

Court File No. 07-CL-7163

ONTARIO
SUPERIOR COURT OF JUSTICE
[Commercial List]

BETWEEN:

CATALYST FUND LIMITED PARTNERSHIP II

Applicant

- and -

IMAX CORPORATION

Respondent

FACTUM OF IMAX, THE MOVING PARTY
(Motion to Stay the Within Application)
Returnable September 24, 2008

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I PART I—THE FACTS

1. The Respondent brings this motion for:

- an Order permanently staying the within Application by reason of a parallel proceeding brought against Catalyst Fund Limited Partnership II (“Catalyst”) and IMAX Corporation (“IMAX”) by the trustee under a trust indenture dated December 2, 2003 (the “Trust Indenture”) in the State of New York (“the New York Action”) which proceeding includes a cross-claim against IMAX by Catalyst for the same alleged defaults under the Trust Indenture Catalyst relies upon in this Application for its claims of oppression;
- in the alternative, an Order staying the within Application on a temporary basis until the New York Court has ruled in the New York Action and such further order of this Honourable Court; or
- in the further alternative, an Order striking out the Notice of Application.

2. On December 21, 2007, the U.S. Bank National Association, in its capacity as indenture trustee (the “Trustee”), commenced the New York Action against Catalyst.¹ In the New York Action, the Trustee seeks a declaration that no Event of Default, as defined by the Trust

¹ Summons and Verified Complaint of U.S. Bank National Association dated December 21, 2007, Affidavit of Alan S. Goudiss sworn July 3, 2008 (“Goudiss Affidavit”), Exhibit “A”, Tab 1 of IMAX’s Compendium.

Indenture, has occurred as alleged by Catalyst and that the notes issued under the Trust Indenture have not been accelerated. The Trustee seeks a further declaration that it has no duty to further respond to Catalyst's request that the Trustee pursue remedies on behalf of the bondholders and a further declaration that Catalyst has not satisfied the conditions precedent to institute any judicial proceeding pursuant to the terms of the Trust Indenture.

3. On February 22, 2008, in the face of this stay motion, Catalyst filed its Answer to the Trustee's New York Action and asserted Cross-Claims against IMAX (the "New York Cross-Claim"²) virtually identical to the claims made against IMAX in this Application.

4. In its New York Cross-Claim, Catalyst requests declarations that the consent solicitation leading to the amendment of the Trust Indenture (the "Consent Solicitation") was ineffective;³ a declaration that any waiver obtained through the Consent Solicitation is void;⁴ and, that IMAX remains in default in its obligations pursuant to Section 1019 of the Trust Indenture, by virtue of its failure to file required financial reports with the SEC for the period from 2001 to 2006, including its failure to file a timely Annual Report on Form 10-K for the period ended December 31, 2006.⁵ Catalyst also cross-claims for a declaration that IMAX is in default of Section 1021 of the Trust Indenture by reason of an alleged failure to file officer's certificates concerning the defaults alleged by Catalyst;⁶ a declaration that the defaults on section 1021 of the Trust Indenture have not been waived;⁷ a declaration that the defaults on section 1021 of the Trust Indenture cannot now be cured;⁸ a declaration that the holders and beneficial holders of the Senior Notes are entitled to the remedy of acceleration or, in the alternative, damages for breach of the Trust Indenture, including the immediate payment of all outstanding principal and interest due under the Trust Indenture;⁹ a judgment awarding it compensatory and punitive damages

² Verified Answer and Cross-Claims, Goudiss Affidavit, Exhibit "C" ("Verified Answer and Cross-Claims") Tab 2 of IMAX's Compendium.

³ Verified Answer and Cross-Claims, paragraphs 114 and 138.

⁴ Verified Answer and Cross-Claims, paragraphs 114 and 138.

⁵ Verified Answer and Cross-Claims, paragraphs 114 and 138.

⁶ Verified Answer and Cross-Claims, paragraph 124.

⁷ Verified Answer and Cross-Claims, paragraph 124.

⁸ Verified Answer and Cross-Claims, paragraph 124.

⁹ Verified Answer and Cross-Claims, paragraph 129.

arising from IMAX's allegedly fraudulent Consent Solicitation process;¹⁰ and, such other relief and costs.¹¹

5. As noted, these New York Cross-Claims are virtually identical to the claims made by Catalyst in its capacity as a bondholder in this Ontario Application. In the Ontario Application, Catalyst requested an order setting aside the Consent Solicitation and other declarations that IMAX is in default under the Trust Indenture and that such defaults cannot now be cured. To the extent that Catalyst has sought to advance its claims as "oppression", it has relied upon the very same alleged defects in the Consent Solicitation process and alleged defects in the reporting of its financial information which are the same as the allegations advanced in the New York Action. Since the Trust Indenture is governed by New York law, the effectiveness of the Consent Solicitation and whether IMAX is in default under the Trust Indenture will be questions of New York law and will require expert testimony in Ontario.

6. These questions of New York law will be answered in the New York Action. In the New York Action, the same alleged Events of Default are in issue. Likewise, in the New York Cross-Claims, Catalyst is seeking declaratory relief in relation to both the Trust Indenture and the Consent Solicitation based on the same issues of fact and law it has raised in the Ontario Application. If the declaratory relief requested by the Trustee is granted by the New York Supreme Court, it will, as a matter of law, disentitle Catalyst to all of the relief claimed in this Application.

7. Similarly, if the relief requested by Catalyst is granted by the New York Supreme Court, it will, as a matter of law, resolve the dispute between Catalyst and IMAX and cure the "oppression" alleged in Ontario. Moreover, if the relief requested by Catalyst is granted by the New York Supreme Court, the bonds will be accelerated, Catalyst will be paid on the bonds that it holds and it will cease to be a bondholder. The relief requested in sub-paragraphs 1(f) and (g) of the Ontario Application would be unnecessary.

8. For a complete comparison of the New York Cross-Claims and the Amended Notice of Application, please see Schedule "C".

¹⁰ Verified Answer and Cross-Claims, paragraphs 129 and 138.

¹¹ Verified Answer and Cross-Claims, paragraph 129.

