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 25, 2023 (the "**Application**").

Part 1: ORDER CONSENTED TO

The Application Respondent does not consent to the granting of any of the orders set out in part 1 of the Application.

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the orders set out in paragraphs 1, 2, 3, 4(a), 4(b), and 5 of Part 1 of the Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Application Respondent takes no position on the granting of the orders set out in paragraphs 4(c) and 4(d) of Part 1 of the Application.

Part 4: FACTUAL BASIS

Overview

1. Access Road holds security and other legal entitlements in the assets of twenty-one (21) of the fifty-nine (59) proposed vendors party to the "sale" transaction before this Court with respect to debt obligations totaling over US $14.5 million.[1]

2. In substance, the petitioners and their business partner turned insider purchaser are seeking to transfer collateral subject Access Road's first-ranking security, and other legal entitlements, to CWL by way of a purported "credit bid" notwithstanding that CWL does not have first-ranking security in this collateral and these entitlements.

3. This is an unprecedented, unfair, and unreasonable attempt to expropriate Access Road's collateral and legal entitlements without compensation.

4. To give the petitioners and their business partner turned insider purchaser what they want on this Application would require this Court to go against fundamental principles of Canadian law, including the fundamental principles that courts:

(a) must respect the separate corporate personality of separate corporate entities and their separate stakeholder groups;

(b) will not rewrite contracts that have been entered into between sophisticated parties for consideration;

(c) cannot authorize the transfer of the benefits of agreements while nullifying their burdens; and

(d) will not bless a transaction under section 36 of the CCAA with their approval absent evidence that the consideration being provided for by the purchaser is reasonable and fair considering the market value of the assets being acquired.

5. In short, what the petitioners and their business partner turned insider purchaser are trying to do on this Application is legally prohibited.

The Access Road Security

6. Access Road is a secured creditor of ten (10) of the forty-three (43) petitioners, including (i) Bakhorma, LLC, (ii) BRON Studios Inc. (iii) BRON Studios USA Inc., (iv) BRON Ventures 1 (Canada) Corp., (v) BRON Ventures 1, LLC, (vi) BRON Animation Inc., (vii) Heavyweight Holdings, LLC, (viii) Henchman Productions Inc., (ix) Windor Productions BC Inc., and (x) BRON Media Holdings USA Corp.[2]

7. Access Road is also a secured creditor of six (6) of nineteen (19) of the proposed "additional petitioners" that are sought to be added as petitioners to these proceedings,

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[1] Pursuant to a Consent Judgment of this Court granted on October 6, 2022, Access Road obtained a declaration that Bron Media Corp. is jointly and severally liable with Bron Ventures 1 LLC and Bron Ventures 1 (Canada) Corp. for US $10,941,847.19 as of May 19, 2022, plus interest thereon from May 19, 2022 to the date of payment at a per diem rate of US $6,663.73 plus costs and expenses.

[2] Austen #2, Exhibit "A", UCC and PPSA results for petitioner entities.

including: (i) Brown Amy, LLC, (ii) Fonzo, LLC, (iii) Needle In a Time Stack, LLC, (iv) Para Productions, LLC, (v) TWWMD Holdings, LLC., and (vi) Villains Pictures, LLC.[3]

8. Additionally, Access Road is the legal beneficiary of absolute, written, and irrevocable assignments of the "CAMA" entitlements of fourteen (14) of the vendors under the proposed "sale" transaction including nine (9) of the proposed additional petitioners.[4]

9. In total, Access Road has security and other legal entitlements to the distinct assets of twenty-one (21) of the fifty-nine (59) vendors to CWL's proposed "credit bid". In contrast, CWL possesses current and existing financing statements appear to be registered against only about (10) of the fifty-nine (59) vendors whose assets it is seeking to acquire by way of a "credit bid." In other words, CWL is attempting to utilize security interests in a comparatively narrower base of collateral to acquire the separate and broader collateral base encumbered by the interests of Access Road.

The Media Res Transaction

10. The purported "credit bid" "**Transaction**" before this Court is said to be conditional upon the petitioners "extinguishing" the right of Access Road to receive a cash payment of approximately US $7.5 million plus accruing interest at a rate of 8% per year due from a solvent third party so that this amount can instead be directed to CWL. If this is the case, then this Application must be dismissed without the need to consider section 36 of the CCAA. There is no legal basis upon which the requested "extinguishment" can be granted by this Court.

11. The proposed extinguishment of rights relates to a multi-party transaction involving Access Road, certain of the petitioners, and a solvent third party named Media Res Studio, LLC. ("**Media Res**").

