

Court File No. BK-24-03003083-0031
Estate No.: 31-3003083

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

MOTION RECORD
(Motion for Directions returnable June 4, 2024)

May 16, 2024

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AND TO: BLANEY MCMURTRY LLP

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AND TO: BENNETT JONES LLP

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Lawyers for Creative Wealth Media Lending Inc.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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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ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AMENDED NOTICE OF MOTION FOR DIRECTIONS

Borden Ladner Gervais LLP (“**BLG**”) will make a motion for directions to ~~the court a~~
~~judge presiding over the Commercial List~~ on ~~a date to be established by the Commercial List~~
~~Office~~ June 4, 2024 at 10:00 a.m., or as soon after that time as the motion can be heard, at the court
house, 330 University Avenue, 8th Floor, Toronto, Ontario, M5G 1R7.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- In writing under subrule 37.12.1 (1) because it is on consent;
- In writing as an opposed motion under subrule 37.12.1 (4);
- In person;
- By telephone conference;
- ~~By video conference.~~
- In writing under subrule 37.12.1 (1) because it is (*insert one of* on consent, unopposed *or* made without notice);

THE MOTION IS FOR:

- (a) An Order providing directions to Borden Ladner Gervais LLP (“**BLG**”) in respect of the production of Creative Wealth Media Finance Corp. (“**CWMF**”) records to TDB Restructuring Limited, in its capacity as the bankruptcy trustee of CWMF (the “**Trustee**”); and,
- (b) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

- (c) BLG was retained by CWMF and Jason Cloth on a joint basis in relation to a confidential matter prior to the within bankruptcy (the “**Joint Retainer**”);
- (d) Mr. Cloth was the principal of CWMF and provided BLG with instructions on behalf of CWMF and in his personal capacity;
- (e) In fulfilling its mandate under the Joint Retainer, BLG received property of CWMF, which included (a) emails sent and/or received using the @cwmmoviefund.ca email domain (“**CWMF Emails**”); and (b) CWMF records, documents and contracts (collectively, the “**CWMF Records**”);
- (f) BLG has not reviewed the entirety of the CWMF Emails in its possession, but only the emails that were required for the purposes of the unrelated confidential mandate;
- (g) It is BLG’s understanding that the CWMF Records may be commingled vis-à-vis
 - (a) other Creative Wealth Media entities that are third parties to the within

bankruptcy, including Creative Wealth Media Lending Inc. who used the same email domain as CWMF, (b) potentially privileged emails and records, and (c) emails and records personal to Mr. Cloth;

- (h) The Joint Retainer was terminated at the time that the Trustee was appointed;
- (i) BLG did not continue as counsel to the Trustee. BLG continues to act as counsel to Mr. Cloth in relation to a confidential matter unrelated to the within bankruptcy;
- (j) The privilege belonging to CWMF and Mr. Cloth under the Joint Retainer did not vest in the Trustee upon CWMF's bankruptcy;
- (k) The Trustee's powers are prescribed by the *Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3* ("**BIA**"). The BIA does not provide that the Trustee steps into the shoes of CWMF, as the bankrupt, for all purposes, and specifically does not confer any authority over privilege or to seize documents of a third party to the bankruptcy;
- (l) BLG does not believe that the Trustee is entitled to any privileged and/or non-CWMF Records (as defined above) in BLG's possession by virtue of the Joint Retainer alone, nor does BLG possess consent from Mr. Cloth, its current client, to produce such records to the Trustee;
- (m) On March 6, 2024, in the context of CWMF delivering its books and records to the Trustee, Justice Penny ordered that an independent expert be appointed by the court to conduct a forensic investigation and unmingling of records (the "**Review Process**"). The Review Process is ongoing. BLG is not a party to the Review Process;

- (n) To ensure consistency and avoid any comingling of records between CWMF and non-CWMF entities, it may be prudent for the CWMF Records to also be subject to the Review Process;
- (o) BLG is seeking directions from the court in respect of the production of the CWMF Records to the Trustee, and on terms the court deems appropriate after hearing submissions of the parties that may be impacted by any such directions;
- (p) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (q) The Affidavit of Eun Ji Yoon, ~~to be affirmed~~ May 14, 2024, and the exhibits thereto;
and
- (r) Such further and other documentary evidence as counsel may advise and this Honourable Court may permit.

May 3 16, 2024

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Lawyers for Creative Wealth Media Lending Inc.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AMENDED NOTICE OF MOTION FOR
DIRECTIONS

BORDEN LADNER GERVAIS LLP

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Lawyers for the Moving Party,
Borden Ladner Gervais LLP

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AFFIDAVIT OF EUN JI YOON
(Affirmed May 16, 2024)

I, **EUN JI YOON**, of the City of Toronto, in the Province of Ontario, **AFFIRM**:

1. I am a law clerk at Borden Ladner Gervais LLP (“**BLG**”). As such, I have personal knowledge of the matters contained in this affidavit, except where my knowledge is based upon information from others, in which case I have set out the source of my information and believe such information to be true.

Background

2. In January 2023, BLG was retained by Creative Wealth Media Finance Corp. (“**CWWMF**”) and Jason Cloth on a joint basis in relation to a confidential matter (the “**Joint Retainer**”).

3. I am informed by Natalia Vandervoort, a lawyer at BLG, and believe, that Mr. Cloth provided BLG with instructions on behalf of CWWMF (as principal of CWWMF) and in his personal capacity. I am further informed by Ms. Vandervoort, and believe, that during the period between January to November 2023, BLG received various records in relation to the confidential matter, which included CWWMF records.

4. I am informed by Ms. Vandervoort, and believe, that the Joint Retainer was terminated at the time that TDB Restructuring Limited was appointed as the bankruptcy trustee for CWMF (the “Trustee”).

