

⑤

21799

No Respondent's Brief Filed

RECEIVED

MAY 19 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA  
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Shirley C. Robinson  
Administrative Law Judge

Case No. 12-ALJ-17-0390-CC  
APPELLANT CASE NO. 2014-001469

Southeast Cinema Entertainment, Inc.,.....Respondent,

v.

South Carolina Department of Revenue,.....Appellant.

**RECORD ON APPEAL**

Timothy C. Thompson  
Managing Counsel for Litigation  
Nicole Wooten  
Counsel for Litigation  
Milton G. Kimpson  
General Counsel for Litigation  
PO Box 12265  
Columbia, SC 29211  
803-898-5119  
803-898-5147 (Fax)  
Attorneys for Appellant

Adam Nicholas Marinelli  
Royal Dane Mall  
Suite 21, St. Thomas VI 000802  
843-276-1495

**INDEX**

Order of May 28, 2014 ..... DOR003

Order of June 16, 2014 .....DOR0012

Notice of Motion and Motion for Reconsideration Pursuant to ALC  
Rule 29(D), ALC Rule 68, and to Alter or Amend Pursuant to  
Rule 59(e), SCRCF, Dated June 9, 2014.....DOR0015

Respondent’s Memorandum in Opposition to Petitioner’s  
Motion for Summary Judgment and Cross-Motion of the Same,  
Dated October 3, 2013 .....DOR0023

Transcript .....DOR0069

Smith Exhibit 3 .....DOR0075

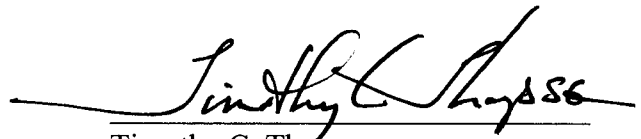
---

**CERTIFICATE OF COUNSEL**

---

The undersigned hereby certified that the Record of Appeal contains all material proposed to be included by any of the parties and not any other material.

May 13, 2015



Timothy C. Thompson  
Managing Counsel for Litigation  
Nicole Wooten  
Counsel for Litigation  
Milton G. Kimpson  
General Counsel for Litigation  
PO Box 12265  
Columbia, SC 29211  
803-898-5119  
803-898-5147 (Fax)  
Attorneys for Appellant

MAY 28 2014

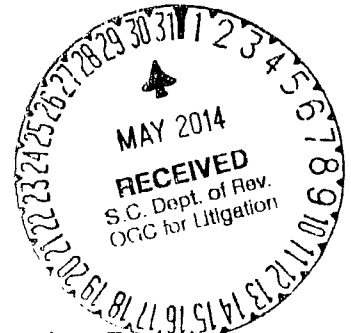
**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

**SC ADMIN. LAW COURT**

Southeast Cinema Entertainment, Inc., )  
)  
Petitioner, )  
)  
v. )  
)  
South Carolina Department of Revenue, )  
)  
Respondent. )  
\_\_\_\_\_ )

Docket No.: 12-ALJ-17-0390-CC

**ORDER**



**APPEARANCES:** Petitioner: Jeffrey T. Allen, Esquire, and Erik P. Doerring, Esquire  
Respondent: Adam N. Marinelli, Esquire

**STATEMENT OF THE CASE**

This matter is before the South Carolina Administrative Law Court (“the ALC” or “the Court”) pursuant to a Request for a Contested Case Hearing filed by Southeast Cinema Entertainment, Inc. (“Petitioner”) challenging the South Carolina Department of Revenue’s (“Respondent’s” or “the Department’s”) denial of a refund request for sales tax paid on the purchase of cinema equipment from IMAX Corporation (“IMAX”). Petitioner owns and operates a movie theatre business located in Charleston, South Carolina. On or about September 30, 2008, Petitioner entered into an agreement (“the Agreement”) to purchase an IMAX theatre system (“the system”) from IMAX for \$1.15 million. IMAX, which has a nexus with the State of South Carolina,<sup>1</sup> charged Petitioner sales tax on the purchase price of the system and on related “additional payments.”

Petitioner obtained an assignment of rights from IMAX, and submitted a request to the Department for a refund of part of the sales taxes it paid on the purchase of the system. Specifically, Petitioner submitted an ST-14 form requesting a refund totaling \$71,000.57, alleging most of the purchase price of the system reflected the value of un-taxable, intangible property. The Department denied the request by letter dated September 2, 2011, and Petitioner

<sup>1</sup> The “Commerce Clause nexus, for sales and use tax purposes, requires some physical presence within the taxing jurisdiction.” Travelscape, LLC v. S.C. Dep’t of Revenue, 391 S.C. 89, 104, 705 S.E.2d 28, 36 (2011).

timely contested the Department's denial on November 3, 2011. On August 2, 2012, the Department upheld its denial, finding the full purchase price of the system was subject to South Carolina sales tax. Petitioner then appealed to this Court. Petitioner and the Department subsequently filed Cross Motions for Summary Judgment, and this Court held a hearing on those Motions on December 13, 2013.

### FACTS

The Agreement is entitled "Agreement for the Purchase and Sale and Maintenance of IMAX® Digital MPX Projection System and Trademark License." Pursuant to the Agreement, IMAX had a duty to: (1) sell to Petitioner a large format digital projection system and provide certain related services; (2) provide maintenance services for a large format digital projection system;<sup>2</sup> and (3) license to Petitioner certain IMAX trademarks. The Agreement describes IMAX as being "in the business of developing, selling and leasing large format projection systems and providing certain related services." The Agreement states the sale was solely for the purchase of the system. It further states the purchase price for the system was \$1,150,000.00,<sup>3</sup> which included the first year's maintenance fee of \$40,000.<sup>4</sup> The purchase price was split into installment payments, but and the parties did not indicate whether, for example, \$500,000 was for the purchase of the projector and \$610,000 was for the purchase of the sound system.<sup>5</sup>

The Agreement also required Petitioner to make "additional payments" to IMAX in arrears on a monthly basis. These "additional payments" were equal to \$40,000 (annually) or a percentage of theater admission proceeds, whichever was greater.

Petitioner, after conducting its own market research, determined that the material components of the system, if purchased from a vendor other than IMAX, would have a retail value of approximately \$170,694.33. Based on this valuation of the material components, Petitioner requested the Department refund the portion of the sales tax it paid on the purchase

---

<sup>2</sup> The "system," as defined by the Agreement, includes the projection system, the sound system, the screen, and a 3D glasses cleaning machine.

<sup>3</sup> Specifically, the Agreement states: "Subject to the terms and conditions contained herein, IMAX hereby sells to Client and Client hereby purchases from IMAXC the System," and "[Petitioner] shall pay US\$1,150,000 as purchase price for the system (the "Purchase Price"), which shall be payable as IMAX directs."

<sup>4</sup> The parties did not contest the inclusion of the maintenance fee as part of the purchase price.

<sup>5</sup> The purchase price was paid in installments; however, the installments were not structured in a way to reflect the purchase of different components of the IMAX system or the related services or benefits.

price of the system that was in excess of \$170,694.33. Petitioner claimed the remainder of the purchase price after subtracting the value of the material parts related to intangible and un-taxable benefits associated with the purchase of the IMAX trademark license.

### ISSUES

- I. **Whether Petitioner is entitled to a refund of a portion of the sales taxes it paid on the initial purchase of the system.**
- II. **Whether Petitioner is entitled to a refund of sales taxes it paid on “additional payments” related to the purchase of the system.**

### CONCLUSIONS OF LAW

Based upon the submitted briefs, oral arguments presented, and a thorough examination of the applicable statutes and jurisprudence, I conclude the following as a matter of law:

This Court has jurisdiction to hear this contested case pursuant to section 1-23-600 of the South Carolina Code (Supp. 2013). Generally, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof. See Leventis v. S.C. Dep't of Health & Env'tl. Control, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (Ct. App. 2000) (citing 2 Am.Jur.2d *Administrative Law* § 360 (1994)). Here, Petitioner requested a contested case hearing and, therefore, has the burden of proof to show by a preponderance of the evidence that the Department's tax assessment was incorrect. See id.; Anonymous (M-156-90) v. State Bd. of Med. Examiners, 329 S.C. 371, 375, 496 S.E.2d 17, 19 (1998) (holding the standard of proof in “administrative hearings is generally a preponderance of the evidence”).

This Court's Rules of Procedure provide “[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules.” ALC Rule 68. Rule 56(c) of the South Carolina Rules of Civil Procedure provides summary judgment is properly granted when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” See Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). In determining whether summary judgment is proper, this Court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. See Byers v. Westinghouse Elec. Corp., 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Although the evidence and inferences drawn therefrom generally must be construed against the moving party, “the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but a

response by affidavit or otherwise . . . must set forth specific facts creating a genuine issue for trial.” Rule 56(e), SCRCF.

“If a statute's language is plain, unambiguous, and conveys a clear meaning ‘the rules of statutory interpretation are not needed and the court has no right to impose another meaning.’” Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). “The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.” Id. “The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” Id.

## DISCUSSION

### I. The taxpayer is not entitled to a refund for sales taxes paid on its initial purchase price for an IMAX theater system.

Section 12-36-910(A) of the South Carolina Code imposes “[a] sales tax, equal to five percent of the *gross proceeds of sales*, [] upon every person engaged or continuing within this State in the business of selling *tangible personal property at retail*.” (emphasis added). “Retailers” are every person “selling or auctioning tangible personal property whether owned by the person or others.” S.C. Code Ann. § 12-36-70(1)(a). Tangible personal property is defined as:

personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under this chapter and does not include stocks, notes, bonds, mortgages, or other evidences of debt.

S.C. Code Ann. § 12-36-60. Next, “gross proceeds of sales” means “the value proceeding or accruing from the sale, lease, or rental of tangible personal property.” S.C. Code Ann. § 12-36-90. Furthermore, gross proceeds of sales includes:

(b) the proceeds from the sale of tangible personal property without any deduction for:

- (i) the cost of goods sold;
- (ii) the cost of materials, labor, or service;
- (iii) interest paid;
- (iv) losses;

- (v) transportation costs;
- (vi) manufacturers or importers excise taxes imposed by the United States;  
or
- (vii) any other expenses;

S.C. Code Ann. § 12-36-90(1). Similarly, “sales price” is defined as “the total amount for which tangible personal property is sold, without any deduction for the cost of the property sold, the cost of the materials used, labor or service cost, interest paid, losses, or any other expenses. S.C. Code Ann. § 12-36-130.

These definitions demonstrate the Legislature’s intent to disallow deductions for the retailer’s cost of labor and services and “any other expenses” from the gross proceeds of sales in computing sales tax liability. §§ 12-36-90(1)(b), -130. Additionally, “tangible personal property” includes, to an extent, “intangibles.” Some of the “intangibles” that are taxable are listed in the statute. See § 12-36-60. Notably, all of the listed “intangibles” subject to sales tax appear to be the subject of the retail sale and not incident to the retail sale. See id.

It is generally accepted that the sale of a trademark license is the sale of an intangible. See Media General Communications, Inc. v. South Carolina Department of Revenue, 388 S.C. 138, 141, 694 S.E.2d 525, 526 (2010). In Medial General, the South Carolina Supreme Court addressed an issue related to the Department’s accounting practices and allocation of income taxes. While the case did not deal with sales taxes, part of Media General’s income included payments for the use of its licenses and trademarks. Id. The Supreme Court categorized these as “intangible assets.” Id. Specifically, the court stated “[t]hese intangibles include[e] licenses and other authorizations issued by the Federal Communications Commission (“FCC”) for the operation of various television broadcasting affiliates, as well as trademarks.” Similarly, in Geoffrey, Inc. v. South Carolina Tax Commission, 313 S.C. 15, 19, 437 S.E.2d 13, 16 (1993), another income tax case, the supreme court referred to the licensing of trademarks as an “intangibles.”

In this case, Petitioner contends the purchase price of the system was approximately \$170,694.33 and the remainder of the sales price was payment for the purchase of IMAX’s trademark license, which was intangible property and not subject to sales tax. Accordingly, Petitioner argues the Department only had authority to tax it for the value of the system and not the full purchase price. Conversely, the Department contends section 12-36-130’s admonition

that “any other expenses” cannot be deducted from the price of tangible personal property for the purposes of calculating the sales tax encompasses ancillary purchases like the trademark license. As a result, the Department argues the total amount charged in conjunction with the sale or purchase of tangible personal property is subject to sales tax. This Court agrees with the Department.

In supporting its case, the Department cites to Meyers Arnold, Inc. v. South Carolina Tax Commission, 285 S.C. 303, 305, 328 S.E.2d 920, 922 (Ct. App. 1985). In Myers Arnold, the South Carolina Court of Appeals addressed whether lay away fees associated with a lay away purchase were subject to sales tax. Id. The court of appeals determined:

But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds of sales and subject to the sales tax.

Id. at 303, 328 S.E.2d at 923. Thus, the court of appeals found that under the definition of “gross proceeds of sale,” the lay away fee constituted the price for a service incident to the purchase of the layaway item, which was not deductible for the purpose of administering the sales tax. Moreover, in Myers Arnold, the court of appeals also addressed whether the sales tax applied to wrapping paper services, and ultimately held “section 12–35–550(14) of the [South Carolina] Code and Regulation 117–174.154 clearly exempt the proceeds of the sale of gift wrapping paper from the sales tax when the paper is used *incident* to the delivery of tangible personal property”. (emphasis added). It further found, in contrast, Regulation 117–174.238 provides the gross proceeds from charges for gift wrapping not incident to the purchase of tangible personal property are subject to the sales and/or use tax.” Id. at 306, 328 S.E.2d at 922. Therefore, Myers Arnold suggests that service fees or benefits that are incident to the sale of tangible personal property are part of the gross proceeds of sale and subject to sales tax.

Here, I find Petitioner cannot parse the purchase price of the system into its alleged component parts to reduce its tax burden. Although the purchase of a trademark license is generally considered an intangible and un-taxable, Petitioner has not presented this Court with an itemized accounting sheet showing the purchase price of \$1.15 million is the sum of the cost of the system and the cost of the trademark. See Media General Communications, 388 S.C. at 141, 694 S.E.2d at 526; Geoffrey, 313 S.C. at 19, 437 S.E.2d at 16. Nor does the contract itself make a distinction between the cost of the system and the cost of the trademark when setting out the

purchase price. The only parsing of the purchase price is the Agreement's provision allowing for installment payments, which do not reflect any kind of itemization. The plain language of the Agreement states the \$1.15 million purchase price is for the system, which is tangible personal property. See Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) ("If [the contract's] language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect."). Accordingly, the entire purchase price is subject to sales tax.

Furthermore, the benefit of the trademark is granted only by virtue of purchasing the system. The limited "Trademark License" is conditionally granted to the Petitioner "solely in connection with the naming, marketing, promotion and operation of the Theatre utilizing the system." In addition, the Agreement requires Petitioner to obtain prior approval from the IMAX corporation for use of the IMAX name, IMAX formatted content, software, advertising materials, etc., which can only be used in conjunction with the system. Thus, although a valuable intangible asset, the limited trademark license Petitioner received when it purchased the system is inextricably connected to the purchase of the system.

In sum, because the plain language of the Agreement provided the purchase price was solely for the system, and the alleged intangibles were inextricably linked to the purchase of the system, I find the initial purchase price represents the gross proceeds of sale and is subject to sales tax. See § 12-36-90(1)(b) (disallowing deductions for the retailer's cost of labor and services and "any other expenses" from the gross proceeds of sales in computing sales tax liability); Meyers Arnold, 285 S.C. at 305-06, 328 S.E.2d at 922-23 (suggesting service fees or benefits incident to the purchase of tangible personal property are part of the gross proceeds of sale and subject to sales tax). Moreover, because this is a legal issue, and Petitioner has failed to demonstrate a genuine issue as to any material fact to prevent Respondent from being entitled to judgment as a matter of law regarding the application of sales tax to the full purchase price, I grant Respondent's motion for summary judgment and deny Petitioner's motion for summary judgment as to this issue. See Rule 56(c), SCRCP.

**II. The additional monthly installment payments for the system are not subject to sales tax.**

Petitioner argued at the hearing that the additional payments equal to the greater of \$40,000.00 or a percent of net admissions proceeds<sup>6</sup> should not be subject to sales tax. Petitioner contended the additional payments should be characterized as “box office fees,” which are exempt from sales tax pursuant to section 12-36-2120(35) of the South Carolina Code. The Court agrees.

Subsection 35 of section 12-36-2120 specifically exempts from sales taxes “motion picture film sold or rented to or by theaters.” § 12-36-2120(35). Here, the percentage of net admissions proceeds IMAX charges Petitioner is essentially a fee for showing films provided by IMAX, which is a box office fee. A box office fee is no more than a charge for renting film, which is exempt from sales tax under section 12-36-2120(35).

The Department argues the additional payments, because they were established in the Agreement as part of the purchase of the system, are part of the gross proceeds of sale. In support of this assertion, the Department cites the part of the Agreement governing “Film Programming,” which states:

Client shall exhibit all IMAX Approved Content commencing from the earliest date any such content is released for exhibition at the Theatre provided that such content is offered to Client on commercially reasonable terms generally found in the industry.

This section of the Agreement refers to “terms generally found in the industry,” which may or may not relate to the rental price of films. “Terms” can also relate to the number of required showings, the length of a film’s run, etc. Accordingly, this Court finds the Department’s argument unpersuasive. Further, because the Agreement makes it clear the box office fees are separate charges from the purchase price of the system, I find the Department’s argument that

---

<sup>6</sup> The Agreement defines the percentage payment referred to here as “three percent (3%) of Net Theatre Admissions for Hollywood Films exhibited at the Theatre plus five percent (5%) of Net Theatre Admissions for all other content exhibited in the Theatre.” “Net Theatre Admissions” means “amounts received by [Petitioner] for admission to the Theatre after deducting amusement or entertainment taxes, admissions or gross receipts taxes, value added taxes, sales taxes or other similar impositions levied on the admissions price by and actually paid by [Petitioner] . . . .”

Regulation 117-313.1 prevents Petitioner from arguing the additional payments are not part of the gross proceeds of sale is also unpersuasive.<sup>7</sup>

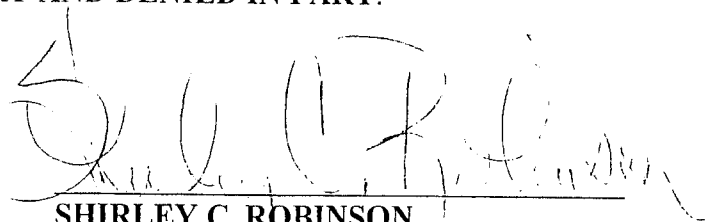
Accordingly, this Court finds the additional payments are box office fees, which are exempt from sales tax under section 12-36-2120(35). Because this is a legal issue, and Respondent has failed to demonstrate a genuine issue as to any material fact to prevent Petitioner from being entitled to judgment as a matter of law regarding the application of sales tax to the additional payments, I grant Petitioner's motion for summary judgment and deny Respondent's motion for summary judgment as to this issue. See Rule 56(c), SCRPC.

### CONCLUSION

South Carolina law imposes a sales tax on the gross proceeds of the sale of tangible personal property. Here, Petitioner paid \$1.15 million to purchase the system, which was tangible personal property. Therefore, the Department properly denied Petitioner's claim for a refund of sales taxes based on its allegation that the value of the system (and therefore gross proceeds of sale) was actually much less than \$1.15 million. However, the Department incorrectly charged sales tax on the "additional payments" Petitioner made pursuant to the Agreement. These "additional payments" were box offices fees, which are exempt from sales tax under section 12-36-2120(35).

