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. C-36, AS AMENDED

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 COMPOROMISE OR ARRANGEMENT OF BRON MEDIA CORP. AND THE ENTITIES LISTED AT SCHEDULE "A"

PETITIONERS

APPLICATION RESPONSE

Application Response of: the Ad Hoc Group of Investor Creditors listed on Schedule "B" hereto, (the "**Investor Creditors**")

THIS IS A RESPONSE TO the notice of application of the Petitioners filed October 24, 2023.

PART 1: ORDERS CONSENTED TO

The Investor Creditors consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms:

1. None.

PART 2: ORDERS OPPOSED

The Investor Creditors oppose the granting of the orders set out in paragraphs 1 and 4 of the notice of application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

The Investor Creditors take no position on the granting of the orders set out in paragraphs 2, 3 and 5 of Part 1 of the notice of application.

PART 4: FACTUAL BASIS

A. The Investor Creditors

1. The Investor Creditors are an ad hoc group of creditors who have made similar investment loans (each a "**Project Loan**") in film or television productions owned by one or more of the Petitioning or Non-Petitioning Entities (in this capacity, a "**Primary Debtor Entity**"). The Primary Debtor Entity for a particular production is a special purpose production and/or holding company. In some cases, another BRON entity provided a guarantee (in such capacity, a "**Guarantor**").

2. Some of the Investor Creditors have commenced legal proceedings against the Lender Entities and/or the Primary Debtor Entity, and where applicable, a Guarantor.

3. Generally, the Project Loans are either "**Tax Credit Loans**", being loans primarily secured against a portion of the anticipated tax credit that a particular production expects to receive from the jurisdiction in which the production occurs, or "**Gap Loans**", being loans that fund the "gap" between pre-sale funding raised and the actual estimated budget for the production.

4. In most cases, the Investor Creditors acquired fractional interests in these Project Loans through Creative Wealth Media Finance Corp. ("**CWMF**"), but sometimes by Creative

Wealth Media Lending LP 2016 ("**CWML**") or by a BRON entity (together with CWMF and CWLP, the "**Lender Entities**"). By virtue of substantially similar participation agreements ("**Participation Agreement**") entered into with a Lender Entity, the Primary Debtor Entity (being a BRON production company) is directly liable to the applicable Investor Creditor for repayment of the Project Loan and other amounts.

5. The Project Loans were to be secured against all assets of the Primary Debtor Entity, and Investor Creditors expected first-ranking security interests, subject only to the interest of guilds and unions. Due to the structure of the transaction, security interests were registered in the name of the applicable Lender Entity, who would be holding such security interest in trust for the Investor Creditor to the extent of their participation interest.

6. Some or all of the Project Loans were intended to be, or were in fact, subject to collection account management agreements ("**CAMAs**"). In most cases, CWMF was intended to be, or was in fact, designated to receive monies in trust from the CAMAs as administrator for an Investor Creditor. Though in other cases, the applicable Lender Entity would be designated as the administrator.

7. The CW Lending Transaction (as defined in the Petitioners' Notice of Application) purports to convey the assets of some of the Primary Debtor Entities, which assets are subject to security interests in favour of the Investor Creditors. The information in the Fourth Gilbert Affidavit and the Third Monitor's Report is insufficient to understand how the CW Lending Transaction affects the interests of the Investor Creditors, and other similarly situated stakeholders.

B. Lack of Information and Disclosure

8. The Investor Creditors have sought confirmation with respect to the status of their Project Loans as recorded in the books and records of the Petitioners and Non-Petitioner entities but have been unable to do so. CWMF has failed or refused to provide accurate information. Although the Monitor indicated that it will review and respond to stakeholder inquiries in due course and within the scope of the Monitor's mandate and powers under the CCAA, in its Third Report, the Monitor did not report on the status of the Project Loans and how the interests of the Investor Creditors may be affected.

9. In the Petitioner's materials filed to support the orders granted in the within CCAA proceeding, Mr. Aaron Gilbert identified the following categories of indebtedness:

    a. Source deductions owing to Canada Revenue Agency;

    b. Amounts owing to various secured creditors by different Primary Debtor Entities:

        i. Comerica Bank;

        ii. Access Road Capital LLC;

        iii. CW Media Finance;

        iv. CW Media Lending;

        v. CW Media Finance and CW Lending in respect of Project Loans;

        vi. Royal Bank of Canada;

        vii. Various individual or non-institutional lender entities;

    c. Unsecured amounts owing to CW Media Lending and CW Media Finance and other related entities;

    d. Amounts owing to trade creditors; and,

e. Amounts owing to judgment creditors.

