

**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

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

June 19, 2020

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**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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**Defendants**

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Defendants

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

**PART I - OVERVIEW**

1. The Receiver, Deloitte Restructuring Inc. (the “**Receiver**”), brings this Motion for advice and directions concerning the making of distributions relating to proceeds from various computer animation and film tax credits arising from the production of a children’s entertainment show, *Rusty Rivets* (the “**Tax Credits**”).

2. The Tax Credits constitute property held in trust by the bankrupt, Arc Productions Ltd. and its subsidiaries and affiliates (“**Arc**”), for the benefit of Spin Master Riveting Productions Inc. (“**Spin Master**”). As such, they are in no way impressed with or affected by the security interests

of Arc's creditors, including the Plaintiff Grosvenor Park Media Fund LP ("GP"). The Tax Credits are the property of Spin Master.

3. The Tax Credits are subject to an express, or alternatively, implied trust for Spin Master's benefit. There is no doubt that Arc and Spin Master always intended for Arc to collect, hold and distribute the Tax Credits for Spin Master. The Production Services Agreement between Arc and Spin Master (the "**Spin Master PSA**") expressly provides that Spin Master "alone shall be entitled to all Tax Credits" which Arc would claim and collect "in trust" on behalf of Spin Master. Spin Master expressly agreed to pre-pay the Tax Credits on the basis that, when received by Arc, they would be held in trust and ultimately paid by Spin Master. There is no doubt that the Tax Credits at issue on this Motion bear all of the hallmarks of a trust, including certainty of intention, subject-matter and object.

4. In the alternative, this Court ought to impose a constructive or *Quistclose* trust on the Tax Credits in favour of Spin Master in order to avoid an unjust enrichment to GP. Arc was under both a contractual, equitable and agency obligation to hold the Tax Credits for Spin Master's benefit "in trust" and to pay the Tax Credits to Spin Master once they were received. The Tax Credits were only ever intended as Spin Master's property. GP would receive a windfall if trust funds were allocated as security for Arc's obligations to it. There is no juristic reason for such enrichment. Moreover, there are good policy reasons for imposing a trust in this case. The goal of the Tax Credits, i.e. to incentivize the employment of Canadian and Ontario labour in the production and film industries, would be significantly undermined if Tax Credits were to be used as collateral for secured creditors, as GP proposes.

5. In the further alternative, the Tax Credits were the object of an absolute assignment from Arc to Spin Master, such that they did not create a security interest under the *Bankruptcy and Insolvency Act* or the *Personal Property Security Act* in favour of GP or anyone else.

6. Accordingly, the Tax Credits constitute the property of Spin Master and are not in any way impressed with GP's security interest. The Receiver ought to distribute the proceeds relating to the Tax Credits to Spin Master.

## **PART II - FACTS**

### **The Parties and the Spin Master PSA**

7. Spin Master is an Ontario corporation which carries on business as a distributor of children's products, directly and indirectly, throughout the world. Spin Master is also involved in the distribution of episodes of various children's television and other entertainment shows.<sup>1</sup>

8. Arc was in the business of providing animation and computer graphic services to the film and television industry. Arc was at all material times a sophisticated commercial party.

9. Spin Master and Arc entered into a Production Services Agreement, i.e. the Spin Master PSA, on August 11, 2014.<sup>2</sup> Similar agreements were entered into with BK2BRAC Holdings Inc. ("**BK2BRAC**" or "**Disney**") and Blazing Productions Ltd. ("**Blazing**") (collectively, the "**PSAs**").<sup>3</sup>

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<sup>1</sup> Affidavit of Chris HARRS, sworn June 17, 2020 ("**HARRS Affidavit**"), Responding Motion Record of Spin Master Ltd., dated June 19, 2020 ("**Spin RMR**"), Tab 5, p.41, para. 2.

<sup>2</sup> Production Services Agreement between Spin Master and Arc ("**Spin Master PSA**"), Spin RMR, Tab 5(A), p.46-82.

<sup>3</sup> Fifteenth Report of Deloitte Restructuring Inc., Receiver of Arc Productions Ltd. et. al, dated April 9, 2020 ("**15<sup>th</sup> Report**") at para. 9.