**THEREFORE, IT IS HEREBY ORDRED** that the Petitioner's Motion for Summary Judgment **IS GRANTED IN PART AND DENIED IN PART**, and the Department's Motion for Summary Judgment **IS GRANTED IN PART AND DENIED IN PART**.

**AND IT IS SO ORDERED.**



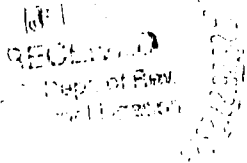
**SHIRLEY C. ROBINSON**  
Administrative Law Judge

Columbia, South Carolina  
May 28, 2014

SEARCHED  
SERIALIZED  
INDEXED  
FILED

28 May 2014  
Jeesh Jenders

<sup>7</sup> Regulation 117-313.1 admonishes that "no method of billing will serve to exempt from the measure of the tax the cost of material used, labor or service cost . . . or any other expenses." S.C. Regs. Ann. 117-313.1.



**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

**SC ADMIN. LAW COURT**

Southeast Cinema Entertainment, Inc., )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 South Carolina Department of Revenue, )  
 )  
 Respondent. )

Docket No. 12-ALJ-17-0390-CC

**ORDER DENYING  
MOTION FOR  
RECONSIDERATION**

This matter is before the South Carolina Administrative Law Court (“the ALC” or “the Court”) pursuant to a Request for a Contested Case Hearing filed by Southeast Cinema Entertainment, Inc. (“Petitioner”) challenging the South Carolina Department of Revenue’s (“Respondent’s” or “the Department’s”) denial of a refund request for sales tax paid on the purchase of cinema equipment (“the system”) from IMAX Corporation (“IMAX”). In its decision, the Department determined Petitioner owed sales taxes on the initial purchase price of the system and on “additional payments” related to the purchase of the system. Petitioner contested the applicability of sales tax to the purchase price of the system and to the additional payments. The parties filed cross motions for summary judgment as to both issues. In an order dated May 28, 2014, this Court denied Petitioner’s motion for summary judgment as it related to the taxes paid on the initial purchase price, but granted Petitioner’s motion for summary judgment regarding the sales tax paid on the additional payments. Accordingly, this Court simultaneously granted the Department’s motion for summary judgment as to the sales taxes paid on the initial purchase price and denied the Department’s motion for summary judgment in regards to the sales tax on the additional payments.

Subsequently, on June 9, 2014, the Department filed a motion requesting the Court to reconsider its decision with respect to the applicability of sales taxes to the “additional payments.” The Department contests this Court’s determination that the additional payments were not part of the gross proceeds of sales, and therefore not subject to sales tax, arguing the additional payments were part of, or at the least incident to, the initial purchase of the system. Moreover, the Department contests the Court’s finding that the additional payments were non-

taxable box-office fees, and it maintains Petitioner did not meet its burden of proof to show the additional payments were box office fees. Having considered the facts of this case and the Department's Motion for Reconsideration, the Court finds that its May 28, 2014 Order must stand.


The Department argues the additional payments are subject to sales tax because the payments fall within the category of "any other expenses" under the statutory definition of "gross proceeds of sale." See S.C. Code Ann. § 12-36-90(1). I find the additional payments at issue do not fall within the category of "any other expenses." See id. The contract for the system states: "Subject to the terms and conditions contained herein, IMAX hereby sells to Client and Client hereby purchases from IMAX the System," and "[Petitioner] shall pay US\$1,150,000 as purchase price for the system (the "Purchase Price"), which shall be payable as IMAX directs." (emphasis added). Therefore, the sale was complete upon the payment of \$1,150,000. The only parsing of the purchase price is the contract's provision allowing for installment payments; there is no indication the purchase price was subject to additional, indefinite "financing payments" as the Department styles them. Upon the payment of the last installment, to equal a total payment \$1,150,000.00, I find the sale was completed, and the purchase price constituted the entirety of the gross proceeds of sale.

Further, I believe this case is distinguishable from Myers Arnold. See 285 S.C. 303, 305, 328 S.E.2d 920, 922 (Ct. App. 1985) (holding that under the definition of "gross proceeds of sale," the lay away fees constituted the price for a service incident to the purchase of the layaway item, which was not deductible for the purpose of administering the sales tax). In Myers Arnold, the lay away fees were charged before, and were directly related to, the purchase of the lay away item. See id. Further, the lay away fees ceased upon the completed sale. See id. Here, the sale is already completed when the additional payments become due, and, until the contract is terminated, the additional fees are theoretically indefinite. Thus, here, there is not a nexus between the purchase price and the additional payments, which is in contrast to the clear nexus between the lay away fees and the purchase price of the lay away item in Myers Arnold.

Finally, I find the Petitioner met its burden to show the preponderance of the evidence supports characterizing the additional fees as box office payments based on the language of the contract and for the reasons stated in the May 28, 2014 order.

**THEREFORE, IT IS HEREBY ORDERED** that Petitioner's Motion for Reconsideration is **DENIED**.

**AND IT IS SO ORDERED.**

  
**SHIRLEY C. ROBINSON**  
Administrative Law Judge

June 16, 2014  
Columbia, South Carolina

16 June 2014  
Shirley C. Robinson

STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT

Southeast Cinema Entertainment, Inc.,	)	Docket No. 12-ALJ-17-0390-CC
	)	
	)	
Petitioner,	)	NOTICE OF MOTION
	)	AND MOTION FOR
	)	RECONSIDERATION
	)	PURSUANT TO ALC RULE
vs.	)	29(D), ALC RULE 68, AND
	)	TO ALTER OR AMEND
	)	PURSUANT TO RULE
	)	59(e), SCRCP
South Carolina Department of Revenue,	)	
	)	
Respondent.	)	

---

TO: THE HONORABLE SHIRLEY C. ROBINSON, PRESIDING JUDGE:

PLEASE TAKE NOTICE that the undersigned, as attorneys for the South Carolina Department of Revenue (Department), pursuant to ALC Rule 29(D), ALC Rule 68, and Rule 59(e), SCRCP, respectfully move this Court to reconsider its Order on Motions for Summary Judgment (Order), dated May 28, 2014, in the above-referenced action and to uphold the Department's Final Agency Determination that denied refund requests on sales taxes paid by the Petitioner on its purchase of an IMAX theatre system. Written notice of the entry of the Order was received by the Department on May 28, 2014. The grounds for such requested relief are as follows:

- I. **This Court erred in finding the "Additional Monthly Payments" as exempt from sales tax pursuant to S.C. Code Ann. § 12-36-2120(35) (2014), as the additional payments are legally part of the gross proceeds of the taxable sale, nothing in the controlling Agreement establishes the payments are "box office fees," and the Petitioner did not meet its burden of showing that those payments fit squarely within the exemption.**

- A. The “Additional Monthly Payments” are part of the gross proceeds of sale pursuant to S.C. Code Ann. § 12-36-90 (2014) and Meyers Arnold, Inc. v. South Carolina Tax Comm’n, 285 S.C 303, 328 S.E.2d 920 (Ct. App. 1985).

This Court was directly on point when it examined the definition of “gross proceeds of sale” pursuant to S.C. Code Ann. § 12-36-90 (2014) and applied that definition to the initial purchase price of the system in this case.<sup>1</sup> In analyzing that definition, this Court properly declared “that ‘any other expenses’ cannot be deducted from the price of tangible personal property for the purposes of calculating the sales tax encompasses ancillary purchases . . . .”<sup>2</sup> This Court then correctly extended that logic by applying the well settled law of Meyers Arnold, Inc. v. South Carolina Tax Comm’n, 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985), and held that “service fees or benefits that are incident to the sale of tangible personal property are part of the gross proceeds of sale and subject to sales tax.”<sup>3</sup> In doing so, this Court reiterated the fundamental “but for” test of the Meyers Arnold decision.<sup>4</sup> This Court erred, however, by not extending that test to all of the incidental benefits that are inextricably linked to the sale of the tangible personal property in this case – namely, the additional monthly payments.

“Gross proceeds of sales” is defined as “. . . the value proceeding or accruing from the sale, lease, or rental of tangible personal property.” S.C. Code Ann. § 12-36-90. The plain language of that definition squarely applies to the value that proceeds or

---

<sup>1</sup>See Order of The Honorable Shirley C. Robinson, dated May 28, 2014 at 4-6.

<sup>2</sup>Id. at 6.

<sup>3</sup>Id.

<sup>4</sup>Id.

accrues to a seller. Here, IMAX sold its system to the Petitioner and received for it the following: an initial purchase price, a maintenance agreement, and additional monthly payments for the life of the agreement. But for the sale of the IMAX system, the incidental valuable consideration (regardless of the secondary purpose of those incidental benefits) is subject to the tax pursuant to our sales tax laws and the Meyers Arnold test.<sup>5</sup> These additional monthly payments are identical in nature to the lay away fees from Meyers Arnold. The lay away fees had an independent purpose, and could be linked to a service that would normally be untaxed; however, because they were incident to the sale of tangible personal property, they were deemed an inextricable part of the entire “value proceeding or accruing from the sale.”<sup>6</sup> It is vital to note again that the definition of “gross proceeds” does not permit the deduction of any discrete aspect of a sale like this one:

(1) The term includes:

\* \* \*

(b) the proceeds from the sale of tangible personal property without any deduction for:

- (i) the cost of goods sold;
- (ii) the cost of materials, labor, or service;

\* \* \*

(vii) *any other expenses*.

S.C. Code Ann. § 12-36-90 (emphasis added). This statute clearly expresses the Legislature’s intent to disallow deductions from the gross proceeds of sales in computing sales tax liability. The “any other expenses” language encompasses any and all value derived from related fees that are ancillary to the purchase of tangible personal property.

---

<sup>5</sup>See Meyers Arnold, 285 S.C. at 303, 328 S.E.2d at 923.

<sup>6</sup>Id.

To that extent, this Court erred in finding that the additional monthly payments were not part of the gross proceeds of sale.

**B. This Court erred in exempting the “Additional Monthly Payments” from sales tax, as nothing in the controlling Agreement establishes the payments are “box office fees.”**

Despite the fact that the Additional Monthly Payments are part of the gross proceeds of sale and it should have been immaterial what the underlying purpose of those payments is for purposes of sales tax, this Court erred in concluding that those payments were made for “motion picture film sold or rented to or by theaters.”<sup>7</sup> Nothing in the controlling agreement supports that conclusion; therefore, it was clear error to describe them as such.

This Court’s mischaracterization is apparently based upon the method of calculation which IMAX uses to determine the amount due for these payments, which is the greater of a flat \$40,000 per annum fee or 3-5% of net admission proceeds.<sup>8</sup> Nothing indicates that the Petitioner’s purchase of the System, which is paid for with an initial purchase price and subsequent monthly payments, includes film. The Agreement states with undeniable clarity that the purchase or rental of IMAX film is a separate transaction:

8.04 Film Programming

Client shall exhibit all IMAX Approved Content commencing from the earliest date any such content is released for exhibition at the Theatre **provided that such content is offered to Client on commercially reasonable terms generally found in the industry.**

---

<sup>7</sup>Order at 8.

<sup>8</sup>Id.

Agreement at 14 (emphasis added). Although this Court is correct that “commercially reasonable terms” could have other meanings, the plain language of the Agreement unambiguously indicates that the film content will be rented or sold at a later date. See Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) (“If [the contract’s] language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract’s language determines the instrument’s force and effect.”).

This misinterpretation is further illuminated by reviewing actual box office fee agreements from other film studios that the Petitioner’s owner and operator, Stephen Smith, attached as Exhibit 3 to his affidavit filed with the Court.<sup>9</sup> If this Court’s strained interpretation of the Additional Monthly Payments is correct, then that would mean that IMAX movies – which are more advanced, cost twice as much for movie-going patrons, and are the main thrust of the Petitioner’s business – are less than one tenth the cost of Disney or Sony movies.<sup>10</sup> Lincoln 3D, a Disney movie example provided by the taxpayer,<sup>11</sup> ranges between a cost of 45-62% of theatre admission proceeds for the taxpayer, compared to the assertion that the IMAX movies only cost 3-5%. It is spurious at best that IMAX movies would be offered at such low cost compared to other lesser content. Furthermore, this Court’s holding would seem to indicate that the Petitioner receives unfettered access to IMAX movies with non-specific costs from that singular clause of the purchase Agreement for the IMAX system, instead of on a movie-by-movie

---

<sup>9</sup>See Smith Aff., dated September 18, 2014, Ex. 3.

<sup>10</sup>Id.

<sup>11</sup>Id.

basis that all other studios seem to operate on. To that extent, it should be obvious that the Additional Monthly Payments are not for the sale or lease of IMAX film content, but instead constitute a financed portion of the Agreement to purchase the IMAX system and trademark license.

Finally, there is absolutely no other mention of the sale or lease of motion picture film anywhere in the Agreement. The Additional Monthly Payments are not related to any sale or rent of film in any section of the contract, and, in fact, if there had been an exchange under the Agreement for motion picture film content it would have been made a part of the clearly enumerated purpose of the contract.<sup>12</sup> Because there is no indication that any of the money exchanged under the governing Agreement was for film content, the Court erred in characterizing the Additional Monthly Payments as “box office fees.”

**C. This Court erred in finding the Additional Monthly Payments as exempt from sales tax pursuant to S.C. Code Ann. § 12-36-2120(35), because Petitioner did not meet its burden of showing that those payments fit squarely within the exemption.**

Even assuming *in arguendo* that the additional payments were not part of the gross proceeds of sale, the Petitioner failed to meet its burden to show that such payments fit squarely within the exemption found at S.C. Code Ann. § 12-36-2120(35) (2014). It is well settled law in South Carolina that the burden is on claimants to prove their rights to an exemption by bringing themselves clearly within the conditions imposed by the statute. TNS Mills, Inc. v. S. Carolina Dep't of Revenue, 331 S.C. 611, 618, 503 S.E.2d 471, 475 (1998) (citing York County Fair Assoc. v. South Carolina Tax Comm'n, 249

---

<sup>12</sup>The Agreement unequivocally states that it is solely for the “purchase and sale and maintenance of IMAX Digital MPX Projection System and Trademark License.” There exists absolutely no mention of the sale or rent of film content in its stated purpose.

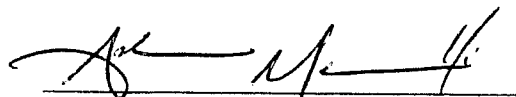
S.C. 337, 341, 154 S.E.2d 361, 363 (1967); and also Asmer v. Livingston, 225 S.C. 341, 82 S.E.2d 465, 466 (1954) (a refund of taxes is solely a matter of governmental grace, and taxpayers seeking such relief must bring themselves clearly within the terms of the statute authorizing a refund)).

Simply put, the Petitioner did not satisfy the burden of proof, by a preponderance of evidence, to establish that the Additional Monthly Payments fit squarely within the parameters of the exemption found at section 12-36-2120(35). The only evidence provided by the taxpayer to indicate these payments are for film content is a self-serving affidavit by the Petitioner, which is directly contradicted by the contents of the controlling Agreement. To that extent, this Court erred in holding that the Petitioner was entitled as a matter of law to summary judgment on that issue.

#### **Conclusion**

On these grounds, the Respondent respectfully requests that this Court rule upon the issues raised but not ruled upon in its Order and to reconsider the conclusions referenced above pursuant to ALC Rule 29(D), ALC Rule 68, and Rule 59(e), SCRCP.

Respectfully submitted,



Adam N. Marinelli (Bar No. 79031)  
Counsel for Litigation  
Milton G. Kimpson (Bar No. 7917)  
Chief Counsel for Litigation  
Joe S. Dusenbury, Jr., (Bar No. 11791)  
General Counsel for Litigation, Tax, and  
Regulatory Services  
PO Box 12265  
Columbia, SC 29211  
803-898-5153 (Telephone)  
803-898-5147 (Fax)

Attorneys for the Department of Revenue  
MarineA@sctax.org

Columbia, South Carolina  
June 9, 2014

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

Southeast Cinema Entertainment, Inc.	)	
	)	
Petitioner,	)	<b>DOCKET NO. 12-ALJ-17-0390-CC</b>
	)	
v.	)	<b>RESPONDENT'S MEMORANDUM</b>
	)	<b>IN OPPOSITION TO PETITIONER'S</b>
	)	<b>MOTION FOR SUMMARY</b>
	)	<b>JUDGMENT AND CROSS-MOTION</b>
South Carolina Department of Revenue,	)	<b>FOR THE SAME</b>
	)	
Respondent.	)	
_____	)	

**TO: The Honorable Shirley C. Robinson, Presiding Judge:**

PLEASE TAKE NOTICE that the undersigned, as attorneys for the Respondent, South Carolina Department of Revenue (Department), will not sooner than ten days from the date of service of this Motion, or as soon thereafter as counsel may be heard, move for an order for summary judgment pursuant to Rule 56(c), SCRPC. It is the position of the Department that there is no genuine issue of material fact in dispute on the issues delineated below and the Department is entitled to judgment as a matter of law.

**Background**

This action was brought by Petitioner to challenge the Department's denial of a refund request for sales taxes paid on the purchase of cinema equipment from the IMAX© Corporation (IMAX). The Petitioner owns and operates a movie theatre business located in Charleston, South Carolina. On or about September 30, 2008, the Petitioner entered into a purchasing agreement (Agreement) to purchase an IMAX theater system. The system, as defined by the Agreement, included the projection system, sound

system, the screen, and a 3D glasses cleaning machine. The initial purchase price for this system was \$1,150,000.00. The Agreement also provided that additional monthly payments, calculated to be equal to the greater of \$40,000.00 annually or 3.5% of theater admission proceeds, and a monthly maintenance fee were to be remitted to IMAX for the duration of the ten year Agreement. The Petitioner was properly charged sales tax by IMAX, which has nexus with the State of South Carolina, on the purchase of the system and all monthly payments associated with that purchase of tangible personal property.

After obtaining an assignment of rights from IMAX, the Petitioner filed a timely refund claim on June 6, 2011. The Petitioner submitted a ST-14 form for refund request, totaling \$71,000.57. The Department denied that request by letter dated September 2, 2011, and the taxpayer timely protested this denial on November 3, 2011. The Department Determination upholding the denial was issued on August 2, 2012, maintaining that the full purchase price of the system, regardless of the method of billing was subject to South Carolina sales tax. Based upon the relevant law and regulations, it was determined that only a question of law exists and these motions followed.

#### **Legal Analysis**

Rule 56(c), SCRPC, provides that a trial court may grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” See Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009).

When construing a statute, the cardinal rule is to ascertain the intent of the Legislature. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579

S.E.2d 334, 336 (Ct. App. 2003). “All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” Id. at 23, 579 S.E.2d at 336. The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Furthermore, “[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” Brown v. S.C. Dep't of Health & Env'tl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Dunton v. S.C. Bd. of Examin'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)); see also Nucor Steel v. S.C. Pub. Serv. Comm'n, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992) (recognizing that where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason). Administrative interpretations of statutes by the agency charged with their administration and not expressly changed by the legislative body, are entitled to great weight. Marchant v. Hamilton, 279 S.C. 497, 500, 309 S.E.2d 781, 783 (1983). When, as in this case, the construction or administrative interpretation of a statute has been applied for a number of years and has not been changed by the Legislature, there is created a strong presumption that such interpretation or construction is correct. Ryder Truck Lines Inc. v. South Carolina Tax Comm'n, 248 S.C. 148, 149 S.E.2d 435 (1966); Etiwan Fertilizer Co. v. South Carolina Tax Comm'n, 217 S.C. 354, 60 S.E.2d 682 (1950).