10. On August 9, 2023, counsel for the Petitioners advised that the indebtedness owing in respect of the Project Loans owing to CW Media Finance and CW Lending are summarized in Exhibit H to the Affidavit of Aaron Gilbert sworn on July 18, 2023, which appears to exclude the Project Loans outstanding and owing the Investor Creditors.

11. On September 5, 2023, counsel for one of the Investor Creditors identified this issue to the Monitor's counsel and requested that the Monitor advise as to whether the outstanding payables on certain of the Investor Creditors' Project Loans could be identified in the Petitioners' or Non-Petitioning Entities' books and records.

12. On September 7, 2023, the Monitor's counsel replied that the Monitor "intends to seek supporting documentation from both BRON and creditors to confirm loan advances and repayments" but did not provide an answer to the question posed by the Investor Creditor.

13. Since that time, other Investor Creditors have joined in requesting appropriate answers from the Monitor as to the status of the Investor Creditors' Project Loans as identified in the books and records of the Petitioners and Non-Petitioning Entities. The Investor Creditors expressly advised the Monitor that the information was not sought in respect of proving claims but in respect of whether the Petitioners have provided open disclosure in the within CCAA proceeding in compliance with their duty of good faith.

14. On October 3, 2023, the Investor Creditors wrote to the Monitor outlining a series of concerns and requests for information, including: (i) the accuracy and status of the Petitioners' indebtedness (including whether, if at all, Premium's and the Investor Creditors'

investments in Project Loans had been disclosed in the Petitioners' filings, and a request that the Monitor review the books and records of the relevant Bron production company and review the security granted in respect of the Project Loans); (ii) the extent of the connections that exist between and among the Petitioners, CWML, CWMF and other "Creative Wealth" entities in order to ascertain "…whether sufficient safeguards have been put in place to guard against any inappropriate effects on the insolvency process"; and (iii) Mr. Gilbert's role in the Crystal Wealth Media Fund matter "…with a view to identifying any concerns that should be brought to the Court's attention, including whether Investor Creditor funds were utilized to repay aged loans purchased from the Receiver."

15. To date, the Monitor has not provided any substantive response to the matters raised and questions posed by the Investor Creditors, nor has the Monitor confirmed its intention or willingness to conduct an investigation into these matters. The Investor Creditors' Project Loans that are unaccounted for in the Petitioners' filings aggregate approximately $23M USD and $35M CAD of principal debt. While some of the Project Loans have been partially paid, the amounts outstanding inclusive of interest greatly exceed the principal loan amounts.

16. By way of example only, with respect to one of the Investor Creditors (Premium Properties Limited), certain projects[1] on which it made Project Loans appear in the Monitor's Appendix 26 disclosing security registrations in favour of CWMF, which projects appear to be purchased by CWML under the CW Lending Purchase Agreement. Based on the

[1] Beatriz – August 10, 2016 – Nevada UCC against Brown Amy LLC; Parallel – October 31, 2016 – Nevada UCC against Para Productions LLC; Red Sea – July 28, 2017 – Nevada UCC against Red Sea, LLC and Red Sea Productions Inc.; Tully – August 15, 2016 – Nevada UCC against Tully Productions, LLC.

Investor Creditors' understanding of the Project Loans and Participation Agreements, security registrations in favour of CWMF may be for the benefit the Investor Creditors, to the extent of their fractional interest acquired.

17. Obtaining information from CWMF has proved futile and there is reason to believe that CWMF breached its fiduciary duties to the Investor Creditors including, among other things, failing to account to Investor Creditors for monies received through CAMAs. As such, the Investor Creditors seek information from the Monitor which has not been received to date.

18. On October 27, 2023, CWMF filed a Notice of Intention to Make a Proposal and as such, claims against CWMF are also stayed pursuant to the provisions of the *Bankruptcy and Insolvency Act*.

C. Concerns with SISP and CW Lending Transaction

i. SISP Timelines were too short

19. As reported by the Monitor, nearly all of the timelines in the SISP were extended such that:

    a. On August 25, 2023, the LOI Submission Deadline was extended from August 28, 2023 to September 1, 2023;

    b. On August 25, 2023, the Final Bid Submission Deadline was extended from September 8, 2023 to September 15, 2023; and,

    c. The Final Agreement Deadline was extended five times from September 22, 2023, ultimately to October 24, 2023.

20. When the LOI Submission Deadline was extended, some potential bidders had only just gained access to the virtual data room ("**VDR**"). According to the Third Report, 18 of 38 potential bidders gained access to the VDR between August 18 and August 31, leaving them with little time to conduct due diligence of complex assets.