9. Catalyst is a highly sophisticated investment manager who holds itself out to its investors as expert in Canadian “distress” situations. This Application is an investment strategy Catalyst embarked on to produce extraordinary rates of return for its investors beyond what any ordinary investor in IMAX bonds would reasonably have expected. All interest payments have been made on the bonds and they trade at par and well above Catalyst’s acquisition cost. This Application has been outstanding for over a year and was widely publicized. However, no other bondholder has joined with Catalyst in substantiating its claims of being misled during the Consent Solicitation. Catalyst itself did not consent and therefore cannot claim it was misled. For all these reasons, Catalyst’s Application does not accord with the reasonable expectations of any of IMAX’s securityholders. Indeed, as is summarized below, the Trustee, on behalf of all of the bondholders, has taken a position *contrary* to Catalyst in the parallel proceedings in the New York State Supreme Court precisely because the Trustee regards Catalyst’s conduct as being contrary to the interests of IMAX bondholders.

10. In these circumstances, it is in the interests of justice to stay this Application and require Catalyst to seek its remedy in New York where it has voluntarily asserted the same claims for relief. This result satisfies the interests of comity, reasonable judicial deference and the efficient operation of the judicial systems in Canada and the United States.

11. It is clear from the relief requested in paragraph 1 of the Amended Notice of Application that Catalyst, is seeking a declaration of oppression based on findings derivative of and dependent on New York law. These matters of New York law should be and will be adjudicated by a New York Court in the New York Action.

12. The Trustee’s New York Action will resolve the following issues:

- (i) whether IMAX Corporation (“IMAX” or the “Company”) lawfully obtained the consent of its bondholders to waive certain defaults under the terms of the Trust Indenture, which is governed by New York law, and to obtain an extension of time to file its 2006 annual report and its 2007 first quarter report with the United States Securities and Exchange Commission (the “SEC”);¹²

¹² Amended Notice of Application dated October 25, 2007 (“Amended Notice of Application”), paragraph 1(a)(i); Affidavit of Glen Banks sworn October 23, 2007 and Exhibit “A” attached thereto (“Banks First Affidavit and Report”); Supplemental Affidavit of Glen Banks sworn December 7, 2007 and Exhibit “B” attached thereto (“Banks Second Affidavit and Report”). Tabs 3, 4, and 5 of IMAX’s Compendium.

- (ii) whether IMAX prematurely filed its 2006 annual report and its 2007 first quarter report with the SEC to avoid the appearance of being in default under the terms of the Trust Indenture;¹³
- (iii) whether IMAX has intentionally suppressed or delayed the release of information which would reveal one or more defaults under the terms of the Trust Indenture;¹⁴
- (iv) whether IMAX filed with the SEC information which was false, inaccurate or incomplete and contrary to United States generally accepted accounting principals ("US GAAP") and American auditing standards.¹⁵

13. The New York Action is a more comprehensive action because the Trustee is a party in New York and is not a party to the Ontario Application. The relief sought by Catalyst in Ontario clearly affects the Trustee and the other bondholders since the Consent Solicitation resulted in the Trustee and IMAX executing the Ninth Supplemental Indenture which waived the very defaults Catalyst relies upon here and in New York. At no time has Catalyst sought to join the Trustee as a party to the Ontario Application which is clearly a deficiency in proceedings where Catalyst is seeking to set aside an amendment to a contract to which the Trustee is a party.

14. All of the following relief which Catalyst seeks in the Ontario Application directly affects the Trustee and engages the application of New York law:

- (i) an order setting aside the Consent Solicitation which amended the Trust Indenture which is governed by New York law and to waive certain defaults;¹⁶
- (ii) a declaration that IMAX remains in default under the Trust Indenture that the Consent Solicitation was invalid, that under New York law the Consent Solicitation did not cure any defaults under the Trust Indenture and that, under New York law, these defaults constituted Events of Default as defined by the Trust Indenture which, under New York law, cannot now be cured;¹⁷

¹³ Amended Notice of Application, paragraph 1(a)(ii); Banks First Affidavit and Report; Banks Second Affidavit and Report.

¹⁴ Amended Notice of Application, paragraph 1(a)(iii); Banks First Affidavit and Report; Banks Second Affidavit and Report.

¹⁵ Amended Notice of Application, paragraph 1(a)(iv); Banks First Affidavit and Report; Banks Second Affidavit and Report.

¹⁶ Amended Notice of Application, paragraph 1(b); Banks First Affidavit and Report; Banks Second Affidavit and Report.

¹⁷ Amended Notice of Application, paragraph 1(c); Banks First Affidavit and Report; Banks Second Affidavit and Report.

- (iii) in addition or in the alternative, a declaration that to the extent the Consent Solicitation is found to be valid, its effect, under New York law, did not cure all of the defaults under the Trust Indenture and that, under New York law, IMAX remains in default under the Trust Indenture and that, under New York law, these defaults cannot now be cured.¹⁸

15. The requests for the appointment of an inspector pursuant to section 229 of the *CBCA* (which also requires a finding of oppression¹⁹) or the production of documents pursuant to section 241 of the *CBCA*, are derivative of Catalyst's claims as a bondholder under the New York Trust Indenture. Catalyst's status as a complainant is entirely derived from its status as a bondholder. If it is determined that there are no defaults under the Trust Indenture; that the Consent Solicitation was valid under New York law or that Catalyst lacked the capacity to institute a judicial proceeding as a bondholder, those findings would impact, and very likely determine, its entitlement to an inspector or the production of documents.

16. Furthermore, given the issues raised in the Amended Notice of Application, the reasonable expectations of a bondholder would be that New York was an appropriate, indeed the most logical jurisdiction for the resolution of a dispute which involves alleged defaults under the bond. The following facts make this expectation evident:

- (a) The Trust Indenture and the amendments thereto are governed by New York law. Section 112 states, in capital letters: "This indenture and the securities shall be governed by and construed in accordance with the laws of the State of New York."²⁰
- (b) The Trust Indenture states that: "[A]ny legal suit, action or proceeding arising out of or relating to the [Senior Notes], may be instituted in any federal or state court in the Borough of Manhattan, The City of New York..."²¹
- (c) Catalyst has pleaded in its New York Cross-Claim that the New York Supreme Court has jurisdiction over the New York Cross-Claim and has specifically pleaded and relied upon Section 112 of the Trust Indenture.
- (d) The Trust Indenture makes specific reference to the *U.S. Securities Act of 1933*, the rules and regulations of the SEC and the *U.S. Trust Indenture Act of 1939*.²²

¹⁸ Amended Notice of Application, paragraph 1(d); Banks First Affidavit and Report; Banks Second Affidavit and Report.