10. The Spin Master PSA provided that Arc was to “provide and arrange for production services” for an animated series, *Rusty Rivets*.<sup>4</sup>

11. Under the Spin Master PSA, Arc contracted to compile information and submit tax recovery claims on behalf of Spin Master. In the ordinary course, Spin Master was entitled to receive the proceeds of these tax credits. The purpose of the tax credits was to maintain and promote production labour in the entertainment industry within Canada and Ontario.<sup>5</sup>

### **Tax Credits Held “In Trust” Under Spin Master PSA**

12. The Spin Master PSA expressly requires that the tax credits be held in trust for Spin Master’s benefit.

13. In particular, section 6(a) of the Spin Master PSA provides that Spin Master agreed to produce *Rusty Rivets* so as to qualify for the federal Canadian Film or Video Production Tax Credit (the “**Federal Credit**”), the Ontario Film and Television Tax Credit (“**OFTTC Tax Credit**”) and the Ontario Computer Animation and Special Effects Tax Credit (“**OCASE Tax Credits**”) (collectively, the OFTTC, Federal and OCASE Tax Credits shall be referred to as the “**Tax Credits**”).<sup>6</sup>

14. Critically, for the purposes of this proceeding, section 6(a) provides that: (i) Arc acknowledged that Spin Master “alone” would be entitled to all the Tax Credits available, including the OCASE Tax Credit; and (ii) Arc would claim the Tax Credits “**in trust**” on behalf of Spin Master:

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<sup>4</sup> Spin Master PSA, Spin RMR, Tab 5(A), p.46.

<sup>5</sup> Harrs Affidavit, Spin RMR, Tab 5, p.41, para. 4.

<sup>6</sup> Spin Master PSA, Spin RMR, Tab 5(A), p. 50-51, at s.6(a).

- 6(a) ...For avoidance of doubt, [Arc] acknowledges and agrees that [**Spin Master alone shall be entitled to all Tax Credits** available in respect of the Services, Elements and / or Episodes, including the OCASE Tax Credit, which [Arc] shall **claim and collect in trust on behalf of [Spin Master]**].<sup>7</sup> [**emphasis added**]

15. Within three (3) days of applying for the OCASE Tax Credit, Arc had a duty under the Spin Master PSA to remit the entirety of the tax credit to Spin Master:

- 6(b) [Arc] shall be responsible for the timely preparation and submission of all applications relating to the OCASE Tax Credit and [Arc] shall cooperate with [Spin Master] to maximize the Tax Credits and assist with the collection thereof. With regards to the OCASE Tax Credit, [Arc] **shall remit one hundred percent (100%) of all such tax credit to [Spin Master]** within three (3) business days of [Arc's] receipt of same.<sup>8</sup> [**emphasis added**]

16. In addition to these obligations, Arc was under a duty to deliver status reports, documents, cost statements, the OCASE Tax Credit application and various books and records for Spin Master's benefit.<sup>9</sup>

### **Trust / Agency Relationship between Arc and Spin Master Evident in the Spin Master PSA's Factual Matrix**

17. At the time the Spin Master PSA was negotiated, there were generally two ways that production companies could deal with tax credits for Canadian productions:

- (a) A production company could pay for production fees, less the tax credits that would be received at a later date by a studio, plus financial costs associated with the studio essentially financing those tax credits; or
- (b) A production company could front the entire production costs, including tax credits, and then the studio would agree to hold any tax credits once received in

<sup>7</sup> Spin Master PSA, Spin RMR, Tab 5(A), p. 50-51, at s.6(a).

<sup>8</sup> Spin Master PSA, Spin RMR, Tab 5(A), p.51, at s.6(b).

<sup>9</sup> Spin Master PSA, Spin RMR, Tab 5(A), p.51, at s.6(c).

trust, and then remit those tax credits to the production company. This would amount to a lower overall cost since there would be no financing element.<sup>10</sup>

18. Spin Master wished to keep its overall costs lower, so it chose the second option. Accordingly, it agreed to pre-pay the Tax Credits on the basis that when they eventually were received by Arc, they would be received in trust and paid out to Spin Master. Otherwise, the economics of the transaction would not have worked.<sup>11</sup>

19. Although some production companies choose to let the studio fund production tax credits, given Spin Master's liquidity and cash reserves, it chose, in effect, to fund the Tax Credits, thus reducing the overall cost of the production.<sup>12</sup>

20. At the time that the Spin Master PSA was negotiated, there were discussions between the senior management of Arc and Spin Master that Spin Master would pay an amount equal to what the parties believed were to be the Tax Credits. The amount of the Tax Credits now received by the Receiver in this proceeding were received pursuant to the terms of the Spin Master PSA. The fact that Arc was later placed in receivership, as set out below, does not change the nature of the Tax Credits. The Tax Credits never belonged to Arc or the Receiver. They should be immediately paid over to Spin Master.<sup>13</sup>

21. Moreover, Spin Master never signed a subordination agreement with Arc that would subordinate Spin Master's interests in the Tax Credits in favour of GP.<sup>14</sup> In any event, it is Spin Master's position in this proceeding that a subordination agreement would not on its own have

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<sup>10</sup> Harrs Affidavit, Spin RMR, Tab 5, p.41, at para. 4.