21. As reported by the Petitioners and the Monitor, the tight timelines of the SISP were imposed by CWML in its capacity as the DIP Lender. CWML retained the sole discretion to consent to any requested extensions to the timelines in the SISP, notwithstanding the Monitor's belief that an extension would generally benefit the Petitioners' creditors and other stakeholders.

22. Given the nature of the assets, even with the extensions, the SISP timelines remained unreasonably short as CWML maintained tight timelines during the due diligence and bidding process, while permitting a much lengthier extension for itself to negotiate the final form of agreement.

ii. Information was missing from VDR

23. The Monitor reported concerns with ensuring information in the VDR was complete and at least in one case, material financial information was withheld by CWML and not made available to other potential bidders.

24. The Monitor reported that CWML had in its possession certain financial information relevant to assessing the value of certain groups of films (the "**Slate Films**") but refused to consent to the inclusion of this information in the VDR. At least one of the potential bidders walked away without making a bid due to the lack of financial information available in

respect of the Slate Films. The lack of information continued to be an issue for other Qualified Bidders during the final negotiations.

25. The Monitor assesses little value for the Slate Films but did not confer with the Consultant or any expert on value.

26. The Monitor reported that important financial information relating to an equity interest in a company called Media Res was unavailable and ultimately was not included in the VDR.

27. On July 30, 2023, approximately one week before the VDR was scheduled to be made available, the Monitor wrote to the Petitioners with concerns as to the information collected to date, advising that the then structured VDR would be insufficient. The Monitor specified the type of information to be included in the VDR, which included sales agent agreements, distribution agreements, documents identifying IP ownership, agreements identifying BRON's share of net profits, current debt name and amount, and more.

28. The Monitor reports that the VDR contained all "available" agreements. The Monitor does not report whether these are all available agreements ***but that there may be more***, or if these comprise all available agreements ***and there are no more available***.

29. The Investor Creditors have requested that the Monitor advise if the Project Loan agreements were contained in the VDR but have only received a partial response. Based on the nature of the underlying agreements giving rise to the Project Loans, such agreements should have been included in the VDR. However, neither the Monitor nor the Petitioners attempted to contact the Investor Creditors to obtain agreements for the purpose of ensuring the VDR was complete.

30. The apparent absence of material information in the VDR raises concerns as to the ability of potential bidders to adequately assess the assets in the SISP. More concerning is that CWML, the successful bidder, had exclusive access to material financial information and refused to provide other potential bidders with the same information, to which the Petitioners were otherwise entitled.

iii. CW Lending Purchase Agreement is not compliant with SISP

31. The proposed transaction purports to convey assets of various entities, including Non-Petitioner Entities. The CW Lending Purchase Agreement provides for an allocation of the purchase price after closing of the transaction. As such, it is not possible to evaluate the proposed transaction on an "entity basis", nor on an "asset basis". The purchase price is substantially comprised of a Credit Bid.

32. The Credit Bid components of the CW Lending Purchase Agreement consist of:

   a. DIP Loan indebtedness (secured by assets of the Petitioners);

   b. BRON Media indebtedness (secured by assets of BRON Media Corp.);

   c. Robin Hood indebtedness (secured by assets of one or more of Robin Hood Digital PC Inc. Robin Hood Digital PC USA Inc. and Robin Hood Digital USA, LLC);

   d. Solitary indebtedness (secured by assets of one or more of Solitary Holdings USA, LLC and Windor Productions BC Inc.); and,

   e. Surrounded indebtedness (secured by assets of one or more of Surrounded Holdings USA, LLC, and Surrounded Productions USA Inc.).

33. However, the purported "Vendors" in the CW Lending Purchase Agreement also include all other Canadian and US Petitioners, and a number of Non-Petitioner Entities.

34. The SISP provided for credit bidding under specific conditions:

   a. That the secured claim portion of such Credit Bid cannot exceed the aggregate value of the Secured Party's secured claim; and,

   b. Such Credit Bid must include at least sufficient cash consideration to satisfy any priority payment required to be paid that ranks ahead of such Secured Party's secured claim or otherwise assume or satisfy such obligations.

35. In addition, the SISP provided that a Secured Party may only make a Credit Bid in relation to the Property subject to such Secured Party's security, and where a Secured Party wishes to bid on Property that is not subject to such Secured Party's security, it must specify a cash purchase price allocated to the unencumbered assets.

36. Based on the information available, it appears that the CW Lending Purchase Agreement is not compliant with the SISP insofar as:

   a. CWML purports to Credit Bid on assets over which it does not have security; and/or

   b. No allocation of cash has been identified in respect of unencumbered assets.

iv. Proposed Transaction results in Unequal Treatment of Creditors

37. Neither the Petitioners nor the Monitor have provided a comprehensive summary of the security interests, assets, and structure of the transaction in respect of the various entities whose assets are purported to be sold. The Monitor has elected not to obtain security

opinions in respect of all Vendors or report on the impact of the proposed transaction on security holders and other stakeholders.

