Court File No.: **13-10362-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

IN THE MATTE OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1995, c.C-36, AS AMENDED

AND 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.

RESPONDING AND CROSS-MOTION RECORD OF CON-DRAIN COMPANY (1983) LIMITED

(Returnable November 29, 2016)

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TO: SERVICE LIST

Court File No. 13-10362-00-CL

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

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INDEX

TAB 1

1A

Court File No.: 13-10362-00CL

ONTARIO
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AND 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.

NOTICE OF CROSS-MOTION
(Returnable November 29, 2016)

THE MOVING PARTY Con-Drain Company (1983) Limited ("**Con-Drain**") will make a Cross-Motion to a Judge presiding over the Commercial List on November 29, 2016 at 10:00 a.m. or as soon thereafter as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

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

THE CROSS-MOTION IS FOR:

(a) An Order directing the sum of $308,014.67 (minus $25,000) be paid into the trust currently being maintained by Chaitons LLP (or paid into Court) from the proceeds to be received by the pending sale of Lot 18 and/or from the funds currently being held by the Monitor;

(b) Additionally, and only if necessary, an Order that any stay of the Con-Drain Non-Lien Action not be continued or be lifted, or that the Initial Order be varied and/or amended to allow the payment into trust or into Court as described above;

(c) If necessary, an order abridging the time for service and validating service of the within Motion Record;

1B

(d) Costs of this motion fixed and payable forthwith from any party that opposes this relief; and,

(e) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

(a) Further to a motion for Mandatory Orders brought by Con-Drain in the Con-Drain Non-Lien Action in the fall of 2013, Orders and endorsements were made by the Court that require payment of $800,000 into trust from the net proceeds of the closings of various homes/lots built and sold by the Applicants, Silver Streams Homes Inc. and its related entities ("**Silver Streams**"). These Orders and the trust created by same were reinforced by Justice Newbould's Initial CCAA Initial Order of December 17, 2013 (the "**Trust**");

(b) This is a motion seeking payment of an additional $308,014.67 (minus $25,000) into said Trust, so as to "top up" the sum of $491,985.33, already being held in the Trust pursuant to the above mentioned mandatory Orders;

(c) On January 8, 2015, Justice Newbould specifically allowed the Con-Drain Non-Lien Action to continue and be transferred from Newmarket to Toronto. The only parties affected by the Order sought herein are parties to the Con-Drain Non-Lien Action, namely:

   (i) the moving party, Plaintiff, Con-Drain (1983) Limited ("**Con-Drain**"); and,

   (ii) the Defendants, Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited, Nastell Investments Limited and Castle Lane Design Group Inc. (hereinafter collectively referred to as the "**Greenberg Companies**"). The Greenberg Companies are secondary lenders/investors controlled by the co-Defendants, Jack Greenberg ("**Greenberg**"), who was also the then lawyer of the Applicants;

1C

(d) Both the Monitor and the Applicants, Silver Streams, do <u>not</u> oppose this motion. In fact, the Applicants have previously admitted they have no claim to these funds;

(e) The stay of proceedings imposed by these CCAA proceedings expires on November 30, 2016 and the Applicants have indicated they only seek to extend the stay of proceedings for a very limited purpose. In addition, sale of the final lot on the subdivision in question, being Lot 18, is closing on December 15th;

(f) On November 29th, the Applicant is bringing a Motion to distribute funds from the sale of lots/homes built by the Applicant, some of which is to be paid to the Greenberg Companies. Con-Drain simply requests that $308,014.67 of the funds to be received from the pending sale of Lot 18 and/or the funds being held by the Monitor be paid into Trust pursuant to the above noted mandatory Orders until the merits of the Con-Drain Non-Lien Action are determined by the Court or settled.