I. The taxpayer is not entitled to a refund for sales taxes paid on its initial purchase price for an IMAX© theater system and additional monthly payments.

S.C. Code Ann. § 12-36-910(A) (Supp. 2011) imposes “[a] sales tax, equal to five percent of the gross proceeds of sales, is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail.”<sup>1</sup> “Retailers” are defined as every person, “selling or auctioning tangible personal property whether owned by the person or others[.]” S.C. Code Ann. § 12-36-90(1)(a) (2000). “Gross proceeds of sales” is defined as,

. . . the value proceeding or accruing from the sale, lease, or rental of tangible personal property.

(1) The term includes:

\* \* \*

(b) the proceeds from the sale of tangible personal property without any deduction for:

(i) the cost of goods sold;

(ii) the cost of materials, labor, or service;

\* \* \*

(vii) *any other expenses.*

(Emphasis added.) This statute clearly expresses the Legislature’s intent to disallow deductions for the retailer’s cost of labor and services from the gross proceeds of sales in computing sales tax liability. The “any other expenses” language encompasses any value derived from related intangibles that are ancillary to the purchase of tangible personal property.

In Meyers Arnold, Incorporated v. South Carolina Tax Commission, 285 S.C. 303, 328 S.E.2d 920, 923 (Ct. App. 1985), the court held the element of service involved

---

<sup>1</sup>“Tangible personal property” includes services and intangibles, as well as, personal property. S.C. Code Ann. § 12-36-60 (2000).

in a lay away sale was subject to tax as being part of the sale of tangible personal property. The court stated:

But for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales. For these reasons, this court holds the lay away fees are part of the gross proceeds of sales and subject to the sales tax.

Id. Accordingly, the total amount charged in conjunction with the sale or purchase of tangible personal property is subject to sales tax. This is further supported by 27 S.C. Code Ann. Regs. 117-313.1 (Supp. 2011) which states:

*No method of billing* will serve to exempt from the measure of the tax the cost of materials used, labor or service cost, interest charges, losses or any other expenses whatsoever that are part of the manufacturing, compounding, processing or fabrication of tangible personal property for sale or resale.

(Emphasis added). Regardless of what the Petitioner claims, the gross proceeds of sale for tangible personal property are the full amount of the purchase, regardless of billing or the intangibles related to the sale. In this case, the Petitioner purchased a large format digital theater system from the IMAX, which included the projection system, the sound system, the screen, and the 3-D glasses cleaning machine. The terms of the Agreement are an initial purchase price of \$1,150,000.00 with an additional annual minimum payment of the greater of \$40,000.00 or 3.5% of admission proceeds, and an annual \$40,000.00 maintenance fee. The additional minimum payment is nothing more than a financing arrangement to lessen the initial purchase price of the theatre system.

The Petitioner argues that the true object of the transaction is the use of IMAX intangibles, and thus sales tax should only apply to the “actual value” (as determined by

the Petitioner) of the system. After conducting its own “market research,” the Petitioner determined that the system components (if they were purchased from other sources) could have been purchased for \$170,694.33, and only that amount should be subject to sales tax. This argument is without merit. The example posed by the Department in its Determination involved Michael Jordan’s basketball shoes. This example was merely used to illustrate the fact that a purchaser pays sales tax upon the full purchase price of an item, and not what he believes it to be worth. The Petitioner points out, however, that the personal pleasure (an intangible) of a single person wearing a recognizable brand such as Jordan’s, is not analogous to the intangible of associating one’s theatre business with IMAX – ostensibly because wearing shoes is not akin to running a business. However, the logic remains irrefutable. The Petitioner’s decision to purchase an overly expensive hardware system in order to have access to the brand, does not present an opportunity to redefine the definition of “gross proceeds.”

Another example may help to illustrate this proposition. An Apple computer, far more expensive than other Windows based products, is nothing more than a collection of processors and microchips that could be assembled for far less than the cost of the Apple at retail. Yet with that purchase, a person gains access to thousands of applications, the Apple operating system, and every other aspect of the Apple brand that comes from using its proprietary products. If a business happens to make that purchase of the computer, i.e. an internet café, the business does not get to deduct an artificial amount from the gross proceeds of the transaction for being able to incorporate the Apple brand as a part of his store. Like Apple computers, simply because IMAX is a more costly theatre system because of brand recognition, the application of South Carolina sales tax laws should

remain unaltered. The full gross proceeds of sale from the purchase of tangible personal property, regardless of billing and without any deductions for “any other expenses” are subject to sales tax. This will be further explained below.

**A. The initial purchase price of the system is subject to sales tax.**

This case incontrovertibly begins and ends with the Agreement between the Petitioner and IMAX. The IMAX Corporation’s self-described business is “developing, selling and leasing large format projection systems, and providing certain related services.” See Agreement p. 1, attached as “Exhibit A”. The payment of \$1,150,000 is **specifically defined** by the Agreement as a payment for the “System.” Id. at 6. The “System” is defined in the Agreement as “the Projection System, the Sound System, the Screen, and the Glass Cleaning Machine,” all of which are tangible personal property. Id. at 4. Those two immutable facts alone, expressly set out by the clear language of the Agreement, should close the door on whether or not the initial purchase price is to be considered gross proceeds from the sale of tangible personal property.

However, if one looks further in the Agreement, the IMAX intangibles claimed by the Petitioner to be the true object are clearly granted only by virtue of purchasing the System. First, the limited “Trademark License” is conditionally granted to the Petitioner “solely in connection with the naming, marketing, promotion and operation of the Theatre utilizing **the System.**” Id. at 13 (emphasis added). The Agreement goes on to limit all uses of the IMAX name, constructing signs, using IMAX formatted content, software, advertising materials, et cetera to requiring prior approval from the IMAX corporation. Id. at 13-16. Finally (and possibly most dispositive), Schedule “H” attached to the Agreement expressly grants an exclusivity right to the Petitioner for separate and

distinct consideration, quashing the idea that any amount of the valuable consideration paid by the Petitioner should be deemed for intangibles,. That portion of the Agreement unequivocally states that the “exclusive rights granted in this Schedule H are conditional upon Client spending US \$50,000 on annual advertising and promotion for the Theatre.” This additional 50K is valuable consideration, and point blank proof that the purchase price and additional monthly payments are not intended to be for anything other than the true object of the transaction: the System.

Clearly, the association with the IMAX brand by the Petitioner is limited by, related to, and inextricably connected to the purchase of the System. To reduce it to the most practical sense, without the hardware, there would be no IMAX movies to watch. This echoes the Myers Arnold “but for” test, as the true object of the transaction is the ability to show IMAX movies at the Petitioner’s theatre. Without the purchase of this tangible personal property – the System – that true object would be unattainable. Furthermore, this Court has unequivocally held that S.C. Code Ann. 12-36-90 “makes clear that the tax base must include the entire value of the sale and cannot be reduced by demarcating discrete aspects of the sale.” See Tronco’s Catering Inc., v. South Carolina Department of Revenue, No. 09-ALJ-17-0089-CC2010, WL 5781622 (April 12, 2010).

**B. The additional monthly payments for the system are subject to sales tax.**

The taxpayer then argues that the additional annual payment of the greater of \$40,000.00 or 3.5% of admissions proceeds should not be subject to sales tax, contending that they should be characterized as “box office fees” and exempt from sales tax pursuant to S.C. Code Ann § 12-36-2120(35) (2000). The Petitioner is mistaken yet again. Subsection (35) only specifically exempts the sale or rent of motion picture film to

theaters. The Petitioner's purchase of the System, which is paid for with an initial purchase price and subsequent monthly payments does not include film. The Agreement states with undeniable clarity that the purchase or rental of IMAX film is a separate transaction:

8.04 Film Programming

Client shall exhibit all IMAX Approved Content commencing from the earliest date any such content is released for exhibition at the Theatre **provided that such content is offered to Client on commercially reasonable terms generally found in the industry.**

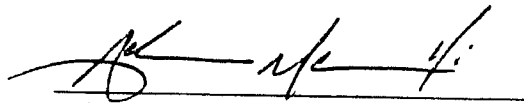
Agreement at 14 (emphasis added). The Petitioner's attempts to mischaracterize the "additional monthly payments" as anything but financing the cost of the System are unsuccessful, and no exemption from sales tax exists in Title 12 for such a payment. Furthermore, the additional annual payment is part of the gross proceeds of sale, and "no method of billing" will exempt such payments from the imposition of sales tax. See Regulation 117-313.1.

**Conclusion**

In summary, the Agreement between the Petitioner and IMAX for the purchase of the system should not be disregarded in order for the Petitioner's attempts to artificially dissect the gross proceeds of sale. That Agreement defines the specific purpose of the purchase price, relates the associated use of the IMAX brand to the purchase of the system consistently throughout, and even assigns separate valuable consideration for part of the associated intangibles. As such, South Carolina law imposes a sales tax upon the full gross proceeds of a sale of tangible personal property, and the refund claim sought by the Petitioner was correctly denied.

THEREFORE, by the undersigned counsel as attorneys for the Respondent, the Department respectfully requests that this Court deny the Petitioner's Motion for Summary Judgment and grant the Department's Motion for Summary Judgment as it is entitled to judgment as a matter of law pursuant to Rule 56(c), SCRPC.

Respectfully submitted,



Adam N. Marinelli (Bar No. 79031)

Counsel for Litigation

Milton G. Kimpson (Bar No. 7917)

Chief of Litigation

PO Box 12265

Columbia, SC 29211

803-898-5153 (Telephone)

803-898-5147 (Fax)

Attorneys for the Department of Revenue

[MarineA@sctax.org](mailto:MarineA@sctax.org)

[CourtOrders@sctax.org](mailto:CourtOrders@sctax.org)

Columbia, South Carolina  
October 3, 2013

# **Exhibit A**

# Signed Contract

## AGREEMENT FOR THE PURCHASE AND SALE AND MAINTENANCE OF IMAX® DIGITAL MPX PROJECTION SYSTEM AND TRADEMARK LICENSE

BETWEEN

IMAX CORPORATION

AND

SOUTHEAST CINEMA ENTERTAINMENT INC.

SEPTEMBER 30, 2008

### Payments

	<u>Due</u>	
360,000. <sup>00</sup>	Signing	Pd 10-3-08 Wire Transfer
670,000. <sup>00</sup>	6-1-2009	Pd 6-4-09 # 1142
120,000. <sup>00</sup>	7-1-2009	Pd 9/23/09 # 07737394
Total Paid \$ 1,150,000. <sup>00</sup>		

mas MP

**AGREEMENT FOR THE PURCHASE AND SALE AND MAINTENANCE OF IMAX®  
DIGITAL MPX PROJECTION SYSTEM AND TRADEMARK LICENSE**

This Agreement dated as of this 30<sup>th</sup> day of September, 2008 is made

**BETWEEN:**

**IMAX CORPORATION,**  
a corporation incorporated pursuant to the laws of Canada (hereinafter "IMAX")

**AND**

**SOUTHEAST CINEMA ENTERTAINMENT INC.**  
a corporation incorporated pursuant to the laws of South Carolina (hereinafter "Client")

**WHEREAS** IMAX is in the business of developing, selling and leasing large format projection systems and providing certain related services;

**AND WHEREAS** Client intends to develop and operate a large format digital theatre to be located in Charleston, South Carolina, and therefore also desires to purchase a large format digital projection system from IMAX to be used in such theatre;

**AND WHEREAS** IMAX and Client wish to enter into this agreement to set out the terms and conditions upon which IMAX shall (i) sell to Client a large format digital projection system and provide certain related services, (ii) provide maintenance services for a large format digital projection system, and (iii) license to Client certain IMAX trademarks;

**NOW THEREFORE THIS AGREEMENT WITNESSES** that in consideration of the premises, mutual covenants and agreements contained herein and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties hereby agree as follows:

**ARTICLE ONE – SUMMARY OF KEY TERMS**

**1.01 SUMMARY OF KEY TERMS**

The following is a summary of the key terms for this Agreement, which terms and conditions are more particularly set out in detail in this Agreement:

<b>TYPE OF SYSTEM</b>	<b>DIGITAL MPX</b>
<b>TERM OF AGREEMENT</b>	ten (10) years, plus three (3) potential five (5) year renewals, subject to Section 3.03
<b>SHIPMENT DATE</b>	On or before June 1, 2009
<b>OPENING DATE</b>	On or before July 1, 2009
<b>PURCHASE PRICE</b>	US\$1,150,000
<b>MINIMUM PAYMENT</b>	US\$40,000, per annum, as adjusted

MBS

CP

<b>ANNUAL MAINTENANCE FEE</b>	<b>US\$40,000, per annum, as adjusted</b>
-------------------------------	---

In the event of a conflict between the terms set out above in this Section 1.01 and other provisions of this Agreement, the other provisions of this Agreement shall prevail and govern.

## **ARTICLE TWO - DEFINITIONS, INTERPRETATION AND SCHEDULES**

### **2.01 DEFINITIONS**

In this Agreement, and the Schedules attached hereto, the following capitalized terms and expressions shall have the following meanings:

"Additional Payment" has the meaning ascribed thereto in Subsection 4.02(a) hereof;

"Agreement" means this agreement, the schedules attached hereto and incorporated herewith, and any duly executed amendments hereto;

"Alternative Content Projector Mode" means a setting of the System reflective of a standard digital theatre, including single-projector head playback, non-enhanced video and audio and modified frequency response;

"Annual Maintenance Fee" has the meaning ascribed thereto in Subsection 6.01(b);

"Business Day" means any Monday to Friday from 9:00 a.m. to 5:00 p.m., excluding all statutory holidays in the Province of Ontario, Canada and in North Carolina;

"Certificate of Acceptance" means a certificate substantially in the form attached as Schedule "G" hereto, signed by the parties whereby IMAX certifies and Client accepts that the installation and run-in testing of the System and training of personnel as operators of the System has been completed in accordance with the terms set out in Schedule "A";

"Change of Control" has the meaning ascribed thereto in Section 18.03 hereof;

"Competitor" means a company or organization in direct competition with IMAX in the cinema exhibition industry;


"Complex" means the multiplex located at the Citadel Mall, 2072 Sam Rittenberg Blvd., Charleston, South Carolina, 29407-4616;

"Confidential Information" has the meaning ascribed thereto in Article 15 hereof;

"Consumables" means materials or components which are depleted or require periodic replacement through normal use of the System, including but not limited to lamps, glasses cleaning fluids, Glasses, screen sheet, air filters, lens tissues and lens cleaner;

"Date of Acceptance" means the earlier of: (a) the date on which the Certificate of Acceptance is signed by the parties; and (b) the Opening Date;

"Date of Notice" has the meaning ascribed thereto in Subsection 13.01(a)(iii) hereof;

NBS 

- "Differentiation Steps" has the meaning ascribed thereto in Subsection 8.05(iii) hereof;
- "Emergency Fee" has the meaning ascribed thereto in Subsection 6.01(c) hereof;
- "Force Majeure Event" has the meaning ascribed thereto in Section 18.07 hereof;
- "Glasses" means IMAX® 3D polarized viewing glasses as more particularly described in Schedule "C" attached hereto;
- "Glasses Cleaning Machine" means the glasses cleaning machine as more particularly described in Schedule "A" attached hereto;
- "Hollywood Films" means any content distributed by IMAX or a major Hollywood studio, which content has a running time in excess of seventy-five (75) minutes;
- "Identification" has the meaning ascribed thereto in Section 8.10 hereof;
- "IMAX Approved Content" means any content (i) converted or enhanced using the IMAX DMR® process and/or endorsed by IMAX as IMAX DMR® content, or (ii) that IMAX has expressly approved for exhibition in the Theatre. Content not meeting (i) or (ii) above shall be deemed "non-IMAX Approved Content";
- "IMAX Software" means any software resident in the System developed by IMAX or its subsidiaries;
- "Index" means the consumer price index published by the US Department of Labor known as All Urban Consumers (US city average - all items) which can be found at <http://ftp.bls.gov/pub/special.requests/cpi/cpiasi.txt>;
- "Index Base Date" means December 31, 2008;
- "Initial Term" has the meaning ascribed thereto in Section 3.02 hereof;
- "Intellectual Property" means any and all (a) copyrights and other rights associated with works of authorship (b) rights in and relating to the protection of trade secrets and confidential information, (c) patents and other industrial property rights, and (d) other intellectual and industrial property and proprietary rights relating to intangible property that are analogous to any of the foregoing rights;
- "Letter of Credit" has the meaning ascribed thereto in Subsection 4.01(c) hereof;
- "Maintenance Program" has the meaning ascribed thereto in Subsection 6.01(a) hereof;
- "Materials" has the meaning ascribed thereto in Section 8.06 hereof;
- "Minimum Payment" means US\$40,000 per annum, as adjusted in accordance with Section 4.03 hereof;
- "Net Theatre Admissions" means amounts received by Client for admission to the Theatre after deducting amusement or entertainment taxes, admissions or gross receipts taxes, value added taxes, sales taxes or other similar impositions levied on the admissions price by and actually paid by Client to local, provincial, state or federal authorities. Client may provide up to two percent (2%) of total Theatre admissions in any year of the Term free of charge to promote the Theatre, which amounts shall be excluded from Net Theatre Admissions. Any free admissions exceeding such two percent (2%) of total

admissions shall be deemed to be fully paid admissions for the calculation of Net Theatre Admissions. If Client offers its patrons combination ticket pricing options for admission to various attractions, including the Theatre, the amount attributable to Net Theatre Admissions will be determined by multiplying the combination ticket price by a fraction, the numerator of which shall be the regular price for admission to the Theatre, and the denominator of which shall be the sum of the regular prices for admission to each of the individual attractions which are included in the combination ticket;

"Opening Date" means the earlier of (i) on or before the opening date set out in Section 1.01; and (ii) the date on which the Theatre is opened to the public;

"Percentage Payment" means three percent (3%) of Net Theatre Admissions for Hollywood Films exhibited at the Theatre plus five percent (5%) of Net Theatre Admissions for all other content exhibited in the Theatre;

"Prime Rate" means the prime rate as published by the Wall Street Journal;

"Projection System" means the IMAX® DIGITAL MPX projection system as more particularly described in Schedule "A" hereto;

"Purchase Price" has the meaning ascribed thereto in Subsection 4.01(a) hereof;

"Remote Access" has the meaning ascribed thereto in Subsection 5.02(b) hereof;

"Renewal Terms" has the meaning ascribed thereto in Section 3.03 hereof;

"Repair Period" has the meaning ascribed thereto in Section 12.02 hereof;

"Screen" means a high gain, coated, non-depolarizing, perforated, vinyl screen sheet with self-supporting frame structure as more particularly described in Schedule "A" hereto;

"Senior Operator" has the meaning ascribed thereto in Subsection 6.02(c) hereof;

"Shipment Date" means the date on which IMAX delivers the System as contemplated by Subsection 5.01(a) hereof, which date shall be on or before the date set out in Section 1.01 or such other date as agreed between IMAX and Client in writing;

"Signage" has the meaning ascribed thereto in Section 8.07 hereof;

"Software" means, collectively, the IMAX Software and the Third Party Software;

"Sound System" means an IMAX® DIGITAL MPX theatre sound system as more particularly described in Schedule "A" hereto;

"Supervision Fee" has the meaning ascribed thereto in Subsection 5.02(e) hereof;

"Supervision Period" has the meaning ascribed thereto in Subsection 5.02(e) hereof;

"System" means, collectively, the Projection System, the Sound System, the Screen, and the Glasses Cleaning Machine;

"Term" means, collectively, the Initial Term and the Renewal Terms as applicable;

"Termination Period" has the meaning ascribed thereto in Section 12.02 hereof;

"Theatre" means the IMAX® theatre auditorium in the Complex utilizing the System;

"Third Party Software" means any software resident in the System developed by a party other than IMAX or its subsidiaries;

"Trademark" means collectively, the "IMAX®" and "IMAX® 3D" trademarks and such other trademarks as IMAX may license to Client from time to time;

"Upgrade Price" has the meaning ascribed thereto in Section 3.03 hereof; and

"Year One" has the meaning ascribed thereto in Subsection 6.01(c) hereof.