12. On or about October 27, 2021, after having defaulted on their obligations to Access Road,[5] BRON Media Corp. ("**Bron MC**"), BRON Ventures 1, LLC ("**Bron Ventures**"), and Bron Studios USA Inc. ("**Bron USA**" and together with Bron MC and Bron Ventures, the "**Bron MR Parties**") entered into a multi-party agreement (collectively, the "**Media Res Transaction**") with Access Road and Media Res that was documented by (a) a Transaction and Settlement Agreement dated October 27, 2021 (the "**Media Res Settlement**") among Media Res and the Bron MR Parties;[6] and (b) an Acknowledgment Agreement dated October 29, 2021 (the "**Media Res Acknowledgment**") among the Bron MR Parties, Access Road, and Media Res.[7]

13. The key aspects of the Media Res Settlement, as they affect Access Road, and their completion status can be summarized as follows.

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[3] Austen #2, Exhibit "B", UCC results for additional petitioner entities.
[4] Austen #2, Exhibit "C", Irrevocable directions. Irrevocable directions to pay were granted pursuant to certain forbearance agreements among Access Road and the applicable petitioners. See Austen #2, Exhibit "D". In the Application, consistent with Access Road's entitlements, the petitioners advise that "rights of other parties to the CAMAs being assumed by CW Lending under the CW Lending Purchase Agreement are intended to remain unaffected." See Application, para. 23. However, the current form of order does not reflect this and must be amended accordingly.
[5] Austen #2, Exhibit "D", Forbearance agreements.
[6] Gilbert #5, Exhibit "B", Media Res Settlement.
[7] Gilbert #5, Exhibit "D". Media Res Acknowledgment.

14. First, 220 Units (as defined in the Media Res Settlement) owned by Bron Ventures and subject to Access Road's first-ranking general security agreement registered against Bron Ventures (the "**Ventures GSA**")[8] were, with Access Road's consent, sold by Bron Ventures to Media Res for an aggregate purchase price of US $7,557,075 (the "**Cash Payment**"). The "**Initial Closing**" with respect to the sale of the Units has occurred and title to 2 Units has been transferred to Media Res in accordance with the Media Res Settlement.[9] The Cash Payment for the balance of the 218 Units was due to be paid by Media Res to Bron Ventures by no later than December 31, 2022 and is presently due and accruing interest at the rate of 8% per year.

15. Second, each issued and outstanding Series A Preferred Unit subject to Access Road's security under the Ventures GSA that was not purchased by Media Res has, with Access Road's consent, been converted into one Class A Common Unit.

16. Third, certain Bron USA projects were, with Access Road's consent, assigned to Media Res.

17. Fourth, all loan obligations owing by Media Res to Access Road pursuant to a Collateral Assignment of Loan Documents Agreement dated May 29, 2020[10] among Bron MC, as assignor, and Access Road, as assignee, pursuant to which obligations owing by Media Res to Bron MR under a Bron Loan Agreement (as defined in the Media Res Settlement) were automatically terminated and cancelled upon the Initial Closing.

18. Fifth, to give effect to the foregoing and to insulate itself from claims by Access Road on account thereof, Media Res required that each of the Bron MR Parties execute the Media Res Acknowledgment providing that (a) so long as any loan obligations from any Bron MR Parties (or any of their affiliates) to Access Road (or any of its affiliates) remain outstanding, that any proceeds payable to the Bron MR Parties pursuant to the Media Res Settlement will be assigned by the Bron MR Parties to Access Road; and (b) Access Road consent to the Media Res Settlement and the transactions contemplated thereby. The Media Res Acknowledgment and the transactions contemplated thereby was a condition of the Media Res Settlement imposed by Media Res.

19. In summary, the commercial terms of the Media Res Settlement, which have been substantially performed, were that (a) Access Road agreed to release its rights to certain collateral including the right to collect amounts owing by Media Res under the Bron Loan Agreement which had prior to the Media Res Transaction been assigned to Access Road; (b) Media Res in turn required assurances that the proceeds of the Media Res Settlement would be utilized to pay Access Road in consideration for the value it was providing under the Media Res Transaction in order to insulate Media Res from liability to Access Road; and (c) to guard against the potential for a windfall to Access Road, a provision was included in the Media Res Settlement that Access Road would only collect the Cash Payment in so far as it was owed money by the Bron MR Parties or their affiliates at the date of payment.

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[8] Austen #2, Exhibit "E". Bron Ventures GSA. Also see Austen #2, Exhibit "A", p. 019.

[9] The Initial Closing date under the Media Res Settlement was October 29, 2021. The Monitor's Third Report, para. 91, confirms that the 2 Units transferrable to Media Res on the Initial Closing have been transferred. Gilbert #5, para. 47 confirms that the Initial Closing has occurred.

[10] Austen #2, Exhibit "F", Collateral Assignment of Loan Documents. Also see Austen #2, Exhibit "A", p. 021.

Part 5: LEGAL BASIS

The Proposed Expropriation of the Cash Payment is Prohibited

20. It is the petitioners' position that CWL is only prepared to close the Transaction if the Cash Payment is made by Media Res to CWL rather than to Access Road.[11] To this end, the petitioners seek to "extinguish"[12] Access Road's right to receive the Cash Payment.