<sup>11</sup> Harrs Affidavit, Spin RMR, Tab 5, p.41-42, at para. 4.

<sup>12</sup> Harrs Affidavit, Spin RMR, Tab 5, p. 42, at para. 4.

<sup>13</sup> Harrs Affidavit, Spin RMR, Tab 5, p.42, para. 5.

<sup>14</sup> Harrs Affidavit, Spin RMR, Tab 5, p.42, para. 6.

changed the nature of the trust relationship applicable to the Tax Credits. Only to the extent that Spin Master was owed cash by Arc would a subordination agreement have assisted with the claims of the Receiver. One cannot subordinate a claim to a third party to an asset that one owns. An entirely different agreement would be required. No one at Spin Master recalls such a subordination agreement ever being signed.<sup>15</sup>

22. Moreover, at the time that GP, which claims to be a creditor of Arc in this proceeding, entered into discussions with Arc, it apparently conducted a significant and in-depth review of the various assets and classes of assets which Arc owned. At no point was GP provided with any information or certificate in which Spin Master agreed to forgo or assign its trust claim to any third party.<sup>16</sup>

23. Notably, the credit agreement between GP and the Defendants in this proceeding, including the borrowing base certificates delivered thereunder, makes no reference to Spin Master or the *Rusty River* Tax Credits.<sup>17</sup> There is no reference to other parties with whom Arc entered into PSAs, such as Blazing Productions Ltd. (“**Blazing**”), either. However, reference is made to several other companies that were using Arc as a producer. Moreover, the tax credits received in relation to those other companies have been referenced in a borrowing base certificate delivered by Arc to GP, in order for the Defendants in this proceeding to obtain advances from GP.<sup>18</sup>

24. GP knew full well that Spin Master was entitled to the Tax Credits, without deduction or set-off. The manner in which the credit agreement was drafted and the borrowing base certificates

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<sup>15</sup> Harrs Affidavit, Spin RMR, Tab 5, p.42, para. 6..

<sup>16</sup> Harrs Affidavit, Spin RMR, Tab 5, p.43, para. 7.

<sup>17</sup> Credit Agreement, dated December 10, 2015, being Exhibit “B” to the Harrs Affidavit, Spin RMR, Tab 5(B), p. 84-210.

<sup>18</sup> Borrowing Base Certificate, dated July 13, 2016, Spin RMR, Tab 5(C), p.212-235.

were completed constitutes clear and independent evidence that GP did not provide any financing for the *Rusty Rivets* productions. It is Spin Master's position on this Motion that GP should not now get the benefit of funds that belong to Spin Master.<sup>19</sup>

### **Distributions of Tax Credits Subject to Court Order**

25. On July 29, 2016, GP brought a motion seeking the appointment of an Interim Receiver over Arc and certain other property. That motion was granted by the Honourable Justice Wilton-Siegel and an interim receiver was appointed pursuant to an Interim Receivership Order, dated July 29, 2016 (the "**Original Interim Receivership Order**").<sup>20</sup>

26. Under the Original Interim Receivership Order, the interim receiver was not to implement the powers provided to it pending a return hearing on August 2, 2016.<sup>21</sup> The Lender then sought and obtained a Fresh as Amended Interim Receivership Order on August 2, 2016 (the "**August 2, 2016 Order**").<sup>22</sup> The Receivership Order was ultimately granted by the Honourable Justice Penny on August 10, 2016.<sup>23</sup>

27. The Ontario Superior Court then made an Order authorizing the Receiver to assign Arc into bankruptcy on January 27, 2017.<sup>24</sup>

28. The Receiver has done so and the Office of the Superintendent of Bankruptcy issued a Certificate of Appointment of Deloitte Restructuring as trustee of Arc on January 31, 2017.

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<sup>19</sup> Harrs Affidavit, Spin RMR, Tab 5, p. 43, para. 9.

<sup>20</sup> 15<sup>th</sup> Report, at para. 4.

<sup>21</sup> 15<sup>th</sup> Report, at para. 4.

<sup>22</sup> Fresh as Amended interim Receivership Order of Penny J. dated August 2, 2016, Spin RMR, Tab 1, p.1-16; 15<sup>th</sup> Report at para. 5.

<sup>23</sup> Receivership Order of Justice Penny, dated August 10, 2016, Spin RMR, Tab 2, p. 17-32; 15<sup>th</sup> Report, at para. 6.

<sup>24</sup> Order of the Superior Court, dated January 27, 2017, Spin RMR, Tab 3, p.33-35.

