

District of ONTARIO  
Division No. 09 – Toronto  
Court File No.: BK-24-03003083-0031  
Estate File No.: 31-3003083

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
*(In Bankruptcy and Insolvency)*

**IN THE MATTER OF THE BANKRUPTCY OF  
CREATIVE WEALTH MEDIA FINANCE CORP.  
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

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**FACTUM OF THE TRUSTEE  
RSM CANADA LIMITED, ALSO KNOWN AS TDB RESTRUCTURING LIMITED**

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Date: February 21, 2024

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## PART I – OVERVIEW

1. TDB Restructuring Limited, in its capacity as the bankruptcy trustee (the "**Trustee**") of Creative Wealth Media Finance (referred to as "**CWMF**" or the bankrupt), seeks an *ex parte* order requiring Jason Cloth, Jenifer George and Creative Wealth Media Lending Inc. ("**CWML**") to permit representatives of the Trustee, its solicitors, and other necessary persons electronic access to the deeds, books, records, documents, and all property of CWMF (collectively, the "**books and records**").

## PART II – FACTS

### A. Background

2. CWMF was incorporated in 2013. CWMF was a syndicator that arranged and provided financing for the development and production of motion pictures, films, television streaming, and animated productions.

Affidavit of Arif Dhanani sworn on February 21, 2024 (the "Dhanani Affidavit") at para 10 Exhibit F, Motion Record of the Trustee ("**Trustees Record**").

3. CWMF's office is located at 151 Bloor Street West, 700, Toronto, Ontario, Canada, M5S 1S4. This office is shared by associated entities of CWMF, including CWML, Creative Wealth Media Lending LP 2016 ("**CWML LP 2016**"), and Creative Wealth Media Advisors Inc. ("**CWMA**"). CWML, CWML LP 2016 and CWMA are not subject to the insolvency proceedings.

Dhanani Affidavit at paras 5 & 10, Exhibit B & F.

4. Mr. Cloth has advised the Trustee that the books and records of CWMF have been digitized and are intermingled with those of CWML and other unidentified entities in an online server. Mr. Cloth is a director of CWMF, CWML and CWMA.

Dhanani Affidavit at paras 4, 20, 24, Exhibit A & N.

## **B. CWMF's Bankruptcy**

5. On October 27, 2023, CWMF filed a Notice of Intention to Make a Proposal ("**NOI**") pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "**BIA**"). This is one day before Mr. Cloth was scheduled to attend discoveries in a lawsuit against him and CWMF. On November 28, 2023, CWMF was deemed to have filed an assignment in bankruptcy.

Dhanani Affidavit at paras 6, 7 & 8, Exhibits C & D.

6. Rosen Goldberg Inc. (the "**Initial Trustee**") acted as the trustee until it was replaced at the first meeting of creditors on December 15, 2023.

Dhanani Affidavit at paras 8 & 11, Exhibit G.

## **C. Attempts to Obtain the Books and Records of the Bankrupt**

7. The Initial Trustee has repeatedly confirmed that it was not provided with CWMF's books and records.

Dhanani Affidavit at para 13, Exhibit I.

8. On January 3, 2024 the Trustee requested access to CWMF's books and records. Access was not provided.

Dhanani Affidavit at para 16, Exhibit J.

9. On January 16 and 19, 2024, the Trustee again requested access to CWMF's books and records. Mr. Cloth did not respond to the inquiry.

Dhanani Affidavit at para 17 & 18, Exhibits K & J.

10. On January 22, 2024, Mr. Cloth was informed that the Trustee would be attending the business premises of CWMF on January 23, 2024, to take possession of CWMF's books and records. The Trustee was advised that it would be turned away.

Dhanani Affidavit at paras 19 & 20, Exhibits M & N.

11. Between January 22 and 30, 2024, the Trustee attempted to schedule a meeting to attend the business premises of CWMF to take possession of the books and records.

Dhanani Affidavit at para 20, Exhibit N.

12. On January 31, 2024, the Trustee met at the business premises with Mr. Cloth, his counsel (David Ullmann at Blaney McMurtry LLP) and the in-house counsel for CWML, Brian Koscak, to take possession of CWMF's books and records.