¹⁹ See Section 229(2) of the *Canadian Business Corporations Act R.S., 1985, c. C-44.*, Tab A of IMAX's Authorities

²⁰ The Trust Indenture dated December 4, 2003, Section 112, Affidavit of Gabriel De Alba sworn September 7, 2007 ("First De Alba Affidavit"), Exhibit A, Tab 6 of IMAX's Compendium.

²¹ The Trust Indenture dated December 4, 2003, Section 114, First De Alba Affidavit, Exhibit A ("The Trust Indenture").

- (e) The Trustee, the U.S. Bank National Association, has its corporate offices in the State of New York.²³
- (f) The holder of record of the bonds issued pursuant to the Trust Indenture is the Depository Trust Company (“DTC”) which is located in the State of New York.²⁴
- (g) The financial statements at issue in the within Application are subject to U.S. GAAP.²⁵
- (h) For the Consent Solicitation process, IMAX retained the services of:
 - (i) Credit Suisse Securities (USA) LLC (“Credit Suisse”), an American company, to serve as its Solicitation Agent;²⁶
 - (ii) Global Bondholder Services Corporation (“GBSC”), an American company, to serve as its Information Agent;²⁷ and
 - (iii) New York lawyers from Shearman & Sterling LLP’s New York City Office.²⁸
- (i) Credit Suisse’s solicitors for legal advice regarding the solicitation were New York lawyers from Skadden, Arps, Slate, Meagher & Flom LLP’s New York City Office.²⁹
- (j) The governing law of the Consent and Forbearance Agreement between IMAX and Plainfield Asset Management LLC (“Plainfield”) whereby Plainfield agreed to vote its IMAX bonds in favour of the Consent Solicitation is New York law.³⁰
- (k) The governing law for the Master Securities Loan Agreement between Plainfield and Bear, Stearns & Co., Inc. (“Bear Stearns”), the registered custodian of the IMAX bonds beneficially owned by Plainfield, is New York law.³¹

²² The Trust Indenture, p. 18-19.

²³ The Trust Indenture, Section 105.

²⁴ Letter from Cede & Co., Affidavit of Gabriel De Alba dated October 23, 2007 (“Third De Alba Affidavit”), Exhibit G, Tab 7 of IMAX’s Compendium.

²⁵ Affidavit of Thomas Ferrigno dated December 7, 2007 and Exhibit “B” attached thereto (“Ferrigno Affidavit and Report”), p. 6, Tab 8 of IMAX’s Compendium; Affidavit of Joseph Sparacio dated November 30, 2007 (“Sparacio Affidavit”), para. 28, Tab 9 of IMAX’s Compendium.

²⁶ The Consent Solicitation Statement dated April 3, 2007, Affidavit of Richard L Gelfond dated November 30, 2007 (“First Gelfond Affidavit”), Exhibit YY, Tab 10 of IMAX’s Compendium.

²⁷ The Consent Solicitation Statement dated April 3, 2007, First Gelfond Affidavit, Exhibit YY (the “Consent Solicitation Statement”).

²⁸ Cross-Examination of Richard L Gelfond dated January 15, 2008 (“Gelfond Cross-Examination”), pp. 48-53, 73-74, 116 - 117, Tab 11 of IMAX’s Compendium.

²⁹ Gelfond Cross-Examination p. 50.

³⁰ Consent and Forbearance Agreement, Affidavit of Thomas X. Fritsch dated November 30, 2007, Exhibit B, Tab 12 of IMAX’s Compendium.

³¹ Master Securities Loan Agreement, Cross-Examination of Thomas X. Fritsch dated January 9, 2008, Exhibit A-1, Tab 19, Tab 13 of IMAX’s Compendium.

- (l) For the purposes of opposing to the Consent Solicitation, Catalyst:
 - (i) retained the services of lawyers in Brown Rudnick Berlack Isreals LLP's New York City office ("Brown Rudnick") to represent it in its opposition to the Consent Solicitation;³² and
 - (ii) purchased IMAX bonds during the period when the Consent Solicitation was ongoing³³ using brokers including Jeffries & Company, Inc. ("Jeffries") and Bear Stearns, both located in the United States.
- (m) Catalyst's lock-up agreement with other bondholders who were prepared to oppose the Consent Solicitation, drafted at the direction of Catalyst, is governed by New York law. Section 8 states: "The parties intend that their rights and obligations under this Agreement shall be governed by the laws of the State of New York, notwithstanding any conflicts of law provision or doctrine that would apply the law of any other jurisdiction".³⁴
- (n) On April 13, 2007, Catalyst's New York solicitors, Brown Rudnick, wrote a letter to IMAX, the Trustee and other parties, at the direction of Catalyst challenging the results of the Consent Solicitation and stating Catalyst's position under New York law. This letter was subsequently quoted, verbatim, by Catalyst in a press release dated April 16, 2007.³⁵
- (o) Notices of Default were sent to IMAX, at the direction of Catalyst, by Mellon Trust of New England, N.A. ("Mellon"), the custodian of Catalyst's holdings located in New York City. Likewise, Cede & Co., of New York City, the nominee of DTC, also sent Notices of Default to IMAX at the request of Mellon.³⁶
- (p) On May 10, 2007, Catalyst commenced an action against IMAX in the New York Supreme Court (the "First New York Action"). Catalyst positively asserted that New York law governed the dispute and that the New York Supreme Court had jurisdiction to resolve the dispute. Catalyst's counsel was Brown Rudnick.³⁷ All of the factual and legal issues raised in the First New York Action have been renewed in the within Application before the Ontario Superior Court of Justice.³⁸

³² Catalyst Press Release dated April 9, 2007, First Gelfond Affidavit, Exhibit BBB, Tab 14 of IMAX's Compendium.

³³ Cross-examination of Gabriel De Alba dated January 23 & 29, 2008 ("De Alba Cross-Examination"), Q. 535, 935, 1006, Tab 15 of IMAX's Compendium.

³⁴ Lock-Up Agreement dated April 11, 2007, De Alba Cross-Examination, Exhibit 1 (tab 6A); De Alba Cross-Examination, Q. 755, Tabs 15 and 16 of IMAX's Compendium.