29. The Honourable Justice Newbould granted a Distribution Order on April 18, 2017 (the “**Distribution Order**”).<sup>25</sup>

30. Under the Distribution Order, the Receiver was, amongst other things, authorized to “distribute to GP from time to time all funds coming into the hands, subject to such reserves as the Receiver may deem prudent in the circumstances, up to the amount of \$43,953,400”. However, the Distribution Order further provides that “any distributions by the Receiver hereunder of proceeds of the realization or collection of tax credits of Arc, where the Receiver has notice of the interests of parties other than GP claiming ownership, security interests, or both in such tax credits or their proceeds, shall only be made upon further Order of the Court on notice to GP and to such other parties”.<sup>26</sup>

31. Since the Receiver’s 13<sup>th</sup> Report, the Receiver states it has collected Tax Credits and accrued interest, net of directly attributable professional fees and costs, related to the PSAs with Spin Master, Blazing and BK2BRAC, as follows: (a) Spin Master--\$754,612; and (b) BK2BRAC--\$395,000.<sup>27</sup> After taking into account an appropriate reserve and the pending tenth distribution of \$1,050,000 to GP as outlined in the Receiver’s Fourteenth Report, there are available funds on hand to permit a distribution of \$1,149,702.<sup>28</sup>

32. As the Receiver has identified in its Fifteen Report, on this Motion, Spin Master takes the position that Arc’s contractual obligations under the Spin Master PSA creates a proprietary interest

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<sup>25</sup> Distribution Order of the Honourable Justice Newbould, dated April 18, 2017, RMR, Tab 4, p. 36-39; 15<sup>th</sup> Report, at para. 7.

<sup>26</sup> Distribution Order of the Honourable Justice Newbould, dated April 18, 2017, RMR, Tab 4, p. 37-38, paras. 4-5; 15<sup>th</sup> Report, at para. 7.

<sup>27</sup> 15<sup>th</sup> Report, at para. 12 and Appendix “C” to the 15<sup>th</sup> Report.

<sup>28</sup> 15<sup>th</sup> Report, at para. 14.

in the net proceeds / Tax Credits, such that they are not impressed with GP's security interest.<sup>29</sup> Spin Master takes the position that the Tax Credits are being held by the Receiver in trust for Spin Master.<sup>30</sup>

33. The Tax Credits should not be and are not included, nor have they been historically included, in any of the collateral owned by the Defendants against which GP had a charge, either at the time that GP acquired its interest in the collateral or thereafter.<sup>31</sup>

### **PART III - ISSUES, LAW & AUTHORITIES**

34. This Motion gives rise to the following issue:

- (a) Does Spin Master have a proprietary or trust interest in the Tax Credits such that they are not divisible amongst creditors like GP?

#### **A. Spin Master Has a Proprietary Trust Interest in the Tax Credits**

35. Section 136(1) of the *Bankruptcy and Insolvency Act* (the "BIA") sets out the priority of payment realized from the "property" of a bankrupt, subject to the rights of secured creditors.<sup>32</sup>

36. "Property" under the *BIA* is defined broadly as "any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property".<sup>33</sup>

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<sup>29</sup> 15<sup>th</sup> Report, at para. 16.

<sup>30</sup> Harrs Affidavit, Spin RMR, Tab 5, p. 41, para. 3.

<sup>31</sup> Harrs Affidavit, Spin RMR, Tab 5, p. 41, para. 3.

<sup>32</sup> *Bankruptcy and Insolvency Act*, [R.S.C. 1985, c.B-3 at s.136\(1\)](#).

<sup>33</sup> *Bankruptcy and Insolvency Act*, [R.S.C. 1985, c.B-3 at s. 2](#).

37. Under subsection 67(1)(a) of the *BIA*, trust property is expressly excluded from distribution amongst creditors of the bankrupt as follows:

67(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...<sup>34</sup> [emphasis added]

38. For the reasons set out below, Spin Master submits that the Tax Credits were held in an express, implied, constructive or *Quistclose* trust by Arc pursuant to the Spin Master PSA. Spin Master acquired a proprietary interest in the Tax Credits, such that they amount to “property held by the bankrupt in trust” under section 67(1)(a) of the *BIA*. Accordingly, Spin Master’s trust claim does not comprise the “property of the bankrupt” to be divisible among secured creditors, such as GP. Spin Master’s trust claim was also not subject to the provisions of the receivership order on the same basis: the receivership order applied to the property and assets of Arc. Spin Master’s Tax Credits are not the property of Arc.