21. In other words, the petitioners request that this Court (a) excise the obligation for the Cash Payment to be paid to Access Road from the Media Res Settlement; (b) allow CWL to "assume" the benefits under the Media Res Settlement "free and clear" of the corresponding obligations owing to Access Road under the same transaction; and (c) "extinguish" Access Road's underlying entitlement to the Cash Payment.

22. Apart from the petitioners' and CWL's approach representing an outright and offensive attempt to expropriate value, it is clearly legally prohibited.

23. "It is trite law that the courts do not rewrite contracts that have been entered into between sophisticated parties for consideration."[13] This fundamental principle remains true even in the context of a *CCAA* restructuring."[14]

24. In what can only be described as a form of complex legal gymnastics, the petitioners seek to evade this fundamental principle by cavalierly asserting – with no analysis provided or legal authority cited – that Access Road's rights under the Media Res Settlement are merely "a secured claim."[15]

25. The petitioners' attempt to characterize what is on its face a complex multi-party settlement as a mere "secured claim" is a misguided effort to distract from the substance of the issue before this Court. The reality is that Access Road already had a secured claim to the Units and the Cash Payment by virtue of the Ventures GSA that was entered into over a year prior to the Media Res Transaction.[16] As a result, there was no need for Access Road to enter into the Media Res Transaction to obtain a "secured claim" to either the Units or the Cash Payment. In any event, as discussed in the next section of this Application Response, Access Road's first-ranking secured claim to all the assets of Bron Ventures does provide an independent basis for prohibiting a "credit bid" by CWL.

26. Properly construed in its factual matrix, the Media Res Transaction gives Access Road an independent contractual right to receive the Cash Payment from Media Res pursuant to a multi-party settlement. Under the Media Res Transaction, Media Res, as the payor of the Cash Payment, had a significant interest in the Cash Payment being made to Access Road. Indeed, it is a term of the Media Res Settlement between Media Res and the Bron MR Parties that the

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[11] Application, para. 60.
[12] Application, paras. 59 and 60.
[13] *Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd*., 2005 ABQB 324, para. 11; see also *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55, [2007] 3 S.C.R. 679, at para. 34, citing *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 31; *Century Services Corp. v. LeRoy*, 2022 BCCA 239, paras. 89 and 93, leave to SCC dismissed.
[14] *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 4218 at para. 110, citing *Allarco Entertainment Inc. (Re)*, 2009 CarswellAlta 1458 (ABQB).
[15] Application, para. 59.
[16] Austen #2, Exhibit "A", p. 019.

Cash Payment be paid by Media Res to Access Road so long as Access Road's loan obligations remain unpaid.[17] The agreements and assurances provided by Access Road under the Media Res Acknowledgment are in turn a condition to the Media Res Settlement such that the Media Res Transaction never would have occurred without Access Road's agreement. All of this is consistent with the Media Res Transaction being a complex and heavily negotiated multi-party settlement. It also makes ample commercial sense.

27. At the time that the Media Res Settlement was entered into by Media Res, the assets Media Res was proposing to acquire from the Bron MR Parties were encumbered by Access Road's security. The Bron MR Parties were also at this time in default of their obligations to Access Road and subject to forbearance terms. In consenting to the consummation of the Media Res Settlement in this context, Access Road was providing to Media Res, and Media Res was receiving from Access Road, valuable consideration in the form of (a) the right to acquire the Units, (b) the forgiveness of debt owing by Media Res to Access Road, and (c) the transfer and/or conversion of other assets free and clear of Access Road's claims. In consideration for these benefits, Media Res had an interest in ensuring that Access Road would be paid for the value it was transferring to Media Res, including to avoid the risk of incurring liability to Access Road that could arise under applicable laws of the United States in the event of non-payment. In other words, the Media Res Transaction required a guarantee that Access Road be paid, which is why the Media Res Acknowledgment was a condition to the Media Res Settlement.

28. In this context, the petitioners' attempts to "extinguish" Access Road's entitlement to the Cash Payment payable under the Media Res Settlement so that CWL can take the Cash Payment without being subject to corresponding obligations to Access Road is legally prohibited for several reasons.

29. First, as noted above, to give the petitioners and CWL what they want, this Court would have to rewrite the Media Res Settlement by effectively severing (a) the Media Res Settlement from the Media Res Acknowledgement which is a condition to the Media Res Settlement, and (b) section 6(e) of the Media Res Settlement from the balance of the commercial terms of the Media Res Settlement. This is a *prima facie* violation of the principle that this Court will not rewrite contracts that have been entered into between sophisticated parties for consideration. It would also be inequitable as it would provide CWL with a windfall under the Media Res Settlement while laying the consequences of the unravelling of the commercial terms of the Media Res Settlement (including potential liabilities) at the feet of Access Road and Media Res. In this regard, it is important that the Media Res Transaction is governed by the laws of California and New York, as applicable. This is a further reason not to disrupt a complex multi-party agreement negotiated among sophisticated United States-based parties.