³⁵ Catalyst press release dated April 16, 2007. First Gelfond Affidavit, Exhibit CCC, Tab 17 of IMAX's Compendium.

³⁶ First De Alba Affidavit, Exhibits S and U to X, Third De Alba Affidavit, Exhibits G and H, Tabs 18, 19, 20, 21, 22 and 23 of IMAX's Compendium.

³⁷ De Alba Cross-examination, Q. 752; Transcript from New York State proceeding dated October 9, 2007, Third De Alba Affidavit, Exhibit A , Tabs 15 and 24 of IMAX's Compendium.

³⁸ On October 9, 2007, Catalyst sought and obtained from the New York Supreme Court an Order allowing it to discontinue the First New York Action in the face of a motion to dismiss brought by IMAX.

- (q) The parties have exchanged eleven Affidavits from six American experts on: the New York law applicable to the Trust Indenture; various aspects of United States securities law applicable to the dispute; and United States Generally Accepted Accounting Principles ("U.S. GAAP") and U.S. accounting practices.³⁹
- (r) Twelve of the fifteen witnesses reside in the United States (seven in the State of New York, one in the State of Connecticut, one in the District of Columbia, and four in the State of California).⁴⁰
- (s) On January 30, 2008, Catalyst requested an adjournment of the February 7, 2008 return date for the main Application in order to seek Letters Rogatory to examine and seek productions from two more witnesses in the United States, Bear Stearns and Credit Suisse.

17. The New York Action is proceeding quickly. Catalyst has aggressively advanced the litigation in New York since it was denied the opportunity to conduct additional discovery in the Ontario Application. In contrast to its conduct prior to February 8, 2008, Catalyst has not significantly advanced this Application since March of 2008 other than a few production motions the fruits of which can be used in the New York Action. Of note, Catalyst has brought a motion for partial summary judgment of its cross-claims returnable before the New York Court on September 25.

18. This Application was originally to be heard on February 7, 2008. However:

- (a) On January 30, 2008, after extensive productions from and examinations and cross-examinations of 14 witnesses located in 5 cities in Canada and the United States, Catalyst requested an adjournment of the February 7, 2008 return date in order to seek Letters Rogatory to examine and seek productions from two more witnesses in the United States, Bear Stearns and Credit Suisse.

³⁹ Banks First Affidavit and Report, Banks Second Affidavit and Report, Ferrigno Affidavit and Report, Affidavit of Karen Balmer sworn December 7, 2007 and Exhibit "B" attached thereto ("Balmer Affidavit and Report"). Affidavit of Marcel Kahan sworn November 29, 2007 and Exhibit "A" attached thereto ("First Kahan Affidavit and Report"), Supplemental Affidavit of Marcel Kahan sworn December 18, 2007 and Exhibit "A" attached thereto ("Second Kahan Affidavit and Report"), Supplemental Affidavit of Marcel Kahan sworn July 3, 2008 and Exhibit "A" attached thereto ("Third Kahan Affidavit and Report"), Affidavit of Irving M. Einhorn sworn November 30, 2007 ("First Einhorn Affidavit"), Supplemental Affidavit of Irving M. Einhorn sworn December 17, 2007 ("Second Einhorn Affidavit"), Affidavit of Stephen Daughters sworn November 30, 2007 and Exhibit "A" attached thereto ("First Daughters Report"), Supplemental Affidavit of Stephen Daughters sworn December 17, 2007 and Exhibit "A" attached thereto ("Second Daughters Report"), Tabs 25, 26, 27, 28, 29, 30, 31 and 32 of IMAX's Compendium. See Schedule "D" hereto for a summary of the expert evidence filed.

⁴⁰ Affidavit of Harvey Eng dated November 27, 2007, Fritsch Affidavit, Affidavit of Scott Hood sworn November 27, 2007, First Gelfond Affidavit, Sparacio Affidavit, Affidavit of Kevin Douglas sworn November 30, 2007, Affidavit of Alan S. Goudiss sworn July 3, 2008 ("Goudiss Affidavit"), First Banks Affidavit and Report, Ferrigno Affidavit and Report, Balmer Affidavit and Report, First Kahan Affidavit and Report, and First Einhorn Affidavit. Tabs 33, 34, 35 and 36 of IMAX's Compendium.

- (b) After unsuccessfully bringing a motion in Ontario to obtain these Letters Rogatory, Catalyst availed itself of the discovery procedures in New York to obtain production and demand examination of witnesses from Bear Stearns and Credit Suisse.
- (c) Catalyst then took the following steps in the New York Action:
 - (i) On March 11, 2008, Catalyst served and filed a Notice of Deposition and Subpoena requiring Credit Suisse to be deposed on April 4, 2008.
 - (ii) On March 11, 2008 Catalyst served and filed a Notice of Deposition and Subpoena requiring Bear Stearns to be deposed on April 7, 2008.
 - (iii) On March 14, 2008, IMAX sent a letter to Catalyst denying the allegations asserted in the New York Cross-Claims and proposing to use the documents and deposition testimony produced in the Canadian Application.
 - (iv) On March 25, 2008, the Trustee served IMAX with its interrogatories requesting answers to certain questions and the production of documents from IMAX (the "First Set of Interrogatories").
 - (v) On April 2, 2008, Credit Suisse provided Catalyst with its Objections to the Credit Suisse Subpoena and some production.
 - (vi) On April 4, 2008, Catalyst requested further production of documents from Credit Suisse.
 - (vii) On April 10, 2008, Bear Stearns produced documents to Catalyst in response to the Bear Stearns Subpoena dated March 11, 2008.
 - (viii) On April 18, 2008, IMAX and Catalyst entered into an agreement to permit the importation of all documents (including Affidavits, transcripts, exhibits, answers to undertakings and refusals and other productions) produced in the Canadian Application into the Trustee's New York Action and the New York Cross-Claims (the "Stipulation Concerning the Use of Documents and Information Discovered in Another Proceeding").
 - (ix) On April 18, 24 and 30, 2008 and May 24, 2008, IMAX produced documents to the Trustee in response to the Trustee's Notice of Discovery and Inspection and the Trustee's First Set of Interrogatories dated March 24, 2008.
 - (x) On April 25, 2008, Credit Suisse produced additional documents to the Trustee pursuant to the Credit Suisse Subpoena.
 - (xi) On April 30, 2008, IMAX provided the Trustee and Catalyst with its Responses and Objections to the Trustee's First Request for the Production of Documents.