38. Based on the summary of security interests provided in the Third Report, many of the entities listed as Vendors and whose assets are purported to be sold pursuant to the CW Lending Purchase Agreement do not list CWML as a secured creditor (a "**Non-CW Encumbered Vendor**").

39. The proposed transaction is conditional on the issuance of an approval and vesting order ("**AVO**") that vests out all claims and interests in respect of Non-CW Encumbered Vendor assets for little or no consideration (ostensibly, the consideration paid for some of these assets is $9,500).

40. Under the proposed transaction, CWML is assuming certain liabilities. These assumed liabilities include secured amounts owing to certain entities in respect of various production entities. However, the Project Loans do not appear to be treated as "Priority Indebtedness", without any explanation or rationale by the Petitioners or the Monitor. No basis was provided for the preferred treatment of certain creditors.

41. As the Monitor has not conducted an investigation as requested by the Investor Creditors, it is in no position to comment on the fairness of the proposed transaction.

v. Inconsistency of information and proposed agreement

42. While the Petitioners and the Monitor state that CWML is assuming the obligations of the applicable Vendor under specified CAMAs such that rights of other parties to the CAMAs

being assumed remain unaffected, the CW Lending Purchase Agreement appears to provide the contrary.

43. As noted by the Monitor, a CAMA does not create an entitlement to receive funds. Rather the entitlement to any funds arise out of separate underlying agreements with the production company, such as a loan and security agreement. The proposed transaction is conditional on the issuance of an AVO which will vest out any and all claims. To the extent a person is entitled to funds under a CAMA pursuant to indebtedness owing by the applicable Vendor entity, the AVO required by the CW Lending Purchase Agreement will extinguish the person's underlying entitlement.

44. The Monitor has not considered the interests of the Investor Creditors and other stakeholders and whether their entitlements will be extinguished or preserved under specific CAMAs because the Monitor has not completed a fulsome review or investigation.

vi. Insufficient consideration for assets

45. The consideration given for the assets being acquired is grossly insufficient:

    a. the DIP Loan is less than $6M and does not encumber all of the assets that are subject to the proposed transaction;

    b. the BRON Media indebtedness is over $40M but can only be considered in respect of assets expressly owned by BRON Media;

    c. Similarly, the Credit Bids for the other production-based assets are only attributable to those assets;

d. The value of the assumption of other contracts is unclear from the Third Report. For example, a Vendor does not have obligations under a CAMA but rather a right to receive funds in accordance with the CAMA. Neither the Monitor nor the Petitioners have provided any information with respect to the nature of the Assumed Contracts and whether these Assumed Contracts have value;

e. There is no evidence to support the value of the Unsold Assets being $9,500. The remarketing of the Unsold Assets to Qualified Bidders would signal that these were assets that could not be sold and as such, elicit only low bids.

vi. Other concerns with SISP and Proposed Transaction

46. The Monitor did not confer with Consultant to assess the reasonableness of the proposed transaction in respect of each type of asset despite the complicated nature of the transaction and assets to be acquired.

47. The proposed transaction appears to preserve value for equity holders of Bron Creative USA Corp., a US Petitioner, by maintaining the interest of its 50% shareholder, BLAC Corp., an affiliate of Creative Wealth Holdings Ltd. ("**CW Holdings**"), rather than selling the entire asset of Bron Creative USA Corp.

48. The Monitor assesses the Unsold Assets as likely having low value, "including as a result of existing security interests". The Monitor does not explain this view which appears inconsistent with an insolvency sales process where assets are typically sold pursuant to a vesting order, vesting out such security interests.

49. The Petitioners seek to convert Non-Petitioning Entities to Petitioner Entities (in this capacity "**Proposed Petitioners**") and to subject these Proposed Petitioners to the DIP Charge. The Monitor supports this relief on the basis that "it is necessary to allow the transfer of all relevant assets to CWML" and because CWML requires this a condition of the CW Lending Purchase Agreement and that the Proposed Petitioners would benefit from having their assets sold and benefiting from the CCAA. However, the Monitor has not provided any analysis as to whether these Proposed Petitioners would actually benefit from such a sale outside of the ordinary course of business, nor has the Monitor reported on the various stakeholders affected by such a sale, in part because the Monitor has not conducted a full review and investigation of these entities.