30. Second, the petitioners' and CWL's proposed scheme of transferring the benefits of the Media Res Settlement to CWL while stranding the corresponding obligations to Access Road runs afoul of what the Supreme Court of Canada has held to be the "fundamental" and "universal commercial legal principle" that an assignor may not assign contractual rights in such a way as to "convey the benefits and nullify the burdens".[18] Stated differently, a party seeking to

[17] The Media Res Acknowledgment merely acknowledges this pursuant to section 6(e) of the Media Res Settlement, because the loans to Access Road had not been paid off by the Initial Closing (had they been paid off no Media Res Acknowledgment would have been required).
[18] *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41, para. 106.

enforce assigned rights under an agreement "can only do so subject to the terms and conditions therein."[19]

31. The fundamental common law principle grounding the courts' refusal to bifurcate the benefits and obligations of an agreement is mirrored in the language of section 11.3 of the CCAA (upon which the petitioners rely to assign the Media Res Settlement). Section 11.3 only permits this Court to assign both "the rights <u>and obligations</u>" of an agreement, and in doing so requires the Court to consider, among other things, "whether the person to whom the rights <u>and obligations</u> are to be assigned would be able to perform <u>the obligations</u>".

32. Contrary to the principles stated by the Supreme Court of Canada, and the ambit of this Court's power to assign contracts under the CCAA, the petitioners and CWL are seeking to bifurcate the benefits flowing from the sale of the Units to Media Res (i.e., the Cash Payment) from the associated obligations of the Media Res Settlement (i.e., the payment of the Cash Payment by Media Res to Access Road). The legal maneuvering being engaged in by the petitioners and CWL is only explainable if the Cash Payment of US $7.5 million plus accruing interest at a rate of 8% per year represents the value that CWL is seeking to acquire. If the Cash Payment "has no value"[20] as the petitioners suggest to this Court, CWL's maneuvering to extract this payment as a condition of proceeding with its Transaction would be inexplicable.

33. As discussed in more detail below, there is also no merit in the petitioners' suggestion that Access Road could have retained its right to receive the Cash Payment by "bidding" on the Units.[21] This suggestion is commercially absurd. For this to occur, Access Road would have had to (a) submit a "credit bid" under the Ventures GSA to (b) acquire the Units so that it could (c) have the petitioners apply to this Court to overturn the transfer restrictions in the Media Res LLC Agreement, thereby (d) potentially allowing Access Road to temporarily become a joint unit holder with Bron Ventures and Media Res for the purpose of (e) allowing Access Road to become the vendor under the Media Res Settlement so that (f) Access Road could compel itself to assign its rights to collect the Cash Payment to itself. Such complex legal gymnastics which are being engaged in by the petitioners and CWL, while creative, are clearly legally prohibited and cannot reasonably be expected to have been mimicked by a party with a legal entitlement to what the petitioner and CWL are trying to expropriate.

34. The sole authority on which the petitioners rely on this issue, *Re Quest University Canada*, 2020 BCSC 1883, also does not assist their position. *Quest* concerned the authority of a CCAA court to vest a right of first refusal ("**ROFR**") off title to lands. This was not a case of the court rewriting a contract. The purchaser in *Quest* was not trying to assume a contract containing a ROFR without also assuming the ROFR. Rather, the mortgages and security of the ROFR holder were <u>not</u> being assumed. The issue was whether the interest in land resulting from the ROFR could also be vested off title. *Quest* and the strained legal analysis that the petitioners build around it simply has no application to this case.

35. To the extent that this Court has residual jurisdiction to grant the petitioners requested relief under section 11 of the CCAA, which is baldly asserted by the petitioners without analysis or case authority, this is not the case to exercise such discretion. None of the social and economic effects that guide the exercise of jurisdiction under section 11 of the CCAA are of concern in this case. The petitioners do not have an ongoing business. They have terminated all

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[19] *Ibid*. See also *Re Aeropostale Canada Corp. (Notice of Intention)*, 2018 ONSC 1468 at paras. 23-38.
[20] Application, para. 60.
[21] Application, para. 65.

their employees. Their assets consist of rights to collect receivables due on intangibles. There is no evidence of ongoing business operations or of any social or economic ills that would follow from a liquidation of the petitioners' remaining assets outside of the CCAA as opposed to within it.[22] In this context, section 11 of the CCAA cannot serve as the basis for CWL saying that it will allow the petitioners to go into liquidation unless it obtains rights to a US $7.5 million Cash Payment from a solvent third party without paying anything to the party legally entitled to it by virtue of contract or, alternatively, security.