*i. Tax Credits Held in an Express or Implied Trust for Spin Master*

39. The creation of an express or implied trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law.<sup>35</sup>

40. With respect to the certainty of intention, it can be inferred from the contractual documents and all the circumstances surrounding the transactions.<sup>36</sup> Where the parties have in their

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<sup>34</sup> [Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3 at s.67\(1\).](#)

<sup>35</sup> [Century Services Inc. v. Canada \(Attorney General\), 2010 SCC 60, per Deschamps J. at para. 83.](#)

[Bank of Nova Scotia v. Societe General \(Canada\), \[1988\] A.J. No. 332 \(C.A.\), per Stratton J.A.](#)

agreement evidenced an unequivocal intention to create a trust, extremely “strong indications must be found to exist” to alter the plain meaning of the language and find that no trust exists.<sup>37</sup>

41. With respect to the certainty of “subject matter”, the Ontario Court of Appeal in its 2019 decision, *Royal Bank of Canada v. A-1 Asphalt Maintenance Ltd.*,<sup>38</sup> affirmed that the subject-matter is “ascertained when it is a fixed amount or a specified piece of property”. In *A-1 Asphalt*, the Court held that a statutory trust under the *Construction Lien Act* took priority over the interests of a secured creditor under section 67(1)(a) of the *BIA* because the statutory trust met the requirements of a common law trust, including the requirement of certainty of subject-matter.

42. The Court held that such certainty is ascertainable when a method by which the subject-matter can be identified is available from the terms of the trust or otherwise.<sup>39</sup> This means that the co-mingling of trust funds with other monies will not defeat the claim to a trust where those funds are ascertainable:

Commingling of this kind does not deprive trust property of the required element of certainty of subject matter. Commingling of trust money with other money can destroy the element of certainty of subject matter, but only where commingling makes it impossible to identify or trace the trust property.<sup>40</sup> [emphasis added]

43. In this case, all of the elements of an express or implied trust have been established:

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<sup>36</sup> [\*Ontario \(Securities commission\) v. Portus Alternative Asset Management Inc.\*, \[2006\] O.J. No. 1121 \(Sup. Ct.\), per Campbell J. at para. 68.](#)

<sup>37</sup> [\*A & A Jewellers Limited v Royal Bank of Canada\* \(2001\), 53 O.R. \(3d\) 97 \(C.A.\), per Moldaver J.A. at para. 37. See also \*Air Canada v. M & L Travel Ltd.\*, \[1993\] S.C.J. No. 118, per Iacobucci J. at para. 23.](#)

<sup>38</sup> [2019 ONCA 9, per Sharpe J.A.](#)

<sup>39</sup> [\*Royal Bank of Canada v A-1 Asphalt Maintenance Ltd\*, supra at para. 80.](#)

<sup>40</sup> [\*Royal Bank of Canada v A-1 Asphalt Maintenance Ltd\*, supra at paras. 87 & 97-99.](#)

- (a) ***Certainty of Intention.*** There is no doubt that the parties intended for Arc to collect and hold the Tax Credits in trust for Spin Master. This is evidenced by the express terms of the Spin Master PSA and the circumstances surrounding its execution. Section 6(a) of the Spin Master PSA expressly provides that Arc “acknowledges and agrees that [Spin Master] alone shall be entitled to all Tax Credits...including the OCASE Tax Credit, which [Arc] shall claim and collect in trust on behalf of [Spin Master]” [emphasis added]. At no point has Arc disputed that the Tax Credits were to be held in trust for Spin Master. As stated in the Spin Master PSA, Arc was required to “remit one hundred percent (100%) [of the OCASE Tax Credit] to [Spin Master] within three (3) business days of [Arc’s] receipt of same”.

Moreover, the circumstances surrounding the execution of the Spin Master PSA make it clear that the Tax Credits were held in trust and were never included in any collateral owned by the Defendants against which GP had a charge.

Spin Master wanted to keep its overall costs lower, so it agreed to pre-pay the Tax Credits on the basis that when the Tax Credits were received by Arc, they would be received in trust and paid out to Spin Master. Moreover, at no time was GP provided with any information or certificate in which Spin Master agreed to forgo or to assign its trust in the Tax Credits to any third party. GP should not now obtain the benefit of the funds that belong to Spin Master. The Credit Agreement and the borrowing certificates thereunder between GP and the Defendants make no reference to Spin Master or the Tax Credits.