50. The relief requested in respect of the Proposed Petitioners is designed to circumvent the express Credit Bidding requirements established by the SISP and approved by the Petitioners, the Monitor and CWML.

D. Other General Concerns that Warrant Investigation and Reporting

51. The Investor Creditors have identified a number of issues that are cause for serious concern with respect to the good faith conduct of the Petitioners that should be investigated by the Monitor prior to any sale approval that would affect stakeholder interests.

i. Irregularities in granting of security

52. The Investor Creditors have discovered that one of the Petitioner Entities, Bron Creative Corp. ("**BCC**"), entered into different Project Loan and Participation Agreements with

different Investor Creditors on terms that are mutually inconsistent in respect of the security interest to be granted.

a. Premium Properties Limited and Colonia Trustco Inc. (related entities) (together, the "**Premium Investor Creditor**") each acquired a 50% interest in a Project Loan to Nightingale Films Holdings Pty Ltd. ("**Nightingale Holdings**") in respect of a project entitled "The Nightingale", for a total of 100% of the Project Loan. This Project Loan was to be secured by a ***first ranking general security interest*** for all receipts and collateral in the "Lenders' Territory", subject only to customary guild liens, Screen Australia and Screen Tasmania. The Premium Investor Creditor's Project Loan remains fully outstanding; and,

b. BCA Alternative Income Fund, LP and Rocking T Ranch, LLLP (related entities) (together, the "**BCA Investor Creditor**") acquired a 69.23% interest and a 30.77% interest, respectively, in a Project Loan to Nightingale Holdings in respect of a project entitled "The Nightingale", for a total of 100% of the Project Loan. This Project Loan was to be secured by a ***first ranking general security interest*** for all receipts and collateral in the "Lenders' Territory", subject only to customary guild liens, Screen Australia and Screen Tasmania. The BCA Investor Creditor Project Loan remains fully outstanding.

53. The above conflict raises concerns with respect to the various stakeholder interests, the status of security interests and indebtedness across the various project specific entities. A Petitioner Entity appears to have directly arranged for these transactions and gives rise to concerns as to the nature of the indebtedness at issue in these proceedings.

ii. Aaron Gilbert's Prior Involvement in Investment Misconduct

54. Mr. Gilbert was a principal participant in a series of transactions involving film loans (the "**Crysal Wealth Media Fund Loans**") that bear striking similarity to the Investor Creditors' Project Loans. The Crystal Wealth Media Fund Loans were the subject of a receivership initiated by the Ontario Securities Commission over entities referred to as the Crystal Wealth Group, controlled by an individual named Clayton Smith. Information relating to this receivership proceeding is available on the receiver's (the "**Receiver**") website: https://www.grantthornton.ca/service/advisory/creditor-updates/#Crystal-Wealth-Group.

55. The Fourth Report of the Receiver, at paragraph 345, sets out the sanctions ordered against Mr. Smith, which includes a permanent ban from the trading or acquiring securities in the markets based on the activities carried on in the Crystal Wealth Group.

56. The Second Report of the Receiver, beginning at paragraph 210, describes the scheme in relation to the Crystal Wealth Media Fund which was comprised of film loans arranged by and purchased from Media House Capital (Canada) Corp. ("**MHC**").

57. The Third Report of the Receiver, beginning at paragraph 85, reports that MHC is controlled by Mr. Gilbert. In addition, the Receiver notes that Mr. Gilbert is also the producer or executive producer on 19 of the 25 film productions for which media loans were purchased, and that Mr. Gilbert was the director or officer of the underlying borrower (the production company). The Receiver reports on the structure of the project loans and the sale to the Crystal Wealth Media Fund and the use of CAMAs. The Receiver reports

that it was "unable to fully understand and support the value of the Media Loans", despite fully reviewing the company's books and records.

58. As set out in Appendix 1 to the Supplement to the Second Report of the Receiver, one of the Petitioner Entities, Bron Releasing Inc., entered into an asset purchase agreement with the Receiver to purchase certain film loans associated with 37 productions, which was said to be valued at over $31M (but actually determined to be worth less than $2M): see Quiver Capital Inc. Report on Receiver's website: https://docs.grantthornton.ca/document-folder/viewer/docul8LWsxcWho7J/194854562114920621?_gl=1*mvj361*_ga*MTA3NTYyNi4xNjg3MTg3OTQ2*_ga_JLRBBJ6PTP*MTY5ODg1MjM3Ny4yOS4wLjE2OTg4NTIzODMuNTQuMC4w. Some of these film loans relate to productions that appear to be the subject of Investor Creditor Project Loans.