## 2.02 HEADINGS

The division of this Agreement into Articles and the insertion of headings are for convenience of reference only and do not affect the construction or interpretation of this Agreement. The terms "this Agreement", "hereof", "hereunder" and similar expressions refer to this Agreement and not to any particular Article, Section or other portion hereof and include any agreement supplemental hereto. Unless something in the subject matter or context is inconsistent therewith, references herein to Articles and Sections are to Articles and Sections of this Agreement.


## 2.03 EXTENDED MEANINGS

In this Agreement words importing the singular number include the plural and vice versa, words importing any gender include all genders, and words importing persons include individuals, partnerships, associations, trusts, companies, corporations and unincorporated organizations. All shipment terms shall have the meanings assigned to them under Incoterms 2000, as set out by the International Chamber of Commerce, and which can be found at [http://www.iccwbo.org/index\\_incoterms.asp](http://www.iccwbo.org/index_incoterms.asp).

## 2.04 SCHEDULES

The following are the Schedules attached to and incorporated into this Agreement, and deemed to be part hereof:

Schedule No.	Description of Schedule
A	Specifications of System, Installation Testing and Training Services
B	Electrical, Mechanical and Acoustical Requirements
C	Specification for IMAX® 3D Polarized Viewing Glasses
D	Form of Box Office Report
E	Technical Qualifications
F	Trademark Usage Guidelines
G	Certificate of Acceptance
H	Exclusive Rights

MBS 

### ARTICLE THREE - SALE AND TERM

#### 3.01 SALE

Subject to the terms and conditions contained herein, IMAX hereby sells to Client and Client hereby purchases from IMAX the System.

#### 3.02 INITIAL TERM

The initial term of this Agreement shall commence on the date hereof and end on the tenth (10<sup>th</sup>) anniversary of the Date of Acceptance for the System (the "Initial Term").

#### 3.03 RENEWAL

If Client is not in default of any of its material obligations under this Agreement, and this Agreement has not been terminated in accordance with the provisions of this Agreement, the Client may request to renew this Agreement for three (3) successive terms of five (5) years each (the "First Renewal Term" and "Second Renewal Term" and "Third Renewal Term", respectively and collectively called the "Renewal Terms"). The Renewal Terms shall be subject to the following provisions:

- (i) The Renewal Terms shall be on the same terms and conditions as are contained herein except for payment of the Purchase Price and further renewal rights, which shall not be applicable;
- (ii) On or before the date four (4) months prior to the end of the Initial Term or First Renewal Term or Second Renewal Term, as applicable, IMAX shall notify Client of the upcoming termination of the Initial Term or First Renewal Term or Second Renewal Term, as applicable, and shall provide an evaluation of the System to provide Client with a written price quotation (the "Upgrade Price") of the work required to properly refurbish and/or upgrade the System to then-applicable standards of IMAX, which Upgrade Price shall be reasonable and shall not exceed the amount charged for similar upgrades to other similar clients of IMAX; and
- (iii) If Client desires to renew for the First Renewal Term or Second Renewal Term or Third Renewal Term as applicable, Client shall provide written notice of Client's election to have IMAX proceed with any required refurbishment and/or upgrade in accordance with the Upgrade Price by no later than the date three (3) months prior to the end of the Initial Term or First Renewal Term or Second Renewal Term as applicable.

### ARTICLE FOUR - PAYMENT

#### 4.01 PURCHASE PRICE

##### (a) Purchase Price

Client shall pay US\$1,150,000 as purchase price for the System (the "Purchase Price"), which shall be payable as IMAX directs in the City of Toronto, Ontario, Canada, in installments as follows:

- | <u>PAYMENTS</u> | <u>DATE PAYABLE</u>                 |
|-----------------|-------------------------------------|
| (i) US\$360,000 | On the execution of this Agreement; |

- (ii) US\$670,000 Upon the earlier of the Shipment Date and June 1, 2009; and  
 (iii) US\$120,000 Upon the earlier of the Date of Acceptance and July 1, 2009.

(b) Payments

Payment (i) in Subsection 4.01(a) above and any other payments to be made pursuant to this Agreement are to be deposited by way of wire transfer to the benefit of IMAX Corporation, as follows (or as otherwise directed by IMAX from time to time):

ACCOUNT #: 2477-4700-073

BENEFICIARY'S BANK: BANK OF MONTREAL  
 INT'L BANKING H.O. MONTREAL  
 S.W.I.F.T. CODE: BOFMCAM2  
 ACCOUNT NUMBER 2000192009878

DESTINATION BANK: WACHOVIA BANK N.A.  
 NEW YORK  
 S.W.I.F.T. CODE: FNBPU33NNYC  
 ABA # 026005092

(c) Letter of Credit

Payments (ii) and (iii) in Subsection 4.01(a) above are to be paid by draw down on an irrevocable letter of credit in a form and drawn on a bank reasonably acceptable to IMAX ("Letter of Credit") upon presentation by IMAX of a commercial invoice for the applicable amount on the applicable date. The Letter of Credit shall be provided by no later than sixty (60) days prior to Shipment Date and shall expire no earlier than thirty (30) days following the date that installment (iv) of the Purchase Price is payable.

**4.02 ADDITIONAL PAYMENT**

(a) Additional Payment

Client shall pay to IMAX commencing on the Opening Date, in arrears on a monthly basis, throughout each year of the Term, an amount (the "Additional Payment") calculated as follows:

A MINUS B

where:

A—the GREATER of: (i) the cumulative Percentage Payment during the applicable year of the Term to the end of such month, and (ii) the cumulative Minimum Payment payable during the applicable year of the Term to the end of such month; and

B—the GREATER of: (i) the cumulative Percentage Payment payable during the applicable year of the Term to the end of the previous month, and (ii) the cumulative Minimum Payment payable during the applicable year of the Term to the end of the previous month.

(b) Records

Client shall keep complete and accurate attendance records of all persons entering the Theatre and other records required to calculate the Additional Payment. Admission to the Theatre shall be by consecutively

numbered tickets showing the price of admission and all applicable taxes. Client shall deliver to IMAX, together with the Additional Payment for each month, a certified schedule substantially in the form attached hereto as Schedule "D", signed by its authorized representatives certifying the calculation of Net Theatre Admissions for the preceding month. Furthermore, Client shall provide IMAX paid attendance figures and gross revenue for the Theatre on a weekly basis if requested by IMAX. Client shall provide such information by facsimile transmission, email, or by telephone, to an authorized IMAX employee. On reasonable notice (which shall be not less than forty-eight (48) hours), Client shall permit IMAX's accountants or representatives full access during normal business hours to such records, and IMAX's representatives shall have the right at any time to check the operation of any devices used to ascertain the number of admissions to the Theatre. Client shall also provide to IMAX monthly reports indicating all cinematic uses and exhibitions in the Theatre.

#### 4.83 INDEX

The Minimum Payment, Annual Maintenance Fee and Emergency Fee shall, on each anniversary of the Opening Date, be adjusted to take into account any increase in the Index, from the Index Base Date to the end of the month prior to the Opening Date or the anniversary of the Opening Date. In the event the Index is not available on such anniversary date, monthly installments thereafter shall be based on the amount payable for the previous month and shall be adjusted and reconciled when the Index is published.

#### 4.84 TAXES

Income taxes levied on IMAX in connection with this Agreement by any government or tax authority of Canada or the United States shall be borne by IMAX. Except for income taxes, duties, customs and similar charges levied on or in connection with the sale of goods, limitation withholding taxes which may be imposed by any government or tax authority on payments otherwise due to IMAX, taxes levied on the System Purchase Price, the Additional Payment, the Annual Maintenance Fee and the Emergency Fee made by Client to IMAX hereunder, imposed in both cases whether the same be assessed to Client or to IMAX, provided Client make such payments, Client shall reimburse IMAX on demand

*What index?*  
*there are a lot of Index's.*

Together with Client's monthly certification of Net Theatre Admissions, Client will also provide IMAX with certification of compliance with all applicable state, provincial or federal sales, use, franchise or other taxes payable in respect of all payments made pursuant to this Agreement. Provided further, at any time upon IMAX's request, Client will promptly provide IMAX with certification of compliance with all applicable state, provincial or federal sales, use, franchise or other taxes payable in respect of all payments made pursuant to this Agreement. If Client is exempt from the payment of such taxes, Client's certification of compliance must state the basis for such exemption, and where applicable, must include Client's tax exempt number.

#### 4.85 NO DEDUCTION OR SET-OFF

Except as expressly otherwise provided in this Agreement, the Client shall pay the Purchase Price, Additional Payment, the Annual Maintenance Fee and any other amounts required to be paid under this Agreement without any deduction, abatement or set-off.

#### 4.86 OVERDUE PAYMENTS

Any overdue payment hereunder, including without limitation payments of the Purchase Price, Additional Payment and the Annual Maintenance Fee shall accrue interest at Prime Rate, as stipulated two (2) days

*MSJ*

prior to the relevant payment, plus two percent (2%) per annum calculated monthly from the date it is due until the date of payment.

## ARTICLE FIVE – SHIPMENT AND INSTALLATION

### 5.01 SHIPMENT

#### (a) Shipment

On the Shipment Date, IMAX shall deliver the Projection System, Sound System and Glasses Cleaning Machine to the Client Ex Works, IMAX's place of business, Mississauga, Ontario, Canada, and the Screen, Ex Works, MDI in Montreal, Quebec, Canada, or Harkness Hall, Virginia, U.S.A., as applicable. On the Shipment Date, Client shall provide the following documents to IMAX:

- (i) certificates evidencing insurance, as required pursuant to Article 11; and
- (ii) a certificate of compliance with sales and use and other taxes, as required pursuant to Section 4.04.

Client will forthwith deliver the System to the customs clearance depot. After customs clearance of the System, Client shall deliver the System to the Theatre as soon as it is required for installation in the Theatre. All costs of handling, and transportation from the delivery docks at the location(s) specified in this Subsection 5.01(a) to the Theatre, and all charges for insurance while the System is in transit to the Theatre shall be the responsibility of the Client. Client may request that IMAX arrange the foregoing shipping and insurance on behalf of Client. IMAX will not charge a fee for any such services provided on behalf of Client but all reasonable costs associated therewith shall be at the expense of Client.

#### (b) Shipping Requirements

IMAX shall properly package the System. Other than as stipulated elsewhere in this Agreement, the packaging of the System provided by IMAX shall follow standard protective measures, using the type of packaging suitable for long-distance ocean and in-bound transport, and that ensure safeguards against the effects of rain, sun, moisture, rust and rough handling have been taken.

#### (c) Storage

In the event that Client is not ready to accept delivery of the System upon Shipment Date, IMAX may elect to cause the System to be shipped to a suitable storage facility, with shipping and storage at Client's expense, in which case IMAX shall be deemed to have satisfied its delivery obligations hereunder. If Client should elect to make storage arrangements, IMAX shall provide Client with details and requirements for a suitable storage facility (which such requirements include without limitation that the storage environment be secure, as well as temperature and humidity controlled), and Client shall pay all related costs, including without limitation transportation to and from the storage facility, insurance, and storage costs.

### 5.02 INSTALLATION

#### (a) Preparation of Theatre

Client, at its cost, shall provide a substantially complete Theatre ready for the installation of the System, in accordance with all of the terms and conditions contained in Schedules "A" and "B" attached hereto

MBS 

and in accordance with any applicable local building codes or requirements, no later than thirty (30) days prior to Opening Date. IMAX shall not be required to commence the supervision of the installation of the System until Client provides a substantially complete Theatre, in accordance with Schedules "A" and "B", ready for System installation. Client's breach or default of this provision shall be deemed a material breach of this Agreement.

(b) Remote Access to Projection System

Client's obligations, as set out in Schedule "B" attached hereto, shall include providing a permanent high speed internet connection with a static address and firewall permanently connected to the Projection System (the "Remote Access"). The Remote Access shall be available within five (5) days of the installation of the System. Connection for Remote Access shall be throughout the Term, 24 hours a day, 7 days a week. Remote Access may be either a fixed Internet IP. address or a Virtual Private Network (VPN) access.

(c) Cost of Installation

When the Theatre is substantially complete and ready for the installation, IMAX shall, at its expense, supervise the installation of the System, complete run-in testing of the System and provide training services in the Theatre for a period of fifteen (15) days ("Supervision Period"), with such installation to be completed in accordance with terms set out in Schedule "A" attached hereto. In the event that IMAX is required to supervise the installation beyond the Supervision Period (provided that the need for an extension of the Supervision Period is not caused by IMAX), such further supervision services will be provided to Client at a cost of US\$1,200 per day plus travel and living expenses associated with the extended duration of the Supervision Period ("Supervision Fee"). Client shall, at its expense, be required to supply materials, equipment and personnel for the proper installation of the System as directed by IMAX. All installation costs, excluding IMAX's supervision for the Supervision Period, shall be paid by Client. Client shall have at least one (1) English-speaking representative at the Theatre during the entire installation process. In the event that IMAX is required to hire translators to assist in the installation process, all such costs shall be borne by Client and Client shall immediately reimburse IMAX. The run-in testing of the System in the Theatre and the training of Client personnel as operators of the System shall be completed by IMAX as provided in Schedule "A" attached hereto. Upon completion of the installation, Client shall forthwith execute and deliver to IMAX a Certificate of Acceptance substantially in the form attached hereto as Schedule "G".

(d) Early Commencement

In the event that Client requests that IMAX begin the supervision of the installation process prior to the Theatre being ready for installation, IMAX may, in its sole discretion, begin to supervise the installation, provided however that if any repair is required that can be directly attributed to the early installation, then the costs of such repairs shall be borne by Client and will be specifically excluded from the costs of maintenance as provided for herein.

**ARTICLE SIX - MAINTENANCE****6.01 MAINTENANCE PROGRAM****(a) Applicability of Maintenance Program**

IMAX shall offer and provide a maintenance program with respect to the System (the "Maintenance Program").

**(b) Maintenance Fee**

The annual maintenance fee for the Maintenance Program shall be US\$40,000 per annum, as adjusted pursuant to Section 4.03 ("Annual Maintenance Fee") and shall be payable in advance by Client on the first day of each year of the Term. The Annual Maintenance Fee for the first year of the Term is included in the Purchase Price and accordingly, the first Annual Maintenance Fee payment shall be due and payable on the first (1<sup>st</sup>) anniversary of the Opening Date.

With respect to the System, the Maintenance Program shall include:

- (i) two (2) regularly scheduled preventative maintenance, cleaning, inspection checks and calibration of the System (specifically excluding the Screen and Consumables) in each year of the Term;
- (ii) emergency visits during the Term, as set forth in Subsection 6.01(c) below; and
- (iii) parts programs during the Term, as set forth in Subsection 6.01(d) below.


**(c) Emergency Service Visits**

For a period of one (1) year from the Date of Acceptance ("Year One"), IMAX, its agents or representatives will provide any emergency visits required to maintain System equipment performance at no additional cost to Client.

Commencing on the expiration of Year One and continuing until the expiration of the Term, any emergency visits requested or required by Client will be provided by IMAX at a cost of US\$1,000 per day (the "Emergency Fee") (also applicable to travel days) plus travel and living expenses associated with such emergency service. The Emergency Fee shall be adjusted in accordance with Section 4.03. IMAX will respond to any request by Client for emergency service within three (3) hours by telephone and within forty-eight (48) hours on site at the Theatre if necessary (subject to any travel restrictions or delays beyond the control of IMAX) after receipt of notice from Client of the requirement for emergency service. The parties agree that in all cases they shall use best efforts to resolve System problems and issues over the telephone with a Senior Operator present (as defined herein).

**(d) Parts Programs**

IMAX shall, at no additional cost to Client: (i) supply any replacement parts required for the System (specifically excluding the Screen and Consumables) with all shipping costs and any applicable customs or duties to be paid by Client, (ii) provide a 24 hour a day, 7 day a week telephone help-line to permit Client to discuss technical issues and problems with IMAX as required, and (iii) maintain a service history database with respect to the System.

MSZ 

## 6.02 GENERAL

### (a) Hardware Improvements

For improvements to the Projection System or Sound System other than those relating to the Software as specified in Section 7.02 herein, the following provisions shall apply:

- (i) IMAX Improvements: IMAX shall make at Client's request and at Client's expense any optional improvements or modifications developed by IMAX to the Projection System or Sound System on IMAX's standard terms and conditions. IMAX shall provide notice to Client of any such optional improvements or modifications indicating the terms upon which IMAX is making them available on a timely basis to permit Client to consider any such options.
- (ii) Third Party Improvements: To the extent there are any optional improvements or modifications developed to any component(s) of the Projection System or Sound System developed and manufactured by a third party that IMAX deems in its reasonable expert opinion to be desirable to enhance the Projection System or Sound System, IMAX shall provide notice to Client of any such optional improvements or modifications indicating the terms upon which IMAX is making them available on a timely basis to permit Client to consider any such options.

### (b) Damage to System

Any damage to the System resulting from the misuse or misoperation of the System, work performed on the System by third parties, power surges, wilful neglect, negligence or deliberate damage by anyone other than IMAX or IMAX's employees, agents or representatives shall be repaired promptly by IMAX at the expense of Client. No such damage to the System shall be repaired by anyone other than IMAX with IMAX's prior written consent. IMAX shall be responsible for any damage to the System resulting directly from the negligence or deliberate acts of IMAX or IMAX's employees, agents or representatives.

### (c) Senior Operator

Client shall designate at least one (1) senior operator ("Senior Operator") from members of Client's staff. The Senior Operator shall meet the basic qualifications as set forth in Schedule "E" to this Agreement. The responsibilities for the Senior Operator shall include (i) acting as the main contact person for IMAX on operational issues, (ii) disseminating information provided by IMAX to appropriate Theatre personnel, (iii) the training of new Theatre personnel with respect to the operation of the System (for clarity, the Senior Operator shall at all times be required to train, at Client's expense, its replacement in accordance with the standards set forth in Schedule "E"), (iv) communicating System issues to IMAX, (v) performing System tests and diagnostics as requested by IMAX, and (vi) following procedures as provided during initial training provided by IMAX. The Senior Operator shall be present during the installation of the System in the Theatre and shall be available for no less than twenty-four (24) hours of training over a three (3) day period during the installation process. Upon successful completion of the training program noted above, IMAX shall provide the Senior Operator with a certificate of completion.

