

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**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.**

Applicants

**FACTUM OF THE APPLICANTS
(Responding Factum on Motions for Lifting of the Stay)
(Returnable October 16, 2014)**

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TO: SERVICE LIST

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I – OVERVIEW

1. The following motions will be brought by certain lien claimants on October 16, 2014:
 - i. a motion by Argo Lumber Inc. and Newmar Window Manufacturing Inc. (collectively, “**Argo**”) for an order extending the Claims Deadline (as defined below) to allow Argo to file its lien claim against the Applicants (the “**Claims Process Motion**”);
 - ii. a motion by Argo for an order lifting the stay of proceedings in favour of the Applicants and their directors and officers (the “**Silver Streams Defendants**”) to allow them to commence a breach of trust action against the Silver Streams Defendants; and
 - iii. a motion by a number of lien claimants (hereinafter referred to as the “**Medi Group**”) for an order lifting the stay of proceedings in favour of the Silver Streams Defendants to proceed with a breach of trust action against the Silver Stream Defendants and a number of other parties, including the Applicants.
2. The Applicants do not oppose the relief sought by Argo as it pertains to their motion to extend the Claims Deadline.
3. It is the Applicants position that it is preferable for all of the construction lien claims against the Applicants to be dealt with by way of arbitration in the CCAA Claims Process (as defined below) rather than by multiple proceedings. The Medi Group have filed their lien claims in the CCAA Claims Process. If the lien claimants are successful in the arbitration they may recover on their claims in full rendering any breach of trust litigation moot.
4. Neither Argo nor the Medi Group have filed any evidence in support of their assertions of prejudice. In contrast, if the stay is lifted and the moving parties are allowed to proceed with their various actions, the Applicants and their principals will be forced to incur substantial legal fees in defending these various proceedings in circumstances which may be rendered moot upon the resolution of the CCAA Claims Process.

5. The Silver Streams Defendants submit that it is premature and unnecessary at this stage to grant an order lifting the stay of proceedings to allow the moving parties to proceed with their breach of trust claims until the CCAA Claims Process has been completed.

II - FACTS

(a) BACKGROUND AND CCAA PROCEEDINGS

6. The Applicants are affiliated Ontario corporations owned by Imran Jinnah. Silver Streams Homes Inc. ("**Silver Streams**") is a residential homebuilder in the Greater Toronto Area and is currently in the process of completing a project in Richmond Hill, Ontario referred to in these proceedings as the "Puccini Project". The Puccini Project is comprised of four phases. Title to the lands in Phases I, II and II are registered in the names of the numbered company Applicants. Puccini was incorporated for the purpose of selling the homes in the Puccini Project.

Affidavit of Imran Jinnah sworn September 16, 2014 (the "**Jinnah Affidavit**")
at para. 3, Tab 1 of the Applicants' Compendium of Documents

7. On December 17, 2013, the Applicants obtained protection from their creditors under the *Companies' Creditors Arrangement Act* ("**CCAA**") pursuant to an order of Mr. Justice Newbould (the "**Initial Order**").

Jinnah Affidavit at para. 6, Tab 1 of the Applicants' Compendium of Documents

Exhibit A to the Jinnah Affidavit, Tab 1A of the Applicants' Compendium of Documents

8. The Initial Order appointed Grant Thornton Limited as monitor of the Applicants in these proceedings (the "**Monitor**"). Pursuant to paragraph 17(k) of the Initial Order, the Monitor was directed and empowered to exercise control over the receipts, disbursements and bank accounts of the Applicants and to receive and collect all monies and accounts of the Applicants in respect of the Applicants' property. Accordingly, pursuant to the terms of the Initial Order, the Applicants were unable to comply with the terms of the Escrow Agreement.

Jinnah Affidavit at para. 7, Tab 1 of the Applicants' Compendium of Documents

9. The Initial Order also granted a stay of proceedings as against the Applicants and their directors and officers until and including January 16, 2014 or such later date as the Court may order. The stay of proceedings has been extended by previous orders of this Court to January 16, 2015.

Jinnah Affidavit at para. 9, Tab 1 of the Applicants' Compendium of Documents

Order and Endorsement of Mr. Justice Wilton-Siegel dated September 23, 2014,
Tab 1 of the Applicants' Brief of Authorities

10. At the time of the CCAA filing, there were 10 remaining homes in Phases II and III of the Puccini Project (the "**Puccini Homes**") that were in various stages of completion. The objective of the Applicants' CCAA proceedings is to complete and sell the Puccini Homes and to pay the net sale proceeds, after payment of operating costs and the costs of these proceedings, to satisfy their creditors' claims in the priority to be determined by the Court. Eight out of the ten Puccini Homes have been sold with the approval of the Court. Seven of these transactions have now closed with the eighth transaction scheduled to close on November 30, 2014.