<u>The Mandatory Orders</u>

(g) On August 15, 2013, Con-Drain issued the Con-Drain Non-Lien Action and brought an ex-parte motion seeking an interim and/or permanent Mandatory Order requiring the sum of $800,000 be paid into Court from the net proceeds received on closing from the then eighteen (18) lots remaining on the Project. On that day, Madam Justice Lack granted Con-Drain's motion and Ordered, *inter alia*:

> 4. THIS COURT ORDERS that on any closing of the Lots the net proceeds received on closing shall be paid into Court, or ***into Trust*** if agreed to by all parties in writing, up to a maximum of $800,000.00 Such net proceeds shall be calculated as the balance of the purchase price after payment of necessary closing legal fees, real estate commissions, mortgage discharge payments to the Bank of Montreal, payment to the necessary trades in an amount to be agreed to by the Plaintiff acting reasonably, and applicable HST, which funds shall remain in Court or in Trust until further Order of this Honourable Court or Consent of the parties herein. [emphasis added]

1D

(h) On October 15, 2013, Con-Drain's motion went back to Court "on notice" and was opposed by Greenberg, the Greenberg Companies and the Applicant. Notwithstanding the said opposition, Madame Justice Gilmore determined that Con-Drain was entitled to a continuation of Lack J.'s existing mandatory Order. In her decision, Madame Justice Gilmore specifically wrote:

> 24 On August 15, 2013, an order was obtained from Lack J., which **protects the $800,000 presently owing to the plaintiff** and directed that the plaintiff's motion be returnable on September 26, 2013...
>
> 25 The August 15, 2013 order of Lack J. required the $800,000 to be paid in trust with Chaitons LLP, solicitors for Silver Streams. The current motion is to determine whether or not the plaintiff is entitled to a continuation of Lack J.'s existing injunction and an order that the $800,000 be paid into court pending the determination of the action at trial. While ***Silver Streams does not claim entitlement to the $800,000*** **and admits owing money to the Plaintiff and the secondary lenders,** they object to the order sought because interest continues to accrue under the mortgages and monies owed to the plaintiff, for which the Silver Streams may be responsible.... [emphasis added]

(i) Over the next few months, and prior to the within CCAA proceedings, a number of the homes in question were sold and certain funds were placed into the Trust as required by the aforementioned Orders. Con-Drain understands the total amount presently being held in the Trust by Chaitons LLP is the sum of $491,985.33, plus interest.

The CCAA Proceedings

(j) On December 17, 2013, the Applicant, Silver Streams, sought and obtained protection from its creditors under the CCAA. In the Initial Order, the CCAA Judge specifically acknowledged the above noted funds and reinforced that this trust "shall be maintained." Moreover, the CCAA Judge was careful "not" to include these monies as property of Silver Streams;

> 3A THIS COURT ORDERS that the sum of $491,985.33, plus interest accrued thereon, being held ***in trust*** by Chaitons LLP pursuant to the orders of the Honourable Madam Justice Lack dated August 15, 2013 and the Endorsement of the Honourable Madam Justice Gilmore dated November 20, 2013 in the Con-Drain Company (1983) Limited

1E

> action bearing Newmarket court file no. CV-12-115757-00 (the "Con-Drain Action") shall be ***maintained in trust*** by Chaitons LLP until further court order or consent of the parties to the Con-Drain Action, **and the determination of whether the above noted funds for Property, as defined in paragraph 5 of the Initial Order, shall be determined at a late[r] date.** [emphasis added]

(k) On January 16, 2014, April 17, 2014, June 26, 2014, September 23, 2014, January 8, 2015, July 15, 2015, and March 29, 2016, the Court issued orders *inter alia* extending the stay of proceeding ultimately until November 30, 2016;

(l) On January 8, 2015, the Court issued an order, *inter alia*, referring Con-Drain's Lien action along with all other Lien actions to a Reference/Arbitration. Moreover, this Court ordered the transfer of the Con-Drain Non-Lien Action from the Newmarket Region to the Toronto Region of the Ontario Superior Court of Justice;

Applicant's Motion

(m) Because the Applicant is bringing a motion on November 29th to distribute funds, to approve the sale of Lot 18 and to distribute said proceeds, some of which is proposed to be paid to the Greenberg Companies, Con-Drain is bringing this Cross-Motion to pay $308,014.67 (minus $25,000) into Trust. The reason for the aforementioned $25,000 reduction is because Con-Drain will be receiving $25,000 from the recent settlement of its Lien action.