Accordingly, the parties' intention to create an express trust for Spin Master's benefit is clear;

- (b) ***Certainty of Subject-Matter.*** There is no doubt that the Tax Credits can be identified with sufficient exactness under the Spin Master PSA so as to be ascertained at the time the trust was created. Section 6(a) expressly identifies the applicable credits as the Ontario File and Television Tax Credit, i.e. the OFTTC Tax Credit, the Ontario Special Effects Tax Credit, i.e. the OCASE Tax Credit, as well the federal Tax Credits. Under sections 6(a) and (b) of the Spin Master PSA, the OCASE Tax Credit is expressly identified as the tax credit to be collected "in trust" on behalf of Spin Master. Whether or not the Tax Credits were co-mingled with other funds held by Arc does not deprive the Tax Credits of the required element of certainty of subject matter, as set out in the case law above. The amounts of the Tax Credits are easily identifiable or traceable; and
- (c) ***Certainty of Object.*** Section 6(a) of the Spin Master PSA is clear that the Tax Credits were to be held "in trust" by Arc for Spin Master's benefit. Spin Master is expressly and easily identified under the PSA. The Tax Credits held for Spin Master's benefit are easily identified and traceable.

44. Accordingly, there is no doubt that the Tax Credits are the subject-matter of an express or implied trust under Spin Master PSA. They do not constitute the "property" of the bankrupt for the purpose of section 67(1)(a) of the *BIA*.

- ii. ***In the Alternative, Tax Credits Are Subject to a Constructive Trust for Spin Master's Benefit***

45. In addition to an express trust, the Courts may impose a constructive trust in order to defeat an unjust enrichment by a secured creditor.

46. The test for unjust enrichment requires a benefit in the hands of the defendant, a corresponding deprivation suffered by the plaintiff and the absence of a juristic reason for the retention of the benefit by the defendant.<sup>41</sup>

47. The test for finding a constructive trust based on wrongful conduct is as follows:

- (a) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (b) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (c) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
- (d) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, e.g., the interests of intervening creditors must be protected.<sup>42</sup>

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<sup>41</sup> [\*Garland v. Consumers' Gas Co.\*, 2004 SCC 25, per Iacobucci J. at para. 30.](#)

<sup>42</sup> [\*Re Redstone Investment Corp.\*, 2015 ONSC 533, per Morawetz R.S.J. at para. 68.](#)

48. Broadly speaking, a constructive trust may be imposed where “good conscience” so requires it:

It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by...the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.<sup>43</sup> [emphasis added]

49. In this case, Spin Master submits that if this Honourable Court finds that the Tax Credits are not the subject of an express or implied trust, the Court should impose a constructive trust for the following reasons:

- (a) Arc was under a contractual and equitable obligation to pay the OCASE Tax Credits, within three days of receipt, to Spin Master. As section 6(a) of the Spin Master PSA makes clear, Arc acted as agent for Spin Master to both “claim and collect” and “remit” the Tax Credits “in trust”. Spin Master relied on Arc to fulfill its duties as its agent. If the Tax Credits are not remitted back to Spin Master, as the parties intended, Arc would be in breach of its equitable obligations to Spin Master, as principal;
- (b) Spin Master has a legitimate reason for protecting its proprietary interest in the Tax Credits. The Tax Credits were only ever intended as Spin Master’s property. They were never intended to act as security for Arc’s obligations to GP or other secured creditors. To ignore the fact that the Tax Credits were held in trust for Spin Master would deprive Spin Master of its proprietary interests;

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<sup>43</sup> [Cummings Estate v. Peopledge HR Services Inc., 2013 ONSC 2781, per Newbould J. at para. 17, citing Soulos v. Korkontzilas, \[1997\] 2 S.C.R. 217, per McLachlin J. at para. 34.](#)

- (c) The imposition of a constructive trust would not be unjust in the circumstances of this case. It would protect Spin Master's proprietary rights and affirm the agency-principal relationship established between Arc and Spin Master. It would also affirm their contractual rights to each other. By contrast, ignoring the trust relationship between Arc and Spin Master in this case would allow the Tax Credits to be used as collateral for secured creditors, an outcome never intended by any of the parties;
- (d) The secured creditors, including GP, would receive a windfall if trust funds were allocated as security for Arc's obligations to them. By contrast, as the beneficiary of a trust, Spin Master would suffer a corresponding deprivation. There is no juristic reason for GP's enrichment in this case. Spin Master's entry into the Spin Master PSA with Arc deliberately factored in the cost of the Tax Credits, as per industry standard. Granting the tax credits to GP as a secured creditor of Arc would result in an unjust enrichment, contrary to the express terms of the Spin Master PSA, the equitable obligations owed by Arc as agent of Spin Master, and industry customs and standards; and
- (e) There are good policy reasons for imposing a constructive trust in this case. The obvious purpose of the Tax Credit scheme is to incentivize the employment of Canadian and Ontario labour in the production and film industries. The purpose of the Tax Credits is to keep production labour in Canada and Ontario. That goal is undermined from a policy perspective if the Tax Credits can be used as a collateral for loans and secured creditors. It was not the Legislature's intention to undermine the Tax Credit program in Ontario (and Canada) by allowing funds intended to

promote the use of Ontario labour in the film industry to act as security for creditors like GP. Moreover, if Spin Master is denied its proprietary rights in the Tax Credits, the effect would be that Spin Master “double paid” for a certain portion of the production services and certainly more than Spin Master ever contracted to pay. The denial of the payment of the Tax Credits to Spin Master on this Motion would negate the entire rationale for its deal with Arc and its selection of Ontario as the forum in which to produce Rusty Rivets.