59. The conduct of Mr. Gilbert disclosed in the Crystal Wealth Group receivership proceedings shows participation, or at the very least, condonation and assistance, in facilitating serious misconduct on the part of Mr. Smith to divert and receive investor funds from purported loan transactions, to mislead auditors and to grossly overvalue assets connected to the loans in order to solicit new investor funds.

iii. Connection between CWML, BRON and CWMF

60. Mr. Jason Cloth, a director of CWMF is also the director of certain Bron entities (Bron Creative Corp, and Bron Ventures 1 (Canada) Corp.), as set out in the First Affidavit of Mr. Gilbert. Until at least August 2022, Mr. Cloth was also a director of Bron Media Corp. ("**BMC**"), one of the Bron parent companies.

61. Mr. Cloth appears to be a director of CW Holdings, the parent company of Creative Wealth Media GenPar Ltd. ("**CWM GP**", together with CWMF, CW Holdings and CWML, the "**CW Parties**"). CWM GP is the general partner of CWML, the DIP Lender, and proposed purchaser. As noted in the Monitor's Report, CW Holdings is an affiliate of BLAC Corp., the 50% shareholder of Bron Creative USA Corp., a US Petitioner.

62. CWMF, insofar as it is a loan administrator on behalf of the Investor Creditors, may stand to benefit from a vesting out of the Project Loans as the vesting out of claims could relieve CWMF of its obligations to the Investor Creditors.

63. Despite being made aware of these connections, the Monitor has declined to investigate and report on the nature of these relationships and whether any concerns should be brought to the Court's attention.

PART 5: LEGAL BASIS

A. The Petitioners have not acted in good faith and have not met the Soundair test

1. To obtain the continued benefit of a general stay of proceedings, including any terms that the Court may impose, under the *Companies Creditors' Arrangement Act* (the "**CCAA**"), an applicant must act, and continue to act, in good faith and with due diligence: CCAA, s. 11.02(3).

2. The requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), [2010] 3 SCR 379, at para 70.

3. The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court: *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 (CanLII), at para 105.

4. Past bad faith illuminated after *CCAA* proceedings have been initiated may undermine the confidence of creditors and the Court in the viability of *CCAA* proceedings, and may be a relevant factor in the Court's assessment under s. 11.02(3): *Re Canada North Group Inc*, 2017 ABQB 508 (CanLII), at para 54.

5. In considering whether to approve a sale in an insolvency proceeding, the Court will apply the "*Soundair* test":

   a. It should consider whether the [debtor] has made a sufficient effort to get the best price and has not acted improvidently.

   b. It should consider the interests of all parties.

   c. It should consider the efficacy and integrity of the process by which offers are obtained.

   d. It should consider whether there has been unfairness in the working out of the process.

   Royal Bank of Canada v. Soundair Corp., 1991 CanLII 2727 (ON CA).

6. In *Calpine Canada Energy Limited (Companies' Creditors Arrangements Act)*, in considering a sale approval application, the Alberta Court of King's Bench stated:

> There was, however, a lack of sufficient transparency and open disclosure, which resulted in a process lacking the degree of integrity and fairness necessary when the court is involved in a public sale of assets under the CCAA. The CCAA insulates a debtor from its creditors for a period of time to allow it to attempt to resolve its financial problems through an acceptable plan of arrangement. It allows the debtor to carry on business during that period of time and to exercise a degree of normal business judgment under the supervision of the court and a Monitor. What may be commercially reasonable and even advantageous when undertaken by parties outside the litigation process, however, may be restricted by the requirement that fairness be done, and be seen to be done, when the process is supervised by the court. While a more open process may not lead to greater value, and may, as in this case, give rise to the possibility that an existing bidder may exit the process, the nature of a court-supervised process demands a process that meets at least minimal requirements of fairness and openness: 2007 ABQB 49 (CanLII), at para 31.

7. The Investor Creditors submit that where there is a lack of transparency and open disclosure on the part of the Petitioners in respect of the causes of insolvency, the nature of indebtedness, and in particular a direct connection to a collapsed, flawed investment scheme closely connected to the business of the Petitioners, this Court will have insufficient information on which to properly apply the *Soundair* test. The Court cannot properly consider the interests of all parties given the lack of information, nor can it consider whether there has been unfairness in the working out of the process without having the benefit of a proper investigation and reporting of the issues identified by the Investor Creditors.

8. The court has declined to approve the sale of assets where a court officer does not obtain an appraisal in order to substantiate the value of the assets being sold. In *9-Ball Interests*

Inc. v. Traditional Life Sciences Inc. the court did not approve a credit bid in circumstances where the Receiver did not go behind the security documents to see if funds were advanced and no valuation of the assets was provided to the Court: 2012 ONSC 2788 (CanLII) at para 31 to 33.

