSA is functionally identical to the language present in the production services agreement dated August 11, 2014 between Spin Master Riveting Productions Inc. and Arc Productions Ltd. so as to give rise to the same legal issues.

17. Accordingly, BPL adopts and relies upon submissions made in the factum of Spin Master Ltd. submitted on June 19, 2020, namely that BPL has a proprietary interest in the Tax Credits resulting from: (i) the creation of an express or implied trust for BPL; or (ii) the Tax Credits being subject to a constructive trust for BPL; or (iii) the Tax Credits being impressed with a Quitclose Trust.

PART IV - ORDER REQUESTED

18. For all of the foregoing reasons, BPL seeks an order that the Tax Credits constitute trust property in favor of BPL and are not in any way impressed with Grosvenor Parks’s security interest. BPL seeks an

order that the OPSTC and PSTC tax credit applications be amended by the Receiver to reflect the existence of the ARPSA and to enable BSPI to make application, in its own name, in respect of the BSPI Tax Credits. BPL seeks an order that the Receiver distribute any portion of the Tax Credits (including the OCASE tax credits) received in the name of Arc to BPL. BPL seeks the costs of this Motion, payable by Grosvenor Park and the Receiver, on a substantial indemnity scale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of June, 2020.



Daniel Goldenberg, Goldenberg Nahmias LLP,
Lawyers for Blazing Productions Ltd.

GOLDENBERG NAHMIAS LLP

Barristers & Solicitors
468 Queen St E Suite 301
Toronto, ON M5A 1T7

Daniel Goldenberg (54276Q)

Tel: (416) 479-1630

Fax: (888) 950-4916

Lawyers for Blazing Productions Ltd.

GROSVENOR PARK MEDIA FUND L.P.

- and -

ARC PRODUCTIONS LTD., et al.

Plaintiff

Defendant

ONTARIO

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

RESPONDING FACTUM OF BLAZING PRODUCTIONS LTD.

GOLDENBERG NAHMIA LLP

468 Queen St E Suite 301
Toronto, ON M5A 1T7

Daniel Goldenberg (LSO#54276Q)

Tel: (416) 479-1630

Fax: (888) 950-4916

Email: daniel@goldenbergnahmias.com

Lawyers for Blazing Productions Ltd.