- (xii) On April 30, 2008, Catalyst served its Responses and Objections to the Trustee's First Set of Interrogatories and to the Notice For Discovery and Inspection.
- (xiii) On or about May 1, 2008, the Trustee, IMAX, Catalyst and Bear Stearns entered into a Confidentiality Stipulation with respect to the Trustee's New York Action and the New York Cross-Claims.
- (xiv) On May 9, 2008 Credit Suisse produced additional documents to IMAX pursuant to the Credit Suisse Subpoena.
- (xv) On May 15, 2008 IMAX served and filed Responses and Objections to the Trustee's First Set of Interrogatories.
- (xvi) On May 21, 2008 the Trustee, IMAX, Catalyst and Credit Suisse entered into an Amended Confidentiality Stipulation.
- (xvii) On May 21, 2008, Catalyst served and filed a Request for Judicial Intervention in the Trustee's New York Action (the "Request for Judicial Intervention, Statement in Support of Request for Assignment to the Commercial Division, Request for a Preliminary Conference, and the Affirmation of Emilio A. Galván in Support of Assignment to the Honorable Charles E. Ramos").
- (xviii) On May 27, 2008 Catalyst filed a Notice of Motion to compel the immediate deposition of Credit Suisse (the "Motion to Compel") and supporting documentation.
- (xix) On May 30, 2008 Credit Suisse served and filed documentation in response to the Motion to Compel.
- (xx) On May 30, 2008, IMAX provided Catalyst with an electronic copy of all documents produced by IMAX to date.
- (xxi) On June 2, 2008, Catalyst provided IMAX with an electronic copy of all documents produced by Catalyst to date.
- (xxii) On June 10, 2008, Catalyst served and filed a Reply Memorandum in support of its Motion to Compel.
- (xxiii) On June 19, 2008, JPMorgan Chase, of which Bear Stearns is now a subsidiary, produced additional documents pursuant to the Bear Stearns Subpoena.
- (xxiv) On July 1, 2008, Catalyst commenced a motion for partial summary judgment in the Trustee's New York Action.

19. In the alternative, if this Application is not permanently stayed so Catalyst can seek its remedies in New York, this Honourable Court should stay the within Application on an interim

basis to give the New York Supreme Court the opportunity to resolve the legal and factual disputes that fall clearly within its jurisdiction and expertise. Thereafter, this Honourable Court can, if necessary, resolve any remaining issues.

20. In IMAX's submissions, no issues can logically remain given the overlap between the two proceedings in terms of claims and relief requested.

21. Lastly, there is no evidence of any urgency or threat to IMAX's ability to pay bondholders in accordance with the terms of the Trust Indenture. The evidence, including Catalyst's own conduct, confirms that there is no urgency to the Ontario Application, that the recent focus of Catalyst's attention has been the New York Cross-Claim and that there is no prejudice in allowing the Trustee's New York Action and the New York Cross-Claim to proceed to a hearing in the next few months.

II PART II—THE LAW AND SUBMISSIONS

A. GRANTING A STAY IS WITHIN THE JURISDICTION OF THE COURT

22. The Court has the jurisdiction to stay any proceeding on such terms as are just.⁴¹ The Court's jurisdiction is not restricted to procedural grounds but extends to substantive bases so as to do justice between the parties.⁴² Indeed, the Court has held that it has the jurisdiction to control its own process and, where necessary, to grant a stay to prevent proceedings in Ontario from being used for collateral, improper, oppressive or vexatious purposes.

23. In addition to the Court's inherent and general jurisdiction, the legislature has specifically indicated, in Section 106 of the Courts of Justice Act and Rule 21.01(3)(c) of the Rules of Civil Procedure, that the Court has the jurisdiction to stay a proceeding in Ontario where a second proceeding is pending in another jurisdiction involving the same parties in respect of the same subject matter.⁴³

⁴¹ Section 106, Courts of Justice Act, R.S.O. 1990, c. C.43.; *Re Stelco Inc.* (2005), 75 O.R. (3d) 5 at para. 34 (C.A.), Tab B of IMAX's Authorities.

⁴² *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et. al.*, [1972] 2 O.R. 280 at 282 (C.A.), Tab 1 of IMAX's Authorities.

⁴³ Rule 21.01(3)(c), Ontario *Rules of Civil Procedure*, R. R. O. 1990, Reg. 194.

24. When considering whether to issue a stay in the specific circumstance of parallel proceedings, the Court will take into account four factors:

- (a) whether there is substantial overlap of the issues in the two proceedings;
- (b) whether issuing a stay will prevent unnecessary and costly duplication of judicial and legal resources;
- (c) whether the two cases share the same factual background; and
- (d) whether the stay will result in an injustice to the party resisting the stay.⁴⁴

B. THERE IS A COMPLETE OVERLAP BETWEEN THE TRUSTEE'S NEW YORK ACTION, THE NEW YORK CROSS-CLAIMS AND THE APPLICATION

25. As stated by Mr. Justice Farley in *Hollinger International Inc. v. Hollinger Inc.*, a stay pending the resolution of a foreign proceeding is granted when the "foreign proceeding would 'substantially reduce the issues to be determined' or if success in the foreign proceeding could render the local proceeding 'substantially moot' or otherwise have a 'material' impact on the outstanding issues in the case."⁴⁵ This case is precisely on point and applicable to this motion.

26. In *Hollinger*, the Court granted a stay pending the final resolution of a parallel proceeding in Illinois. The Court concluded that the resolution of the foreign proceeding would resolve all or most of the substantive issues between the parties in the Ontario proceeding.⁴⁶ As is the case here, the jurisdiction of the foreign court was not challenged by either party.

27. The legal issues raised by the Trustee's New York Action and the New York Cross-Claims are identical to the legal issues based upon New York law raised in Catalyst's Application in the Ontario Superior Court of Justice. The determination of the legal issues raised by the Trustee's New York Action and the New York Cross-Claims will resolve all of the issues in the within Application which are subject to foreign law and upon which all of Catalyst's claim for relief in Ontario depend.

