

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**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 OF ARRANGEMENT OF
SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC.,
2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC.
AND 2147650 ONTARIO INC.**

**COST SUBMISSIONS OF SILVER STREAMS HOMES INC., SILVER STREAMS
HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681
ONTARIO INC., 2147659 ONTARIO INC. AND IMRAN JINNAH**

1. The Responding Parties to the Cost Submissions, Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148993 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., 2147659 Ontario Inc. ("Numbered Companies") (collectively "the Applicants") and Imran Jinnah ("Jinnah") submit that no costs should be awarded in respect of the motion. In the alternative, if costs should be awarded, costs should be paid from the Estate.

BACKGROUND

2. The context in which the Motion was brought is relevant to the disposition of the costs issue.
3. The Applicants are affiliated Ontario corporations owned by Jinnah. On December 17, 2013, the Applicants obtained protection from creditors under the *Companies Creditors*

Arrangement Act, R.S.C. 1985, c. C.36 as amended (“CCAA”) pursuant to an initial Order of the Ontario Superior Court of Justice, Commercial List.

4. This motion was brought in the context of the CCAA proceeding.
5. Silver Streams Homes Inc. (“Homes”) is a residential home builder in the Greater Toronto Area. Silver Streams Homes (Puccini) Inc. (“Puccini”) was later incorporated for the purpose of selling homes in the residential development described as the Puccini Project and replacing Homes as the vendor under the agreements of purchase and sale.
6. Homes was registered as the builder and vendor with Tarion Warranty Corporation (“Tarion”) under the *Ontario New Home Warranties Plan Act* since May 2004, in connection with other construction projects that predate the Puccini Project. In May 2010, the numbered companies became registered as vendors under the *Warranties Act*.
7. In connection with the registrations under the *Warranties Act*, Homes and the Numbered Companies provided security in favour of Tarion in the aggregate amount of \$920,000 by way of letters of credit issued by the Bank of Montreal.
8. At all relevant times, the Applicants believed that the Puccini Project was properly registered with Tarion under the *Warranties Act* and that the registrations in respect of the Puccini Project extended to all of them. This understanding was communicated to the Court and all of the Applicants’ stakeholders in the CCAA proceeding. The lien claimants acknowledged in their materials that they understood that Puccini was registered under the *Warranties Act* and the Letters of Credit were posted in favour of Tarion as security for their obligations to Tarion under the *Warranties Act*.

9. No lien claimant expected to have access to the cash collateral posted as security for the Letters of Credit. The Applicants and Jinnah did not learn that Puccini was not registered as a vendor under the *Warranties Act* until the summer of 2014.
10. Upon learning that Puccini was not a registered vendor under the *Warranties Act*, Jinnah and Tarion entered into discussions which ultimately resulted in the Settlement Agreement dated February 2015 (“Settlement Agreement”). The purpose of the Settlement Agreement was to restore the parties to the Settlement Agreement to the position they intended and would have been in had Puccini been registered as a vendor with Tarion.
11. On February 26, 2015, the Applicants advised the Service List in the CCAA proceeding of the Settlement Agreement.
12. The lien claimants objected to the execution of the Settlement Agreement.

NO COSTS ORDER SHOULD BE MADE

13. The Commercial List Practice Direction (para. 61) requires a party to submit a costs outline and be prepared to deal with costs at the conclusion of the hearing of the matter, or if absolutely necessary, by written submissions immediately thereafter. The Lien Claimants failed to comply with the Practice Direction. As a result, they should not be entitled to their costs.

14. In the circumstances, the Applicants had no alternative but to bring the motion for approval of the Settlement Agreement. But for the lien claimants' objection, the motion would not have been launched.
15. There was no economic benefit to the Applicants in bringing the motion.
16. On the motion, no relief was sought against the lien claimants.
17. There was no fault by the Applicants. The Court found that the failure to register Puccini as a vendor was an inadvertent mistake or negligence.
18. The lien claimants have achieved a potential windfall.
19. In the alternative, if the lien claimants are entitled to costs, costs should be paid out of the Estate.
20. Jinnah is not a party to the CCAA proceeding. Costs should not be ordered against him as a non-party. The Applicants were the proper parties.
21. The Applicants submit that the quantum of costs claimed by the lien claimants are excessive. In assessing costs, the Court of Appeal stated in *Boucher et al. v. Public Accountants Council for the Province of Ontario*, [2009] O.J. No. 2634, 71 O.R. (3d) 291, that a cost award should reflect what the court views as a fair and reasonable amount.¹ If costs are to be awarded, the quantum claimed by Argo Lumber Inc. and Newmar Window Manufacturing Inc. is more reasonable but should be reduced by a further 15%.

¹ See also *Zesta Engineering Ltd. v. Cloutier* (2002) 21 C.C.S. (3d) 161 (Ont. C.A.)
Davies v. The Corporation of the Municipality of Clarington (2009) 100 O.R. (3d) (Ont. C.A.)

22. The Applicants do not object to the hourly rate charged by the lien claimants' lawyers or the disbursements claimed.

All of which is respectfully submitted.

Dated: January 4, 2016

Stephen Schwartz
(computer generated signature)

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ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) Proceedings commenced at TORONTO	COST SUBMISSIONS OF SILVER STREAMS INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC., 2147659 ONTARIO INC. AND IMRAN JINNAH	CHAITONS LLP Barristers and Solicitors 5000 Yonge Street, 10th Floor Toronto, ON M2N 7E9 Stephen Schwartz (LSUC#: 25980A) Tel: 416-218-1132 Fax: 416-218-1832 Lawyers for the Applicants
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