No. S-235084
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C-36, AS AMENDED

AND

AND IN THE MATTER OF *THE BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED AND THE *BUSINESS CORPORATIONS ACT*, R.S.O. 1990, c. B-16, AS AMENDED

AND

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BRON MEDIA CORP. AND THE ENTITIES LISTED AT SCHEDULE "A"

PETITIONERS

APPLICATION RESPONSE

Application response of: Access Road Capital, LLC ("**Access Road**" or the "**Application Respondent**").

THIS IS A RESPONSE TO the notice of application of the petitioners filed October 5, 2023.

Part 1: ORDERS CONSENTED TO

The Application Respondent does not consent to the granting of the orders set out in paragraph 1 of Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The application Respondent does not oppose the granting of the orders set out in paragraph 1 of Part 1 of the notice of application provided that conditions are imposed upon the granting of the relief sought by the petitioners as set out in this application response.

Part 3: FACTUAL BASIS

Background

1. Access Road is a secured creditor of six of the petitioners, including BRON Studios Inc., BRON Ventures 1 (Canada) Corp., BRON Ventures 1, LLC, BRON Animation Inc., Henchman Productions Inc., and Windor Productions BC Inc., among other entities in the "BRON Group" of companies.

2. Access Road is also (a) an unsecured judgment creditor of the petitioner BRON Media Corp. pursuant to a consent judgment of this Court entered on October 6, 2022, and (b) a

judgment creditor of the petitioners BRON Ventures 1 (Canada) Corp., BRON Ventures 1 LLC, and BRON Media Holdings USA, Corp. pursuant to a judgment of the Supreme Court of the State of New York (Commercial Division) granted on May 24, 2022.

3. The approximately US $12.5 million in secured obligations that is owed to Access Road makes it the largest "non-insider" secured creditor of the petitioners.

The "Comeback" Hearing

4. The initial order in these proceedings was granted on a *ex parte* basis on July 19, 2023.

5. On the "comeback" hearing held on July 27 and 28, 2023, Access Road did not oppose the petitioners obtaining CCAA protection and commencing a sale and investment solicitation process ("**SISP**") as an alternative to becoming subject to the receivership order that Access Road obtained from this Court on March 10, 2023 (which order was subject to a stay of proceedings granted by the Court of Appeal as of the date of the petitioners' application for CCAA protection).

6. Access Road and other stakeholders did, however, raise several concerns with this Court including the need to ensure that the petitioners' restructuring efforts proceeded in a manner that was in the interest of arm's length stakeholders and not insiders like the petitioners and their interim lender. Concerns regarding fairness, the equal treatment of creditors, and the need for stakeholder consultation were specifically emphasized by Access Road.

7. In responding to the concerns raised by Access Road and other stakeholders, the petitioners submitted to this Court with the support of the Monitor that, among other things, (a) "Access Road, together with other creditors, will benefit substantially from collective marketing of Bron's business", and that (b) the petitioners' proposed SISP "is likely to optimize recovery for stakeholders, including unsecured creditors and possibly shareholders."

***Bron Media Corp. (Re)*, 2023 BCSC 1563, paras. 36 and 42 [*Bron Media*]**

8. To further address stakeholder concerns with the SISP, including the shortness of the timelines called for by the SISP, this Court held that "the fairness of the SISP should not be presumed on any future application for approval of a transaction generated by the SISP."

***Bron Media*, para. 44.**

Concerns with the Conduct of the SISP

9. On September 12, 2023, due to emerging concerns about the conduct and status of the SISP, Access Road requested that the Monitor provide it with access to the data room being maintained by the Monitor in connection with the SISP. On the same day, counsel to Access Road was provided by the Monitor with a copy of the confidentiality agreement required for access to the data room. Access Road returned a signed copy of the confidentiality agreement to the Monitor later that day.

Affidavit #1 of Joanne Austen, sworn on October 10, 2023 [Austen Affidavit], Exhibit A.

10. On September 13, 2023, a representative of the Monitor advised counsel to Access Road that the Monitor was "progressing towards having the document [i.e., the confidentiality agreement] fully executed."

Austen Affidavit, Exhibit A.

11. On September 14, 2023, with no intervening correspondence or discussion, the Monitor reversed its decision to grant Access Road access to the data room, advising in an email that "[u]pon further review and following discussion internally, and given that Access Road did not submit an LOI, per the SISP guidelines, they are therefore unable to commence participation in the SISP at this stage, which includes access to the VDR [i.e., the data room]".

Austen Affidavit, Exhibit B.