Jinnah Affidavit at paras. 13-16, Tab 1 of the Applicants' Compendium of Documents

THE CLAIMS PROCESS

11. On January 16, 2014, this Court granted, among other things, an order (the "**Claims Process Order**") approving a claims process for the purpose of determining the validity, quantum and priority of claims against the Applicants' Property (each as defined in the Claims Process Order) (the "**CCAA Claims Process**").

Jinnah Affidavit at para.17, Tab 1 of the Applicants' Compendium of Documents

12. The Claims Process Order established a claims filing deadline of 5:00 pm on February 14, 2014. The Medi Group filed proofs of claim against the Applicants in the CCAA Claims Process. For the reasons described in the motion materials filed by Argo, Argo had

inadvertently failed to do so and seeks an order bringing its lien claims within the CCAA Claims Process.

Jinnah Affidavit at para. 18, Tab 1 of the Applicants' Compendium of Documents

13. Pursuant to the Claims Process Order, the CCAA Claims Process is being administered by the Monitor with the assistance of the Vetting Committee (as defined in the Claims Process Order).

Jinnah Affidavit at para.18, Tab 1 of the Applicants' Compendium of Documents

14. The Monitor served and filed with the Court its Third Report which, among other things, summarized the status of the CCAA Claims Process. With respect to the claims of construction lien holders, the Monitor recommended that the construction lien claims be determined in the context of a binding arbitration by a claims adjudicator. This recommendation was reiterated by the Monitor in its Fifth Report to the Court.

Jinnah Affidavit at para. 18, Tab 1 of the Applicants' Compendium of Documents

The Monitor's Third Report to the Court dated June 24, 2014 (the "**Third Report**"), Tab 1D of the Applicants' Compendium of Documents

The Monitor's Fifth Report to the Court dated September 17, 2014,

15. Contrary to the statements made in Argo's motion record, the CCAA Claims Process has not been abandoned. The Monitor's recommendations that the determination of construction lien claims to an arbitration proceeding has been consistently communicated to the Service List in its reports to the Court and in the Applicants' materials filed with the Court in support of the last stay extension motion.

16. On August 1, 2014, the Monitor brought a motion for an order approving its fees and activities as set out in the Third Report. The motion was opposed by a group of the Applicants' secured lenders on the grounds that, among other things, the Claims Process Order has not been complied with. The motion was heard by Justice Wilton-Siegel who held that, among other things, the Claims Process Order has been complied with, and granted an order approving the Monitor's fees and activities as set out in the Third Report.

Endorsement of Justice Wilton-Siegel dated August 1, 2014, Tab 2 of the Applicants' Brief of Authorities

17. Counsel for the Applicants has engaged in discussions with counsel for a number of the lien claimants to have a number of issues, including the validity of the construction lien claims and the priority of those lien claims over certain mortgages determined by arbitration. The terms of the draft order referring the matter to arbitration are close to being finalized.

Jinnah Affidavit at para. 22

18. It is preferable for the benefit of all of the Applicants' stakeholders to have all of the lien claims litigated in these CCAA proceedings rather than have the Applicants defend multiple claims in various courts. If it is determined by the arbitrator that the lien claimants have priority over the mortgagees, the lien claimants will recover fully on their claims rendering these breach of trust actions moot.

ARGO

19. Argo Lumber Inc. supplied lumber, trusses and related building materials to Puccini for the Puccini Project. Newmar Window Manufacturing Inc. supplied windows, doors and related building materials for the Puccini Project.

Affidavit of Sonja Turajlich sworn September 26, 2014, Tab 2 of Argo's Motion Record (the "**Turajlich Affidavit**") at paras. 2 and 5

20. In October 2013, Argo caused to be registered a Claim for Lien against title to the lands subject to the Puccini Project. On November 27, 2013, Argo caused a Statement of Claim to be issued to perfect its claim for lien as against a number of parties, including the Applicants.

Turajlich Affidavit at paras. 3, 4, 6 and 7

21. Argo confirms in its motion materials that the subject matter of the breach of trust action and the subject matter of its claim for lien is the same.

22. Argo seeks the lifting of the stay of proceeding to permit it to issue the statement of claim in the breach of trust action and to pursue the action against the Silver Streams Defendants. Argo submits that the purpose of its lifting of the stay motion is to preserve their interest in

the breach of trust action. However, Argo has filed no evidence in support of the fact that its rights at this time are being prejudiced by the stay of proceedings.

THE MEDI GROUP

23. The Medi Group consists of a number of construction trades which supplied construction services to the Applicants in connection with the Puccini Project. The Medi Group seeks a lifting of the stay of proceedings to commence an action for breach of trust against the Silver Streams Defendants and a number of the Applicants' secured creditors.

24. All of the Medi Group claimants have filed lien claims in the CCAA Claims Process.

25. The Medi Group claims that it needs to commence its action against the Silver Streams Defendants at this time in order to preserve their rights under the Escrow Agreement dated December 12, 2012. However, the Escrow Agreement contains a tolling agreement pursuant to which the parties to the Escrow Agreement have agreed to stay the running of any and all statutory limitation periods.