The Petitioners' Obfuscations with Respect to the Nature and Effect of the Transaction

36. In applying the factors set out in s. 36 of the CCAA, it is critical to start from the principle enunciated by the Supreme Court of Canada in the CCAA case of *Sun Indalex Finance v. United Steelworkers*,[23] that, "unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected." The need to guard against unfairness in group insolvencies was acknowledged by this Court in these proceedings.[24]

37. The need to consider the separateness of corporate personality in any CCAA proceeding does not mean that aggregate transactions cannot be advanced. What it does mean is that greater scrutiny of aggregate transactions is required to ensure that there is evidence before the Court that allows the section 36 analysis to be undertaken in a manner that respects the separate corporate personality of separate corporate debtors and their separate stakeholder groups. Absent an order for substantive consolidation,[25] it is not appropriate to conduct a consolidated analysis of "purchased assets" that are owned by distinct corporate entities with distinct creditors against an unallocated "purchase price". To put it colloquially, the Court must guard against a transaction that is structured in a manner that "robs Peter to pay Paul."

38. In the present case, the petitioners and CWL ignore the separate corporate personality of the separate petitioners and their separate stakeholder groups. The monitor in fact implies that it has not been able to obtain information on the petitioners' separate assets and liabilities that would allow it to comply with the approach required by *Sun Indalex* and has instead approached the SISP and its outcome on a consolidated basis.[26] In other words, a *de facto*, unauthorized consolidation of the petitioners' separate estates has taken place, notwithstanding the concerns raised by stakeholders at the outset of these proceedings regarding the need to guard the separate corporate personality of separate corporate entities and their separate creditors. Despite being aware of these issues and concerns for months, the petitioners have not brought an application for substantive consolidation.

39. As a result, this Court lacks the necessary information to conduct the analysis required by section 36 of the CCAA. Notably, the monitor concedes that this lack of information was of concern to bidders in the SISP, advising that potential bidders requested from the monitor a "breakdown of the total debt of BRON outstanding and the asset associated with the debt."[27] The monitor does not report on whether it provided the necessary information to potential bidders and, in any event, does not provide it to this Court and stakeholders on this Application.

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[22] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60.
[23] 2013 SCC 6, para. 238.
[24] *Bron Media Corp. (Re)*, 2023 BCSC 1563 ["***Bron Reasons***"], para. 34.
[25] *Redstone Investment Corporation*, 2016 ONSC 513.
[26] Monitor's Third Report, paras. 46 – 48.
[27] Monitor's Third Report, para. 68(c).

40. The lack of specificity and transparency to the petitioners' evidence masks the fact that the Transaction has been structured in a manner that proposes to expropriate value from Access Road to the benefit of CWL for effectively no consideration. As noted above, there is a complete disconnect between what is alleged to be the consideration provided by CWL and the assets it is attempting to acquire. This is evident when one considers the "purchase price" purportedly being "paid" by CWL as against the assets it is seeking to acquire.

41. As noted above, the "security review" conducted by the monitor's counsel confirms that CWL has a comparatively minor secured interest in the assets subject to its "credit bid". The "BRON Media Debt", "Robin Hood Debt", "Solitary Debt", and "Surround Debt" is not secured by priority charges on the Access Road collateral that is subject to the "credit bid." Statements to the effect that CWL is bidding credit in the tens of millions of dollars is not grounded in anything. There is simply no evidence of there being any value in the limited assets on which CWL is bidding its credit. In contrast, there is evidence of significant value to which Access Road is entitled in the form of a US $7.5 million Cash Payment plus accruing interest at a rate of 8% per year from a solvent third party among other notes and revenue streams that CWL is seeking to acquire.

42. In this context, it is inexplicable that the petitioners and monitor are advising this Court that the scheme CWL is advancing is "primarily a credit bid involving significant consideration and the acquisition of a broad range of assets."[28] Where is the evidence for any of this? The only thing that is clear is the fact that CWL's "credit bid" is purporting to acquire a broad range of assets owned by petitioners and proposed additional petitioners over which <u>Access Road</u> and not CWL has first ranking security.

43. In terms of the other components of the "credit bid", being a portion of unallocated cash of only **$9,500.00**, a portion of unallocated "Interim Lender Debt" of US $6.2 million, and unspecified, unquantified, and unallocated "Assumed Liabilities", no analysis whatsoever is provided by the petitioners or monitor. These "amounts" may amount to $0 as against any petitioner. In fact, it appears that many of the "Assumed Liabilities" rank in priority ahead of CWL on its limited collateral and would have to be assumed with or without the Transaction being approved by this Court. Similarly, many of the "Assumed Contracts" consist of assets such as promissory notes that will be payable to CWL as opposed to liabilities it will have to satisfy. In the case of Access Road, the liabilities forming part of CWL's bid would in most if not all cases presumptively rank below Access Road's security. There is a complete lack of evidence and analysis on what "consideration" if any is being provided by CWL. No evidence of consideration cannot plausibly be found to be "reasonable and fair" consideration under the CCAA.