Dhanani Affidavit at para 23.

13. At this meeting it was confirmed to the Trustee that all (i) all of CWMF's books and records were stored online; (ii) that they were intermingled with the records of CWML and other entities; (iii) that Brian Koscak was asserting privilege over his office and his records stored online; (iv) the Trustee would not be given access at that time; and (v) that a letter would be sent by Mr. Ullmann setting out his clients' position on the Trustee's access to the books and records.

Dhanani Affidavit at para 24.

14. On February 6 and 19, 2024, correspondence was sent to Messrs. Cloth, Ullmann and Koscak following up on the requests for the books and records and the matters discussed at the January 31<sup>st</sup> meeting.

Dhanani Affidavit at paras 25 & 27, Exhibits Q & R.

#### **D. Outstanding Information**

15. Mr. Cloth has not provided complete information regarding the \$67 million in receivables listed as the sole asset of CWMF in the Statement of Affairs.

Dhanani Affidavit at paras 24 & 35.

16. Mr. Cloth has not confirmed or provided any information regarding which companies can access the cloud server on which CWMF's books and records are located.

Dhanani Affidavit at para 20 Exhibit N.

17. Mr. Cloth has not provided any information on how the books and records of CWMF are being preserved or protected from destruction.

Dhanani Affidavit at paras 25 & 26, Exhibit Q.

18. Mr. Cloth has not provided access to the books and records of CWMF.

Dhanani Affidavit at paras 25 & 26, Exhibit Q.

#### **PART III - ISSUE**

19. The issue on this motion is whether this Honourable Court should grant the Trustee an order to access the books and records of CWMF, notwithstanding that they are apparently intermingled with the records of non-bankrupt entities.

#### **PART IV - LAW AND ARGUMENT**

##### **A. The Bankrupt is Required to Produce its Books and Records**

20. Section 158 of the *BIA* imposes a duty on a bankrupt to make discovery of and deliver to the trustee all books, records, documents, writings and papers that in any way relate to the bankrupt's property or affairs. Further, the *BIA* requires a bankrupt – and where the bankrupt is a corporation, its executing officer – to "generally do all such acts and things in relation to his

property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee".

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, [ss. 158\(a\)-\(p\)](#) & [159](#).

### **B. The Trustee Has a Statutory Right to the Books and Records of the Bankrupt**

21. The Trustee has a duty to the CWMF's creditors to obtain the greatest possible value for the creditors of the bankrupt's estate. To fulfill this duty, and in accordance with s. 16(3) of the *BIA*, the Trustee must, as soon as possible, take possession of the bankrupt's deeds, books, records, documents, and all property. No person is entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents, including material in electronic form, relating to the accounts or to any trade dealings of the bankrupt. As noted by the Ontario Superior Court in *Saran (Re)*, a bankruptcy trustee is to take possession of the deeds, books, documents and assets as soon as possible after a bankruptcy.

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, [s. 16\(3\)](#) & [16\(5\)](#).

*Saran (Re)*, 2018 ONSC 2998 at para [49](#).

22. In the absence of the books and records, the creditors will be prejudiced with respect to the recoveries of the \$67 million in receivables listed as CWMF's sole asset.

### **C. Third Parties**

23. Section 164(1) of the *BIA* gives the Trustee power to require any person who has or is believed or suspected to have "any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property" to produce the book, document or paper. Neither s. 164, or s. 189(1) of the *BIA* entitles it to seize the documents or property of a third party. However, this Court has held that s. 164 is wide enough to include a right to *inspect* documents, even where

they are another person's property, as long as they relate in whole or in part to the bankrupt, its dealings or its property.

*MacDonald, Re, 2001*, CanLII 28279 (ON SC) at paras [17-23](#).

*GMAC Commercial Credit Corp. - Canada v T.C.T. Logistics Inc.*, 2002 CanLII 35019 (ON SC) at para [4](#) citing *Re Sun Squeeze Juices Inc. (1994)*, [1994 CanLII 7467 \(ON SC\)](#).