5. I am informed by Ms. Vandervoort, and believe, that BLG did not and does not act as counsel to the Trustee and that BLG continues to act as counsel to Mr. Cloth in relation to the confidential matter unrelated to the within bankruptcy.

Trustee’s Requests for BLG to Provide Records

6. I am informed by Ms. Vandervoort, and believe, that the Trustee has requested records from BLG. A copy of an email chain (without attachments) between Trustee’s counsel and BLG lawyers during the period between February 13 to April 5, 2024 is attached as **Exhibit “A”**. Certain emails in this email chain are referenced in the paragraphs below.

7. In an endorsement released March 7, 2024, in the context of a motion for CWMF to deliver its books and records to the Trustee, Justice Penny ordered that an independent expert be appointed by the court to conduct a forensic investigation and unmingling of records as between CWMF and other Creative Wealth Media affiliated companies (the “**Review Process**”). A copy of Justice Penny’s endorsement (the “**Endorsement**”) is attached as **Exhibit “B”**.

8. I am informed by Ms. Vandervoort, and believe, that BLG was not a party to the Review Process and there was no order made by Justice Penny for BLG to deliver records to the Trustee.

9. In an email dated April 5, 2024, from BLG to Trustee’s counsel, contained in the email chain at Exhibit “A” to this affidavit, it was noted that BLG believed it did not have an obligation to produce any records to the Trustee in its possession that it received from CWMF as a result of

the Joint Retainer. The email further noted that it was BLG's understanding that the documents were being dealt with in accordance with the Endorsement.

10. In an email responding to BLG on the same day, with attention to Ms. Vandervoort, contained in the email chain at Exhibit "A" to this affidavit, Trustee's counsel noted that the "Trustee's next step" was to "bring a motion against you personally for non-compliance with the clear statutory obligations under the *Bankruptcy and Insolvency Act*." [emphasis in the original]

11. I am informed by Ms. Vandervoort, and believe, that on April 10, 2024, BLG informed Trustee's counsel, during a telephone conference, that it would be seeking a motion for directions from the court in relation to production of any records to the Trustee in BLG's possession.

12. In an email to BLG dated May 1, 2024, Trustee's counsel clarified the Trustee's request for records from BLG, which included "all books and records regarding CWMF", "BLG's entire file pursuant to the joint engagement between CWMF and Jason Cloth", and "BLG's work product for CWMF". A copy of the email chain that includes this email is attached as **Exhibit "C"**.

The CWMF Records in BLG's Possession

13. I am informed by Ms. Vandervoort, and believe, that under the Joint Retainer, BLG received various CWMF records, which included emails sent and/or received using the @cwmmoviefund.ca email domain (the "**CWMF Emails**"), and CWMF records, documents and contracts (collectively, the "**CWMF Records**").

14. I am informed by Christian Kashila, Case Manager of Discovery Services at BLG, and believe, that BLG has a total of 63,672 CWMF Emails (including attachments) hosted on its e-

discovery Relativity platform. I am further informed by Mr. Kashila, and believe, that the CWMF Emails were received as follows:

- (a) In March 2023, June 2023 and August 2023, BLG received production sets from a third-party service provider. A total of 50,490 documents were received, consisting of 24,775 emails and 25,715 attachments; and
- (b) In late November 2023, BLG received a production set from CWMF's counsel in the United States consisting of 13,182 emails, including attachments, for the period between August 1, 2017 and April 28, 2022.

15. I am informed by Ms. Vandervoort, and believe, that the third-party service provider was instructed to collect emails from CWMF mailboxes (all custodians) between January 1, 2021 and October 31, 2022 in accordance with a privileged document review protocol. I am further informed by Ms. Vandervoort, and believe, that the third-party service provider was also requested to provide emails between certain custodians for the period between January 2021 and August 2023.

16. I am informed by Ms. Vandervoort, and believe, that the entirety of the CWMF Emails has not been reviewed by BLG.

17. A copy of the Affidavit of Richard McConnell, sworn February 29, 2024 (without exhibits), on behalf of Creative Wealth Media Lending Inc. ("**Lending**") in response to the motion by the Trustee to access books and records on Lending's premises, is attached as **Exhibit "D"**.

18. At paragraph 9 of his affidavit, Mr. McConnell states that digital records and communications of CWMF, Lending and several other entities are "housed on a common network

system with some common cloud storage” and that “the paper and digital records of all of the businesses and entities at 151 Bloor are substantially intermingled.”

19. I am informed by Ms. Vandervoort, and believe, that CWMF’s offices were located at 151 Bloor Street West and that the @cwmmoviefund.ca email domain may have also been used by Lending and other Creative Wealth entities.

20. I am informed by Ms. Vandervoort, and believe, that it is BLG’s understanding that the CWMF Records may be commingled vis-à-vis (a) other entities that are third parties to the within bankruptcy, (b) potentially privileged emails and records, and (c) emails and records personal to Mr. Cloth.

21. I swear this affidavit in support of BLG’s motion seeking directions in respect of the production of CWMF records to the Trustee.

Affirmed before me: (*select one*): in person OR by video conference

By EUN JI YOON, at the City of Toronto in the Province of Ontario, before me on May 16, 2024, in accordance with [O. Reg. 431/20](#), Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (*or as may be*)



Signature of Commissioner (or as may be)

EUN JI YOON

ALYSSA MARIE ALLEN

Alyssa Marie Allen, a Commissioner, etc.
Province of Ontario, for Borden Ladner Gervais LLP,
Barristers and Solicitors.
Expires July 18, 2025.

This is **Exhibit “A”** referred to in the Affidavit of Eun Ji Yoon, AFFIRMED REMOTELY by EUN JI YOON of the City of Toronto, in the Province of Ontario, before me on May 16, 2024, in accordance with [O. Reg. 431/20](#), Administering Oath or Declaration Remotely.