Section 36 Factors are Not Met

44. With respect to s. 36(3)(a), this Court expressly held when it approved the SISP that "the fairness of the SISP should not be presumed on any future application for approval of a transaction generated by the SISP."[29] It is apparent now that stakeholder concerns with the SISP made at the time of its approval warranted such a reservation of judgment. The financial assumptions underlying the tight SISP timelines, which the monitor relied upon to shut out potential bidders, were clearly unwarranted. The asserted urgency to the SISP timelines has also proved to be baseless. CWL, after urging tight timelines for the SISP, which disadvantaged non-insiders, subsequently agreed to extend the same timelines as it worked towards revisions

[28] Monitor's Third Report, para. 130(g).
[29] *Bron Reasons*, para. 36.

to its own insider bid. Even on the eve of this Application, additional funds of $1.5 million have suddenly been found by the petitioners.[30] The monitoring of resources and timelines on which the very tight SISP timelines were premised was clearly faulty from the outset.

45. The SISP has also been marred by lack of information. This is abundantly clear from the monitor's report to this Court. Most concerningly, there is evidence that financial information about the petitioners' most valuable assets was not made available to potential bidders. At the same time, this information was made available to the petitioners and their business partner and insider purchaser, CWL. Specifically, the financial information regarding Bron Ventures' interest in Media Res was only made available to the petitioners.[31] Similarly, CWL prevented arms'-length bidders from accessing information regarding certain "Slates".[32] The monitor's statements throughout its report that it supports this Transaction based on the information available to it ring hollow in circumstances where available information was either lacking or withheld.

46. Also concerning is that the monitor and petitioners have taken highly technical and rigid legal positions aimed at precluding access to information that could be used by stakeholders to scrutinize the SISP. For example, Access Road has been denied access to information with respect to its collateral that was made available to potential bidders by the monitor on the grounds that the SISP precludes this. This is notwithstanding Access Road's contractual rights to such information.[33] In the context of the October 11, 2023 hearing before this Court, where Access Road's concerns with lack of consultation and information were front and center, the petitioners supported the monitor's approach to limiting Access Road's rights to access information on the grounds that Access Road's rights were "stayed" by operation of the ARIO. This heavy-handed approach to information access has continued. The sealing order sought by the petitioners is overly broad and withholds information that would assist in scrutinizing the conduct of the SISP (including the adequacy of the contents of the data room). This approach and the perfunctory nature of the evidence upon which it is based is not consistent with the law in this jurisdiction, including *Fibreco Export Inc. v AG Growth International Inc*., 2023 BCSC 1719 and *NHK Spring Co., Ltd. v. Cheung*, 2023 BCCA 230.

47. The unreasonableness of the SISP process is also evident when its results are compared to the representations made to this Court and stakeholders at the SISP approval stage. As noted above, in response to Access Road's submission that failure to respect the separate corporate personalities of the petitioners and their distinct creditors in the conduct of these proceedings would likely result in prejudice, the petitioners, interim lender, and monitor submitted that "Access Road, together with other creditors, will benefit substantially from collective marketing of Bron's business."[34] The monitor further submitted that the SISP was likely "to optimize recovery for stakeholders, including unsecured creditors and possibly shareholders."[35] It is now evident that the submissions of the SISP proponents were either seriously ill judged and unsupported by analysis at the time they were made, or that the SISP process has failed. In either case, the SISP proponents' reliance on the same collective marketing process that was intended to substantially benefit Access Road as a basis for imposing a Transaction that substantially prejudices Access Road is untenable.

[30] Monitor's Third Report, para. 243.
[31] Monitor's Third Report, para. 93.
[32] Monitor's Third Report, para. 83.
[33] Austen #2, Exhibit "G", Payment Guaranty, section 7, page. 168.
[34] *Bron Reasons*, para. 36.
[35] *Bron Reasons*, para. 42.

48. With respect to s. 36(3)(b), it is not disputed that the monitor fully supported the SISP and is to an extent responsible for its progress and failed outcome. The fact is that, contrary to the monitor's submissions to this Court at the SISP approval stage, (a) Access Road and other creditors have not benefitted substantially from collective marketing of Bron's business, (b) the SISP has not optimized recovery for unsecured creditors and shareholders, and (c) the monitor's position that the petitioners' cash flows did not provide for the possibility of even a one week extension in the SISP timelines, were significantly off mark.

49. With respect to s. 36(3)(c), the monitor has <u>not</u> filed a report stating that the proposed sale would be more beneficial to creditors than a sale in a bankruptcy. What the monitor has done instead is make a one-sentence long bald assertion in the context of a 682-page report that "The Monitor has concluded that, based on the information available to it, the Purchased Assets would achieve a lower value if sold in a bankruptcy or liquidation compared with the purchase price set out in the CWML APA."[36] There is no analysis provided by the monitor – let alone evidence – to support this generic statement. The information available to the monitor on which it has based its conclusion is not specified let alone disclosed. This is inexplicable in the context of an application on which more than US $14.5 million of secured creditor claims is sought to be "extinguished" by the petitioners.

