Court of Appeal No. M45666

**COURT OF APPEAL FOR ONTARIO**

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

**IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. and 2147650 ONTARIO INC.**

Moving Parties

# FURTHER AMENDED NOTICE OF MOTION
(Motion for Leave to Appeal)

Silver Streams Homes Inc. ("**Silver Streams**"), Silver Streams Homes (Puccini) Inc. ("**Puccini**"), 2148993 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc. and 2147659 Ontario Inc. (collectively, the "**Appellants**") will make a motion for leave to appeal to a panel of three judges of the Court of Appeal for Ontario pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c.C-36, as amended ("**CCAA**") and Rule 61.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "**Rules**").

**THIS MOTION WILL BE HEARD** 36 days after service of the Appellants' motion record and factum, or on the filing of the Appellants' reply factum, if any, whichever is earlier, on such date and in such manner as may be directed by the Court, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

**PROPOSED METHOD OF HEARING**: The motion is to be heard in writing unless the Court orders an oral hearing.

**THE MOTION IS FOR**:

(a) Leave to appeal from the Order of the Honourable Mr. Justice Wilton-Siegel dated September 25, 2015, dismissing the Appellants motion for: (i) an order declaring that they have the requisite authority to enter into the Settlement Agreement dated February 17, 2015 (the "**Settlement Agreement**") between the Appellants, Imran Jinnah ("**Jinnah**") and Tarion Warranty Corporation ("**Tarion**") without the approval of the Court; or, in the alternative (ii) an order approving the Settlement Agreement (the "**Order**");

(b) <u>An order granting leave to have the motion determined at an oral hearing rather than in writing</u>;

(c) The costs of this motion; and

(d) Such further and other relief as counsel may advise and this Honourable Court may permit.

**THE GROUNDS OF THE MOTION ARE**:

**Background**

(a) The Appellants are affiliated Ontario corporations owned by Jinnah. On December 17, 2013, the Appellants obtained protection from their creditors under the CCAA pursuant to an order of Mr. Justice Newbould (the "**Initial Order**").

(b) At the time of the commencement of the CCAA proceeding, the Appellants were in the process of completing a four phase residential development project in Richmond Hill, Ontario referred to in this proceeding as the "**Puccini Project**". Title to the lands that comprised phases one through three of the Puccini Project are registered in the names of the numbered company Appellants.

(c) In connection with the Puccini Project and, as required under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "***Warranties Act***"), certain of the Appellants submitted registrations to Tarion to be registered as builders and vendors in connection with the Puccini Project and provided security in favour of Tarion in the aggregate amount of $920,000 by way of letters of credit (the "**Security**") held by Bank of Montreal ("**BMO**"). The Security was provided to Tarion to allow it to pay for deposit claims and warranty claims by purchasers in connection with the Puccini Project homes in the event the Appellants were unable to satisfy their obligations under the *Warranties Act*.

(d) Each of the letters of credit is drawn in favour of Tarion as the beneficiary. In order to draw under each letter of credit, Tarion must provide BMO with a certificate stating that the monies being drawn are "in respect of obligations owed or which will be owed by the Registrant to the Beneficiary" identified in the letters of credit as Silver Streams.

(e) The Appellants' registrations under the *Warranties Act* were renewed on an annual basis. In addition, the Appellants paid to Tarion registration fees for every lot constructed by the Appellants at a cost ranging from $800 to $1,400 per lot. As a result, in addition to the Security, the Appellants incurred substantial costs on an annual basis to maintain their Tarion registrations in good standing.

(f) For ease of administration and marketing purposes, Puccini acted as a vendor under a number of agreements of purchase and sale. At all relevant times, the Appellants believed and understood that all of the companies involved with the Puccini Project were covered by the Appellants registrations with Tarion under the *Warranties Act*, including Puccini.

**CCAA Proceeding and Settlement Agreement**

(g) The purpose of the Appellants CCAA proceeding was to complete construction of and sell 10 homes in the Puccini Project (the "**Puccini Homes**") and to distribute the proceeds from the sale of the Puccini Homes to their creditors in accordance with Court determined priorities. Nine of out ten homes have now been completed and sold. The proceeds from the sale of the Puccini Homes have been comingled and deposited into the account of Grant Thornton Limited, in its capacity as the Court-appointed Monitor.

(h) There is a Court-ordered arbitration underway to determine the priorities between the lien claimants and certain mortgagees.