A Commissioner for Taking Affidavits

ALYSSA MARIE ALLEN

Alyssa Marie Allen, a Commissioner, etc.
Province of Ontario, for Borden Ladner Gervais LLP,
Barristers and Solicitors.
Expires July 18, 2025.

From: Nowina, Michael <Michael.Nowina@bakermckenzie.com>
Sent: April 5, 2024 12:09 PM
To: Vandervoort, Natalia
Cc: Bryan Tannenbaum; Brooksbank, Bevan; Sheikh, Usman; Arif Dhanani
Subject: RE: Creative Wealth Media Finance Corp
Attachments: Matter of Creative Wealth Media Finance (BK-24-03003083-0031) Penny J. 06-MAR-2024.pdf; 2023-11-08 - Creative Wealth and Jason Cloth -Updated Joint Retainer.pdf

Follow Up Flag: Follow up
Flag Status: Completed

[External / Externe]

Natalia,

I am attaching the decision of Justice Penny in which I note that you appears to be acting for Creative Wealth Media Lending Inc., please confirm whether you also act for that entity or if this is a mistake. Our understanding had been that your firm acted for the bankrupt company and Jason Cloth.

The motion brought by the trustee primarily addressed the records located in shared cloud servers and the former business premises of the bankrupt located Suite 700, 151 Bloor Street West, Toronto, Ontario. The only basis for not producing those records is the position taken by Creative Wealth Media Lending Inc. that they are intermingled with their own records. You are not correct that Justice Penny's Order is dealing with the records held by your firm. Justice Penny did not decide a motion against you or your firm as that was not before him. Your firm is in a different position that Creative Wealth Media Lending because BLG:

- holds the records that you previously have identified as belonging to the bankrupt company [REDACTED]
- was previously engaged by the bankrupt company and Jason Cloth
- did not act for any other entity in relation to the documents BLG now holds
- has sought a new engagement with the bankruptcy trustee
- [REDACTED]

The Trustee's next step is to bring a motion against you personally for non-compliance with the clear statutory obligations under the *Bankruptcy and Insolvency Act* to provide the bankruptcy trustee with the bankrupt's documents which are in your possession. We would like to schedule a call with you as this motion is not one that we want to bring against a lawyer, but your refusal to provide the records of the bankrupt company is completely unjustified and you are prejudicing the estate of the bankrupt in relation to [REDACTED] which you have advised exists, but which you have not provided to the bankruptcy trustee.

I can speak today at 2:30. However, I suggest you discuss the position you are taking with an insolvency lawyer at BLG or your firm's management and that we arrange for a call on Monday.

Regards,
Michael

Michael Nowina (he/him/his)
Partner, Pro Bono Chair (Toronto)
Baker & McKenzie LLP
181 Bay Street, Suite 2100
Toronto, Ontario, Canada M5J 2T3
Direct: +1 416 865 2312

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From: Vandervoort, Natalia <NVandervoort@blg.com>
Sent: Friday, April 5, 2024 11:13 AM
To: Nowina, Michael <Michael.Nowina@bakermckenzie.com>
Cc: Bryan Tannenbaum <btannenbaum@tdbadvisory.ca>; Brooksbank, Bevan <BBrooksbank@blg.com>; Sheikh, Usman <Usman.Sheikh@bakermckenzie.com>
Subject: [EXTERNAL] RE: Creative Wealth Media Finance Corp

Michael,

We have now considered your email dated March 12, 2024 requesting that our firm deliver documents in our possession that we received from CWMF as a result of our joint retainer with Jason Cloth and CWMF in relation to [REDACTED]. We don't believe that we have an obligation to produce any records to the trustee in the circumstances.

As we understand it, the issue of access to the documents is being dealt with in accordance with Justice Penny's order dated March 6, 2024. We made submissions before Justice Penny in respect of the order seeking production from counsel. Justice Penny did not order BLG to produce any documents.

Please let me know if you would still like to discuss.

Thank you,

Natalia Vandervoort

Counsel

T 416.367.6504 | NVandervoort@blg.com

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Borden Ladner Gervais LLP

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From: Vandervoort, Natalia
Sent: Thursday, April 4, 2024 4:24 PM
To: Nowina, Michael <Michael.Nowina@bakermckenzie.com>; Sainsbury, Caitlin R. <CSainsbury@blg.com>
Cc: Bryan Tannenbaum <btannenbaum@tdbadvisory.ca>; Arif Dhanani <adhanani@tdbadvisory.ca>; Sheikh, Usman <Usman.Sheikh@bakermckenzie.com>
Subject: RE: Creative Wealth Media Finance Corp

Hi Michael,

Thanks for the follow-up. Our written response is forthcoming. If you still want a call after receiving our written response, I am happy to have one. I am available tomorrow between 1 and 3.

Thanks,

Natalia Vandervoort

Counsel

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Borden Ladner Gervais LLP

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From: Nowina, Michael <Michael.Nowina@bakermckenzie.com>

Sent: Wednesday, April 3, 2024 3:05 PM

To: Vandervoort, Natalia <NVandervoort@blg.com>; Sainsbury, Caitlin R. <CSainsbury@blg.com>

Cc: Bryan Tannenbaum <btannenbaum@tdbadvisory.ca>; Arif Dhanani <adhanani@tdbadvisory.ca>; Sheikh, Usman <Usman.Sheikh@bakermckenzie.com>

Subject: RE: Creative Wealth Media Finance Corp

[External / Externe]

Natalia, Caitlin,

We trust that you have had sufficient time to consider your position about providing the bankrupt's records in your possession to the bankruptcy trustee. We would like to schedule a call with you tomorrow or on Friday to discuss your position as we have instructions from the inspectors.