24. If the books and records of the bankrupt are intermingled with those of non-bankrupt third parties, such as CWML, the effect of s. 164 is to empower the Trustee to gather information that might lead to additional recovery on behalf of the bankrupt's creditors. Preventing access to the books and records because CWMF failed to segregate them would defeat the clear statutory purposes of the *BIA*.

*Bawolin v Wood-Layton*, 2005 SKQB 365 at paras [20-23](#) & [26](#).

25. Courts have granted orders similar to that requested by the Trustee and granted access to computer servers shared by third parties. For example, in *Teleglobe Inc. (Re)*, the interim receiver sought access to Teleglobe data that was located on BCE's servers. Concerning its right of access to such data, the Court stated: "Clearly, the [Interim Receiver] of Teleglobe is entitled to Teleglobe "documentation" including material of this nature by virtue of its appointment to the office of Interim Receiver and its power and authority to conduct an investigation". Farley J directed that an independent company be retained to extract Teleglobe's documents from BCE's servers with the costs borne by BCE.

*Teleglobe Inc. (Re)*, 2004 CanLII 1547 (ON SC) at para [1](#).

26. Similarly, in *St. Anne-Nackawic Pulp Co., Re*, the New Brunswick Court of King's Bench granted the order of a trustee for the possession of all books, records and documents of a bankrupt that were intermingled with a non-bankrupt on 27 computer discs.

*Bankruptcy of St. Anne-Nackawic Pulp Company Ltd. (Re)*, [2005 NBQB 76](#).



**D. An *Ex Parte* Order is Necessary**

27. Judges of the Ontario Superior Court of Justice have the jurisdiction to hear and determine any *ex parte* application arising out of a bankruptcy.

*Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, [s. 192\(1\)\(f\)](#) & [s. 192\(2\)](#).

**i. Jason Cloth has Proven to be Uncooperative**

28. Mr. Cloth has refused to comply with repeated demands to deliver CWMF's books and records despite having a statutory obligation to do so. Mr. Cloth has also had ample time to propose a methodology for segregating the documents; however, he has chosen not to.

29. Mr. Cloth's statement that "we gave the books and records to the original monitor" contradicts his most recent statement that access cannot be provided because the records are intermingled with CWML and other entities. The Initial Trustee has confirmed that it did not receive the books and records.

Dhanani Affidavit at paras 13 & 20, Exhibit N.

**ii. Risk of Serious Harm to Creditors**

30. The destruction of the books and records would cause serious harm to CWMF's creditors due to the loss of important information. In the face of a specific request from the Trustee, Mr. Cloth has even failed to confirm that he is taking any steps to preserve CWMF's books and records.

31. Further delay may lead to the destruction of or otherwise permanent loss of the books and records, resulting in serious, potentially irreparable harm to CWMF's creditors. The Trustee is unaware of how many or what entities have access to the online server on which CWMF's books

and records are located. If documents are deleted from the online server, it may be difficult, if not impossible, to determine whether, how many, and by whom the books and records were deleted.

Affidavit of Lisa Bertrand sworn on February 21, 2024 at paras 10, 11, 13, 14 & 15.

**iii. The Non-Bankrupt Third Parties Would Not be Prejudiced by an Order Requiring Access to the Books and Records of CWMF**

32. Assuming that CWMF's books and records are intermingled, it chose to intermingle its books and records with those of other third parties and vice versa. Any temporary inconvenience resulting from granting the Order is due to the decision of the bankrupt, CWML, and the other entities not to maintain separate books and records. Such a temporary inconvenience cannot outweigh the interests of CWMF's creditors in the complete and thorough administration of the estate.

*Decosimo, Re*, [1999 CarswellOnt 72](#) at [para 4](#).

33. Moreover, prior to the bankruptcy, Mr. Cloth appears to have provided Borden Ladner Gervais with some of CWMF's documents so it appears that segregation is possible.

Dhanani Affidavit at para 28 Exhibit S.

34. As set out in the proposed draft order, the Trustee will mitigate any potential prejudice to the third parties by a preliminary review of the books and records to determine the extent and degree to which they may be intermingled with those of third parties. Following this preliminary review, the Trustee will provide this Court with a report and propose a protocol for segregating the records. Moreover, the proposed draft order requires the Trustee to take reasonable measures not to review any documents over which legal privilege may be claimed by CWML and/or other entities.