50. Although section 36 of the CCAA does not specifically require a valuation opinion or liquidation analysis, either or both have been provided in other cases in appropriate circumstances.[37] At a minimum, in a case such as this, where the petitioners own distinct assets subject to distinct creditor claims, some evidence concerning the value of the petitioners' assets and the "creditor stack" on such assets should have been provided by the petitioners or the monitor. Particularly in a context where the monitor has advised that such information had been requested by potential bidders (without referencing whether it was provided to such bidders by the monitor). Were it to be provided, such evidence must necessarily include the nature, extent, and scope of the research grounding the monitor's baldly asserted conclusion on the outcome of a liquidation. Absent such evidence, it is impossible to scrutinize the generic statements made by the petitioners, monitor, and interim lender regarding the value of the consideration being "paid" by CWL, the alleged benefits flowing to unspecified stakeholders, and most importantly at whose cost is any value flowing to CWL and stakeholders being provided.

51. With respect to s. 36(3)(d), affected creditors were not adequately consulted. Indeed, it is notable that the petitioners do not purport to make any submissions on this Application that they have even attempted to satisfy this factor. It is simply omitted from their analysis of the section 36 factors.[38]

52. The fact is that there was <u>no consultation</u> at all with Access Road, which is by far <u>the largest non-insider secured creditor</u> of the petitioners. Given this reality, the monitor's statements in its report to this Court that "there was consultation with many key creditors whose interests might be affected by the SISP"[39] is jarring. Also jarring is the monitor's acknowledgment that it pressed for consultation with Comerica (which is owed about 1/3 as much as Access Road with respect to much narrower collateral) and WME and Hercules so that their interests would be addressed as part of any transaction but not Access Road.[40] Jarring, yet

[36] Monitor's Third Report, para. 163.
[37] *PaySlate Inc. (Re)*, 2023 BCSC 608, para. 134.
[38] Application, para. 45.
[39] Monitor's Third Report, para. 154.
[40] Monitor's Third Report, para. 155.

understandable given the nature of the Transaction before this Court. There is no reason to consult with a creditor if one's objective from the outset of the SISP is to bring about the expropriation of that creditor's collateral. The lack of consultation is not without effect. The monitor's analysis of issues such as security and impact on stakeholders is questionable in circumstances where the monitor did not seek to understand where security is registered and its value. Even issues such as the impact of intercreditor agreements among CWL and Access Road on CWL's ability to "credit bid" debt where CWL does hold security appear to have gone unanalyzed by the monitor.[41]

53. With respect to s. 36(3)(e), as noted above, there is no evidence on the effects of the proposed sale on creditors and other interested parties capable of supporting the approval of the Transaction. All that is before this Court are bald assertions, generalities, and obfuscations. That said, in a way, it is trite that stakeholders other than Access Road may benefit from the Transaction if valuable collateral subject to Access Road's first ranking security is transferred to CWL. Paul is always benefitted when he robs Peter. Paul's friends may also be better off if he wishes to share his spoils. This is why it is important in the context of a section 36 analysis to respect the separate corporate personality of separate corporate entities and their separate creditors. This is what the law as well as fairness, reasonableness, and appropriateness require.

54. With respect to s. 36(3)(f) the consideration to be received for the "sale" of the collateral subject to the Access Road security is not reasonable and fair. Notably, neither the petitioners nor the monitor purport to suggest that this factor is satisfied within the meaning of s. 36. The petitioners merely suggest that the Transaction "represents the best available purchase price for the assets being purchased." This is not the factor that is required to be applied. The question before this Court is whether the consideration to be received by the fifty-nine (59) vendors under the Transaction is reasonable and fair, considering the market value of their respective assets. In the present case, the evidence and analysis to make this assessment is completely lacking. The evidence that is available, such as the value of the Cash Payment, establishes that the consideration to be provided by CWL with respect to this asset is effectively nil.

Additional Petitioners

55. The petitioners seek to add nineteen (19) additional petitioners to these CCAA proceedings at the 11th hour including nine (9) additional petitioners whose property has either been irrevocably assigned to Access Road or is otherwise subject to Access Road's security. This Court does not have the jurisdiction to grant this relief and, even if it did, there is no evidence to support it being appropriate in the circumstances.

56. First, the petitioners have not satisfied the statutory requirements under the CCAA for obtaining this relief. Section 10(2) of the CCAA requires the petitioners to file, among other things, "copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement." This is not a technicality. Compliance with these requirements by providing the required financial statements or equivalent information is necessary to ensure that solvent entities subject to creditor claims are not included in CCAA proceedings to the prejudice of their creditors.