50. Accordingly, should this Honourable Court find that the Tax Credits were not impressed with an express or implied trust, Spin Master submits that the Court should impose a constructive trust on these funds to the benefit of Spin Master.

*iii. In the Further Alternative, Tax Credits Impressed with a a Quistclose Trust*

51. A *Quistclose* trust arises when funds are advanced for a specific purpose, but cannot be or are not used for that purpose.<sup>44</sup>

52. A *Quistclose* trust will be found where:

- (a) The funds are advanced for a specific purpose;
- (b) The funds are paid to the party in receivership at a time when the party was operating under court supervised creditors' protection or under the supervision of the Monitor; and
- (c) If the funds are returned, there is no effect on the other creditors of the party under receivership. The funds were never the property of the party under receivership and its creditors have no entitlement to the funds in question.<sup>45</sup>

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<sup>44</sup> [Re Redstone Investment Corp., supra at para. 83.](#)

<sup>45</sup> [Re Redstone Investment Corp., supra at para. 84.](#)

53. Accordingly, a *Quistclose* trust is imposed in equity to ensure that the funds used solely for their intended purpose and returned to the parties who advanced them.

54. In *Cummings Estate v. Peopledge HR Services Inc.*,<sup>46</sup> a 2013 decision of the Ontario Superior Court, the Court held that funds never intended for the respondent payroll processing company, Peopledge, or its creditors were impressed with an equitable *Quistclose* or constructive trust where “good conscience” so required:

...it would appear to be inequitable to permit the general creditors of Peopledge other than the Customers who provided the funds to now be paid their claims from those funds. It was never intended that Peopledge or its creditors would have any beneficial interest in these funds. The issue is whether there is a basis in law to achieve this result. In my view there is.

...

If any particular Customer of Peopledge had a trust agreement with Peopledge, this *Quistclose* type of trust would not be necessary to impress the payroll funds advanced to Peopledge with a trust. For any Customer of Peopledge without an express trust agreement, I accept that a trust as in *Quistclose* should be recognized.

...

...In this case, Peopledge and its general creditors would be enriched by having the ability to access the payroll funds advanced by Customers to Peopledge. The Customers, and their employees, would be deprived by not having the funds paid to them and there would be no juristic reason for this to occur. It was never intended that Peopledge, or its creditors, would have any beneficial interest in the payroll funds advanced by Customers.<sup>47</sup> [emphasis added]

55. Spin Master submits in the alternative that there are good reasons to impose a *Quistclose* trust in this case.

56. The Tax Credits were advanced for a specific purpose, i.e. to reimburse Spin Master for employing Canadian and Ontario Labour in the production of “Rusty Rivets Season One”. The Tax Credits were paid when Arc was in receivership. The Tax Credits were never Arc’s property

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<sup>46</sup> [2013 ONSC 2781, per Newbould J.](#)

<sup>47</sup> [Cummings Estate v. Peopledge HR Services Inc., supra at paras. 13, 14 & 18.](#)

and Arc's secured creditors have no basis to claim otherwise. It would be inequitable to permit Arc's general creditors to be paid their claims from the Tax Credits, which were never intended for that purpose. It would unjustly enrich GP and provide little incentive for production companies in Canada to employ and use Canadian labour.

57. In the circumstances, a *Quistclose* trust should be impressed on the Tax Credits.

***iv. Complete and Absolute Assignment of Tax Credit***

58. Where there has been the assignment of a debt and the assignor becomes bankrupt or otherwise seeks protection from its creditors, the debt does not form part of the bankrupt's estate. If the assignor receives payment of the principal of the debt, these receipts are held in trust for the assignee. They are unavailable for distribution amongst the assignor's creditors:

...the Agreement in this case completely and irrevocably assigned to Pythe Navis 6% of all proceeds received from the insurer in respect of the loss. No suggestion of a lien, charge or security interest arises either on the face of the document or otherwise. In the absence of any persuasive argument to the contrary, I see no error in the trial judge's conclusion that the Agreement effected a 'complete' (to use a neutral term) assignment of part of the insurance proceeds to Pythe Navis and did not create a security interest for purposes of the BIA or otherwise...<sup>48</sup> [emphasis added]

59. In this case, Arc as assignor received the Tax Credits in trust for Spin Master as assignee. Under the Spin Master PSA and in equity, this constitute a "complete assignment", such that it cannot form the subject-matter of GP's security interest under section 67(1)(a) of the *BIA*.