⁴⁴ *Hollinger International Inc. v. Hollinger Inc.* (2004), 11 C.P.C. (6th) 245 at para. 5 (S.C.J.); leave to appeal refused by [2005] O.J. No. 708 (Div. Crt.), Tab 9 of IMAX's Authorities; *Ainsworth Lumber Co. v. Canada (Attorney General)* (2001), 1 C.P.C. (5th) 49 at para. 15 (B.C.C.A.), Tab 2 of IMAX's Authorities; *Newcourt Financial Ltd. v. First Union Management Inc.*, [2000] O.J. No. 2879 at para. 15 (S.C.J.), Tab 13 of IMAX's Authorities.

⁴⁵ *Hollinger International Inc. v. Hollinger Inc.*, supra.; *Ainsworth*, supra at para 14; *Dowell v. Spencer*, [2001] O.J. No. 5149 at paras. 4-7 (S.C.J.) Tab 7 of IMAX's Brief of Authorities.

⁴⁶ *Hollinger International Inc. v. Hollinger Inc.*, supra, at para. 8.

28. Of note, based upon the expert evidence tendered by the parties, there is not a single New York or other American decision directly on point to support its interpretation of the Trust Indenture. Catalyst relies entirely on a case known as *Bearing Point*. This case has not been followed in more recent decisions in the United States and Catalyst has not responded to, or cross-examined Professor Kahan, IMAX's expert on New York law, who filed a supplementary report on the lack of precedential value in *Bearing Point*. Simply put, Catalyst is asking the Ontario Superior Court of Justice to interpret and apply New York law and make findings regarding United States regulatory and accounting practices in circumstances and in ways the American courts have yet to do. Where the applicable legal principles have not been applied by a New York court to analogous facts, it is respectfully submitted that it would be preferable for this Honourable Court to avoid adjudicating a novel point of New York trust indenture law when a New York Court is seized of the very issue and will make the very decision in law the experts have opined on here in Ontario.

29. Based upon the record filed by Catalyst, this Honourable Court cannot make any finding of oppression pursuant to either section 241 or 229 without first making specific findings of defaults under the Trust Indenture that require the application of New York law. Therefore, if the New York Supreme Court concludes in the proceeding commenced by the only person entitled to commence a claim, namely the Trustee, that IMAX has acted in accord with the Trust Indenture, there simply cannot be a finding of oppression that falls within one or more of the three categories of oppression set out in Sections 241(1)(a) to (c) and Sections 229(2)(a) to (c) of the *CBCA*.

30. Lastly, although the Trust Indenture does not contain a forum selection clause, Section 112 clearly requires that disputes involving the Trust Indenture and the securities (i.e. the bonds themselves) to be resolved in accordance with New York law. In circumstances where the expertise of the New York courts are required to apply New York legal principles to a new factual situation, and where the parties are actually engaged in litigation in New York on that very point, the only reasonable expectation of bondholders must be that this issue will be resolved by a New York court. Moreover, this provision is for the benefit of all bondholders, not

just Catalyst. This Court should give effect to this reasonable expectation and this essential part of the bargain.⁴⁷

C. A STAY WILL AVOID A MULTIPLICITY OF PROCEEDINGS AND INCONSISTENT REASONS

31. It must be emphasized that by commencing the First New York Action on May 10, 2007, and cross-claiming in the New York Action against IMAX, Catalyst admitted that the New York Supreme Court has both the expertise and jurisdiction to resolve this dispute. Catalyst commenced the within Application in Ontario on September 7, 2007, in the face of a fully briefed motion to dismiss the First New York Action. Only then did Catalyst abandon the First New York Action. This was the first clear indication that Catalyst has been engaged in forum shopping. Then on February 22, 2008, in the face of a stay motion in Ontario, Catalyst advanced its New York Cross-Claim. Finally, on Tuesday, March 11, 2008, after Madam Justice Pepall denied Catalyst's request to conduct additional Rule 39.03 examinations of Credit Suisse and Bear Stearns, Catalyst served and filed Notices of Deposition and Subpoenas on Credit Suisse and Bear Stearns in the Trustee's New York Action. Since then, no substantive steps have been taken by Catalyst to advance this Application and it has pursued its Cross-Claim in the New York Court.

32. Furthermore, on April 18, 2008, IMAX and Catalyst entered into the Stipulation Concerning the Use of Documents and Information Discovered in Another Proceeding, which allowed all of the evidence and disclosure from the Ontario Application to be used in the New York Action. So, the New York Action will proceed on the very same record before this Court. Indeed, in its motion for partial summary judgment in the New York Action, Catalyst has relied on evidence obtained through the Ontario Application.

33. In these circumstances, it is preferable that the New York Supreme Court apply New York law to the relevant facts. To allow Catalyst to preserve proceedings in both jurisdictions for its own tactical benefit results in needless duplication, and the risk of inconsistent results.

⁴⁷ *Allen v. Carnival Corporation et al.*, [2008] O.J No. 249 at para. 2-3 (C.A.), Tab 3 of IMAX's Authorities; *Z.I. Pompey Industrie v. ECI-Line N.V.*, [2003] 1 SCR 450 at 463-464, Tab 16 of IMAX's Authorities.

34. Should this Honourable Court permit this Application to proceed before the hearing of the New York Action and the New York Cross-Claims, particularly in light of the absence of a New York case directly on point, there is a real risk that the Ontario and New York Courts will make inconsistent findings of fact and liability on identical evidence and in respect of identical legal issues.

35. Of note, Catalyst has not made any request to the New York Supreme Court to have the Trustee's New York Action stayed. On the contrary, Catalyst has engaged the processes of the New York Supreme Court and commenced the New York Cross-Claims and is now moving for partial summary judgment on those claims.

36. A stay of the within Application will serve the dual purpose of making the most efficient use of judicial resources in Ontario and New York, while avoiding the risk of inconsistent decisions on the same points of New York law involving the same set of facts.

D. BOTH PROCEEDINGS RAISE IDENTICAL FACTUAL ISSUES

37. Both the Ontario Application and New York Action arise from identical facts set down in the same record. The identical documents relied upon by IMAX and Catalyst in the Ontario Application have been imported into the New York Action through the stipulation.⁴⁸

38. Furthermore, there can be no suggestion that the Consent Solicitation is somehow outside of the scope of the Trustee's New York Action and the New York Cross-Claims. It is clear from the pleadings in the New York Action that its resolution requires adjudication on whether the amendment to the Trust Indenture and the waiver of past defaults obtained through the Consent Solicitation were and are effective. Furthermore, Catalyst specifically asks the New York Supreme Court to adjudicate on the same issues regarding the Consent Solicitation as have been raised in the Ontario Application.