Affidavit of Dominic Montemurro sworn September 19, 2014, Tab 2 of Medico Group's Motion Record (the "**Montemurro Affidavit**") at para. 13

Exhibit C to the Montemurro Affidavit

FOREMONT DRYWALL

26. On October 14, 2014, Foremont Drywall Inc., 1382479 Ontario Inc., 1382503 Ontario Inc. and 2203579 Ontario Inc. (collectively, "**Foremont**"), brought a motion also seeking an order lifting the stay of proceedings and granting leave to continue a breach of trust action against Silver Streams Homes (Puccini) Inc., Imran Jinnah and Asma Jinnah. Foremont also filed a lien claim in the CCAA proceeding.

27. Foremont's motion was heard and dismissed by Justice Newbould on October 14, 2014. In his Endorsement, Justice Newbould held that in light of the anticipated arbitration in the CCAA Claims Process, there is no point at this time in allowing Foremont's breach of trust claim to proceed against the Silver Streams Defendants.

Endorsement of Justice Newbould dated October 14, 2014, Tab 3 of the Applicants' Brief of Authorities

IV - LAW AND ARGUMENT

(a) Test for Lifting of the Stay

28. A stay of proceedings in a CCAA proceeding is designed to preserve the status quo among the creditors of the debtor company. The stay prevents "manouvers for positioning" among creditors and prevents one creditor from getting a "leg up" on others.

Canadian Airlines Corp. (Re) (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.) at paras. 17-19

29. Lifting a stay is a discretionary decision. By lifting the stay, the court is not preserving the *status quo* and keeping all stakeholders equal, but rather, is allowing one stakeholder to advance a claim while all others are stayed. The party seeking a lifting of the stay faces "a very heavy onus" in obtaining a lift stay. In considering whether to grant a lift stay, the court should consider whether there are sound reasons for lifting the stay consistent with the objectives of the CCAA, including the balance of convenience, relative prejudice to the parties and, where relevant, the merits of the proposed action.

Canwest Global Communications Corp. (Re.) (2009), 61 C.B.R. (5th) 2000 (SCJ) ("Canwest") at paras. 32-33

30. The following factors, set out first by Professor R. H. McLaren but adopted by this Court on a number of occasions, have been identified in determining whether or not to grant a lift stay:

- i. When the plan is likely to fail.

- ii. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
- iii. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
- iv. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
- v. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
- vi. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
- vii. There is a real risk that a creditor's loan will become unsecured during the stay period.
- viii. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
- ix. It is in the interests of justice to do so.

Canwest, supra at para. 33

(b) The Lift Stay Should Not Be Granted

31. The moving parties submitted no evidence that would warrant a lifting of the stay at this time. There is no evidence filed by Argo that the limitation period for bringing its breach of trust claim is set to expire shortly. The rights of the Medi Group claimants to commence their breach of trust action are preserved by the tolling agreement executed by all parties.

32. It is not consistent with the purposes of the CCAA to allow some creditors to get ahead of all other claims before a claims process has been completed. The Applicants, the lien claimants

and the Monitor are finalizing an order for the adjudication of the priority disputes between the construction lien claimants and the mortgage holders within the CCAA Claims Process. If the lien claimants, including the moving parties, are successful in proving their claims, their claims will be paid out in full.

33. The balance of convenience militates in favour of denying the motions for lifting of the stay. There is no prejudice to the moving parties from the continuation of the stay of proceedings until the completion of the arbitration in the CCAA Claims Process. In contrast, if the stay is lifted and the moving parties are allowed to proceed with their various actions, the Applicants and their principals will be forced to incur substantial legal fees in defending these various proceedings which may subsequently be rendered moot upon the resolution of the CCAA Claims Process.

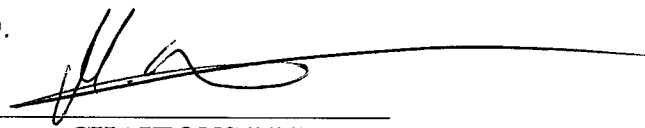
34. In the alternative, if this Court makes a finding that the rights of the moving parties to commence their breach of trust actions may be prejudiced at this time, the Applicants submit that an order lifting the stay should be limited to allowing the moving parties to issue their respective statements of claim.

V – RELIEF SOUGHT

35. The Applicants respectfully requests an order dismissing the moving parties' motions, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: October 15, 2014


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SCHEDULE “A” – List of Authorities

1.	Order and Endorsement of Mr. Justice Wilton-Siegel dated September 23, 2014
2.	Endorsement of Justice Wilton-Siegel dated August 1, 2014
3.	Endorsement of Justice Newbould dated October 14, 2014
4.	<i>Canadian Airlines Corp. (Re)</i> (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.)
5.	<i>Canwest Global Communications Corp. (Re.)</i> (2009), 61 C.B.R. (5 th) 2000 (SCJ)

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) Proceedings commenced at TORONTO	
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