(n) Additionally, or alternatively, and if necessary, if there is a stay of proceedings precluding the requested payment of funds into Trust (which is not admitted), then an Order should be granted that the stay of proceedings not be continued or be lifted, or that the Initial Order be varied and/or amended to allow the payment requested above;

1F

(o) There are sound reasons consistent with the scheme of the CCAA to grant the requested Order, including the balance of convenience, the relative prejudice to the parties, and the merits of the Con-Drain Non-Lien Action. Further, any stay on the Court Orders requiring payment of the additional funds into the Trust will not affect the Applicants ability to effect a Plan and will have no impact on other stake holders other than Con-Drain and the Greenberg Defendants, all of whom are parties to the Con-Drain Non-Lien Action;

(p) Rules 1.04, 1.05, 2.03, 3.02, 16, and 37 of the *Rules of Civil Procedure;*

(q) The provisions of the CCAA, including but not limited to sections 11, 11.02(2) and 11.02(3); and

(r) Such further and other grounds as counsel may advise and this Honourable Court may deem just.

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

(a) Affidavit of Nunzio Bitondo, sworn November 17, 2016; and,

Such further evidence as counsel may advise.

November 18, 2016

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TO: Service List

TAB 2

Court File No.: 13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1995, c.C-36, AS AMENDED

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Applicants

AFFIDAVIT OF NUNZIO BITONDO (SWORN NOVEMBER 17, 2016)

I, **NUNZIO BITONDO**, of the City of Vaughan, **MAKE OATH AND SAY AS FOLLOWS**:

1. I am the Chief Financial Officer for the Plaintiff, Con-Drain Company (1983) Limited (**"Con-Drain"**) and have been involved with this matter for the past several years in regards to collecting amounts owing to Con-Drain from work performed on the Silver Streams Homes residential project in Richmond Hill (the **"Project"**). As such I have knowledge of the matters to which I hereinafter depose. Where evidence is not of my direct knowledge it has been advised to me by my counsel, Jeffrey Long, and I verily believe same to be true.

2. This affidavit is sworn in response to a motion brought by the Applicants returnable November 29, 2016 and in support of a cross-motion brought by Con-Drain, which is returnable that same day.

AMOUNTS CLAIMED

3. Con-Drain provided earthworks, underground services, roads, curbs, asphalt along with all related labour and materials to the Project. Con-Drain provided its services to the defendant, Silver Streams Homes Inc. and its related entities, namely, Silver Streams Homes (Puccini) Inc., 2148990 Ontario Inc., 2148993 Ontario Inc., 2147650 Ontario Inc. and 2147681 Ontario Inc. (collectively "**Silver Streams**").

4. Con-Drain claims the sum of $794,881.68, plus applicable interest from August 1, 2013, is owing in relation to the work performed by Con-Drain on the Project. In fact, this amount is admitted as owing by Silver Streams.

5. As explained in detail below, Con-Drain asserts a claim against the following:

(a) The sum of $794,881.68, plus applicable interest from August 1, 2013, as a trust claim against the defendants herein based upon actual and/or constructive trust, on the breach of an Irrevocable Direction and Irrevocable Undertaking, breach of trust, breach of statutory trust under the Construction Lien Act, breach of fiduciary duty, misappropriation, unjust enrichment, conspiracy, fraud, and negligent and fraudulent misrepresentation; and

(b) The sum of $491,985.33 (which amount is "included" in the above noted amount) currently being held in trust pursuant to the Injunction Orders of Madam Justice Lack dated August 15, 2013 and Madam Justice Gilmore dated November 20, 2013 in Court File Number CV-13-115757-00, for the benefit of Con-Drain, if successful in that action. Silver Streams has confirmed they do not claim an entitlement to these funds. Attached to this my Affidavit and marked as **Exhibits "A"** and **"B"** are copies of the Order of Justice Lack and the Endorsement of Justice Gilmore.

PARTICULARS OF CON-DRAIN'S CLAIM

6. By the end of 2009, Con-Drain was owed almost $2 million dollars for its construction services, but Silver Streams was unable and/or refused to pay. As a result, Con-Drain registered two claims for Lien against the Project in the sums of $998,098.46 and $930,120.27.