Regards,
Michael

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Mobile: +1 647 339 7896
Fax: +1 416 863 6275

From: Vandervoort, Natalia <NVandervoort@blg.com>

Sent: Thursday, March 14, 2024 4:30 PM

To: Nowina, Michael <Michael.Nowina@bakermckenzie.com>; Sainsbury, Caitlin R. <CSainsbury@blg.com>

Cc: Bryan Tannenbaum <btannenbaum@tdbadvisory.ca>; Arif Dhanani <adhanani@tdbadvisory.ca>

Subject: [EXTERNAL] RE: Creative Wealth Media Finance Corp

Michael,

We are considering your email and will be back with our position shortly.

Thank you,

Natalia Vandervoort

Counsel

T 416.367.6504 | NVandervoort@blg.com

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From: Nowina, Michael <Michael.Nowina@bakermckenzie.com>

Sent: Tuesday, March 12, 2024 10:11 AM

To: Vandervoort, Natalia <NVandervoort@blg.com>; Sainsbury, Caitlin R. <CSainsbury@blg.com>

Cc: Bryan Tannenbaum <btannenbaum@tdbadvisory.ca>; Arif Dhanani <adhanani@tdbadvisory.ca>

Subject: RE: Creative Wealth Media Finance Corp

[External / Externe]

Natalia,

I am following up on the email below. Your firm acted for Creative Wealth Media Finance Corp and Jason Cloth prior to the bankruptcy and has the bankrupt's documents. By no later than March 15, 2024, please deliver those documents to the Trustee which your firm is required to do pursuant to section 164 of the BIA. If Jason Cloth is instructing you not to deliver these records to the Trustee, please confirm that, and on what basis your firm believes those instructions overrides the statutory provisions of the BIA and your duties to your former client, Creative Wealth Media Finance Corp.

If the documents are not delivered, we will be seeking instructions from the inspectors to bring a further motion against your firm compelling BLG to provide the bankrupt's records to the Trustee.

Regards,
Michael

Michael Nowina (he/him/his)
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Fax: +1 416 863 6275

From: Vandervoort, Natalia <NVandervoort@blg.com>

Sent: Tuesday, February 27, 2024 9:30 AM

To: Nowina, Michael <Michael.Nowina@bakermckenzie.com>; Sainsbury, Caitlin R. <CSainsbury@blg.com>

Cc: Bryan Tannenbaum <btannenbaum@tdbadvisory.ca>; Arif Dhanani <adhanani@tdbadvisory.ca>

Subject: [EXTERNAL] RE: Creative Wealth Media Finance Corp

Michael – I don't yet have instructions to provide you with the documents. I will provide an update if that changes.

Natalia Vandervoort

Counsel

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Borden Ladner Gervais LLP

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From: Nowina, Michael <Michael.Nowina@bakermckenzie.com>

Sent: Tuesday, February 27, 2024 9:15 AM

To: Vandervoort, Natalia <NVandervoort@blg.com>; Sainsbury, Caitlin R. <CSainsbury@blg.com>

Cc: Bryan Tannenbaum <btannenbaum@tdbadvisory.ca>; Arif Dhanani <adhanani@tdbadvisory.ca>

Subject: RE: Creative Wealth Media Finance Corp

[External / Externe]

Natalia,

I am following up on my email below. Please provide the documents of the bankrupt that are in your possession to the trustee and address the other questions as well.

Regards,
Michael

Michael Nowina (he/him/his)
Partner, Pro Bono Chair (Toronto)
Baker & McKenzie LLP
181 Bay Street, Suite 2100
Toronto, Ontario, Canada M5J 2T3
Direct: +1 416 865 2312
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From: Nowina, Michael

Sent: Tuesday, February 13, 2024 10:34 AM

To: Vandervoort, Natalia <NVandervoort@blg.com>; Sainsbury, Caitlin R. <CSainsbury@blg.com>

Cc: Bryan Tannenbaum <btannenbaum@tdbadvisory.ca>; Arif Dhanani <adhanani@tdbadvisory.ca>

Subject: Creative Wealth Media Finance Corp

Natalia,

Further to our call, we are writing to confirm that the trustee is requesting production from you of all the emails and other documents you have in your possession regarding the bankrupt company. Pursuant to section 164 of the Bankruptcy and Insolvency Act, the trustee can require production from any person who has possession of records relating to a bankrupt. We understand from our call that these documents were provided to you by the US firm Herrick, Feinstein LLP on the directions of Jason Cloth in order to [REDACTED]

One question that we did not discuss but we would also like to confirm is how the documents were collected in order to ensure that all relevant documents were produced. If you have information regarding how the documents were collected (e.g. keyword, date range and custodian search terms), please confirm this as well.

We confirm that all costs related to this will be covered by Jason Cloth who BLG had jointly representing along with CWMF prior to its bankruptcy and that all you are looking for is the trustee's instructions to provide CWMF's records [REDACTED] We will confirm the trustee's instructions in this regard.

Best regards,
Michael

Michael Nowina (he/him/his)
Partner, Pro Bono Chair (Toronto)
Baker & McKenzie LLP
Brookfield Place, Suite 2100
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**RESTRUCTURING
& INSOLVENCY**

Baker's Global Restructuring & Insolvency Blog: <http://restructuring.bakermckenzie.com>

This is **Exhibit “B”** referred to in the Affidavit of Eun Ji Yoon, AFFIRMED REMOTELY by EUN JI YOON of the City of Toronto, in the Province of Ontario, before me on May 16, 2024, in accordance with [O. Reg. 431/20](#), Administering Oath or Declaration Remotely.



A Commissioner for Taking Affidavits

ALYSSA MARIE ALLEN

Alyssa Marie Allen, a Commissioner, etc.
Province of Ontario, for Borden Ladner Gervais LLP,
Barristers and Solicitors.
Expires July 18, 2025.



SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: BK-24-03003083-0031

DATE: March 6, 2024

NO. ON LIST: 6

TITLE OF PROCEEDING: IN THE MATTER OF THE BANKRUPTCY OF CREATIVE WEALTH MEDIA FINANCE CORP.

BEFORE: JUSTICE PENNY

PARTICIPANT INFORMATION

For Moving Party:

| Name of Person Appearing | Name of Party | Contact Info |
|--------------------------|---|--|
| Michael Nowina | Counsel for the Trustee (TDB Restructuring Limited, previously known as RSM Canada Limited) | Michael.Nowina@bakermckenzie.com |
| Anton Rizor | | Anton.Rizor@bakermckenzie.com |
| Arif Dhanani | Representative of the Trustee | adhanani@tdbadvisory.ca |
| Bryan Tannenbaum | | btannenbaum@tdbadvisory.ca |

For Responding Party:

| Name of Person Appearing | Name of Party | Contact Info |
|--------------------------|--|--|
| Robert Staley | Counsel for Creative Wealth Media Lending Inc. | staley@bennettjones.com |
| Michael Shakra | | shakram@bennettjones.com |
| Andrew Sahai | | sahaia@bennettjones.com |

For Other:

| Name of Person Appearing | Name of Party | Contact Info |
|--------------------------|--|--|
| Natalia Vandervoort | Counsel for Creative Wealth Media Lending Inc. | nvandervoort@blg.com |
| Philip Cho | Counsel for Premium Properties | pcho@weirfoulds.com |
| Wojtek Jaskiewicz | | wjaskiewicz@weirfoulds.com |
| Anna White | Counsel for Catalyst Wealth Management Media Fund 1 and the Ad-Hoc Group | awhite@tyrllp.com |
| Jason Wadden | | jwadden@tyrllp.com |
| David Ullmann | Counsel for Jason Cloth | dullmann@blaney.com |
| Elizabeth Ayo | Counsel for Bayshore Capital Advisors LLC, GCA Alternative | elizabeth@booklaw.ca |

ENDORSEMENT OF JUSTICE PENNY (Released March 7, 2024):

- [1] In this motion, the Trustee in Bankruptcy of Creative Wealth Management Finance Inc. (“Finance”) seeks orders granting the Trustee access to the books and records of Finance and establishing protocols for the delivery of these books and records to the Trustee.
- [2] The substantive problem at the heart of the current dispute arises from the fact that Finance is one of several of Creative Wealth Management (CWM) affiliated companies. Only Finance is in bankruptcy. All of the CWM group share office space in Toronto and, more importantly, the books and records for the entire CWM group are, allegedly, intermingled. In these Reasons, I will use the term “Books and Records” to refer only to the books and records of Finance.
- [3] The central issues on this motion are:
- 1) who should separate out the Books and Records from the intermingled records of the CWM group, and how? and
 - 2) who should pay the cost of the unmingling exercise?
- [4] There are additional, collateral issues which I will address in the course of these Reasons.

Background

- [5] On October 27, 2023, Finance issued a notice of intention to make a proposal under the BIA. Finance was deemed to have filed an assignment bankruptcy on November 28, 2023. The initial trustee was not provided with access to the Books and Records of Finance.
- [6] The proposal trustee was replaced by the present Trustee at the first meeting of creditors on December 15, 2023. Beginning on January 3, 2024, the Trustee made repeated requests for access to Finance’s books and records, without avail. After weeks, on January 22, continuing on January 31, 2024, the Trustee was finally able to meet at the CWM business premises with Mr. Cloth, who is a shareholder and one of the officers and directors of Finance and other CMW companies.¹ He attended with his counsel, Mr. Ullman, and with in-house counsel for Creative Wealth Management Lending Inc (“Lending”).
- [7] The Trustee was advised at these meetings that: all of Finance’s Books and Records were stored online; the Books and Records were intermingled with the books and records of other CWM entities; CWM Lending, specifically, was asserting privilege; access to the Finance Books and Records would not be granted at that time; and, a letter would be forthcoming from Mr. Ullman setting out the position of the non-Finance CWM entities with respect to the Trustee’s access.

¹ I was advised that the two shareholder of the CWM group are Mr. Cloth and a Mr. Tennyson and that the directors and officers of the group were Mr. Cloth and Mr. McConnell.

- [8] Counsel for the Trustee followed up on February 6 and 19, 2024, requesting access to the Books and Records. Access was not forthcoming, nor was any plan or proposed protocol for granting access.
- [9] On February 23, 2024, the Trustee brought a motion, *ex parte*, for an order granting it access to the Books and Records. Justice Wilton-Siegal declined to grant any relief, other than an interim preservation order.
- [10] At the return of the motion on notice before me, Mr. Cloth filed no evidence or submissions, other than a brief “aide memoire” from his counsel. His counsel was in attendance and made submissions. Counsel for Lending filed evidence and a factum, and made submissions. Various creditors of Finance also filed material, were in attendance, and made brief submissions.
- [11] It became clear that the CWM group is involved in other insolvency proceedings in British Columbia, where it is in conflict with various creditors, and that there is other litigation extant, including against Mr. Cloth, initiated by CWM group creditors (including creditors of Finance). This provides context for the highly acrimonious and disputed nature of the relief sought on the motion.