9. Similarly, in *Canrock Ventures LLC v. Ambercore Software Inc. et al*, ("*Ambercore*") the court did not approve a credit bid. The Court's concerns included the fact that no appraisal was provided to the Court, or in the case of some assets even obtained. With respect to obtaining an appraisal the Court says:

> This is a credit bid in which no cash is being paid to the receiver. Without an indication of the value of the assets that have been sold, is not possible to consider whether the payment by way of a reduction of debt is satisfactory. Without this information, what is taking place is essentially a foreclosure with the prospect that any upside may well be all to the benefit of Canrock/GeoDigital. There is no basis for a court to conclude that a sale in the circumstances should be approved.
>
> 2011 ONSC 1138 (CanLII) at para 14 to 16 and 18.

10. In *Ambercore* the Court was also concerned about the time provided for marketing and submission of bids where there was little justification for the short timeline. This was compounded by the lack of an appraisal: *Ambercore* at para 19.

11. The length of the sales process was of particular concern in *Toronto-Dominion Bank v. Crosswinds Gold & Country Club Ltd*. The Court did not accept the sale of a golf course in 28 days over the summer. 2002 CanLII 49473 (ON SC) at para 19.

12. In this case the assets were marketed over a short period of time during the summer months. The Investor Creditors submit that similar concerns arise, especially in light of the lack of an appraisal.

B. The Monitor should conduct an investigation

13. Under the CCAA, the Monitor shall make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings: CCAA, s. 23(1)(c).

14. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the CCAA and its restructuring purpose: *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 (CanLII), at para 109.

15. In *Philip's Manufacturing Ltd. (Re)*, 1992 CanLII 423 (BC CA), the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors. In *Woodward's Ltd. (Re)*, 1993 CanLII 881 (BC SC), the British Columbia Supreme Court held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy.

16. Paragraph 31 of the Amended and Restated Initial Order mandates the Monitor to provide any creditor of the Petitioners with information provided by the Petitioners in response to reasonable requests for information made in writing by such creditor addressed to the Monitor.

17. The Investor Creditors have sought specific information with respect to the Project Loans, namely, whether the specific Project Loans appear on the books and records of the applicable Primary Debtor Entity as accounts payable, what payments, if any, were made by the applicable Primary Debtor Entity and to whom. The information sought is not intended as an exercise of proving claims but rather, scrutinizing the adequacy of disclosure by the Petitioners and ensuring that the CCAA process is not utilized to obscure any improper transactions or activities conducted by the Petitioners using funds advanced by the Investor Creditors.

18. Given the nature of CCAA proceedings with frequent abridgments of notice requirements, lack of cross-examinations on affidavits filed by participants, the Investor Creditors submit that the Monitor should be directed to conduct a preliminary investigation into the allegations being made and to provide its report before the Court approves any transaction resulting in the sale of all or substantially all of the Petitioners' assets. Permitting the sale to proceed before the Monitor has conducted an investigation and reported on its findings puts the "cart before the horse".

C. The test for a substantive consolidation has not been met

19. The proposed CW Lending Transaction and the request to amend the Amended and Restated Initial Order to convert various Non-Petitioner Entities into Petitioners for the

sole purpose of effecting a sale of substantially all assets is in effect substantive consolidation of the various Bron entities.

20. The factors that the court considers when deciding whether to order a substantive consolidation are:

    a. difficulty in segregating assets;

    b. presence of consolidated financial statements;

    c. profitability of consolidation at a single location;

    d. commingling of assets and business functions;

    e. unity of interests in ownership;

    f. existence of intercorporate loan guarantees; and

    g. transfer of assets without observance of corporate formalities.

    Northland Properties Ltd., Re, 1988 CanLII 2924 (BC SC), at para 37

    White Oak Commercial Finance, LLC v Nygård Holdings (USA) Limited et al, 2023 MBCA 73 (CanLII), at para 47

    Redstone Investment Corporation (Re), 2016 ONSC 4453 (CanLII), ("*Redstone*") at para 47

21. In *Redstone* at paragraph 47, Justice Morawetz said that "…the court must balance the economic prejudice to the creditors resulting from continuing corporate separateness

against the economic prejudice caused by consolidation. To establish that substantive consolidation is warranted, it must be shown that the "elements of consolidation" are present, and that the consolidation would prevent a harm or prejudice or would effect a benefit generally."