7. After Con-Drain registered Claims for Lien against the Project, the parties herein entered settlement negotiations. In March of 2010, a settlement was reached (the "**Settlement**"), which Settlement provided for the immediate payment to Con-Drain of $550,000. In addition, **Silver Streams** signed an irrevocable direction and its lawyer, the defendant, Jack Greenberg (**"Greenberg"**), signed an irrevocable direction and Undertaking to pay Con-Drain $50,000 plus interest from each future closing, which amount was to be paid in priority to any amounts otherwise payable to Silver Streams on closing (the aforementioned "**Irrevocable Direction and Undertaking**"). Attached to this my Affidavit and marked as **Exhibit "C"** is a copy of the Settlement.

8. Con-Drain received the initial $550,000 lump sum payment pursuant to the Settlement and began to receive $50,000 plus interest payments from all closings of the homes on the Project. As well, as a result of the Settlement, Con-Drain continued to perform its contract work on the Project and discharged its two claims for lien.

9. Having said that, at some point in early 2012, Silver Streams got into further financial trouble such that Imran Jinnah, president of Silver Streams ("**Jinnah**") and Greenberg contacted Con-Drain to discuss revising the Settlement terms. In order to assist Silver Streams in continuing to close its various homes without undue delay, Con-Drain agreed to revise some of the Settlement terms. The "revised" Settlement that was agreed upon provides that Con-Drain shall be paid $50,000.00 plus interest from each of the first ten (10) closings on the "Third Plan of Subdivision (Plan 3)" instead of being paid from other closings on Plan 2.

10. While agreeing to the above would delay payment to Con-Drain, Jinnah and Greenberg advised same was necessary due to various financing issues with the Bank of Montreal and advised that Con-Drain would be paid in full from those funds. The terms of the "revised" Settlement were agreed to and were confirmed in Greenberg's letter dated April 16, 2012, which letter is attached hereto as **Exhibit "D"**.

11. In total, Con-Drain received the required $50,000 payments, along with applicable interest, from 34 separate closings. The last such payment being received in mid-March 2013.

12. However, unbeknownst to Con-Drain, in June and/or July 2013, Greenberg and the other Defendants, Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited and Nastell Investments Limited (collectively the **"Greenberg Companies"**) secretly proceeded with nine (9) closings on Plan 3 of the Project and they failed to pay the required $50,000.00 amount plus interest to Con-Drain from any of those nine (9) closings. Instead of paying Con-Drain, the excess closing proceeds were directed to Greenberg and/or the Greenberg Companies being the various lenders having subsequent mortgages registered on title after the first mortgage of the Bank of Montreal.

13. In light of the above, on August 15, 2013, Con-Drain issued a Notice of Action in Newmarket Court, against Silver Streams and its related companies along with Greenberg and his companies, claiming *inter alia* interest in the net closing proceeds regarding the remaining eighteen (18) lots to be sold on the Project (the aforementioned "**Non- Lien Action**"). Con-Drain's Statement of Claim was filed on September 3, 2013. Attached to this my Affidavit and marked as **Exhibit "E"** is a copy of said Notice of Action and Statement of Claim.

14. (a) In addition, on August 9, 2013, Con-Drain registered a Claim for Lien against the eighteen (18) remaining lots, which lien was in the sum of $94,836.71 being for only the value of the most recent work performed by Con-Drain. This Lien Claim along with the Lien Claims of all other trades and suppliers were recently settled and/or resolved by Arbitration with Duncan Glaholt.

6

(b) I confirm the above noted Arbitration and settlement of the Lien actions were completely separate from Con-Drain's Non-Lien Action and these proceedings did <u>not</u> deal with the issues nor the Mandatory Orders made in the Con-Drain Non-Lien Action in any way.

CON-DRAIN INJUNCTION MOTION / ORDER

15. On August 15, 2013, Con-Drain brought a motion in its Non-Lien Action seeking an interim and/or permanent Mandatory Order requiring the sum of $800,000 be paid into Court from the net proceeds received on closing from the remaining eighteen (18) lots located on the Project. On that day, Madam Justice Lack granted an Order in favour of Con-Drain, inter alia:

> THIS COURT ORDERS that on any closing of the Lots the net proceeds received on closing shall be paid into Court, or ***into Trust*** if agreed to by all parties in writing, up to a maximum of $800,000.00 Such net proceeds shall be calculated as the balance of the purchase price after payment of necessary closing legal fees, real estate commissions, mortgage discharge payments to the Bank of Montreal, payment to the necessary trades in an amount to be agreed to by the Plaintiff acting reasonably, and applicable HST, which funds shall remain in Court or in Trust until further Order of this Honourable Court or Consent of the parties herein. [emphasis added]

Justice Lack's Order is already attached as Exhibit "A" hereto.