The legal framework

- [12] The Trustee has a duty to the Finance’s creditors to obtain the greatest possible value for the bankrupt estate. Section 16(3) of the BIA provides that the Trustee must 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. The Trustee must take possession of the deeds, books, documents and assets as soon as possible after the bankruptcy.
- [13] Further, s. 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. The BIA requires a bankrupt and, where the bankrupt is a corporation, its officers or directors, to generally do all such acts and things in relation to Finance’s property and the distribution of that property among Finance’s creditors as may be reasonably required by the Trustee.
- [14] Section 167 of the BIA also requires 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 or its dealings or property, to produce those documents. While s. 164 does not entitle the Trustee to seize the documents or property of a third party, the court has held that s. 167 includes a right of the Trustee to inspect such 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. This inspection right does not abrogate the law of solicitor client privilege, however.
- [15] Mr. Ullman and others have suggested that the Trustee does not really need all the Books and Records and that there is no urgency because recovery on Finance’s accounts receivable is tied to royalty payments on movies and will take a long time. I utterly reject all such arguments. It is not for the bankrupt, its shareholders officers or directors, or anyone else for that matter, to tell the Trustee what it does and does not need, or when. There is no doubt that the Trustee is entitled to immediate access to the Books and Records. This is not in serious dispute.
- [16] Mr. Ullman also suggested that the process of separating the Books and Records from the rest of the CWM group’s records will be costly and is unnecessary. He says the request is “premature” and that the most important documents have already been provided. There was, among other things, a complete lack of any evidence to support these propositions.

[17] By the end of submissions, it had become obvious that the necessary path forward is to extract the Books and Records from the intermingled records of the other CWM entities so that the Trustee will have unimpeded access to them. I will now turn to the two principal issues raised by this conclusion.

Who should separate out the Books and Records and how?

[18] There is a serious dispute between the Trustee and Lending about by whom, and how, the CWM records should be reviewed and analyzed to separate out the Books and Records. The Trustee takes the position that, in view of the common ownership and common officers and directors, there can be no suggestion of adversity of interest between Finance and the other CWM entities, specifically Lending. As a result, the Trustee proposes to utilize its related forensic investigation enterprise, RSM Consulting's Digital Forensics and Incident Response Team.

[19] I cannot agree. Once the Trustee was appointed, the fate of Finance was in the hands of the Trustee and the inspectors/creditors of Finance. Their interests are potentially adverse to the interests of the remaining members of the CWM group. Indeed, it seems almost certain to be so.

[20] In my view, the required forensic investigation and unmingling of records must be conducted by an independent expert appointed by the court. To this end, the parties shall endeavor to agree on the appropriate choice of investigator. If they are unable to do so, they will each choose a preferred individual and provide me with: a) the CV of the proposed expert; a consent to act; confirmation they have no conflicts; and, confirmation that they understand the role of a court-appointed expert regarding independence and objectivity, similar in nature (with necessary modifications) to the declaration required of expert witnesses under the Rules of Civil Procedure. This may be accompanied by a brief submission, not to exceed one typed, double-spaced page, addressing why their proposed candidate is to be preferred over the other proposed candidate.

[21] The protocols for the work of the investigator must include provisions to ensure preservation of CWM claims of solicitor client privilege. It shall also contain provisions which reflect the issues addressed in para. 6 of the Trustee's proposed draft order, starting at page E11 of the CaseLines in the March 6, 2024 bundle.

[22] Any other issues which cannot be resolved between the parties may be spoken to at a case conference convened for that purpose.

Who should pay the cost of the unmingling exercise?

[23] The Trustee maintains that because the CWM group saw fit to conduct its record keeping on an intermingled basis, it should pay the cost of unmingling Finance's Books and Records. Lending maintains that it was entitled to conduct its affairs as it saw fit and that it is Finance's's estate which should pay the cost of satisfying the Trustee's need for the Books and Records.

[24] I order that the cost of the court-appointed independent investigator shall, in the short run, be born equally (that is, on a 50/50 basis) by the Finance estate on the one hand and the remainder of the CWM group on the other. This shall be without prejudice to the right of either party to revisit this issue once the job is done. At this point, next to nothing is known about the extent, of, reasons for, and consequences of the intermingling of the CWM financial records. With the benefit of the work and findings of the independent investigator, there will be a more robust record to assess the need for all of this, its causes and consequences.

Costs of the motion

[25] Both the Trustee and Lending seek their costs of this motion. In light of my disposition, neither side was entirely successful. I make no order as to costs.

A handwritten signature in blue ink, appearing to read 'Penny J.' with a stylized flourish at the end.

Penny J.

This is **Exhibit “C”** referred to in the Affidavit of Eun Ji Yoon, AFFIRMED REMOTELY by EUN JI YOON of the City of Toronto, in the Province of Ontario, before me on May 16, 2024, in accordance with [O. Reg. 431/20](#), Administering Oath or Declaration Remotely.



A Commissioner for Taking Affidavits

ALYSSA MARIE ALLEN

Alyssa Marie Allen, a Commissioner, etc.
Province of Ontario, for Borden Ladner Gervais LLP,
Barristers and Solicitors.
Expires July 18, 2025.

From: Nowina, Michael <Michael.Nowina@bakermckenzie.com>
Sent: May 1, 2024 12:04 PM
To: Vandervoort, Natalia
Cc: Sheikh, Usman; Brooksbank, Bevan
Subject: RE: CWMF

[External / Externe]

Hi Natalia,

The trustee is entitled to all books and records regarding CWMF pursuant to the provisions of the BIA that we have cited in our prior correspondence. Subject to the Law Society rules about the transfer of a file, the trustee is also entitled to BLG's entire file pursuant to the joint engagement between CWMF and Jason Cloth. As you can appreciate, we would like BLG's work product for CWMF in order to understand what work has been done by BLG for CWMF in relation to collecting and reviewing CWMF's documents to [REDACTED]. For example, we have asked questions about the collection process which have never been answered. However, we are not intending this to be a difficult for BLG to do as we assume that there are a few key documents that will explain the collection and review process undertaken.

You refer to "personal emails" of Jason Cloth and I am not sure whether you mean emails that are [REDACTED] or emails giving instructions to BLG. Under a joint engagement, we don't see how there can be any privilege maintained between the two clients. However, if there are certain personal emails that Jason Cloth is instructing BLG to hold back, let us know what those are and we can confirm whether that is an issue or not. What we would like is clarity on what will be provided and what Jason Cloth wants to have held back by BLG.