(i) More than ninety five Puccini Project homes have been sold by the Appellants with Puccini acting as vendor under the agreements of purchase and sale. In all of these transactions, it was the Appellants', Tarion's and the purchasers' understanding that the sold homes were subject to the *Warranties Act* and that Tarion could look to the Letters of Credit to fund expenditures for deposit claims and warranty claims made by purchasers in the event the Appellants default in their obligations under the *Warranties Act*.

(j) The Appellants are insolvent and are not able to satisfy their obligations to their purchasers under the *Warranties Act*.

(k) At all relevant times, the Appellants advised the Court and the service list, including the lien claimants, that the Security was posted in favour of Tarion and the lien claimants have acknowledged that they had notice of same.

(l) In or around the summer of 2014, the Appellants for the first time learned that their registrations under the *Warranties Act* did not extend to Puccini. The registrations extended to all other Appellants. The failure by the Appellants to register Puccini under the *Warranties Act* was inadvertent, a fact which was not disputed at the motion.

(m) On September 3, 2014, a *Provincial Offences Act*, R.S.O. 1990, c. P. 33 (the "**Offences Act**") summons was issued to Puccini and Jinnah under the *Warranties Act*, which, summons among other things: (i) charged Puccini with acting as a vendor of a new home without being properly registered under the *Warranties Act*; and (ii) charged Jinnah with knowingly concurring, as an officer or director of Puccini, allowing Puccini with acting as a vendor of a new home without properly being registered under the *Warranties Act.*

(n) To remedy the defect of Puccini not being a properly registered vendor under the *Warranties Act* and allow Tarion to access the Security posted in respect of the

Puccini Project, the Appellants agreed to enter into the Settlement Agreement and, among other things, assign to Silver Streams Homes Inc. ("**Silver Streams**"), which is a Tarion registrant, all of Puccini's rights, title, interest and obligations under the agreements entered into by Puccini in its capacity as vendor.

(o) A number of the lien claimants objected to the Settlement Agreement and took the position that the letters of credit in favour of Tarion should be cancelled and the funds released to the Appellants' estate to be distributed in accordance with priorities to be determined by the Court.

(p) The Appellants brought a motion before the Ontario Superior Court of Justice (Commercial List) (the "**Court**") for an order: (i) declaring that they had the requisite authority to enter into the Settlement Agreement without a further order of the Court; or, in the alternative (ii) approving the Settlement Agreement.

**The Motion and Order**

(q) The motion was heard by the Honourable Mr. Justice Wilton-Siegel on June 25, 2015.

(r) On September 25, 2015, Justice Wilton-Siegel released his decision (the "**Decision**") wherein his Honour made the following findings:

   i. The execution of the Settlement Agreement will cause Silver Streams to incur the liabilities of Puccini under the agreements of purchase and sale;

   ii. The execution of the Settlement Agreement engages paragraph 9(c) of the

Initial Order which prohibits the Appellants from granting credit or incurring liabilities, except in the ordinary course of business or until further order of the court;

iii. Paragraph 9(c) of the Initial Order must be read to apply to each of the Appellants individually and not on a consolidated basis;

iv. The Appellants maintained separate, legal and financial status both prior to and following the commencement of the CCAA *proceeding*.

v. The Court has the authority and jurisdiction to approve the Settlement Agreement;

vi. The effect of the Settlement Agreement is detrimental to the objecting parties; and

vii. The Court should refrain from exercising its discretion to approve the Settlement Agreement.

**The Leave to Appeal Test is Met**

(s) An appeal of the Order is *prima facie* meritorious.

**Approval of the Settlement Agreement was not required**

(t) The motions judge erred in finding that paragraph 9(c) of the Initial Order prevents the Applicants from entering into the Settlement Agreement without a further order of the Court.

(u) The motions judge erred in law in his interpretation of paragraph 9 of the Initial Order. Paragraph 9(c) of the Initial Order states as follows:

> **THIS COURT ORDERS** except as specifically permitted herein, the Appellants are hereby directed, until further Order of this Court: (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

(v) In particular, the motions judge erred law in his interpretation that paragraph 9 does not apply to the Appellants on a consolidated basis. That finding is contradictory to the plain and ordinary meaning of the words of paragraph 9 of the Initial Order.

(w) The motions judge erred in his conclusion that the Appellants did not carry on business on a consolidated basis. There was no evidence before the motions judge to support that finding other than the bald allegations made by the objecting parties.