MBS 

**ARTICLE SEVEN - LICENSE GRANT****7.01 TRADEMARK LICENSE**

For the term of this Agreement, and subject to the other terms, conditions, and restrictions in this Agreement, IMAX hereby grants to the Client the limited, non-exclusive, non-transferable, non-sublicensable license to use the Trademark solely in connection with the naming, marketing, promotion and operation of the Theatre utilizing the System.

**7.02 SYSTEM LICENSE****(a) Grant**

For the term of this Agreement, and subject to the other terms, conditions, and restrictions in this Agreement, IMAX hereby grants to the Client the limited, non-transferable, non-exclusive, non-sublicensable license to use the System, the Software and any user manuals for the System solely in connection with the operation of the System in the Theatre.

**(b) IMAX Software**

IMAX will provide at no additional cost error corrections, bug fixes, patches or other similar updates or modifications to the IMAX Software in accordance with IMAX's release schedule during the Initial Term of the Agreement.

**(c) Third Party Software**


To the extent there are any optional improvements or modifications developed for Third Party Software that IMAX deems in its reasonable opinion to be desirable to enhance the System, IMAX shall provide notice to Client of any such optional improvements or modifications indicating the terms upon which IMAX is making them available on a timely basis to permit Client to consider any such options.

**(d) No Software Infringement**

Client shall not copy, modify, reverse engineer or make derivative works of the Software. Where Client is in default of its obligations contained in this Agreement, as more particularly described in Section 16.02 hereof, which default is not cured as set out therein, this license shall terminate and be of no further force or effect.

**ARTICLE EIGHT - LIMITATIONS, RESERVATIONS AND GUIDELINES****8.01 NAMING RIGHTS**

Notwithstanding the foregoing but subject to Section 8.02 hereof, the Client shall be entitled to sell to a third party the right to name the Theatre in which the IMAX System has been installed. IMAX shall have no rights to any consideration received by the Client from such third party for the purposes stated herein.

mas 

**8.02 USE OF NAME**

Client shall submit the proposed name of the Theatre to IMAX for prior approval, which name shall incorporate proper use of the Trademark. During the Term, Client shall use and display the Theatre name in a conspicuous manner in media advertising and other promotional material for the Theatre.

**8.03 COMPLIANCE**

Client agrees that any use of the Trademark will comply with established standards and specifications prescribed or approved by IMAX including the Trademark Usage Guidelines published by IMAX, attached hereto as Schedule "F", as the same may be amended from time to time. Further, during the Term, the Client covenants to comply with the trademark and branding guidelines of third parties whose trademarks IMAX requires to be included in connection with the marketing, promotion and/or operation of the Theatre utilizing the System.


**8.04 FILM PROGRAMMING**

Client shall exhibit all IMAX Approved Content commencing from the earliest date any such content is released for exhibition at the Theatre provided that such content is offered to Client on commercially reasonable terms generally found in the industry.

**8.05 STANDARDS**

Throughout the Term, Client shall continually operate the System in the Theatre and shall conform to the following standards in addition to those set forth elsewhere in this Agreement:

- (i) the quality and reputation of Client's business operations and specifically, the operation of the Theatre, shall always be maintained at a level that reflects favourably on the Trademark and does not dilute or tarnish the Trademark or the reputation of IMAX;
- (ii) Client shall not use the System at the Theatre to exhibit content (i) other than IMAX Approved Content, or (ii) other than utilizing the System in Alternative Content Projector Mode (subject to Subsection 8.05(iii)(3)). Client acknowledges that IMAX may embed metadata in the key distribution master or digital cinema package that is issued by IMAX to ensure the System is displaying IMAX Approved Content; and
- (iii) In addition, throughout the Term:
  1. Client shall use the Theatre to exhibit presentations using only the System.
  2. For all exhibitions of non-IMAX Approved Content at the Theatre, Client shall take the "Differentiation Steps" as hereinafter defined. For purposes hereof, the "Differentiation Steps" for a System means:
    - (A) utilize the System to display an IMAX DMR® branding trailer provided by IMAX;
    - (B) exhibit a trailer or other display acceptable to IMAX indicating that the ensuing presentation "is not An IMAX Experience®"; and
    - (C) not advertise or promote non-IMAX Approved Content at the Theatre as being "enhanced 35mm", "enhanced digital", "in IMAX", "on the IMAX screen" or

MBS 

any other similar statements or statements that could be reasonably construed as Client making improper use of the Trademark with respect to non-IMAX Approved Content exhibited at the Theatre.

3. In the event that any content is distributed in both the IMAX DMR® format and non-IMAX DMR® format, Client covenants and agrees that it shall not in any circumstances exhibit such content in a Theatre in any format other than the IMAX DMR® format as projected by the System. Any breach of this covenant by Client shall be a breach of this Agreement and shall entitle IMAX to immediate equitable relief, including but not limited to an injunction, to stop the breach and protect the Trademark.

- (iv) Client shall fully comply with any additional quality standards as may be set by IMAX for IMAX® theatres in its sole discretion from time to time, and as may be required of IMAX's worldwide theatre network or operators of IMAX® DIGITAL MPX systems.

### **8.06 MATERIALS**

Client must not publish or distribute marketing or promotional materials (collectively, the "Materials") which incorporates the Trademark or otherwise uses the Trademark until Client has received prior approval from IMAX as to form. Such approval may be granted or withheld as IMAX, in its sole discretion, may determine but if withheld, IMAX shall explain to Client the reasons for so doing. IMAX agrees that where Client provides such Materials to IMAX for review, IMAX will respond within ten (10) Business Days of receipt of such Materials. If IMAX fails to respond within such ten (10) Business Day period, IMAX shall be deemed to have approved such Materials. Client will cause any objections of IMAX relating to the Materials to be resolved promptly upon receipt of notice from IMAX. After the Materials have been approved pursuant to this Agreement, Client shall not materially modify the Materials other than pursuant to the Trademark Usage Guidelines or with IMAX's prior written consent.

### **8.07 SIGNAGE**

Client must not display exterior or interior signage at the Theatre (collectively, the "Signage") which incorporates the Trademark or otherwise uses the Trademark until Client has received prior approval from IMAX as to form and placement in the interior or exterior of the Theatre. Such approval may be granted or withheld as IMAX, in its sole discretion, may determine but if withheld, shall explain to Client the reasons for so doing. IMAX agrees that where Client provides examples of the Signage, IMAX will respond within ten (10) Business Days of receipt of such Signage or examples. If IMAX fails to respond within such ten (10) Business Day period, IMAX shall be deemed to have approved such Signage. Client will cause any objections of IMAX relating to the Signage to be resolved promptly upon receipt of notice from IMAX. After the Signage and the placement of the Signage have been approved pursuant to this Agreement, Client shall not materially modify the Signage or the placement of the Signage without IMAX's prior written consent. Client agrees to prominently display the Trademark in the Theatre name (i) on the exterior of the Complex, (ii) immediately outside the entrance to the Complex, and (iii) at the entrance to the Theatre. Client shall furnish to IMAX in a timely manner, material (including, if available, architect's drawings) sufficient for IMAX to confirm the location of the Signage. Client shall not use any other trademark, service mark or tradename in the name of the Theatre without IMAX's prior written consent.

### **8.08 WEBSITE**

Notwithstanding the license granted herein, Client shall not incorporate the Trademark in a website name for use on the Internet without the prior written consent of IMAX.

### **8.09 SYSTEM COMPONENTS**

Client shall not copy, modify, reverse engineer or make derivative works of the Software or the System hardware. Without the prior written consent of IMAX, Client shall not license, sublicense, lease, rent, or otherwise convey any right in the Software to any other person.

### **8.10 IDENTIFICATION**

Client shall allow IMAX to affix and place on the System additional plates, engravings, identification, intellectual property notices, trademarks and certification marks ("Identification") as it considers necessary to give notice of its rights under this Agreement and applicable laws, and Client shall not remove the Identification.

### **8.11 DESIGN**

All design details that may affect the quality of the theatrical presentation by the System, including, without limiting the generality of the foregoing, interior decoration and lighting of the Theatre, design of the screen, theatre geometry and the audience-to-screen relationship, ambient lighting reaching the screen during the show, as well as proper design of the projection room and the ancillary spaces shall be subject to the prior written approval of IMAX, which shall not be unreasonably withheld. The noise control and acoustics of the Theatre shall conform to the specifications set out in Schedule "B" of this Agreement.

### **8.12 IMAX'S EXCLUSIVE RIGHTS IN THE TRADEMARK**

Client acknowledges IMAX's rights in the Trademark and that IMAX is the owner thereof. Client shall not, at any time during or after the Term, dispute or contest itself or in concert with other parties, IMAX's right and title to the Trademark or the validity thereof or take any action that would likely adversely affect or otherwise interfere with IMAX's ownership of the Trademark. In particular, Client shall not adopt or use any trademark, service mark or trade name similar to the Trademark including, without limitation, any name or mark that consists of or includes the term "MAX". Client shall not take any action that transfers or attempts to transfer the ownership of the Trademark from IMAX to Client.

### **8.13 NOTICE OF THIRD PARTY INFRINGEMENT**

Client shall promptly report to IMAX any infringement of the Trademark, imitation of the Trademark or challenge to the Trademark of which Client becomes aware. In the event that IMAX commences any action or legal proceeding on account of any such infringement, imitation or challenge, Client shall provide all reasonable assistance (other than financial assistance) requested by IMAX in its prosecution. IMAX shall retain sole discretion as to whether or not to institute, continue or settle any action or legal proceeding. Subject to the foregoing, Client shall co-operate with IMAX in taking all actions that IMAX deems necessary or advisable to create, protect or defend IMAX's ownership of the Trademark and the goodwill associated therewith or to obtain or maintain registrations of the Trademark.

### **8.14 NO IMPAIRMENT OF IMAX INTELLECTUAL PROPERTY**

At all times during the Term and thereafter, Client shall not give assistance by way of information, technical support, financial support or in any other manner whatsoever, to third-parties which might adversely affect the validity or enforceability of IMAX's Intellectual Property. Provided further, Client shall not, nor will it encourage or assist a third party to challenge the validity or ownership of any

Intellectual Property of IMAX. Client also agrees that it will not act, or fail to act, in any way that impairs the value of the Confidential Information or Intellectual Property of IMAX.

### **8.15 UNAUTHORIZED REGISTRATION**

At all times during the Term and thereafter, the Client will not, nor will it encourage or assist a third party to register, or attempt to register any Intellectual Property residing in or embodied in the System or derived from the Confidential Information provided under this Agreement. In the event of any breach of the foregoing, the Client agrees to terminate the unauthorized registration activity, and execute and deliver, or cause to be delivered, to IMAX such assignments and other documents as IMAX may require in order to transfer to IMAX all rights to the registrations or applications involved.

### **8.16 RESERVATION OF RIGHTS**

All rights in and title to confidential information and intellectual property licensed to Client by IMAX shall remain in IMAX. Except for as explicitly stated in this Agreement, neither the execution and delivery of this Agreement, nor the furnishing of any confidential information or intellectual property by IMAX shall be construed as granting to Client (by implication, estoppel or otherwise) any license of any sort of intellectual property. All rights not specifically and expressly granted by IMAX to Client herein shall remain with, and are hereby reserved by IMAX and may be fully exploited and used by IMAX without any limitation.

## **ARTICLE NINE – REPRESENTATIONS AND WARRANTIES**

### **9.01 STATUS**

Each party hereby represents and warrants to the other party that, at the time of the execution of this Agreement, it is a legally constituted and validly existing organization, in good standing, under the laws of the jurisdiction of its constitution and with adequate power to enter into this Agreement.

### **9.02 AUTHORIZATION**

Each party hereby represents and warrants to the other party that it is duly authorized to enter into this Agreement and that this Agreement, when executed shall be a legally valid and enforceable contract, binding upon it.

## **ARTICLE TEN – FURTHER COVENANTS**

### **10.01 COVENANTS OF IMAX**

IMAX hereby covenants that:

#### **(a) System Specifications**

As of the date of the commencement of the installation of the System, the System shall conform to the specifications set out in Schedule "A" attached hereto.

MBS 

**(b) Theatre Design**

IMAX, at no additional cost to Client, will reasonably advise and consult with Client with respect to the optimal cinematic and acoustic design and construction of the Theatre.

**(c) Title**

IMAX owns, possesses and has good and marketable title to the System, free and clear of all liens, charges, claims and encumbrances of every kind whatsoever. Title to the System shall not pass from IMAX to Client until such time as IMAX has received instalment (iii) of the Purchase Price as specified in Subsection 4.01(a), at which time title and ownership shall pass to Client. Notwithstanding the above, the provisions of this Agreement related to the ongoing rights and obligations of Client and IMAX shall continue in full force and effect after title and ownership to the System has passed from IMAX to Client.

**(d) Trademark**

IMAX represents and warrants to Client that (i) all times during the Term, IMAX has or will have the right to license the Trademark as set forth in Section 7.01, and (ii) at the time of execution, IMAX is the owner of the Trademark. IMAX also hereby warrants and represents to Client that at all times during the Term IMAX shall register and maintain the Trademarks in the jurisdiction in which the Theatre is located.

**(e) System**

IMAX represents and warrants to Client that at the time of execution, Client's use of the System, including the Software, as licensed under this Agreement and as contemplated in this Agreement shall not infringe on the copyrights of any third party.

**(f) Exclusive Rights**

IMAX shall provide Client with certain exclusive rights, as set forth in Schedule "H" to this Agreement.

**10.02 COVENANTS OF CLIENT**

Client hereby covenants that:

**(a) Theatre Construction**

Not later than fifteen (15) days prior to the Date of Acceptance, Client shall complete construction of a first-class theatre that fully conforms to the IMAX specifications, including without limitation the electrical, mechanical, and acoustic specifications set out in Schedule "B" of this Agreement.

**(b) Opening Covenant**

Client hereby covenants that it shall open the Theatre to the public no later than the Opening Date.

**(c) Glasses**

Client may purchase from IMAX all Glasses to be used in the Theatre at IMAX's then prevailing prices, terms and conditions. For all orders of Glasses, Client will place its order for Glasses not later than twelve (12) weeks prior to Client's desired delivery date for such Glasses. Delivery terms for the glasses

11/25  


shall be *Ex Works*, IMAX's place of business in Mississauga, Ontario, Canada or other location mutually agreed by the parties.

It is expressly agreed by the parties that Client may procure Glasses from third party suppliers provided that such Glasses comply with the specifications set out in Schedule "C".

**(d) Third Party Equipment**

Without IMAX's prior written approval, Client shall not install, connect or in any way affix third party equipment, devices or peripheral equipment, whether externally or internally, to IMAX equipment and System components.

**(e) Movement**

Client shall use the System and the Glasses only in the Theatre and at no other location and Client shall not permit the System to be moved from the projection room in the Theatre without the prior written consent of IMAX. Client shall not use the Glasses other than in conjunction with the System.

**(f) Access**

Upon reasonable notice (which shall be not less than forty-eight (48) hours), Client shall provide IMAX with access to the Theatre, in order to verify compliance with the provisions of this Agreement and to service and inspect the System.

**(g) Demonstration**

During the Term, Client shall permit IMAX to use the Theatre in order to demonstrate the System upon reasonable notice to Client and at reasonable times, so long as such demonstration does not disrupt Client's operation of the Theatre. Client shall not be entitled to any compensation in respect of these demonstrations except for any reasonable additional expenses incurred by Client in order to comply with this Subsection 10.02(g).

**(h) Compliance with Laws**

Client shall comply with all applicable laws, statutes, ordinances, rules and regulations regarding its obligations under this Agreement including but not limited to the use and operation of the System and Theatre.

**(i) Projection System Lamps**

Client agrees that it shall replace the Projection System lamps in accordance with any relevant manufacturer's specifications.

**ARTICLE ELEVEN - INSURANCE**

**11.01 BROAD FORM ("ALL RISKS") PROPERTY INSURANCE**

Commencing on the Shipment Date and continuing until IMAX has received the full amount of the Purchase Price, Client shall obtain Broad Form ("All Risks") Property Insurance with respect to the System, naming IMAX as the loss payee in an amount equal to the replacement cost of the System (namely the Purchase Price), specifically including without limitation coverage of the System while in

transit or storage, and during installation. Any deductible portion shall not exceed ten percent (10%) of the replacement cost of the System. A certificate of insurance evidencing such coverage will be provided to IMAX no later than the Shipment Date, and at anytime upon the request of IMAX.

#### **11.02 COMPREHENSIVE GENERAL LIABILITY INSURANCE**

Commencing on the Shipment Date and continuing until the expiration or termination of this Agreement, Client shall obtain, at its expense, Comprehensive General Liability Insurance, naming IMAX as an additional insured, in an amount not less than US\$5,000,000 combined single limit, and specifically covering, among other things, operation of the Theatre. ~~A certificate of insurance evidencing such coverage will be provided to IMAX no later than the Date of Acceptance, and at anytime upon the request of IMAX.~~ *Handwritten initials: JF*

#### **11.03 BUSINESS INTERRUPTION INSURANCE**

Commencing on the Date of Acceptance and continuing until the expiration or termination of this Agreement, Client shall obtain, at its expense, Business Interruption Insurance to provide for the payment of the Minimum Payment for not less than twelve (12) months in the event of any damage or loss to the System or the Theatre. A certificate of insurance evidencing such coverage will be provided to IMAX no later than the Date of Acceptance, and at anytime upon the request of IMAX.

#### **11.04 RIGHTS OF CONTRIBUTION**

Any applicable insurance policy will be primary and without right of contribution from other insurance that may be carried by IMAX and will expressly provide that all of the provisions thereof, except the limits of liability, will operate in the same manner as if there were a separate policy covering each insured. Any applicable insurance policy will provide that once any payment by or on behalf of any insured has been made to IMAX in accordance with these requirements, the insurers and any subrogees will have no right of recourse against IMAX. Any applicable insurance policy will require at least 30 days written notice be given to IMAX before any termination, expiry, surrender, cancellation or material change. The insurer will be required to promptly notify IMAX if any installment of premium is not paid on time by Client.

#### **11.05 EVIDENCE OF INSURANCE**

If Client fails to provide IMAX with evidence of insurance as required in this Article 11 within fifteen (15) days after IMAX's request for same, IMAX may, but shall not be obligated to, at its sole option, obtain such insurance from an insurer of IMAX's choice (which may be an affiliate of IMAX). If IMAX purchases such insurance, Client will cooperate with IMAX's insurance agent with respect to the placement of insurance and the processing of claims. Client agrees to pay to IMAX on demand all costs incurred by IMAX (which may include a fee for IMAX's administration of such insurance).

### **ARTICLE TWELVE - DAMAGE OR LOSS TO THE SYSTEM OR THEATRE**

#### **12.01 DAMAGE OR LOSS TO THE SYSTEM**

In the event of damage to or loss of the System from any cause after the Shipment Date, IMAX shall, unless otherwise agreed pursuant to Section 12.02 hereof, make reasonable efforts to repair the System or construct another System: (i) at the expense of IMAX where the damage or loss is due to the negligence of IMAX; or (ii) at the expense of Client (or any insurance proceeds received by Client) in all other cases.

Unless otherwise provided under the terms of this Agreement, neither the damage or loss of the System nor the damage or loss of the Theatre, at any time, shall entitle Client to any abatement or reduction of amounts due under this Agreement, including without limitation the Purchase Price and the Minimum Payment payable during the Initial Term.