60. Accordingly, the Tax Credits amount to a proprietary trust interest under section 67(1)(a) and are not at all impressed with GP's security interest.

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<sup>48</sup> [See, for example, \*Re Redstone Investment Corp.\*, 2015 ONSC 533, per Morawetz R.S.J. at para. 54, citing \*Pythe Navis Adjusters Corp. v. Columbus Hotel Co. \(1991\)\*, 2014 BCCA 262, per Newbury J.A. at para. 32.](#)

v. ***The PPSA does not Apply to the Tax Credits***

61. Section 2 of the *Personal Property Security Act* (the “*PPSA*”)<sup>49</sup> provides that the *Act* only applies to every transaction that in substance creates a security interest:

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.<sup>50</sup>

62. “Security interest” is defined under the *PPSA* as:

“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.<sup>51</sup>

63. “Collateral” is defined under the *PPSA* as “personal property that is subject to a security interest”.<sup>52</sup>

64. In this case, the Tax Credits do not constitute “collateral” under the *PPSA*. The Tax Credits are not the personal property of Arc that secure payment or the performance of an obligation of Arc. Arc could not grant a security interest in property it did not own.

65. Accordingly, the Tax Credits do not meet the definition of “collateral” for the purposes of subsection 2(1) of the *PPSA*. The *PPSA* simply does not apply.

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<sup>49</sup> [R.S.O. 1990, c.P.10.](#)

<sup>50</sup> [PPSA, supra at ss. 2, 4\(1\) & 20\(1\).](#)

<sup>51</sup> [PPSA, supra at s.1\(1\).](#)

<sup>52</sup> [PPSA, supra at s.1\(1\). See generally Centennial Plymouth Chrysler \(1973\) Ltd. \(c.o.b. Klean Auto Leasing\) v. Conlin, \[2000\] O.J. No. 709 \(Sup. Ct.\), per Marchand J.](#)

**PART IV - ORDER REQUESTED**

66. For all the foregoing reasons, Spin Master seeks an Order that the Tax Credits constitute trust property in favour of Spin Master and are not in any way impressed with GP's security interest. Spin Master seeks an Order that the Receiver distribute the proceeds relating to the Tax Credits to Spin Master. Spin Master seeks the costs of this Motion, payable by GP and the Receiver, on a substantial indemnity scale.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 19<sup>th</sup> day of June, 2020.



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LLP, Lawyers for the Responding Party, Spin  
Master Ltd.

## SCHEDULE “A”

### LIST OF AUTHORITIES

*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60

*Bank of Nova Scotia v. Societe General (Canada)*, [1988] A.J. No. 332 (C.A.)

*Ontario (Securities commission) v. Portus Alternative Asset Management Inc.*, [2006] O.J. No. 1121 (Sup. Ct.)

*A & A Jewellers Limited v Royal Bank of Canada* (2001), 53 O.R. (3d) 97 (C.A.)

*Air Canada v. M & L Travel Ltd.*, [1993] S.C.J. No. 118

*Royal Bank of Canada v A-1 Asphalt Maintenance Ltd.*, 2019 ONCA 9.

*Garland v. Consumers’ Gas Co.*, 2004 SCC 25

*Re Redstone Investment Corp.*, 2015 ONSC 533

*Cummings Estate v. Peopledge HR Services Inc.*, 2013 ONSC 2781

*Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217

*Re Redstone Investment Corp*, 2013 ONSC 2781

*Pythe Navis Adjusters Corp. v. Columbus Hotel Co. (1991)*, 2014 BCCA 262

*1231640 Ontario Inc.*, 2007 ONCA 810

*Centennial Plymouth Chrysler (1973) Ltd. (c.o.b. Klean Auto Leasing) v. Conlin*, [2000] O.J. No. 709 (Sup. Ct.)

## SCHEDULE “B”

### 1. **BANKRUPTCY AND INSOLVENCY ACT, R.S.C., 1985, c. B-3**

#### **Property of bankrupt**

**67 (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.

### **Vesting of property in trustee**

**71** On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

R.S., 1985, c. B-3, s. 71 1997, c. 12, s. 67 2004, c. 25, s. 44.

## **2. 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”)

“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.

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.
  - (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).

- 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).

4(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).

s. 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.

20(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).

20(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).

**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

**RESPONDING FACTUM OF SPIN MASTER LTD.**

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RCP-E 4C (May 1, 2016)