(x) The motions judge erred in his conclusion that the construction lien claims are not being addressed on a consolidated basis in the CCAA proceeding. On the contrary, the arbitration of the lien claims is proceeding in the CCAA proceeding on a consolidated basis. The arbitration of the lien claimants concerns their entitlement to the proceeds from the sale of the Puccini Homes in the CCAA proceeding, which have been comingled into a fund held by the Monitor in trust.

(y) The motions judge erred in his conclusion that the Settlement Agreement does not satisfy the requirements for approval of an agreement under section 11 of the CCAA.

**The Settlement Agreement was fair and reasonable and should have been approved**

(z) The motions judge erred in his conclusion that the Settlement Agreement was not fair and reasonable.

(aa) The motions judge erred in his conclusion that the Settlement Agreement, if implemented, will result in a detriment to the objecting parties. The letters of credit were posted by the numbered Appellants. If the letters of credit were cancelled, the collateral under the letters of credit will be returned to the numbered Appellants. The objecting parties are not creditors of the numbered Appellants and would have no entitlement to these funds.

(bb) The motions judge correctly held that the fairness and reasonableness test requires a demonstration of a balancing of conflicting interests of stakeholders. However, the motions judge erred in his conclusion that the Settlement Agreement does not satisfy that requirement. In particular, the motions judge erred in preferring the interests of objecting creditors, who admittedly were looking for a windfall and who acknowledged that they always understood that the Security was provided in favour of Tarion, over the interests of Tarion, a quasi governmental authority, the Appellants and Jinnah.

(cc) The motions judge erred by disregarding Tarion's submissions that the Settlement Agreement furthers the public interest generally by preserving the guarantee fund that it administers under the *Warranties Act.*

(dd) The motions judge erred in his distinction between a liquidating CCAA and a restructuring CCAA. Once the motions judge concluded that he had the authority to approve the Settlement Agreement in a liquidating CCAA, there is no legal reason for distinguishing between the two types of CCAA proceeding in determining whether the agreement is fair and reasonable.

(ee) The motions judge erred in law by focusing his determination of whether the Settlement Agreement was fair and reasonable on the collateral benefit that Jinnah would derive from the Settlement Agreement. The test for approving a settlement agreement in a CCAA proceeding requires the Court to consider the effect of the settlement agreement on all parties and stakeholders. The Settlement Agreement put all parties, including the objecting creditors, in the position that they intended and/or expected to be in. Accordingly, the Settlement Agreement is fair and reasonable.

(ff) The motions judge erred in his finding that Jinnah was negligent in failing to register Puccini as a vendor under the *Warranties Act*. There was no evidence before the motions judge to support such finding.

**The appeal is of significance to the construction industry**

(gg) The appeal is of significance to the construction industry as it addresses the balancing of interests between creditors of an insolvent builder/vendor, Tarion and the insurance scheme under the *Warranties Act*. Furthermore, the appeal is of significance to the insolvency community as it concerns interpretation of standard terms of the model initial order.

**The appeal is of significance to the Appellants**

(hh) The points raised on the appeal are of significance to the Appellants, Jinnah and Tarion. In particular, as a consequence of the Decision, Puccini and Jinnah continue to face criminal sanctions under the *Offences Act*.

(ii) The court would benefit by the receipt of oral submissions of the parties;

(jj) In any other circumstance, the Appellants and Tarion would have an automatic right to appeal from the order of Justice Wilton-Siegel. However, as this motion was brought within the CCAA proceeding, the Appellants and Tarion are required to seek leave.

(kk) The appeal would not unduly hinder the progress of the Appellants' CCAA proceeding.

(ll) Section 13 and 14 of the CCAA and Rule 61.03 of the *Rules of Civil Procedure*.

(mm) 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:

(a) The Affidavits of Imran Jinnah sworn February 26, 2015, March 25, 2015 and April 13, 2015;

(b) The Affidavit of Zena Hanson sworn April 2, 2015;

(c) The Affidavit of Frank Del Fatti sworn April 6, 2015;

(d) The Affidavit of Daniela Gaglio sworn June 12, 2015;

(e) Transcript from Cross-examinations of Imran Jinnah held on May 19, 2015;

(f) Transcript from Examination of Jack Greenberg held on May 19, 2015;

(g) The Monitor's Eighth Report to the Court dated April 8, 2015; and

(h) Such further and other material as this counsel may submit and this Honourable Court may permit.

Date: January 7, 2016

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

**AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO SILVER STREAMS HOMES INC et. al.**

Court of Appeal No.

**COURT OF APPEAL FOR ONTARIO**

Proceedings commenced at TORONTO

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**(Motion For Leave To Appeal)**


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