22. In the present case the "elements of consolidation" are either not present or there is no evidence showing whether or not they are present:

    a. There is no difficultly in segregating assets. Each Non-Petitioner was incorporated to hold rights in one specific production. Similarly, creditors provided loans which were to be used for each specific production.

    b. There is no evidence that financial statements were consolidated.

    c. There is no need to consolidate in one location. The assets are not physical assets that need to be stored at a location.

    d. There is no co-mingling of business function. In fact, each production likely operated generally with unique personnel and talent.

    e. Ownership is not the same. For example, Bron Creative USA Corp is half owned by BRON Studios USA Inc. and half owned by a third party whereas other Non-Petitioners are wholly owned by other related Bron entities.

    f. There is no evidence of intercorporate loan guarantees.

    g. There is no transfer of assets without observance of corporate formalities. In fact, there is no transfer of assets at all between the corporations.

23. There is also no evidence showing that consolidation would “prevent a harm or prejudice” or would “effect a benefit generally”. The sole argument in favour of consolidation is that the credit bidder wants the additional assets, even though it is only willing to pay a nominal amount for them.

D. The Non-Petitioners are not debtor companies within the meaning of the CCAA

24. The Act applies in respect of a debtor company. Debtor company is defined as a company that is bankrupt or insolvent, has committed an act of bankruptcy, or is in the course of being wound up: CCAA s. 2 “Debtor Company” and s. 3.

25. There is no evidence that any of the Non-Petitioners are insolvent, etc.

PART 6: MATERIAL TO BE RELIED ON

26. Second Affidavit of Milton Winberg Sworn on November 1, 2023;

27. Affidavit of Simon Misselbrook sworn November 1, 2023;

28. Affidavit of Tready Smith sworn November 1, 2023;

29. Affidavit of James Richardson sworn November 1, 2023;

30. Affidavit of Adam Somer sworn October 31, 2023.

The Investor Creditors estimate that the application will take a full day.

Date: November 1, 2023

Philip Cho
Digitally signed by: Philip Cho
DN: CN = Philip Cho email = pcho@weirfoulds.com C = CA O = WeirFoulds LLP
Date: 2023.11.01 23:12:53 -04'00'

Philip Cho
Lawyers for Premium Properties Limited and as agent for the Ad Hoc Group of Investor

Creditors

<u>Schedule "A"</u> List of Petitioners

1. BRON Animation Inc.
2. BRON Creative Corp.
3. BRON Developments Inc.
4. BRON Media Corp.
5. BRON Media Holdings Intl. Corp.
6. BRON Media Holdings USA Inc.
7. BRON Releasing Inc.
8. BRON Studios Inc.
9. BRON Ventures 1 (Canada) Corp.
10. BRON Everest Productions Inc.
11. Fables Productions BC Inc.
12. Gossamer Productions BC Inc.
13. Hench 2 BC Productions Inc.
14. Henchmen Productions Inc.
15. Robin Hood Digital PC BC Inc.
16. Windor Productions BC Inc.
17. BRON Creative USA, Corp.
18. BRON Digital USA, LLC
19. BRON Life USA Inc. (BRON Legacy USA Inc.)
20. BRON Media Holdings USA Corp.
21. BRON Releasing USA Inc.
22. BRON Studios USA Inc.
23. BRON Ventures 1, LLC
24. BRON Studios USA Developments Inc.
25. Bakhorma, LLC
26. Drunk Parents, LLC
27. Fables Holdings USA, LLC
28. Fables Productions USA Inc.
29. Gossamer Holdings USA, LLC
30. Gossamer Productions USA Inc.
31. Harry Heft Productions, Inc.
32. Heavyweight Holdings, LLC (previously Harry Haft Films, LLC)
33. I Am Pink Productions, LLC
34. Lucite Desk, LLC
35. National Anthem Holdings, LLC (f.k.a. BCDC Holdings, LLC)
36. National Anthem ProdCo Inc.
37. Oakland Pictures Holdings, LLC
38. Pathway Productions, LLC
39. Robin Hood Digital PC USA Inc.
40. Robin Hood Digital USA, LLC
41. Solitary Holdings USA, LLC
42. Surrounded Holdings USA, LLC
43. Welcome To Me, LLC

<u>SCHEDULE "B"</u>

AD HOC GROUP OF INVESTOR CREDITORS

1. PREMIUM PROPERTIES LIMITED
2. COLONIA TRUSTCO INC.
3. PREMIUM TRUST INC.
4. MCFLOW CAPITAL CORP.
5. BAYSHORE CAPITAL ADVISORS, LLC
6. BCA ALTERNATIVE INCOME FUND LP
7. ROCKING T. RANCH LLLP
8. JAMES RICHARDSON
9. NIKINK HOLDINGS LTD.
10. LUKIS GLOBAL CORP.
11. DESERT MEDIA PARTNERS LLC