35. It is just and convenient to grant the order requested by the Trustee. The Trustee has repeatedly demanded that Mr. Cloth provide access to the books and records to no avail.

**PART V - RELIEF REQUESTED**

36. The Trustee requests an Order in the form of the draft order enclosed in the Motion Record that:

- (a) compels Mr. Cloth and other persons to provide access to CWMF's books and records;
- (b) requires Mr. Cloth and other persons to preserve the books and records;
- (c) provides for a limited review of the books and records by the Trustee prior to the Trustee returning to Court for directions; and
- (d) such further and other relief as this Honourable Court may deem just.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21<sup>st</sup> of February 2024.**



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Michael Nowina / Christina Doria / Anton Rizor  
**Baker & McKenzie LLP**  
Lawyers for the Trustee

**SCHEDULE "A" – AUTHORITIES**

1. *Saran (Re)*, [2018 ONSC 2998](#).
2. *MacDonald, Re*, [2001 CanLII 28279 \(ON SC\)](#).
3. *GMAC Commercial Credit Corp. - Canada v T.C.T. Logistics Inc.*, [2002 CanLII 35019 \(ON SC\)](#).
4. *Re Sun Squeeze Juices Inc. (1994)*, [1994 CanLII 7467 \(ON SC\)](#).
5. *Bawolin v Wood-Layton*, [2005 SKQB 365](#).
6. *Teleglobe Inc. (Re)*, [2004 CanLII 1547 \(ON SC\)](#).
7. *Bankruptcy of St. Anne-Nackawic Pulp Company Ltd. (Re)*, [2005 NBQB 76](#).
8. *Decosimo, Re*, [1999 CarswellOnt 72](#).

1999 CarswellOnt 72  
Ontario Court of Justice, General Division (In Bankruptcy)

Decosimo, Re

1999 CarswellOnt 72, 7 C.B.R. (4th) 149

**In the Matter of the Bankruptcy of Michael Gerrard Decosimo of the City of Mississauga in the Regional Municipality of Peel in the Province of Ontario**

Registrar Ferron

Judgment: January 14, 1999

Docket: 32-086834

Counsel: *L.J. Melconian*, for the moving parties John Zivanovic, John Zivanovic Holdings Limited and Grand Port Meadows Ltd.

*Miles D. O'Reilly, Q.C.*, for the trustee.

***Registrar Ferron:***

1 The motion by way of appeal is for a declaration that the moving parties, clients of the bankrupt, and not the trustee are entitled to the documents and correspondence generated by the bankrupt and relating to their business and affairs and for an order requiring the trustee, who has current possession of the relevant documents to deliver the same to the moving parties.

2 There is no dispute that the trustee is in possession of the documents in issue and no dispute that such documents are the property of the moving parties; the difficulty lies in another direction.

3 The solicitor was acting not only in a solicitor-client relationship for the moving parties but was also the financier of certain of their operations. In connection with such operations he acted in mortgage transactions not only for the moving parties but also for the mortgagees. The solicitor's files apparently fails clearly to delineate and separate the various actors and there appears to be a difficulty in determining what documents belong to which party involved in a particular transaction. The trustee, now in the possession of the bankrupt's files has an obligation not only to protect and deliver appropriate documents to the moving party but also to be clear that documents belonging to other parties are not in the process misdirected. That is the first difficulty although a fairly minor matter.

4 The trustee's major position is that, while not denying the ownership rights of the moving party, it requires mere possession of the files until it has completed its investigation of the bankrupt's affairs vis-a-vis the moving parties. Nothing in the material indicates that the possession of the files in the trustee presents anything more than an inconvenience to the moving parties. The files in question have been made available to the moving parties and they have had free access to them. There is nothing in the material to indicate an urgent need for the physical transfer of the files, nor is prejudice shown if the files remain for a short period in the trustee's possession. The trustee, coming into possession of property belonging to another must have time to determine its position and balance a mere inconvenience occasion the moving parties with the interest of creditors generally in the complete and thorough administration of the estate.