12. On September 15, 2023, in responding to a letter in which counsel to Access Road expressed its disappointment with the Monitor's sudden change of position, counsel to the Monitor advised, among other things, that:

(a) Access Road's request for access to the data room and/or request for an extension to the bid deadline (were one to be made by Access Road) was subject to the consent of the interim lender. It would subsequently be disclosed in the Monitor's Second Report that the interim lender had by this time submitted its own bid in the SISP. In other words, the Monitor advised that a bidder participating in a competitive SISP process was entitled to exercise influence over the rights of stakeholders to access information required to scrutinize the SISP and/or participate in it.

Austen Affidavit, Exhibit D.
Monitor's Second Report dated October 6, 2023 [Second Report], para. 40.

(b) the Monitor was not prepared to grant a "last-minute" extension to "a single potential bidder". Subsequently, the Monitor would disclose in its Second Report that it had in fact blocked access to two potential bidders (on September 5 and September 11) within a week of Access Road's request for access to the data room made on September 12. The Monitor's Second Report does not disclose whether the interim lender had influence over the decision to block these potential competing bidders from the SISP process in which the interim lender had submitted a bid of its own.

Austen Affidavit, Exhibit D.
Second Report, paras. 41 – 42.

(c) any further extensions to the SISP deadlines were prevented by "cash flow considerations" including that the DIP financing would "be exhausted shortly after the October 6, 2023 deadline for closing any approved transaction(s)." Of course, as is now evident, the cash flow considerations did not prevent the Monitor from subsequently extending the SISP deadlines, and the petitioners are now seeking an extension of the CCAA stay to a date that is approximately 6 weeks later than the October 6 date

> cited as a purported justification for denying Access Road's request for access to information.

Austen Affidavit, Exhibit D.

13. On September 19, 2023, counsel to Access Road responded to the Monitor's counsel's letter, as follows:

> Our client, Access Road Capital, LLC, is owed more than US $10 million by certain of the petitioners and as such is the petitioners' largest arm's length secured creditor. The Monitor's position denying our client access to the Data Room maintained in connection with a SISP that includes assets subject to our client's security is wholly inappropriate.
>
> Our client requested access to the Data Room because among other things it had concerns about the conduct and status of the SISP process being overseen by the Monitor. The Monitor's position set out in your September 15 letter denying our client the ability to access information being made available to parties that may be bidding in the SISP heightens those concerns.
>
> Contrary to your statement that the Monitor considers the integrity of the SISP to be of utmost importance, the rigid and highly technical position advanced in your letter puts the integrity of the process being administered by the Monitor into serious question. In a context where our client has not been consulted on the conduct of the SISP and has now been denied access to the Data Room, we trust that the Monitor would not without prior consultation purport to have accepted or to accept any bid on assets subject to our client's security that would not see our client paid out in full.

Austen Affidavit, Exhibit E.

14. Also on September 19, 2023, counsel to Access Road responded to an email thread to the service list for this proceeding regarding collection account management agreements ("**CAMAs**") to which the petitioners are party. In this correspondence, counsel to Access Road confirmed to the Monitor's counsel that Access Road was party to several CAMAs and anticipated advancing a position like that of other CAMA stakeholders if the petitioners sought the approval of any sale that purports to impact or detract in any way from rights and obligations under the CAMAs.

Austen Affidavit, Exhibit F.

15. In response to this notification, counsel to the Monitor advised that (a) the Monitor was seeking a sale approval hearing date; (b) the Monitor would work to schedule a subsequent hearing date to deal with "priorities"; and (c) it is not clear what bid(s) will be accepted and thus it is not clear whether there will be any attempt to affect the asserted rights of parties to the CAMA. Contrary to the suggestion in Affidavit #3 of Aaron Gilbert sworn on October 4, 2023 that the petitioners have, "in consultation with the Monitor, liaised with CAMA stakeholders in good faith since the Filing Date", no consultation has been undertaken with Access Road before or after its September 19 notice to the Monitor.

Austen Affidavit, Exhibit F.

16. On September 20, 2023, counsel to Access Road exchanged correspondence with counsel to the Monitor in which it was made clear that (a) Access Road expected to be consulted with respect to the SISP in so far any proposed transaction would either not see Access Road paid out in full or otherwise adversely affect its rights, and (b) the Monitor was not prepared to engage in any consultation with Access Road or to provide access to information being made available to potential bidders on Access Road's collateral for any reason.

Austen Affidavit, Exhibits G – I.