## **12.02 CATASTROPHIC LOSS TO THE THEATRE**

If, after the Date of Acceptance, all or a substantial part of the Theatre is rendered unusable by damage from fire or other casualty which cannot be substantially repaired (employing normal construction methods without overtime or other premium) under applicable laws and governmental regulations within 300 days from the date of the casualty (the "Repair Period"), then either IMAX or Client may elect to terminate this Agreement by written notice (a "Termination Notice") delivered to the other not more than thirty (30) days after the earlier of (i) the end of the Repair Period, and (ii) the date upon which such party makes a good faith determination that the damage cannot be repaired within the Repair Period. In the event that either party delivers a Termination Notice, IMAX shall not be required to repair or replace the System, and this Agreement and all licenses contained herein shall terminate as of the date of such casualty. In the event either party delivers a Termination Notice prior to IMAX's receipt in full of the Purchase Price, Client shall pay to IMAX (from insurance proceeds received by Client or otherwise) any and all outstanding amounts owed to IMAX under this Agreement, including any amounts owing with respect to the Purchase Price. Provided further, any unpaid amounts of Minimum Payment during the Initial Term not yet due and owing to IMAX as of the date that the System was damaged or lost shall be accelerated and discounted at a rate equal to the then current Prime Rate and be immediately paid to IMAX upon demand. Client waives any statutory or other rights of termination by reason of fire or other casualty, it being the intention of the parties to provide specifically in this Article 12 for all circumstances under which rights of termination shall exist due to casualty.

## **ARTICLE THIRTEEN - RIGHTS OF IMAX TO THE SYSTEM**

### **13.01 RIGHTS OF IMAX TO THE SYSTEM**

#### **(a) Sale of System**

Except as noted in this Article 13, Client agrees that at no time shall it sell the System other than on the following terms:

- (i) Client will not violate any agreements that IMAX may have or be negotiating with any other customers and IMAX will advise Client of all such agreements;
- (ii) The purchaser must first conclude an agreement with IMAX on substantially the same terms and conditions as provided in this Agreement relating to the ongoing use and maintenance of the System and license of the Trademark;
- (iii) If at any time Client desires to sell the System, IMAX shall have the first right to purchase the System from Client at the offer price Client has received from an arm's length third party, confirmation of which has been provided by Client to IMAX in writing. IMAX shall have 30 days from receipt of notice from Client expressing Client's desire to sell the System (the "Date of Notice") to deliver notice to Client expressing its intention to purchase the System. If IMAX notifies Client that it will not exercise its right to purchase the System, or does not respond to Client within the above time limits, Client shall have the right to sell the System to a third party if a contract is concluded with a third party within 180 days of the Date of Notice. If a contract is

not concluded within such time period then any future offer to sell the System to a third party shall again be subject to the foregoing provisions. In the event that IMAX determines not to acquire the System, as aforesaid, Client agrees that it will not sell the System to a third party where the third party:

- (A) is a Competitor of IMAX; or
  - (B) intends to operate the System in a theatre located in an area which would cause IMAX to be in breach of any of its agreements with other parties or which would materially affect the operation or profitability of another IMAX® theatre; or
  - (C) engages in a business that would denigrate the Trademark; and
- (iv) IMAX agrees that it shall act reasonably with respect to any efforts by Client to sell the System to a third party pursuant to this Subsection 13.01(a).

(b) Lease or Use of System

Except as noted in this Subsection 13.01(b), Client agrees that at no time shall it lease, license or grant the right to use the System other than on the following terms:

- (i) Client will not cause IMAX to violate any agreements that IMAX may have or be negotiating with any other parties and IMAX will advise Client of all such agreements;
- (ii) The lessee, licensee or grantee of the right to use the System must first conclude an agreement with IMAX on substantially the same terms and conditions as provided in this Agreement relating to the ongoing use and maintenance of the System and license of the Trademark;
- (iii) Client agrees that it will not lease, license or grant a right to use the System to a third party where the third party:
  - (A) is a Competitor of IMAX; or
  - (B) intends to operate the System in a theatre located in an area which would cause IMAX to be in breach of any of its agreements with other parties or which would materially affect the operation or profitability of another IMAX® theatre; or
  - (C) engages in a business that would denigrate the Trademark; and
- (iv) IMAX agrees that it shall act reasonably with respect to any efforts by Client to lease the System to a third party pursuant to this Subsection 13.01(b).

(e) General

Until the receipt by IMAX of the Purchase Price, during the Term Client shall maintain the System as moveable, personal or chattel property. If under local laws the System is considered to be a fixture, Client agrees that the System shall remain subject to the rights of IMAX. Any sale, conveyance, lease, mortgage, transfer, assignment or other disposition or alienation of Client's interest in the property in or on which the Theatre is situated, shall be made subject to the rights of IMAX respecting the System as set forth in this Agreement. Client will procure from any person acquiring an interest in the property upon which the System may be attached, an acknowledgment of IMAX's rights under this Agreement, in writing, and in form and content satisfactory to IMAX. Client shall consent to the registration of this Agreement and/or notice of the same to the extent permitted by law to provide notice to third parties that IMAX retains title and ownership of the System.

**ARTICLE FOURTEEN - INDEMNIFICATION****14.01 INDEMNITY BY CLIENT**

Client hereby agrees to indemnify, defend and hold harmless IMAX, its affiliates and subsidiaries, and all their respective officers, directors, employees and agents from and against any and all liabilities, damages, costs and expenses, including but not limited to reasonable solicitor costs, arising out of or in connection with third-party claims, lawsuits, proceedings and legal actions in anyway related, directly or indirectly, to:

- (i) a breach of the Agreement; or
- (ii) the possession, ownership, operation or maintenance of the Theatre, the design of the Theatre, the use of the System, and the maintenance or use of the Glasses, including without limitation, all liabilities, actions, suits, complaints, claims and judgments for damage arising out of, or in connection with any actual or alleged breach of or non-compliance with applicable laws or regulations governing protection of persons with disabilities, or similar laws, ordinances or regulations occasioned by the possession, use or operation of the Theatre, the System and the Glasses;

except to the extent that such liabilities, losses, claims, damages or costs are caused directly by the negligence of IMAX or its agents or representatives.

**14.02 INDEMNITY BY IMAX**

IMAX hereby agrees to indemnify, defend and hold harmless Client, its affiliates and subsidiaries, and all their respective officers, directors, employees and agents from and against any and all liabilities, damages, costs and expenses, including but not limited to reasonable solicitor costs, arising out of or in connection with third-party claims, lawsuits, proceedings and legal actions in anyway related, directly or indirectly, to:

- (i) a breach of the Agreement; or
- (ii) the actions of IMAX or its representatives in respect of the design, manufacture, installation supervision or maintenance of the System by IMAX;

except to the extent that such liabilities, losses, claims, damages or costs are caused directly by the negligence of Client or its agents and representatives.

**14.03 INDEMNITY FROM INTELLECTUAL PROPERTY CLAIMS RELATED TO SYSTEM**

During the Term of this Agreement, and provided that Client is not in default of its obligations under this Agreement, IMAX shall indemnify, defend and hold harmless Client, its affiliates and subsidiaries, and all their respective officers, directors, employees and agents from and against any and all liabilities and damages arising out of third-party claims, lawsuits, proceedings and legal actions alleging that the use of the System (or any component thereof) violates or infringes on their copyrights, trade secrets, or patents of such third parties.

#### **14.04 INDEMNITY FROM TRADEMARK CLAIMS**

During the Term of this Agreement, and provided that Client is not in default of its obligations under this Agreement, IMAX shall indemnify, defend and hold harmless Client, its affiliates and subsidiaries, and all their respective officers, directors, employees and agents from and against any and all liabilities and damages arising out of third-party claims, lawsuits, proceedings and legal actions alleging that the use of the Trademark as expressly authorized under the license granted in Section 7.01, and as expressly limited under Section 17.02 hereof, violates or infringes on the registered trademarks or service marks of any such third parties.

### **ARTICLE FIFTEEN - CONFIDENTIALITY**

#### **15.01 CONFIDENTIAL INFORMATION**

For the purposes of this Agreement, "Confidential Information" means the information, regardless of form, maintained in confidence by or proprietary to either IMAX or Client, including without limitation any information relating to the System, the Glasses, Theatre operations, service manuals, commercial data, quotations, discoveries, ideas, inventions, concepts, software, equipment, designs, drawings, specifications, techniques, processes, models, documentation, diagrams, research, development, business plans or opportunities, marketing strategies, future projects, and information related to finances, costs, prices, suppliers, vendors, customers, employees and agents. Confidential Information also includes (i) the terms of this Agreement, but not the fact of its existence, and (ii) any information obtained from a third party that either IMAX or Client treats as confidential or proprietary. Any document or other material provided by either IMAX or Client that is labelled or designated "Confidential" or "Privileged" shall be presumed to be Confidential Information. Failure to label or designate any document or other material shall not be determinative of whether or not the information contained therein is Confidential Information.

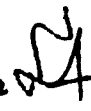
#### **15.02 DISCLOSURES**

Upon execution of this Agreement and all times thereafter, neither party shall disclose, divulge or otherwise furnish to any third party any of the other party's Confidential Information without the other party's prior written approval. Except as expressly contemplated by this Agreement, neither Party shall use or utilize the other party's Confidential Information. Client shall not modify, copy or reproduce in any way the Glasses, the Software, the System or any part or component thereof. Both parties shall take all steps necessary with their respective officers, employees, advisors, representatives and agents to ensure compliance with this Article 15.

#### **15.03 EXCEPTIONS**

The foregoing confidentiality obligations set in Section 15.02 shall not apply to information that is:

- (a) Already in the public domain or becomes so through no fault of the disclosing party;
- (b) Disclosed during the course of litigation, provided that the owner of the Confidential Information is provided sufficient notice and opportunity to seek a protective order or otherwise prevent such disclosure;
- (c) Disclosed pursuant to any order or requirement of a court, administrative agency, or other governmental body, provided that the owner of the Confidential Information is provided sufficient notice and opportunity to seek a protective order or otherwise prevent such disclosure; and

MBS 

- (d) Disclosed pursuant to the requirements of applicable laws and regulations, including without limitation the security laws and regulations of the United States of America and Canada.

#### **15.04 EQUITABLE RELIEF**

Both parties acknowledge that a breach of this Article 15 will result in immediate and irreparable harm to the other, for which there will be no adequate remedy at law, and in addition to monetary damages awarded, a court of competent jurisdiction or an appropriate governmental agency may grant equitable relief, including without limitation, orders to cease and desist all unauthorized uses and disclosures of Confidential Information.

### **ARTICLE SIXTEEN - DEFAULTS**

#### **16.01 DEFAULT OF IMAX**

Whenever IMAX is in default of its material obligations under this Agreement and continues to be in default, within twenty (20) days after Client has delivered written notice of the default to IMAX, Client may, at its election, in addition to Client's rights at law or in equity, either: (i) terminate this Agreement, claim losses and damages, and immediately cease any and all use or reference to the Trademark; or (ii) Client may perform the continuing obligations of IMAX with respect to which IMAX has made default and IMAX shall reimburse Client for such costs forthwith.

#### **16.02 DEFAULT OF CLIENT**

Whenever Client is in default of its material obligations under this Agreement and continues to be in default after IMAX has delivered written notice of the default to Client for more than (i) ten (10) Business Days for payment defaults, and (ii) twenty (20) days for any other defaults, IMAX may, at its election, in addition to IMAX's rights at law or in equity, terminate this Agreement. IMAX shall be entitled to claim its damages and seek both legal and equitable remedies. All unpaid amounts due to IMAX shall be forthwith paid by Client, and IMAX shall be entitled to retain all payments made by Client hereunder. Any outstanding Minimum Payment payable during the Initial Term shall be accelerated based on a discount rate equal to the then current Prime Rate, and shall become immediately due and shall be paid upon the demand of IMAX.

### **ARTICLE SEVENTEEN - DISCLAIMER AND LIMITATIONS OF LIABILITY**

#### **17.01 WARRANTY DISCLAIMER**

THE COVENANTS, REPRESENTATIONS AND WARRANTIES OF IMAX CONTAINED IN THIS AGREEMENT ARE IN LIEU OF, AND NOT IN ADDITION TO, ALL OTHER COVENANTS, REPRESENTATIONS AND WARRANTIES, EXPRESSED (EITHER IN WRITING OR MADE ORALLY), STATUTORY OR OTHERWISE IMPLIED, AS TO THE SYSTEM, ITS CONDITION, FITNESS FOR USE, MERCHANTABILITY, DURABILITY OR SUITABILITY FOR ANY PARTICULAR USE INTENDED BY CLIENT, NON-INFRINGEMENT, AS WELL AS THE FINANCIAL VIABILITY OF THE THEATRE, AND CLIENT HEREBY CONFIRMS THAT IMAX HAS NOT GIVEN ANY SUCH COVENANT, REPRESENTATION OR WARRANTY. EXCEPT FOR THE COVENANTS, REPRESENTATIONS AND WARRANTIES EXPRESSLY SET OUT IN THIS AGREEMENT, IMAX HEREBY DISCLAIMS AND CLIENT HEREBY WAIVES ANY AND ALL

COVENANTS, REPRESENTATIONS AND WARRANTIES OF ANY KIND OR NATURE, INCLUDING WITHOUT LIMITATION ANY AND ALL COVENANTS, REPRESENTATIONS AND WARRANTIES THAT MAY HAVE BEEN MADE PRIOR TO THE EXECUTION OF THIS AGREEMENT BUT NOT EXPRESSLY INCORPORATED INTO THIS AGREEMENT OR MADE A PART HEREOF.

**17.02 IMAX LIMITATION OF LIABILITY**

OTHER THAN FOR DEFAULTS OR BREACHES OF ARTICLE 15 HEREOF, AND EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, AND TO THE EXTENT ALLOWED BY APPLICABLE LAW, CLIENT'S EXCLUSIVE REMEDY SHALL BE PAYMENT BY IMAX OF DAMAGES TO A MAXIMUM AMOUNT EQUAL TO, AND IN NO EVENT SHALL IMAX BE LIABLE IN EXCESS OF, THE AGGREGATE OF THE TOTAL PURCHASE PRICE AND ADDITIONAL PAYMENT THAT HAS BEEN PAID TO IMAX UNDER THIS AGREEMENT. IN NO EVENT SHALL IMAX BE LIABLE UNDER THIS AGREEMENT FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES, EVEN IF IMAX HAS BEEN ADVISED OF THE POSSIBILITY THEREOF INCLUDING, BUT NOT LIMITED TO, LOST PROFITS, LOST BUSINESS REVENUE, OR OTHER COMMERCIAL OR ECONOMIC LOSS OF ANY KIND.

**17.03 CLIENT LIMITATION OF LIABILITY**


OTHER THAN FOR DEFAULTS OR BREACHES OF ARTICLES 8 AND 15 HEREOF, AND EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, AND TO THE EXTENT ALLOWED BY APPLICABLE LAW, IN NO EVENT SHALL CLIENT'S LIABILITY IN DAMAGES BE IN EXCESS OF THE AGGREGATE OF THE TOTAL PURCHASE PRICE AND ADDITIONAL PAYMENT PAYABLE PURSUANT TO THIS AGREEMENT. IN NO EVENT SHALL CLIENT BE LIABLE UNDER THIS AGREEMENT FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES, EVEN IF CLIENT HAS BEEN ADVISED OF THE POSSIBILITY THEREOF INCLUDING, BUT NOT LIMITED TO, LOST PROFITS, LOST BUSINESS REVENUE, OR OTHER COMMERCIAL OR ECONOMIC LOSS OF ANY KIND.

**ARTICLE EIGHTEEN - GENERAL PROVISIONS**

**18.01 EFFECT OF TERMINATION**

Upon any termination of this Agreement, for any reason whatsoever, all rights licensed by IMAX hereunder shall revert to IMAX and Client shall immediately cease any and all use of the Trademark.

Upon any termination of this Agreement, if title to the System has passed to Client, IMAX may purchase such System from Client at fair market value as determined by the parties acting reasonably and shall be entitled to make entry upon the Theatre premises where the System is located and remove the System, and any and all rights of the Client with respect to the System and the possession or use thereof shall be absolutely forfeited and shall lapse. Client shall fully cooperate in permitting IMAX access to the Theatre to regain possession of the System. IMAX will be permitted access to the Theatre to supervise the removal of the System. All costs of removal and return shipment, including export packaging shall be at the expense of IMAX unless the removal of the System is a result of Client's default under Section 16.02 in which case it shall be at Client's expense. IMAX shall, at its expense, supervise the removal of the System from the Theatre. Client shall cause the Projection System, the Sound System and Glasses Cleaning Machines to be returned, properly packaged as required by IMAX, to IMAX at Mississauga, Ontario, Canada, or such other location as IMAX may reasonably designate, provided the cost of shipping

MRS 

the System to another location shall be no greater than the cost of shipping the System as aforesaid. Except as otherwise provided, and subject to IMAX carrying out its maintenance obligations under this Agreement, the System shall be returned in good condition and repair, otherwise IMAX may make all repairs and replacements necessary to place the System in good condition and repair, reasonable wear and tear excepted, and Client shall pay the cost of such repairs and replacements upon demand, unless previously paid out of insurance proceeds.

### **18.02 NOT A PENALTY**

Client acknowledges and agrees that a material breach of this Agreement will result in injury and damage to IMAX, including without limitation foregone revenue and other losses, expenses and costs associated with the manufacturing of the System and the planning, scheduling and performance of services required under this Agreement. The parties hereby agree and acknowledge that Section 16.02, and any and all amounts to be paid to IMAX or to be retained by IMAX pursuant to Section 16.02 are a fair and approximation of the injury and damages IMAX will suffer in the event of a material breach of this Agreement, and therefore the application of Section 16.02 and any amounts paid to IMAX or retained by IMAX shall constitute liquidated damages, not a penalty.

### **18.03 ASSIGNMENT**

None of the rights, duties and obligations of Client hereunder may be assigned without the prior written consent of IMAX in IMAX's sole discretion. For the purposes of this Agreement, assignment shall include any assignment by operation of law, or as a result of any change of control, merger, transfer, consolidation or other transaction (each, a "Change of Control"). Notwithstanding the foregoing, Client shall not require such written consent to an assignment but upon prior written notice to IMAX (A) by Change of Control of Client if (i) Client is not, at the time of the proposed assignment, in default or breach of this Agreement, (ii) the resultant entity of the Change of Control is not a Competitor of IMAX and has a financial position sufficient to fulfill its obligations pursuant to this Agreement in the reasonable opinion of IMAX, and (iii) the resultant entity of the Change of Control has sufficient experience operating movie theatres in the reasonable opinion of IMAX, or (B) in favour of the Client's lender as security for its obligations. No acceptance by IMAX of any payments by an assignee shall be deemed a waiver of this covenant or the acceptance of the assignee as the lessee or a release of Client. IMAX may at any time assign this Agreement or any of its rights, duties or obligations hereunder, to an affiliate or subsidiary or to a third party as a result of a Change of Control.

### **18.04 PUBLIC RELEASES**

No public announcement or press release concerning this Agreement or the transactions or business ventures contemplated herein will be made by either party without the prior written consent of the other party, not to be unreasonably withheld. Notwithstanding the foregoing, a party may make a public announcement or press release concerning this Agreement without the prior consent of the other party when such public announcement or press release is required by applicable law, regulation or rule, including without limitation the security laws, regulations, and rules of the United States of America and Canada, and the regulations and rules of the U.S. Securities and Exchange Commission and the Canadian securities commissions; provided, that the party required to make such a public announcement or press release shall provide the other party prior written notice in order to allow such party to seek a protective order.