5 Accordingly, the declaration required is made and the trustee is directed to deliver all relevant documents and correspondence having to do with the business and affairs of the moving parties to the moving parties immediately following the completion of its investigation. In the meantime, the moving party shall continue to have full access to the material in the files with the right to take copies.

6 This is not a matter for costs and no order is made save and except the stipulation that the trustee is entitled to its cost out of the assets of the estate.

*Motion granted.*

**SCHEDULE "B" – STATUTES  
RELEVANT STATUTES**

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

**Right of trustee to books of account, etc.**

16(5) No person is, as against the trustee, entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents, including material in electronic form, relating to the accounts or to any trade dealings of the bankrupt or to set up any lien or right of retention thereon.

**Duties of bankrupt**

158 A bankrupt shall

- (a) make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or any part thereof;
- (n.1) in such circumstances as are specified in directives of the Superintendent, deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt;
- (b) deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs;
- (c) at such time and place as may be fixed by the official receiver, attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property;
- (d) within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;
- (e) make or give all the assistance within his power to the trustee in making an inventory of his assets;
- (f) make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before the date of the initial bankruptcy event or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any

- part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;
- (g) make disclosure to the trustee of all property disposed of by transfer at undervalue within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;
  - (h) attend the first meeting of his creditors unless prevented by sickness or other sufficient cause and submit thereat to examination;
  - (i) when required, attend other meetings of his creditors or of the inspectors, or attend on the trustee;
  - (j) submit to such other examinations under oath with respect to his property or affairs as required;
  - (k) aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;
  - (l) execute any powers of attorney, transfers, deeds and instruments or acts that may be required;
  - (m) examine the correctness of all proofs of claims filed, if required by the trustee;
  - (n) in case any person has to his knowledge filed a false claim, disclose the fact immediately to the trustee;
  - (n.1)** inform the trustee of any material change in the bankrupt's financial situation;
  - (o) generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed by the court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee, or any creditor or person interested; and
  - (p) until his application for discharge has been disposed of and the administration of the estate completed, keep the trustee advised at all times of his place of residence or address.

### **Where bankrupt is a corporation**

159 Where a bankrupt is a corporation, the officer executing the assignment, or such

- (a) officer of the corporation, or
- (b) person who has, or has had, directly or indirectly, control in fact of the corporation

as the official receiver may specify, shall attend before the official receiver for examination and shall perform all of the duties imposed on a bankrupt by section 158, and, in case of failure to do so, the officer or person is punishable as though that officer or person were the bankrupt.

### **Powers of registrar**

192 (1) The registrars of the courts have power and jurisdiction, without limiting the powers otherwise conferred by this Act or the General Rules,

- (a) to hear bankruptcy applications and to make bankruptcy orders if they are not opposed;
- (b) to hold examinations of bankrupts or other persons;
- (c) to grant orders of discharge;



- (d) to approve proposals where they are not opposed;
- (e) to make interim orders in cases of urgency;
- (f) to hear and determine any unopposed or ex parte application;
- (g) to summon and examine the bankrupt or any person known or suspected to have in his possession property of the bankrupt, or to be indebted to him, or capable of giving information respecting the bankrupt, his dealings or property;
- (h) to hear and determine matters relating to proofs of claims whether or not opposed;
- (i) to tax or fix costs and to pass accounts;
- (j) to hear and determine any matter with the consent of all parties;
- (k) to hear and determine any matter relating to practice and procedure in the courts;
- (l) to settle and sign all orders and judgments of the courts not settled or signed by a judge and to issue all orders, judgments, warrants or other processes of the courts;
- (m) to perform all necessary administrative duties relating to the practice and procedure in the courts; and
- (n) to hear and determine appeals from the decision of a trustee allowing or disallowing a claim.

**May be exercised by judge**

(2) The powers and jurisdiction conferred by this section or otherwise on a registrar may at any time be exercised by a judge.

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**RSM CANADA LIMITED, ALSO KNOWN AS TDB**  
**RESTRUCTURING LIMITED**

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