Part 4: LEGAL BASIS

Concerns with the Conduct and Status of the SISP

17. Access Road has serious concerns with the conduct and status of the SISP.

18. ***First***, given the concern expressed at the comeback hearing about the fairness of the SISP and timelines therein, it is troubling that the Monitor and petitioners have taken an approach to the conduct of the SISP that is rigid, highly technical, not reflective of this Court's jurisprudence, and potentially prejudicial to stakeholders.

19. It is well-established in this jurisdiction that the <u>primary</u> interest to be considered in a court-supervised sales process is that of creditors, with the goal being to obtain the best possible price. While important, the integrity of the sales process is a <u>secondary</u> consideration. Given this relative priority of objectives, it is axiomatic in this jurisdiction that late bids in a sales process may be considered where the price has been substantially increased such that it is likely "indicative of the fact that the sales process did not work [...]". In other words, if present, the existence and contents of late bids or expressions of interest in a SISP are crucial to the conduct and evaluation of the SISP.

***Port Capital Development (EV) Inc. (Re)*, 2021 BCSC 1272, paras. 98 – 101, reversed on other grounds 2021 BCCA 382.**

20. Notwithstanding the clarity on the priority of the interests in any sales process, the Monitor has declined (whether unilaterally or with the input of the petitioners and their related party interim lender and prospective purchaser) to consider expressions of interest from "late" bidders on highly technical grounds (that were subsequently proven to be unwarranted in the case of cash flow projections) without any indication that the Monitor assessed whether consideration of such expressions of interest would be in the best interest of stakeholders. The Monitor's and petitioners' conduct in this regard is not reflective of how a CCAA sales process is intended to be conducted and deprives the petitioners' stakeholders – and this Court – of information required to assess the robustness of the SISP on any sale approval hearing.

21. On this ground alone, the Monitor's and petitioners' approach to the conduct of the SISP casts significant doubt on whether the SISP has worked as intended.

22. ***Second,*** given the concerns raised by Access Road at the comeback hearing about a potential adverse impact of these proceedings on its security, it is troubling that the SISP is being

undertaken by the Monitor and the petitioners with no consultation with Access Road, which as noted above is the largest "non-insider" secured creditor of the petitioners.

23. It is axiomatic that creditors of debtors undertaking a court-supervised sales process should be consulted as to the conduct and status of the sales process. Indeed, pursuant to section 36 of the CCAA, in deciding whether to grant authorization for the debtors to sell any of their assets, "the court is to consider, among other things, [...] (d) the extent to which creditors were consulted." This statutory requirement is fully consistent with this Court's recognition that the primary interest to be considered in a court-supervised sales process is that of creditors. It is also premised on creditors being provided with reasonable access to the type of information from which Access Road has been barred by the Monitor and/or the petitioners and their related-party interim lender / prospective purchaser.

***CCAA*, section 36.**

24. Notwithstanding the statutory emphasis on the appropriateness and need for creditor consultation in a CCAA sales process, Access Road's requests for consultation and transparency have been rejected by the Monitor.

25. The Monitor's and petitioners' approach to this aspect of the conduct of the SISP again casts significant doubt on whether the SISP has worked as intended.

26. ***Third***, given the emphasis on the comeback hearing as to the importance of the equal treatment of creditors, it is troubling that the Monitor and the petitioners appear to be undertaking selective consultation with some stakeholders while not others. In particular, the statement in Affidavit #3 of Aaron Gilbert that "[t]he Company has, in consultation with the Monitor, liaised with CAMA stakeholders in good faith since the Filing Date" is not accurate vis-à-vis Access Road. Access Road is party to several CAMAs with the petitioners but has not been consulted at all with respect to the Monitor's or petitioners' positions with respect to the status of CAMAs.

27. The Monitor's and petitioners' selective approach to consultation with stakeholders creates an information imbalance that puts the petitioners and the stakeholders with whom they are consulting on a different footing than the stakeholders who are not being consulted. This is not fair and likely to adversely affect the ability to proceed with any sale approval hearing in a timely manner.

28. ***Fourth***, given the concerns raised at the comeback hearing about petitioners and their related-party interim lender treating the outcome of these proceedings as a *fait accompli*, it is deeply concerning to Access Road that the petitioners have terminated on one days' notice all "employees other than those necessary to facilitate asset proposed transaction(s)" (Affidavit #3 of Aaron Gilbert, para. 22).