**18.05 NOTICE**

Any demand, notice or other communication to be given in connection with this Agreement will be given in writing and will be given by personal delivery or by electronic means of communication addressed to the recipient as follows:

IMAX at:  
2525 Speakman Drive, Sheridan Park  
Mississauga, Ontario, Canada  
L5K 1B1

Telephone No.: (905) 403-6500  
Facsimile No.: (905) 403-6468  
Attention: General Counsel

Client at:  
4523 Park Road  
Suite A-105  
Charlotte, NC  
28209

Telephone No.: (704) 529-1200  
Facsimile No.: *[INSERT]*  
Attention: *[INSERT]*

or to such other address, individual, official or electronic communication number as may be designated by notice given by either party to the other. Any demand, notice or other communication given by personal delivery will be conclusively deemed to have been given on the day of actual delivery thereof and, if given by electronic communication, on the day of transmittal thereof if given during the normal business hours of the recipient and on the Business Day during which such normal business hours next occur if not given during such hours on any day.

**18.06 FURTHER ASSURANCES**

The parties shall give further assurances and do, execute and perform all such acts, deeds, documents and things as may be required to enable them to have the full benefit of all rights and remedies intended to be reserved or created hereby or as may be required under the local laws.

**18.07 FORCE MAJEURE**

Neither party shall be liable to the other for delays in the performance or observance of its covenants or agreements under this Agreement due to the occurrence of unforeseeable events which are beyond its control, including, but not limited to, delays by fires, strikes, carriers, acts of God, war, insurrection, riot, acts of terrorism, epidemic, and the actions of any governmental authority (each a "Force Majeure Event"), provided that the party so affected must advise the other of the occurrence of the Force Majeure Event as soon as is reasonably possible. The occurrence of any of the aforesaid events shall not entitle Client or IMAX to terminate this Agreement.

MBS *[Signature]*

**18.08 NO PARTNERSHIP**

This Agreement does not constitute and shall not be construed as constituting an agency, partnership, franchisor-franchisee relationship or joint venture between IMAX and Client.

**18.09 SEVERABILITY**

Any term, condition or provision of this Agreement which may be unenforceable by law shall be severable from this Agreement to the extent of such unenforceability without invalidating the remaining terms and conditions.

**18.10 CURRENCY**

Unless otherwise specifically provided herein, all amounts expressed or described hereunder are in lawful currency of the United States of America.

**18.11 LANGUAGE**

This Agreement has been drafted in the English language with the consent of both parties. In the event that any or all of this Agreement, including without limitation any Schedules attached hereto, is translated into a language other than English (which translation shall be at the sole cost and expense of Client), the English language version thereof shall govern in the event of any conflict or inconsistency between the English language version and the version in such other language.

**18.12 GOVERNING LAW**

This Agreement shall be construed according to the laws of the Province of Ontario, Canada, and the parties agree to attorn to the exclusive jurisdiction of the courts of Ontario, Canada. The parties further agree that the provisions of the United Nations Convention on the International Sale of Goods (also known as the "Vienna Sales Convention") shall not apply to the subject matter of this Agreement.

**18.13 NON-WAIVER**

No term or condition of this Agreement can be waived except by the written consent of the waiving party and any forbearance or indulgence by either party in any regard shall not constitute a waiver of the term or condition to be performed by the other party; and until complete performance by the other party of the term or condition the waiving party shall be entitled to invoke any remedy available to it under this Agreement or at law.

**18.14 ENTIRE AGREEMENT**

This Agreement represents the entire transaction between the parties relating to its subject matter, its execution has not been induced by, nor do any of the parties rely upon or regard as material, any representations, negotiations, statements or proposals, written or oral, whatsoever not incorporated herein and made a part hereof, and it supersedes all prior agreements, negotiations and proposals, written and oral, relating to the subject matter of this Agreement. No agreement purporting to amend or modify this Agreement shall be valid and binding upon the parties unless in writing and signed by both parties.

MBS 

**18.15 COUNTERPARTS**

This Agreement may be executed in any number of counterparts, by facsimile or original, each of which when taken together shall make one and the same instrument.

**18.16 TIME OF THE ESSENCE**

Time is of the essence in this Agreement.

**18.17 ENUREMENT**

This Agreement shall inure to the benefit of and be binding upon the parties hereto, their successors and, where permitted or approved, their assigns.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

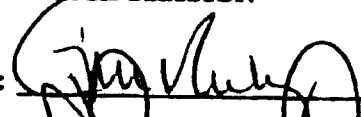


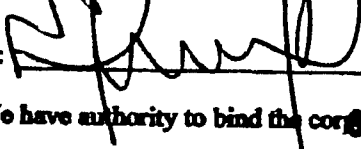
**18.18 SURVIVAL**

Notwithstanding any other provision hereof, and without prejudice to survival of other terms of this Agreement provided elsewhere, Sections 8.05, 8.09, 8.12, 8.14, 8.15, 8.16, Article 12, Article 13, Article 14, Article 15, Article 16, Article 17, Sections 18.01, 18.09, 18.12, 18.13 and 18.17 shall survive the expiration of the Term or any termination of this Agreement.

IN WITNESS WHEREOF the parties have executed this Agreement.


**IMAX CORPORATION**

Per:   
G. MARY RUBY  
Exec. VP Corporate Services,  
& Corporate Secretary

Per:   
Ed MacNeil  
Vice President, Finance

I/We have authority to bind the corporation

**SOUTHEAST CINEMA ENTERTAINMENT INC.**

Per: 

Per: \_\_\_\_\_

I/We have authority to bind the corporation

**SCHEDULE A**  
**IMAX® DIGITAL MPX THEATRE SYSTEM**

**SPECIFICATIONS OF SYSTEM, INSTALLATION  
TESTING AND TRAINING SERVICES**

**SCHEDULE B**  
**IMAX® DIGITAL MPX THEATRE SYSTEM**

**ELECTRICAL, MECHANICAL AND ACOUSTICAL REQUIREMENTS**

**SCHEDULE C**  
**SPECIFICATION FOR IMAX® 3D POLARIZED VIEWING GLASSES**

**SCHEDULE D**  
**BOX OFFICE REPORT**

**SCHEDULE E**  
**TECHNICAL QUALIFICATIONS**

**SCHEDULE F**  
**TRADEMARK USAGE GUIDELINES**

**SCHEDULE G**  
**CERTIFICATE OF ACCEPTANCE**

**SCHEDULE H**  
**EXCLUSIVE RIGHTS**

**SCHEDULE H**  
**EXCLUSIVE RIGHTS**

Subject to Section 2 of this Schedule H, IMAX hereby agrees to provide Client with certain exclusive rights, as set out below:

**1. Exclusive Rights**

IMAX agrees that it shall not open or permit to open another IMAX® theatre utilizing any IMAX® technology within the Territory, other than Excluded Theatres, for a period of time commencing on the date of this Agreement and ending on the tenth (10<sup>th</sup>) anniversary of the Date of Acceptance of the System, such date being no later than June 1, 2019 in any event. Further, if the Agreement is renewed for the First Renewal Term in accordance with Section 3.03 of the Agreement, the parties shall in good faith negotiate the exclusive rights for the First Renewal Term taking into account such factors as gross box office and population that are equivalent to that in the Territory.

For the purposes of this Schedule "H", "Territory" shall mean a radius of twenty (20) miles around the Theatre.

**2. General**

- (a) In no event shall the exclusive rights granted above extend to the following:
- (i) any attraction utilizing both a projection system and motion seats/platforms for a similar ride experience;
  - (ii) any destination theatre exhibiting a specially themed dedicated film for at least 85% of its annual programming (no restrictions for 15% programming);
  - (iii) temporary theatres or specialty theatres which are theatres utilizing special technology, including, without limitation IMAX® MAGIC CARPET and/or IMAX® 3D Dome technology;
  - (iv) any existing IMAX® theatres as of the date of this Agreement;
  - (v) any theatre located at or affiliated with a museum, science centre or other educational institution; and
  - (vi) any demonstration or production theatre which IMAX may develop, which theatre would not be open to the general public.

(collectively the "Excluded Theatres")

IMAX agrees that the Excluded Theatres shall not be permitted to exhibit IMAX DMR® content for greater than a total of fifteen percent (15%) of the exhibition schedule in any operating week, subject to any applicable laws. As of the date of this Agreement, IMAX does not have any Excluded Theatres in the Territory.

MBS



-2-

- (b) The exclusive rights granted in this Schedule H are conditional upon Client spending US\$50,000 on annual advertising and promotion for the Theatre.
- (c) In the event of any default by Client of any of its representations, warranties or covenants or any other obligations under this Agreement that have not been cured within any applicable cure periods, then all rights provided in this Schedule H shall automatically terminate and IMAX shall be under no obligation to maintain any exclusive rights in favour of Client.

18. 

1 between Southeast Cinema and the Department of  
2 Revenue. And Southeast Cinema has claimed a  
3 refund for \$71,000. And there are really two  
4 issues that need to be determined, in order to  
5 determine whether the refund claim should be  
6 granted. First issue is whether sales tax  
7 applies to proceeds from the sale of intangible  
8 rights. And the second issue is whether sales  
9 tax should apply the proceeds from payments for  
10 film content. The facts in this case are also  
11 relatively straightforward and undisputed.  
12 IMAX Corporation was a pioneer in the large  
13 format movie industry. Beginning in the 1970s  
14 they developed a proprietary film projector and  
15 camera system that allowed them to show movies  
16 in a larger format than other competing  
17 cinemas. And over the decades consumers began  
18 to associate the IMAX brand with superior movie  
19 going experience. And in 2008, IMAX developed  
20 a new technology. It differed from their prior  
21 film projectors, which showed large format  
22 movies, and this was a digital projection  
23 system. The digital projection system was not  
24 as unique as their film projector system was.  
25 There are many competing digital projection



**CREEL COURT REPORTING, INC.**

1230 Richland Street / Columbia, SC 29201

(803) 252-3445 / (800) 822-0896

1 systems in the market, all of which are capable  
2 of showing large format movies. IMAX, in fact,  
3 doesn't manufacture its components, but merely  
4 procures them in the market and then assembles  
5 them and then sells its system. IMAX is also  
6 somewhat unique in the industry in that they  
7 provide all film content that is shown on their  
8 projection systems. With the old IMAX film  
9 projection system, most of that content was  
10 originally produced by IMAX Corporation,  
11 because there was special equipment required in  
12 order to produce a film in the IMAX format.  
13 And with the new digital projection systems,  
14 the movies primarily are Hollywood-type movies,  
15 where IMAX will take a movie from a Hollywood  
16 studio, remaster into a different format and  
17 then provide that to its customers who have an  
18 IMAX digital projection system. Naturally,  
19 they provide some original content, but for the  
20 most part with the digital projection system,  
21 you have those in theaters that are showing  
22 your Hollywood movies, and so the IMAX digital  
23 projection system is in much more widespread  
24 use. And IMAX doesn't differentiate between  
25 the old theaters, which used the film



1 projectors and had a much larger format screen  
2 than the new digital projection system. Which  
3 again, has the competitors in the marketplace  
4 that can show the same quality of film as the  
5 IMAX digital system. Southeast Cinema operates  
6 a theater in Charleston called the Citadel Mall  
7 IMAX Stadium 16. They opened the theater in  
8 2009. And they wanted to take advantage of the  
9 IMAX goodwill when they were opening their  
10 theaters, so they could gain a foothold in the  
11 marketplace. And they entered into what was  
12 titled Agreement For The Purchase And Sale,  
13 Maintenance of IMAX Digital MPX Projection  
14 System, Trademark License from IMAX Corporation  
15 and Southeast Cinema Entertainment, Inc.,  
16 September 30, 2008. This agreement essentially  
17 governs a business relationship of IMAX and  
18 Southeast for the next 10 years. And it covers  
19 the purchase of a digital projection system,  
20 the right to use IMAX trademarks granting  
21 exclusive operating territory and the provision  
22 of film content. The agreement states that  
23 Southeast Cinema is required to pay \$1.15  
24 million for the digital projection system.  
25 Also, \$40,000 annual maintenance fee for the



1 separate and distinct consideration for one of  
2 the intangibles. Now, this court has held  
3 unequivocally that what the taxpayer's trying  
4 to do today simply is not allowed under Title  
5 12. In *Tronco's Catering*, and also upheld in  
6 *Hamby's Catering*, which was a few years after  
7 that, this court held that 12-36-90 makes  
8 clear that the tax base must include the entire  
9 value of the sale and cannot be reduced by  
10 demarcating discreet aspects of the sale. Now,  
11 in *Tronco's* and *Hamby's*, those cases, we're  
12 talking about a catering company that not only  
13 sells food, which was the tangible personal  
14 property that triggered sales tax in that case,  
15 but they provided the tents, they provided the  
16 waiters, the bartenders, the set-up, the  
17 installation of everything, lots and lots of  
18 services. Services, in and of themselves in  
19 South Carolina, are not subject to sales tax.  
20 Intangibles sold, in and of themselves, are not  
21 subject to sales tax. He's absolutely correct  
22 in that statement, but when they're sold in  
23 conjunction with tangible personal property,  
24 unequivocally, the sales tax applies to the  
25 entire gross proceeds of the sale. Now, the



1 additional monthly payments have been painted  
2 as some sort of payment for film content; it's  
3 simply not the case. If you look at the  
4 invoice here that was provided by the taxpayer  
5 to the Department of Revenue, the internal  
6 reference code for the additional monthly  
7 payment, down at the bottom where the blue  
8 arrow is, clearly states that this is a payment  
9 that represents the financed purchase price,  
10 the purchase price of the system. So trying to  
11 characterize it as film content or box office  
12 fees is simply inappropriate in this case, Your  
13 Honor, it's not what these payments were for.  
14 This is part of the billing process of IMAX for  
15 the payment of this digital projection system.  
16 And here's the regulation that I referenced  
17 earlier, no method of billing will serve to  
18 exempt the measure of the tax, cost of  
19 materials used, labor, or service cost,  
20 interest charges, losses, or any other expenses  
21 whatsoever that are part of this sale of  
22 tangible personal property. In conclusion,  
23 Your Honor, like I said, this is a very, very  
24 simple case. The definition of gross proceeds  
25 of sale is the controlling aspect of the law in



1 page 14 of the contract, which is attached to  
2 Exhibit A to my motion. Section 8.04 states,  
3 and it's entitled, Film Programming. Client  
4 shall exhibit all IMAX approved content  
5 commencing from the earliest date any such  
6 content is released for an exhibition at the  
7 theater provided that such content is offered  
8 to the client on commercially reasonable terms  
9 generally found in the industry. The theater  
10 doesn't get these films for free just because  
11 they entered into this agreement. They still  
12 have to pay for the movies. The additional  
13 monthly payments are not for box office fees.  
14 They are not for film content. He attempts to  
15 claim that they're mischaracterized by IMAX's  
16 finance purchase payment and he objects to the  
17 introduction of the invoice. I'm not providing  
18 it as evidence, but clearly showing the court  
19 today, as a demonstrative, that the additional  
20 monthly payment is referenced in the invoices  
21 as provided by the taxpayer to the Department  
22 as part of the initial purchase price financed,  
23 so it's related to the tangible personal  
24 property. Now, continually the Petitioner has  
25 stated that a \$170,000 is the value of the



**Smith  
Exhibit  
3**

Print Date: 1/10/2013 2:58:40AM

**WALT DISNEY STUDIOS MOTION PICTURES  
THEATRICAL DISTRIBUTION LICENSE AGREEMENT - SCHEDULE  
AMENDMENT**

This license agreement supersedes prior license agreements, if any, that may have been issued for this engagement

DMA Group	Division	Client	Picture Name	Publication Dates	Contract Date
LANGE	EASTERN	INDEP.THEA.BKG.SERV.	LINCOLN-2D	11/18/2012 - 1/31/2013	1/10/2013

Theater Name	Town	State	Owner
CITADEL MALL 16	CHARLESTON	SC	SOUTHEASTERN BOOKING

**INDEP.THEA.BKG.SERV.**

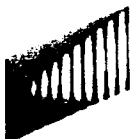
**11917 SAM ROPER DR. STE A  
CHARLOTTE, NC 28269-750**

Box Office	Days	Hours Allowed	Spots/Cr	Screen #	Fee/Screen/Day
BOX OFFICE \$12,000,000 OR LESS	46.00%				
BOX OFFICE \$12,000,000 - \$24,000,000	48.00%				
BOX OFFICE \$24,000,000 - \$37,000,000	47.00%				
BOX OFFICE \$37,000,000 - \$49,000,000	46.00%				
BOX OFFICE \$49,000,000 - \$62,000,000	46.00%				
BOX OFFICE \$62,000,000 - \$74,000,000	48.00%				
BOX OFFICE \$74,000,000 - \$86,000,000	51.00%				
BOX OFFICE \$86,000,000 - \$124,000,000	52.00%				
BOX OFFICE \$124,000,000 - \$149,000,000	53.00%				
BOX OFFICE \$149,000,000 - \$174,000,000	54.00%				
BOX OFFICE \$174,000,000 - \$199,000,000	55.00%				
BOX OFFICE \$199,000,000 - \$224,000,000	56.00%				
BOX OFFICE \$224,000,000 - \$249,000,000	57.00%				
BOX OFFICE \$249,000,000 - \$274,000,000	58.00%				
BOX OFFICE \$274,000,000 - \$299,000,000	59.00%				
BOX OFFICE \$299,000,000 - \$324,000,000	60.00%				
BOX OFFICE \$324,000,000 - \$349,000,000	61.00%				
BOX OFFICE \$349,000,000 OR GREATER	62.00%				

Holdover Amt	Holdover Term	GDD Amt	Advance Amt	Guarantee Amt	Minimum Amt
\$0.00		\$0.00	\$0.00	\$0.00	\$0.00

**Additional Terms and Conditions:**  
THE LICENSE FEE IS A PERCENTAGE OF THE ENGAGEMENT TOTAL GROSS RECEIPTS USING THE SCALE ABOVE TO DETERMINE THE PERCENTAGE. "BOX OFFICE" MEANS THE ULTIMATE "DOMESTIC BOX OFFICE TOTAL" REPORTED FOR THE PICTURE IN DAILY VARIETY.

**Pay Capabilities (Amounts are Fixed):**  
CHILDREN/CITIZEN(AT ALL TIMES)\$7.00;STUDENT(AT ALL TIMES)  
\$7.00. ALL OTHER PATRONS:MATINEES \$7.00;EVENINGS \$9.00;  
BARGAIN DAY \$5.00.