E. NO PREJUDICE TO CATALYST: THEY SHOULD BE HELD TO THE BARGAIN

39. The issuance of a stay will not result in any material injustice or prejudice to Catalyst:

⁴⁸ Stipulation Concerning Use in this Action of Documents and Information Discovered in Another Proceeding dated April 18, 2008, Goudiss Affidavit, Exhibit K, Tab 37 of IMAX's Compendium.

- (a) New York law will be determined by the New York court which indisputably has jurisdiction;
- (b) Catalyst has submitted no evidence that a stay of this Application would cause it an injustice;
- (c) conversely, the evidence does establish that it would be unjust and premature to deprive IMAX of the opportunity to have questions of New York law determined by a New York Court;
- (d) the reasonable expectation of bondholders, including Catalyst, is that disputes would be resolved in accordance with New York law and that litigation would only be commenced by individual bondholders in specific circumstances; and
- (e) the Trustee New York Action and the New York Cross-Claims have proceeded expeditiously in the New York Court.⁴⁹

40. This Court has stayed actions where a contractual clause (such as a jurisdiction or arbitration clause) provides for the adjudication of disputes in an alternative forum or pursuant to a non-judicial procedure. In this manner, the Court attempts to give effect to the parties' contractual agreement and reasonable expectations as to where or how disputes are to be resolved.⁵⁰

41. As is the case with arbitration and jurisdictional clauses, no-action clauses constitute an agreement between the parties that certain pre-conditions must be met before the parties can commence legal proceedings. For example, in the case of jurisdiction clauses, the party commencing the proceeding must submit to the designated jurisdiction. Similarly, in the case of a no-action clause, a bondholder must take specific steps before commencing an individual action against the issuer.

42. In *Woolcock v. Bushert*⁵¹ the Ontario Court of Appeal granted a stay of an oppression proceeding on the ground that the parties had agreed that their disputes should be submitted to arbitration. In granting the stay, the Court gave effect to "party autonomy" and the need to hold parties to their bargain. As the No-Action Clause in the Trust Indenture serves one of the functions of an arbitration clause, namely to limit recourse to the courts, and reflects party

⁴⁹ Goudiss Affidavit.

⁵⁰ *Desputeaux v. Éditions Chouette*, [2003] 1 S.C.R. 178 at para. 40 and 48, Tab 6 of IMAX's Authorities; *GreCon Dimer Inc. v. J.R. Normand Inc.* (2005), 255 D.L.R. (4th) 257 at para. 22, Tab 8 of IMAX's Authorities; *Z.I. Pompey Industrie v. ECU-Line N.V.*, supra at 463.

⁵¹ *Woolcock v. Bushert*, 2005 CanLII 35081 (Ont. C.A.), Tab 15 of IMAX's Brief of Authorities.

autonomy, the principles applied by the Court of Appeal in *Woolcock v. Bushert* apply equally to the within proceeding.

43. Moreover, in the Trustee's New York Action, the Trustee has expressly pleaded that the No-Action Clause prohibits Catalyst from commencing proceedings to trigger remedies pursuant to the Trust Indenture. Though Catalyst seeks to use the oppression remedy in this Application, its claims of oppression and the relief it requests all depend upon findings that there have been defaults under the Trust Indenture or misrepresentation concerning a Consent Solicitation under the Trust Indenture. All of these claims are "with respect to the Trust Indenture".

44. The Trustee's New York pleading states:

"Finally, the Trustee seeks a declaration that Catalyst has not satisfied the conditions precedent to institute any judicial proceedings with respect to the Indenture pursuant to Section 507 thereof." [emphasis added]

and then proceeds, in paragraphs 36 to 39, to describe the within Application and to state with reference to the Ontario Application:

"Catalyst never has had and does not now have the right under Section 507 of the Indenture to institute judicial proceedings **with respect to the Indenture.**" [emphasis added]

45. In effect, what the Trustee is seeking is a declaration that would prevent Catalyst from doing precisely what is being attempted here in Ontario. Whether the No-Action clause does preclude Catalyst from commencing such a proceeding, continuing with the Ontario Application or obtaining these remedies is an issue of New York law.

46. In light of the Catalyst claims in the Ontario Application, it was clearly the reasonable expectation of Catalyst that its rights and remedies would be based upon the terms and conditions of the Trust Indenture which in turn must be interpreted according to New York trust indenture law, United States securities laws and United States accounting practices and principles. A review and comparison of Catalyst's pleadings in both jurisdictions clearly demonstrate that, with the exception of the remedies for the appointment of an inspector and production of financial information – which are themselves inconsistent with the reasonable expectations created by the Trust Indenture – all of the remedies being sought by Catalyst are drawn from the terms of the Trust Indenture itself. Canadian law is clear that the reasonable

expectations of bondholders such as Catalyst are defined by the terms of the Trust Indenture and their remedies are limited thereto.⁵²

47. In any event, no prejudice can result in staying this Application given Catalyst's own decision to commence a proceeding in New York, in the face of this very stay motion. Catalyst commenced its cross-claim in New York on the same issues that are the subject matter of the Ontario Application well after this stay motion was commenced.

F. THE EQUITIES FAVOUR IMAX

(i) *New York is the Convenient Forum for the Adjudication of this Dispute*

48. As stated by Mr. Justice Farley, the equities must dictate the Court's decision on a stay motion. Such relief is "discretionary and should be governed by the equities of the situation."⁵³

49. In considering the equities, the Court may consider the following factors:

- (a) the avoidance of multiplicity of proceedings;
- (b) the contractual provisions that specify applicable law or accord jurisdiction;
- (c) the applicable law and its weight in comparison to the factual questions to be decided;
- (d) whether declining jurisdiction would deprive the plaintiff of legitimate juridical advantage available in the domestic court;
- (e) the location of a majority of the parties;
- (f) the location of the key witnesses and evidence; and
- (g) geographical factors suggesting the natural forum.⁵⁴

⁵² *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (S.C. [Commercial List]), aff'd (2004), 40 B.L.R. (3d) 112 (C.A.), Tab 5 of IMAX's Authorities.