57. Second, there is no evidence that the additional petitioners require CCAA protection. The sole "evidence" that the additional petitioners require CCAA protection consists of bare and

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[41] Austen #2, Exhibit "H", Intercreditor Agreement among CWL and Access Road, among others.

unsupported assertions in the legal basis portion of the petitioners' Application. No "material facts" establishing the insolvency of the additional petitioners are pleaded in the factual basis of the Application. This is again not a technicality. The fact is that there is no evidence in Affidavit #5 of Mr. Gilbert sworn in support of this Application that supports the legal assertions of the additional petitioners' insolvency including the legal submission that the additional petitioners "are insolvent because they are unable to pay their obligations as they become due, and their liabilities exceed their assets."[42] Additionally, the evidence is that many of the additional petitioners have assets that include those that have been irrevocably assigned to Access Road. The attempt to add the additional petitioners who have irrevocably assigned their assets under CAMAs to Access Road as petitioners to these proceedings would only be appropriate (assuming that evidence of insolvency and CCAA requirements are met) if the additional petitioners have assets other that those that have been irrevocably assigned to Access Road and/or made subject to its security. There is no evidence that this is the case.

58. Third, the petitioners' submissions on the need to add the additional petitioners troublingly assert both that (a) the petitioners did not believe three months ago that the additional petitioners "had assets of material value" and (b) the petitioners now believe that the additional petitioners "hold valuable assets that will contribute to a greater recovery for all stakeholders."[43] No evidence is provided to substantiate let alone explain any of this. The monitor's report to this Court is equally unhelpful on this substantive aspect of this Application. The lack of information can only be taken to reflect the fact that the petitioners' submission that the additional petitioners "hold valuable assets that will contribute to a greater recovery for all stakeholders" is irreconcilable with the evidence that (a) the valuable assets of many of these additional petitioners had been irrevocably assigned to Access Road and prior to that were subject to its security; and (b) the total consideration for these "valuable assets that will contribute to a greater recovery for all stakeholders" is the sum of **$9,500.00**.[44]

The Red Herring of the Absent Bid

59. The petitioners and monitor imply that Access Road's objections to this Application should be given less weight because Access Road did not itself bid as part of the SISP. These arguments are fly in the face of the position taken by the petitioners, monitor, and interim lender at the SISP approval stage where it was suggested that "<u>Access Road</u>, together with other creditors, <u>will benefit substantially from collective marketing of Bron's business</u>."[45] It is untenable for the petitioners, interim lender, and monitor to now suggest that Access Road ought to be prejudiced for taking them at their word and letting the collective marketing process run its course.

60. The fact is that this line of argument is a distraction from the legal and evidentiary weaknesses in this Application.

61. If Access Road had bid in the SISP, one of two things could have happened.

62. First, Access Road's hypothetical credit bid(s) could have been accepted. If this were to occur, the sworn evidence is that CWL would have taken its proverbial ball and go home; i.e., CWL would not bid on the petitioners' assets if it did not get Access Road's collateral. In this

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[42] Gilbert #5, paras. 64 – 68.
[43] Application, paras. 36 and 87.
[44] Gilbert #5, para. 34(g), footnote 5.
[45] *Bron Reasons*, para. 36.

scenario, the outcome would be no different than dismissing this Application and allowing Access Road to enforce its security by any means allowable at law in or outside of these proceedings.

63. Second, Access Road's hypothetical credit bid(s) could have been rejected in favour of the CWL bid. In other words, the parties would be in the same position as they are on this Application. The issue would be whether CWL should be allowed to acquire Access Road's collateral, on the one hand, or if Access Road should be allowed to preserve its right, on the other.

64. In any event, this is all a distraction. Secured creditors do not waive the legal protections afforded to them by the statutory scheme of priorities or under the CCAA by not participating in a bidding process. They are not required to convert their status as lenders to that of business owners at the risk of having their collateral expropriated for no consideration. To hold otherwise would be to invite in some larger CCAA's hundreds of desperate bids by lenders of every kind with every imaginable form of security out of fear that the Court will otherwise transfer their assets for any bid that may come in the door. This is neither the law nor the practice in this jurisdiction. The burden on a section 36 application rests on the debtor company. It must establish that the transaction it is seeking to approve satisfies the section 36 factors. In the present case, the petitioners have failed to meet their legal and evidentiary burden. The petitioners' Application must be dismissed.

Part 6: MATERIAL TO BE RELIED ON

65. In addition to the materials listed in the Application, Access Road relies upon Affidavits #1 and #2 of Joanne Austen, made October 10, 2023 and November 1, 2023, respectively, and such further and other materials as counsel may advise and this Honourable Court may allow.

Access Road estimates that the application will take two days. Access Road has filed in this proceeding a document that contains the application respondent's address for service.

Date: November 1, 2023

Signature of Peter Bychawski
Lawyer for Access Road Capital, LLC