**SONY  
PICTURES**

Sony Pictures Releasing  
10202 W. Washington Blvd.,  
Culver City, CA, 90232-3119  
United States

Send Remittance To:  
Sony Pictures,  
PO Box 840550,  
Dallas, TX, 75284-0550  
United States

**Booking Confirmation**  
Confirmation Date: 11/09/2012

12/9/2012 140

CREATED

Film: SKYFALL

Theatre	Booking No	Start Date	End Date	Min. No. of Days	Screens by Format			Terms				PC Avg Adm Price	Weighted %	PC 2.0 Price
					Wk	# of Screens	Med/Lang/Dim	Wk	Max%	Min%	HA			
CITADEL MALL 16 W/IMAX 2072 SAM RITTENBURG BLVD., CHARLESTON, SC 29407  SMITH, ROBERT	1654686	11/09/2012	01/17/2013	70	1	1	D/EN/2D	1	60%	60%	N/A	7.50	95	7.13
					2	1	D/EN/2D	2	60%	60%	N/A	7.50	95	7.13
					3	1	D/EN/2D	3	60%	60%	N/A	7.50	95	7.13
					4	1	D/EN/2D	4	60%	60%	N/A	7.50	95	7.13
					5	1	D/EN/2D	5	60%	60%	N/A	7.50	95	7.13
					6	1	D/EN/2D	6	60%	60%	N/A	7.50	95	7.13
					7	1	D/EN/2D	7	60%	60%	N/A	7.50	95	7.13
					8	1	D/EN/2D	8	60%	60%	N/A	7.50	95	7.13
					9	1	D/EN/2D	9	60%	60%	N/A	7.50	95	7.13
					10	1	D/EN/2D	10	60%	60%	N/A	7.50	95	7.13
<b>Additional Terms:</b>														
Firm: Yes														
Per Capita: Yes: PC 2.0 Price as defined on last page														
Floating Terms: No														

01-18-02 p.m.

01-14-2013

9/9

Page 1

# Universal Pictures Distribution

## Confirmation

Date: December 20, 2012

**Circuit** Independent Theatre Booking Service

**Theatre** Citadel Mall Stadium 15 + IMAX  
2072 Sam Rittenburg Blvd  
Charleston, SC 29407 USA

**Mail To** Independent Theatre Booking Service  
bsitbs@att.net

**Reprint To:**  
Universal Film Exchanges LLC  
P.O. Box 848270  
Dallas, TX 75284-8270 USA

**Branch** CHARLOTTE

### Booking Information

Film Title						
Les Miserables						
Begin Date	End Date	Weeks	House	Advance	Guarantee	Bid
Tue - 12/25/2012	Mon - 01/21/2013	4				

### Screens

Scr No.	Seats
8	296

### Weekly Terms

Week	Terms	House	SF	SF Ded	Min.
1	55.00% Scale				
2	55.00% Scale				
3	55.00% Scale				
4	55.00% Scale				
If Held	55.00% Scale				

### Term Notes

The above release will be licensed at the agreed percentage of 55% for all weeks. Such 55% percent shall be adjusted based on the reported total domestic box office as set forth in the attached scale.

#### REPORTED DOMESTIC BOX OFFICE/Rental %

Greater Than or equal to \$0M and less than \$50M - 50%  
 Greater Than or equal to \$50M and less than \$75M - 51%  
 Greater Than or equal to \$75M and less than \$90M - 52%  
 Greater Than or equal to \$90M and less than \$105M - 53%  
 Greater Than or equal to \$105M and less than \$120M - 54%  
 Greater Than or equal to \$120M and less than \$135M - 55%  
 Greater Than or equal to \$135M and less than \$150M - 56%  
 Greater Than or equal to \$150M and less than \$170M - 57%  
 Greater Than or equal to \$170M and less than \$200M - 58%  
 Greater Than or equal to \$200M and less than \$250M - 59%  
 Greater Than \$250M - 60%

### Additional Terms

The terms contained herein plus those contained in the Universal Pictures Distribution Master License Agreement which Exhibitor acknowledges having received and reviewed constitute this license agreement. All said terms herein set forth are agreed to by Exhibitor and confirmed as accurate unless Distributor is notified in writing immediately on receipt of this Confirmation and before exhibition of the film which is the subject of this Agreement.

January 8, 2013

**Circuit** Independent Theatre Booking

**Theater** Citadel Mall Stadium 16 & IMAX  
2072 Sam Rittenberg Blvd.  
Charleston, SC 29407 USA

**Mail To** Independent Theatre Booking  
11917 Sam Roper Drive  
Charlotte, NC 28269 USA

Film Title and Information			
Parental Guidance			
Rating	Run Time	Ratio	No Reels
PG	104m 37s	FLAT	6

Booking Summary			
Begin Date	End Date	Weeks	Scrns
Tue - 12/25/2012	Mon - 02/04/2013	6	1
House Amt	Advance	Guarantee	Bid?

**Remit And Make Check Payable To**  
Twentieth Century Fox Film Corp.-NY  
Attn: Bank of America  
5799 Collection Center Drive  
Chicago, IL 60693 USA

**Screen Detail**

No.	Days Playing	House Allowance				Seats	Sound	Language	Caption Type	Caption Lang
		Full	Day %	Scrn %	Adjusted					
9	TWTFSSM					298	DGTL	English		

**Schedule of Weekly Terms**

Week	Terms	House	SF?	Ded's.	Min.
1	Applicable Scale				250
2	Applicable Scale				
3	Applicable Scale				
4	Applicable Scale				
5	Applicable Scale				
6	Applicable Scale				
If Held	Applicable Scale				
Floor	Applicable Scale				

**Holdover**

If Friday through Sunday Gross of Week 6 or any subsequent week is over \$5,925, exhibitor agrees to hold Film at terms provided in Schedule of Weekly Terms.

**Per Capita Royalty Base**

Adult	Child	Senior
5.75	3.50	3.50

For each performance of the Film which commences at or after 5:30 p.m., Exhibitor shall pay the greater of (a) the applicable stated weekly percentage term of each picture sold, or (b) the minimum per capita royalty for each patron entering the theater, to be calculated as follows: the applicable weekly percentage term, multiplied by the per capita royalty base indicated above for adults (patrons 12 years of age or older), children (patrons under 12 years of age), and senior citizens. Exhibitor retains the right to charge any price it desires for admissions, and the per capita is in no way a requirement that Exhibitor charge any particular price.

**Additional Terms**

This Booking Confirmation Sheet incorporates by reference all of the terms set forth in the Master Contract between Twentieth Century Fox Film Corp. and Exhibitor, and supercedes any prior Booking Confirmation Sheet. In the event the Master Contract is not executed, Exhibitor agrees that the exhibition of the Film shall constitute Exhibitor's acceptance of all terms set forth on the Master Contract and in this Booking Confirmation

# Universal Pictures Distribution

Confirmation

Date: December 20, 2012

**Circuit** Independent Theatre Booking Service

**Theatre** Northwoods Mall 13  
2181 Northwoods Boulevard  
North Charleston, SC 29406 USA

**Mail To** Independent Theatre Booking Service  
bsitbs@att.net

**Remit To:**  
Universal Film Exchanges LLC  
P.O. Box 848270  
Dallas, TX 75284-8270 USA

**Branch** CHARLOTTE

## Booking Information

Film Title						
Les Miserables						
Begin Date	End Date	Weeks	House	Advance	Guarantee	Bid
Tue - 12/25/2012	Mon - 01/21/2013	4				

## Screens

Scr No.	Seats
1	275

## Weekly Terms

Week	Terms	House	SF	SF Ded	Min.
1	55.00% Scale				
2	55.00% Scale				
3	55.00% Scale				
4	55.00% Scale				
If Held	55.00% Scale				

## Term Notes

The above release will be licensed at the agreed percentage of 55% for all weeks. Such 55% percent shall be adjusted based on the reported total domestic box office as set forth in the attached scale.

### REPORTED DOMESTIC BOX OFFICE/Rental %

- Greater Than or equal to \$0M and less than \$50M - 50%
- Greater Than or equal to \$50M and less than \$75M - 51%
- Greater Than or equal to \$75M and less than \$90M - 52%
- Greater Than or equal to \$90M and less than \$105M - 53%
- Greater Than or equal to \$105M and less than \$120M - 54%
- Greater Than or equal to \$120M and less than \$135M - 55%
- Greater Than or equal to \$135M and less than \$150M - 56%
- Greater Than or equal to \$150M and less than \$170M - 57%
- Greater Than or equal to \$170M and less than \$200M - 58%
- Greater Than or equal to \$200M and less than \$250M - 59%
- Greater Than \$250M - 60%

## Additional Terms

The terms contained herein plus those contained in the Universal Pictures Distribution Master License Agreement which Exhibitor acknowledges having received and reviewed constitute this license agreement. All said terms herein set forth are agreed to by Exhibitor and confirmed as accurate unless Distributor is notified in writing immediately on receipt of this Confirmation and before exhibition of the film which is the subject of this Agreement.



## Booking Confirmation

Date: 12/22/2012

5555 MELROSE AVENUE BLUHDORN BUILDING, 3RD FLOOR LOS

**Remit To:** PARAMOUNT PICTURES  
File # 100486  
PO BOX 100486  
PASADENA, CA 91189

Reference is made to Section 1 of the Master License Agreement of Paramount Pictures Corporation, which is set forth below:

**Formation of Contract.** Distributor's transmission of the Booking Confirmation to Exhibitor by mail, electronic delivery or by facsimile shall constitute Distributor's confirmation and acceptance of Exhibitor's offer to exhibit the Title and Distributor's grant of a license under copyright to Exhibitor limited to, and in accordance with, the terms contained in the Booking Confirmation and in the Master License Agreement (collectively, the "License Agreement"). If the addressed recipient of the Booking Confirmation is acting as the booking/buying agent for the Theatre, such addressee represents and warrants that Exhibitor's name is accurately set forth and that the addressee, as booking/buying agent, is fully authorized by Exhibitor to enter into the License Agreement on behalf of Exhibitor; Distributor specifically relies upon such representation and warranty in performing the License Agreement. All provisions of the Booking Confirmation shall be deemed correct unless Exhibitor notifies Distributor of any error upon receipt thereof. In any event, the first public exhibition of the Title by Exhibitor shall constitute Exhibitor's agreement to each and every term of the License Agreement....

The attached contains the specific licensing terms, names of theatre(s) and play dates covered by this Booking

**Mail To:** IND THEATRE BKG SVC(ITBS)  
11917 SAM ROPER DRIVE  
CHARLOTTE NC 28269

Title	Theater	Play Date	Status	Advance	Guarantee	Prints
CIRQUE DU SOLEIL WORLDS	ITBS AYRSLEY GRAND CINEMAS 13 CHARLOTTE NC	12/21/2012 - 01/17/2013	FINL	0.00	0.00	1
Screens:	Scm: 1 Cap: 275					
Weekly Terms:	Wk 1 - 52/52	Wk 2 - 52/52	Wk 3 - 52/52	Wk 4 - 52/52		
CIRQUE DU SOLEIL WORLDS	ITBS CAROUSEL 151 W GREENSBORO NC	12/21/2012 - 01/17/2013	FINL	0.00	0.00	1
Screens:	Scm: 1 Cap: 292					
Weekly Terms:	Wk 1 - 52/52	Wk 2 - 52/52	Wk 3 - 52/52	Wk 4 - 52/52		
CIRQUE DU SOLEIL WORLDS	ITBS CAROUSEL @ ALAMANCE 16 BURLINGTON NC	12/21/2012 - 01/17/2013	FINL	0.00	0.00	1
Screens:	Scm: 7 Cap: 242					
Weekly Terms:	Wk 1 - 52/52	Wk 2 - 52/52	Wk 3 - 52/52	Wk 4 - 52/52		
CIRQUE DU SOLEIL WORLDS	ITBS CITADEL STADIUM MALL IMAX 16 CHARLESTON SC	12/21/2012 - 01/17/2013	FINL	0.00	0.00	1
Screens:	Scm: 13 Cap: 300					
Weekly Terms:	Wk 1 - 52/52	Wk 2 - 52/52	Wk 3 - 52/52	Wk 4 - 52/52		
<b>52% EACH WK</b>						
GUILT TRIP, THE	ITBS AYRSLEY GRAND CINEMAS 13 CHARLOTTE NC	12/19/2012 - 01/01/2013	FINL	0.00	0.00	1
Screens:	Scm: 1 Cap: 275					
Weekly Terms:	Wk 1 - 52/52	Wk 2 - 52/52				
GUILT TRIP, THE	ITBS CAROUSEL 151 W GREENSBORO NC	12/19/2012 - 01/01/2013	FINL	0.00	0.00	1
Screens:	Scm: 1 Cap: 292					
Weekly Terms:	Wk 1 - 52/52	Wk 2 - 52/52				
GUILT TRIP, THE	ITBS CAROUSEL @ ALAMANCE 16 BURLINGTON NC	12/19/2012 - 01/01/2013	FINL	0.00	0.00	1
Screens:	Scm: 1 Cap: 296					
Weekly Terms:	Wk 1 - 52/52	Wk 2 - 52/52				
GUILT TRIP, THE	ITBS CITADEL STADIUM MALL IMAX 16 CHARLESTON SC	12/19/2012 - 01/01/2013	FINL	0.00	0.00	1
Screens:	Scm: 1 Cap: 315					
Weekly Terms:	Wk 1 - 52/52	Wk 2 - 52/52				
<b>52% EACH WK</b>						
GUILT TRIP, THE	ITBS NORTHRIDGE 10 W HILTON HEAD ISLAND SC	12/19/2012 - 01/01/2013	FINL	0.00	0.00	1
Screens:	Scm: 1 Cap: 317					
Weekly Terms:	Wk 1 - 52/52	Wk 2 - 52/52				
GUILT TRIP, THE	ITBS NORTHWOODS STADIUM CINEMA 131 N CHARLESTON SC	12/19/2012 - 01/01/2013	FINL	0.00	0.00	1
Screens:	Scm: 1 Cap: 275					
Weekly Terms:	Wk 1 - 52/52	Wk 2 - 52/52				

Weekly terms subject to float.

Title	Theater	Play Date	Status	Advance	Guarantee	Prints
JACK REACHER	ITBS AYRSLEY GRAND CINEMAS 13 CHARLOTTE NC	12/21/2012 - 01/31/2013	FINL	0.00	0.00	1
Screens:	Scrn: 1 Cap: 275					
Weekly Terms:	Wk 1 - 57/57	Wk 2 - 57/57	Wk 3 - 57/57	Wk 4 - 57/57	Wk 5 - 57/57	Wk 6 - 57/57
Agreed Upon Aggregate Scale						
JACK REACHER	ITBS CAROLINA MALL 8 CONCORD NC	12/21/2012 - 01/31/2013	FINL	0.00	0.00	1
Screens:	Scrn: 5 Cap: 377					
Weekly Terms:	Wk 1 - 57/57	Wk 2 - 57/57	Wk 3 - 57/57	Wk 4 - 57/57	Wk 5 - 57/57	Wk 6 - 57/57
Agreed Upon Aggregate Scale						
JACK REACHER	ITBS CAROUSEL @ ALAMANCE 16 BURLINGTON NC	12/21/2012 - 01/31/2013	FINL	0.00	0.00	2
Screens:	Scrn: 1 Cap: 296					
Weekly Terms:	Wk 1 - 57/57	Wk 2 - 57/57	Wk 3 - 57/57	Wk 4 - 57/57	Wk 5 - 57/57	Wk 6 - 57/57
Agreed Upon Aggregate Scale						
JACK REACHER	ITBS CITADEL STADIUM MALL IMAX 16 CHARLESTON SC	12/21/2012 - 01/31/2013	FINL	0.00	0.00	1
Screens:	Scrn: 1 Cap: 315					
Weekly Terms:	Wk 1 - 57/57	Wk 2 - 57/57	Wk 3 - 57/57	Wk 4 - 57/57	Wk 5 - 57/57	Wk 6 - 57/57
Agreed Upon Aggregate Scale						
<b>57% min. EACH WK - could go up.</b>						
JACK REACHER	ITBS EAGLE CINEMA 5 ROCKY MOUNT VA	12/21/2012 - 01/17/2013	FINL	0.00	0.00	1
Screens:	Scrn: 1 Cap: 285					
Weekly Terms:	Wk 1 - 57/57	Wk 2 - 57/57	Wk 3 - 57/57	Wk 4 - 57/57		
Agreed Upon Aggregate Scale						
JACK REACHER	ITBS EASTGATE 5 ALBEMARLE NC	12/21/2012 - 01/17/2013	FINL	0.00	0.00	1
Screens:	Scrn: 1 Cap: 296					
Weekly Terms:	Wk 1 - 57/57	Wk 2 - 57/57	Wk 3 - 57/57	Wk 4 - 57/57		
Agreed Upon Aggregate Scale						
JACK REACHER	ITBS EPICENTER THEATER 5 CHARLOTTE NC	12/21/2012 - 01/31/2013	FINL	0.00	0.00	1
Screens:	Scrn: 1 Cap: 244					
Weekly Terms:	Wk 1 - 57/57	Wk 2 - 57/57	Wk 3 - 57/57	Wk 4 - 57/57	Wk 5 - 57/57	Wk 6 - 57/57
Agreed Upon Aggregate Scale						
JACK REACHER	ITBS NORTHRIDGE 10 W HILTON HEAD ISLAND SC	12/21/2012 - 01/31/2013	FINL	0.00	0.00	1
Screens:	Scrn: 1 Cap: 317					
Weekly Terms:	Wk 1 - 57/57	Wk 2 - 57/57	Wk 3 - 57/57	Wk 4 - 57/57	Wk 5 - 57/57	Wk 6 - 57/57
Agreed Upon Aggregate Scale						
JACK REACHER	ITBS NORTHWOODS STADIUM CINEMA 131 N CHARLESTON SC	12/21/2012 - 01/31/2013	FINL	0.00	0.00	1
Screens:	Scrn: 1 Cap: 275					
Weekly Terms:	Wk 1 - 57/57	Wk 2 - 57/57	Wk 3 - 57/57	Wk 4 - 57/57	Wk 5 - 57/57	Wk 6 - 57/57
Agreed Upon Aggregate Scale						
JACK REACHER	ITBS STARMOUNT 5 JONESVILLE NC	12/21/2012 - 01/17/2013	FINL	0.00	0.00	1
Screens:	Scrn: 1 Cap: 275					
Weekly Terms:	Wk 1 - 57/57	Wk 2 - 57/57	Wk 3 - 57/57	Wk 4 - 57/57		
Agreed Upon Aggregate Scale						

Weekly terms subject to float.

<u>Title</u>	<u>Theater</u>	<u>Play Date</u>	<u>Status</u>	<u>Advance</u>	<u>Guarantee</u>	<u>Prints</u>
RISE OF THE GUARDIANS	ITBS SOUTH HILL CINEMA 2 W SOUTH HILL VA	12/21/2012 - 01/17/2013	FINL	0.00	0.00	1
Screens:	Scm: 1 Cap: 600					
Weekly Terms:	Wk 1 - 35/35	Wk 2 - 35/35	Wk 3 - 35/35	Wk 4 - 35/35		

---

Weekly terms subject to float.

10

THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

**RECEIVED**  
MAY 19 2015

**SC Court of Appeals**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE SHIRLEY C. ROBINSON, ADMINISTRATIVE LAW JUDGE

CASE NO. 12-ALJ-17-0390-CC  
APPELLATE CASE NO. 2014-001469

Southeast Cinema Entertainment, Inc.,.....Respondent,

v.

South Carolina Department of Revenue,.....Appellant.

**PROOF OF SERVICE**

I, Jean M. O'Connor, hereby certify that I have caused to be mailed a copy of the South Carolina Department of Revenue's Final Brief and Record on Appeal regarding the above-referenced case, by depositing the same in the United States Mail, postage prepaid, on May 19, 2015, addressed to Respondent, Southeast Cinema Entertainment, Inc., 4523 Park Road, Suite 105, Charlotte, NC 28209.

  
\_\_\_\_\_  
Jean M. O'Connor