⁵³ *Hollinger International Inc. v. Hollinger Inc.*, supra, at para. 7, 8-10, aff'd. [2005] O.J. No. 708 (Div. Crt.) at paras. 12 and 15.

⁵⁴ *Muscutt et al. v. Courcelles et al.* (2002), 60 O.R. (3d) 20 at para. 41 (C.A.), Tab 11 of IMAX's Authorities.

50. In *Hollinger*, Mr. Justice Farley considered these factors, concluded that Illinois was by far the favoured forum, and granted the request for a temporary stay pending the final resolution of the parallel proceeding in Illinois. He found that the equities of the situation "clearly favour a temporary stay of the Ontario [proceeding]."⁵⁵

51. Applying these factors to the within Application, it is clear that New York is the most appropriate forum for the resolution of questions of New York Law. The documents related to the purchase of Senior Notes (primarily the Trust Indenture) provide that they are governed by New York Law. The performance of the contract (ie. the purchase of Senior Notes) occurs primarily through American brokers and the bonds are held by DTC, which is located in New York State. The majority of the witnesses and experts for both parties reside in New York State. The relief sought by Catalyst depends upon the interpretation and application of New York Law as well as U.S. accounting rules and practices.

52. It was reasonable for IMAX to anticipate that any dispute under the terms of the Trust Indenture would be resolved in New York. IMAX is entitled to have a New York Court apply New York law and to invoke the procedures that it anticipated utilizing in the case of a dispute. More importantly, Ontario is not the appropriate forum given the following:

- (a) Catalyst commenced the New York Action three months before it commenced the within Application;
- (b) Catalyst pleaded in the New York Action that the New York State Supreme Court has proper jurisdiction over the dispute;
- (c) the Trustee has commenced its own action in the New York State Supreme Court and Catalyst has not disputed that the New York State Supreme Court has proper jurisdiction over the dispute
- (d) there is substantial identity between the within Application and the Trustee's New York Action, the declaratory relief being sought in both jurisdictions on the same grounds and arising out of the same operative facts;
- (e) the New York Action is more comprehensive in so far as it involves the Trustee who is a necessary and proper party for the purposes of the resolution of the dispute;
- (f) the Trust Indenture is governed by the laws of the State of New York;
- (g) the New York Action is proceeding in the Commercial Part, which is the specialized commercial list for the New York State Supreme Court;

⁵⁵ *Hollinger International Inc. v. Hollinger Inc.*, supra at para. 7.

- (h) the true subject matter of the within Application relates to rights, duties and obligations under the Trust Indenture, which is governed by the laws of the State of New York;
- (i) Catalyst has now taken concrete steps to obtain additional information from third parties domiciled in the United States which it was unable to obtain through the Ontario Application;
- (j) the within Application is a reaction to IMAX's Motion to Dismiss in the original New York Action and was brought for tactical and improper reasons; and
- (k) the requests for relief pursuant to both sections 248 and 229 of the *Canada Business Corporations Act* are derivative of the factual and legal issues that were raised in the New York Action and are now again being raised in the Trustee's New York Action.

53. Although he does not make reference to *Amchem Products v. British Columbia (Workers' Compensation Board)*⁵⁶, Mr. Justice Farley's analysis is, in essence, the application of the *forum conveniens* test as set forth in the Supreme Court's decision in that case.⁵⁷ His Honour effectively determined in the *Hollinger* case that the moving party had demonstrated that Illinois was the more appropriate forum. It is respectfully submitted that the evidence in the within Application also clearly demonstrates that New York is the preferable forum for the resolution of this dispute.

(ii) Catalyst has no judicial advantage in Ontario

54. Since mid-March, Catalyst has not actively pursued this Application and has clearly used the record in this Application to advance the New York Action. The primary purpose of Catalyst continuing this Application has been to feed evidence into the New York Action. Their New York attorney attended (by phone) the cross-examination of the Trustee's representative in this motion for a stay.

55. Courts are loathe to permit a proceeding to continue solely for the purpose of conducting a fishing expedition.⁵⁸

⁵⁶ *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* (1993), 102 D.L.R. (4th) 96 (S.C.C.). Tab 4 of IMAX's Authorities.

⁵⁷ *Ibid* at 110 – 111 and 118 – 119.

⁵⁸ *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 at para 7 (Gen. Div.), Tab 12 of IMAX's Authorities; *Kastner v Painblanc* [1994] F.C.J. No. 1671 at para. 4 (F.C.A.), Tab 10 of IMAX's Authorities.

56. In the cross-examination leading to this stay motion, Catalyst advanced a theory that the Trustee was in collusion with IMAX or a “proxy” for the company.

57. These suspicions are groundless and lack all merit. To the extent that Catalyst wishes to assert such accusations against the Trustee, it is free to do so directly in the New York Action which includes the Trustee. It has not yet done so.

(iii) A Stay is Equitable in all the Circumstances

58. The Court should exercise its jurisdiction to ensure that litigation proceeds fairly and equitably. In this case, the balance of equities favours IMAX:

- (a) a multiplicity of proceedings will be avoided;
- (b) the documents in relation to this proceeding are governed by New York law and the purchase and issuance of bonds occurred primarily in New York;
- (c) the determination of the issues in the dispute require the interpretation and application of New York law;
- (d) there is no evidence of prejudice to Catalyst;
- (e) there is evidence that issuing a stay is just in the circumstances; and
- (f) Catalyst is not coming to the Ontario Superior Court with clean hands.

59. Where, as here, the equities demonstrate that a stay of this Application would be just in the circumstances, the stay should be granted.⁵⁹

⁵⁹ *Hollinger International Inc. v. Hollinger Inc.*, supra at para 7

III PART III—RELIEF REQUESTED

60. The moving party, IMAX, respectfully requests the relief as set forth in the Notice of Motion.

All of which is respectfully submitted.

Friday, September 19, 2008

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BETWEEN:

CATALYST FUND LIMITED PARTNERSHIP II - and -

IMAX CORPORATION

24 + 25 SEPT 2008

Court File No. 07-CL-7163

ONTARIO
SUPERIOR COURT OF JUSTICE
[Commercial List]
Proceeding Commenced at TORONTO

FACTUM OF IMAX,
THE MOVING PARTY
(Motion to Stay the Within Application)
Returnable September 24, 2008

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