16. Thereafter, the Order was served on the Defendants and they decided to challenge Justice Lack's Order. To that end, on September 9, 2013, Jinnah was cross-examined regarding an affidavit he swore as president and on behalf of Silver Streams in response to Con-Drain's Motion. Jinnah's evidence given on cross examination is as follows:

(a) Jinnah acknowledges the $800,000.00 amount owing to Con-Drain. (Cross-examination transcript page 37, Q. 136);

(b) Jinnah is the sole shareholder, officer and director of the Silver Streams companies, including those companies, which own the lands in question. (Cross-examination transcript pages 5 and 6, Qs. 9 – 16);

(c) Silver Streams/Jinnah did not pay Con-Drain $1.2 million received from the Town of Richmond Hill notwithstanding same was required under the contract with Con-Drain. (Cross-examination transcript pages 8 and 9, Qs. 29 – 36);

(d) Greenberg was Jinnah's main contact and representative of the investors that comprise the Secondary Lender companies. In fact, Jinnah has never met any of the investors in those companies. (Cross-examination transcript page 13, Qs. 52 – 54);

(e) Jinnah acknowledges that the original Settlement Agreement with Con-Drain was revised in April, 2012 and that Con-Drain was to receive $50,000.00 plus interest on the first 10 closings on Plan 3. (Cross-examination transcript pages 19 and 20, Q. 76);

(f) Insofar as the 9 secret closings on Plan 3 that took place in June and July, Jinnah did not direct the distribution of those closing proceeds and is not fully aware of how those transactions transpired nor the details of the final amounts paid on those 9 closings. Jinnah acknowledges that same was done by Greenberg. (Cross-examination transcript pages 29 and 306, Qs. 113 – 117);

(g) Jinnah also confirms the Secondary Lender mortgages went into default in February, 2013 as they expired and were not renewed. However, Jinnah and Greenberg agreed those mortgages would not be enforced at that time. (Cross-examination transcript pages 32 and 33, Qs. 130 – 139); and,

(h) Jinnah did not advise Con-Drain of the 9 closings that took place in June and July, 2013 notwithstanding his understanding that Con-Drain expected to get paid from those closings. (Cross-examination transcript page 35, Qs. 149, 150 and 151).

Attached to this my Affidavit and marked as **Exhibit "F"** is a copy of Jinnah's cross-examination transcript.

17. Greenberg was also cross-examined on his affidavit sworn in response to Con-Drain's Motion. Greenberg's evidence given on cross-examination includes as follows:

(a) that Greenberg is the sole officer, director and shareholder of all six (6) of the Greenberg Companies/"Secondary Lenders" seeking priority to the $800,000.00 amount presently being held in trust. The only exception being that Greenberg's wife is also an officer and director of the Defendant company, Castle Lane. (Cross-Examination transcript pages 3 and 4, Qs. 4 -12);

(b) Greenberg is the only contact person that Jinnah ever spoke with or dealt with insofar as negotiating the mortgages for the Greenberg Companies/Secondary Lenders. (Cross-examination transcript pages 5 and 6, Qs. 21 – 23);

(c) Greenberg is counsel for all of the Secondary Lenders and was the person who syndicated the investors behind the Secondary Lender companies. Greenberg also brought those funds to Jinnah and was also paid a fee for doing so. (Cross-examination transcript pages 6 and 7, Qs. 24 – 29);

(d) Greenberg is also an "investor" in some of the Secondary Lender companies. (Cross-examination transcript pages 7 and 8, Qs. 30 – 32);

(e) The Secondary Lender mortgages all became due on February, 2013 and were not extended such that all of these mortgages were in default as of February, 2013. (Cross-Examination transcript pages 21 and 36, Qs. 79, 80 and 133);