Regards,
Michael

Michael Nowina (he/him/his)
Partner, Pro Bono Chair (Toronto)
Baker & McKenzie LLP
181 Bay Street, Suite 2100
Toronto, Ontario, Canada M5J 2T3
Direct: +1 416 865 2312
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Fax: +1 416 863 6275

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From: Vandervoort, Natalia <NVandervoort@blg.com>
Sent: Wednesday, May 1, 2024 11:24 AM
To: Nowina, Michael <Michael.Nowina@bakermckenzie.com>
Cc: Sheikh, Usman <Usman.Sheikh@bakermckenzie.com>; Brooksbank, Bevan <BBrooksbank@blg.com>
Subject: [EXTERNAL] CWMF

Hi Michael,

As we prepare our motion for directions, I think it would be helpful to understand exactly what the trustee expects BLG to produce. Initially you indicated that you wanted CWMF records in our possession, but subsequently I think you took

the position that you were entitled to the entirety of our file (inclusive of personal emails sent by Jason) by virtue of the joint retainer. I just want us to be clear on exactly what your expectations are. Please advise.

Thank you,



Natalia Vandervoort

Counsel

T 416.367.6504 | NVandervoort@blg.com

BLG | Canada's Law Firm

Calgary | Montréal | Ottawa | Toronto | Vancouver

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Borden Ladner Gervais LLP

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This is **Exhibit “D”** referred to in the Affidavit of Eun Ji Yoon, AFFIRMED REMOTELY by EUN JI YOON of the City of Toronto, in the Province of Ontario, before me on May 16, 2024, in accordance with [O. Reg. 431/20](#), Administering Oath or Declaration Remotely.



A Commissioner for Taking Affidavits

ALYSSA MARIE ALLEN

Alyssa Marie Allen, a Commissioner, etc.
Province of Ontario, for Borden Ladner Gervais LLP,
Barristers and Solicitors.
Expires July 18, 2025.

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

AFFIDAVIT OF RICHARD MCCONNELL
(Sworn February 29, 2024)

I, RICHARD MCCONNELL, of the Township of Ajax, in the Province of Ontario, MAKE
OATH AND SAY:

1. I am the Chief Investment Officer and a Director of Creative Wealth Media Lending Inc. ("Lending"). As such, I have personal knowledge of the matters deposed to below.
2. This affidavit is sworn in response to the motion by RSM Canada Limited (now TDG Restructuring Limited), in its capacity as trustee (the "Trustee") of Creative Wealth Media Finance Inc. ("Finance"), to access books and records on Lending's premises. The motion was initially brought without notice to Lending.
3. As set out in the affidavit of Arif Dhanani ("Dhanani") sworn February 21, 2024, the Trustee was appointed by Finance's creditors to replace the initial trustee appointed when Finance was deemed to file an assignment in bankruptcy.

Creative Wealth Media Lending Inc.

4. Lending arranges for financing to the producers and distributors of motion picture, television, and animated productions. Lending also provides investment and administrative services to various entities.

5. Lending represents a single Canadian institutional pension fund investor whose investments are structured primarily through limited partnerships administered by Lending as general partner. Through the limited partnerships, Lending, as administrator, through different investment vehicles, makes direct and indirect investments in productions on behalf of its investor client.

6. Lending and Finance are separate corporations, operating separate businesses in the motion picture, television, and animated productions industry. Lending and Finance are separately managed, have separate clients and separate legal representation. Lending operates independently of Finance.

7. Lending and Finance exist under common upstream ownership by two ultimate shareholders that are unrelated, and which share equal indirect voting entitlement, resulting in neither shareholder controlling Lending or Finance. Neither Lending nor Finance are subsidiaries of the other.

151 Bloor Street West

8. Lending's office is located in Toronto at 151 Bloor St West, Suite 700 ("151 Bloor"). The office is shared by Lending, Finance, and several other entities, including Epic Media. Also using

that address are several other corporations and investment vehicles that have been established in foreign jurisdictions that use 151 Bloor as their mailing address.

9. The office does not house extensive paper records. The businesses, other than Epic Media, have generated extensive digital records and communications, including email, all of which is housed on a common network system with some common cloud storage. Other than Epic Media, the paper and digital records of all of the businesses and entities at 151 Bloor are substantially intermingled.

10. The records at 151 Bloor are accessible on the cloud from 151 Bloor include lawyer/client communications and other confidential communications in relation to matters in which Lending and its limited partnerships are adverse to Finance.

Adversity Between Lending and Finance

11. As is known to the Trustee and to counsel for the Trustee, Lending and Finance are adverse in interest. Among other things:

- (a) Creative Wealth Media Lending Limited Partnership, one of Lending's limited partnerships, is a contingent claimant of Finance. It is listed (as "Creative Wealth Media Lending LP") in Finance's notice of bankruptcy as a creditor of Finance (Exhibit "E" to the Dhanani affidavit). Lending's institutional pension fund investor invested through Creative Wealth Media Lending Limited Partnership in several Finance-led film and television projects that have failed;
- (b) Creative Wealth Media Lending LP 2016 ("LP 2016") is a limited partnership administered by Lending. LP 2016 and Finance made competing bids in the SISP

of Bron Media Corp. ("Bron") in Bron's proceeding under the *Companies' Creditors Arrangement Act*. Finance subsequently did not proceed in the Bron SISF;