29. The conduct of the petitioners in this regard is not reconcilable with their submissions to this Court and stakeholders on the need to keep key employees in their positions "through these CCAA proceedings" as advised in Affidavit #2 of Aaron Gilbert made on July 25, 2023. It also impairs the ability of stakeholders who may oppose the appropriateness of any transaction(s) brought before this Court for approval to take steps to preserve their collateral should the preferred transaction(s) of the petitioners be not acceptable to this Court.

30. The cumulative nature of the foregoing concerns prevents Access Road – in its capacity as the petitioners' largest "non-insider" secured creditor – from concluding that the petitioners are acting in good faith and with due diligence in advancing these proceedings.

31. Nonetheless, given the prejudicial position in which it finds itself as a result of the conduct of the Monitor and the petitioners, Access Road is not opposing the relief sought by the petitioners on the condition that (a) stakeholders be provided with copies of any final agreement(s) accepted by the petitioners in the SISP by no later than 6 pm PST on Friday, October 13, 2023; and (b) stakeholders receive not less than ten business days' notice of any sale approval hearing so that concerns and issues can be fully assessed on an appropriate record.

Lack of Reporting on Costs

32. Pursuant to paragraph 28(h) of this Court's Order granted on July 28, 2023 (the "**ARIO**"), the Monitor is required to monitor and track the costs of these CCAA proceedings including the utilization of the proceeds of the DIP Facility (as defined in the ARIO) and the incurring of the costs and liabilities that are subject to any of the Charges (as defined in the ARIO) in respect of each of the petitioners and their respective property.

33. The Monitor has to date not reported to stakeholders on the matters subject to paragraph 28(h) of the ARIO. Access Road's position is that such costs information ought to be disclosed to stakeholders at the same time as any potential application seeking the approval of a transaction with respect to any of the petitioners or their respective property.

Part 5: MATERIAL TO BE RELIED ON

34. Affidavit #1 of Joanne Austen, made October 10, 2023; and

The application respondent estimates that the application will take 2 hours.

The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: October 10, 2023

Signature of Peter Bychawski
Lawyer for the Application Respondent

Schedule "A"

List of Petitioners

	Debtor Company	Jurisdiction
1.	BRON Animation Inc.	British Columbia
2.	BRON Creative Corp.	Ontario
3.	BRON Developments Inc.	British Columbia
4.	BRON Media Corp.	British Columbia
5.	BRON Media Holdings Intl. Corp.	British Columbia
6.	BRON Media Holdings USA Inc.	British Columbia
7.	BRON Releasing Inc.	British Columbia
8.	BRON Studios Inc.	British Columbia
9.	BRON Ventures 1 (Canada) Corp	British Columbia
10.	BRON Everest Productions Inc.	Ontario
11.	Fables Productions BC Inc.	British Columbia
12.	Gossamer Productions BC Inc.	British Columbia
13.	Hench 2 BC Productions Inc.	British Columbia
14.	Henchmen Productions Inc.	British Columbia
15.	Robin Hood Digital PC BC Inc.	British Columbia
16.	Windor Productions BC Inc.	British Columbia
17.	BRON Creative USA, Corp.	Nevada
18.	BRON Digital USA, LLC	Delaware
19.	BRON Life USA Inc. (BRON Legacy USA Inc.)	Delaware
20.	BRON Media Holdings USA Corp.	Delaware
21.	BRON Releasing USA Inc.	Delaware
22.	BRON Studios USA Inc.	Nevada

23.	BRON Ventures 1, LLC	Delaware
24.	BRON Studios USA Developments Inc.	Nevada
25.	Bakhorma, LLC	Washington
26.	Drunk Parents, LLC	New York
27.	Fables Holdings USA, LLC	Delaware
28.	Fables Productions USA Inc	Delaware
29.	Gossamer Holdings USA, LLC	Delaware
30.	Gossamer Productions USA Inc.	Delaware
31.	Harry Haft Productions, Inc.	New York
32.	Heavyweight Holdings, LLC (previously Harry Haft Films, LLC)	Delaware
33.	I Am Pink Productions, LLC	Delaware
34.	Lucite Desk, LLC	Delaware
35.	National Anthem Holdings, LLC (f. k. a. BCDC Holdings, LLC)	Delaware
36.	National Anthem ProdCo Inc.	New Mexico
37.	Oakland Pictures Holdings, LLC	Delaware
38.	Pathway Productions, LLC	Delaware
39.	Robin Hood Digital PC USA Inc.	Delaware
40.	Robin Hood Digital USA, LLC	Delaware
41.	Solitary Holdings USA, LLC	Delaware
42.	Surrounded Holdings USA LLC	Delaware
43.	Welcome to Me, LLC	California