- (c) Finance's creditors strongly objected to various steps taken by LP 2016 in the CCAA proceedings of Bron. They objected to LP 2016's debtor-in-possession financing, they objected to the SISF and they objected to approval of LP 2016's original bid and revised bid, which was ultimately approved by the CCAA court on January 17, 2024, and which approval was given preliminary and final recognition by the Chapter 15 Court in the United States;
- (d) in opposing LP 2016's, creditors of Finance argued that they (directly and through Finance) had competing claims against Bron's assets that should not be vested out in favour of LP 2016's approval and vesting order;
- (e) the Bron CCAA proceeding is known to the Trustee and to Trustee's counsel, as it is described in the Dhanani affidavit, and reasons dated November 29, 2023 in the Bron CCAA proceeding are attached as Exhibit "V" to the Dhahani affidavit. The Trustee and Trustee's counsel are also aware from the Bron CCAA proceeding that LP 2016 is represented by Bennett Jones LLP; and
- (f) at the January 17, 2024 hearing at which LP 2016's bid in the Bron SISF was approved, Bryan Tannenbaum ("Tannenbaum") and Dhanani appeared for the Trustee, and Tannenbaum made submissions in opposition to LP 2016's bid. Attached as Exhibit "A" are the oral reasons for judgment given that day by Justice Gomery.

12. The records of Lending and its limited partnerships, including LP 2016, in relation to the Bron SISP, and Lending administered limited partnership investments participating with Finance, including privileged and confidential communications, are among the commingled records at 151 Bloor, and accessible on the cloud from 151 Bloor.

January 31, 2024 Attendance at 151 Bloor by the Trustee and Baker McKenzie

13. On the evening on January 30, 2024, Lending learned from Eric Golden of Blaney McMurtry, counsel for Jason Cloth ("Cloth"), that the Trustee would be attending at 151 Bloor the following day to search the premises and take possession of Finance's books and records.

14. On January 31, 2024, Brian Koscak ("Koscak"), the General Counsel of Lending, attended at 151 Bloor on behalf of Lending. Also in attendance were Michael Nowina ("Nowina") of Baker McKenzie, counsel for the Trustee, Dhahani, representing the Trustee, and David Ullman of Blaney McMurtry, representing Cloth. Koscak informed Nowina and Dhanani that he was representing Lending and its limited partnership interests. This paragraph, and the two paragraphs that follow, are based on information from Koscak that I believe to be true.

15. When Nowina and Dhanani attended on January 31, 2024, Koscak was advised that the Trustee wanted to make a copy all electronic books and records on or accessible through 151 Bloor.

16. In response, Koscak advised Nowina and Dhanani that Finance shared premises with other entities, including Lending and its limited partnerships, that the books and records on the premises were intermingled, and that Lending's records included privileged and confidential communications. For this reason, Koscak refused to allow the Trustee to access 151 Bloor as

requested. Koscak advised Nowina and Dhanani that he needed to consult external counsel before proceeding further.

February 23, 2024 Motion

17. The February 23, 2024 motion was brought without notice to Lending, to any of our limited partnerships, or to our counsel, Bennett Jones LLP.

18. The Trustee did not provide Lending or Bennett Jones with a copy of the order made on February 23, 2024. Lending learned of the order from Blaney McMurtry.

Communications Between Bennett Jones and Trustee/Baker McKenzie

19. Lending accepts that the Trustee should be permitted to access books and records of Finance located at 151 Bloor, or that can be accessed from 151 Bloor. As they are commingled with the records of other entities, Finance's records need to be extracted in a manner that respects the confidentiality and privilege of other parties whose records are commingled at 151 Bloor.

20. In an exchange of emails among Bennett Jones, Baker McKenzie and the Trustee on February 26 and 27, 2024, and a call on February 27, 2024, Lending proposed that the review and disclosure of any commingled records be undertaken by a neutral third-party custodian pursuant to a review protocol agreed to by affected parties.

21. I am advised by Michael Shakra ("Shakra") of Bennett Jones LLP and believe that the Trustee's position is that it should not pay for any costs associated with the segregation and production of Finance's records. Attached as Exhibit "B" are email exchanges involving counsel and the Trustee on February 26 and 27, 2024.

Failure to Make Full Disclosure / Request to Cross-Examine

22. Lending believes that the Trustee and Trustee's counsel failed to make full disclosure to the court in obtaining the February 23, 2024 *ex parte* order.

23. Through Bennett Jones, Lending has asked to cross-examine Dhanani on his affidavit. As set out in Exhibit "B", Baker McKenzie has refused to produce Dhanani to be cross-examined on his affidavit.

SWORN BEFORE ME by way of)
videoconference on this 29th day of)
February 2024. The affiant was located in)
the Town of Ajax, in the Province of)
Ontario and the Commissioner was located)
in the City of Toronto, in the Province of)
Ontario. This affidavit was commissioned)
remotely and declaration administered in)
accordance with Ontario *Regulation*)
431/20.)

DocuSigned by:
Andrew Sahai
9BE7E0B4825841D

ANDREW SAHAI)
A Commissioner for Oaths in and for the)
Province of Ontario)

DocuSigned by:
Richard McConnell
C317D020236B4E5

RICHARD MCCONNELL

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

Court File No.: BK-24-03003083-0031
Estate File No.: 31-3003083

ONTARIO
SUPERIOR COURT OF JUSTICE
(In Bankruptcy and Insolvency)

Proceedings Commenced in Toronto

AFFIDAVIT OF RICHARD MCCONNELL
(Sworn February 29, 2024)

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One First Canadian Place
Suite 3400, P.O. Box 130
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M5X 1A4

Robert Staley (LSO# 27115J)
Mike Shakra (LSO# 64604K)

Tel: 416-863-1200
Fax: 416-863-1716

Lawyers for the Respondent

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AFFIDAVIT OF EUN JI YOON
(Affirmed May 16, 2024)

BORDEN LADNER GERVAIS LLP

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Lawyers for the Moving Party,
Borden Ladner Gervais LLP

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

MOTION RECORD
(Motion for Directions returnable June 4, 2024)

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