(f) Greenberg never told the "investors" in the Secondary Lender companies about the Settlement Agreement with Con-Drain and also never told the investors about Con-Drain's Claim for Lien registered against the lands in February, 2010. (Cross-Examination transcript pages 22 and 23, Qs. 85, 86 and 87);

(g) The vendor on all of the Agreements of Purchase of Sale was "Silver Streams", so all of the purchasers' payments under those Agreements were/are payable to Silver Streams. (Cross-examination transcript page 32, Qs. 118, 119 and 120); and,

(h) Greenberg decided to serve Notices of Power of Sale for the Secondary Lenders mortgages on Monday, August 12th being immediately after Greenberg received Con-Drain's Claim for Lien served the previous Friday, August 9th. Greenberg also acknowledges the Secondary Lender mortgages were already in default at that time (as they went into default in February, 2013). In addition, Greenberg admitted he never told any of the investors that he served the recent Notices of Power of Sale on the basis Greenberg is the administrator of the mortgages and has the authority and ability to decide how and when those mortgages get enforced. (Cross-examination transcript pages 36, 37 and 38, Qs. 128 – 140)

Attached to this my Affidavit and marked as **Exhibit "G"** is a copy of Greenberg's cross-examination transcript.

18. On October 15, 2013, Con-Drain's Motion went back in front of Madame Justice Gilmore for argument on the merits. At that time Greenberg's counsel attended and opposed Con-Drain's request to continue Justice Lack's Order. After hearing arguments from counsel, Madam Justice Gilmore decided that Con-Drain was entitled to a continuation of Justice Lack's existing Injunction Order. In her decision, Madame Justice Gilmore specifically wrote:

> 24 On August 15, 2013, an order was obtained from Lack J., which **protects the $800,000 presently owing to the plaintiff** and directed that the plaintiff's motion be returnable on September 26, 2013…
>
> 25 The August 15, 2013 order of Lack J. required the $800,000 to be paid in trust with Chaitons LLP, solicitors for Silver Streams. The current motion is to determine whether or not the plaintiff is entitled to a continuation of Lack J.'s existing injunction and an order that the $800,000 be paid into court pending the determination of the action at trial. While **Silver Streams does not claim entitlement to the $800,000 and admits owing money to the Plaintiff and the secondary lenders**, they object to the order sought because interest continues to accrue under the mortgages and monies owed to the plaintiff, for which the Silver Streams may be responsible…. [emphasis added]

Justice Gilmore's Endorsement is already attached as Exhibit "B" hereto.

19. Over the next few months, (prior to registration of any Claims for Lien and prior to the within CCAA proceedings) a number of the residential properties were sold and funds were placed into trust with Chaiton & Chaiton LLP as required by the aforementioned Orders. The total of the amounts presently being held in trust is the sum of $491,985.33, plus interest.

CCAA PROCEEDINGS – DECEMBER, 2013

20. However, on December 17, 2013, Silver Streams sought and obtained protection from its creditors under the CCAA. The CCAA Judge specifically acknowledged the above noted funds being held in trust for the Con-Drain Non-Lien Action and reinforced that this trust "shall be maintained." Moreover, the CCAA Judge was careful "not" to include these monies as property of Silver Streams. The Initial Order provides:

> 3A THIS COURT ORDERS that the sum of $491,985.33, plus interest accrued thereon, being held ***in trust*** by Chaitons LLP pursuant to the orders of the Honourable Madam Justice Lack dated August 15, 2013 and the Endorsement of the Honourable Madam Justice Gilmore dated November 20, 2013 in the Con-Drain Company (1983) Limited action bearing Newmarket court file no. CV-12-115757-00 (the "Con-Drain Action") shall be ***maintained in trust*** by Chaitons LLP until further court order or consent of the parties to the Con-Drain Action, **and the determination of whether the above noted funds for Property, as defined in paragraph 5 of the Initial Order, shall be determined at a late[r] date.** [emphasis added]

Attached to this my Affidavit and marked as **Exhibit "H"** is a copy of the CCAA Order.

CONCLUSION

21. The Monitor and its counsel recently advised that lot 18 is being sold and should close on December 15, 2016. It is anticipated the sale proceeds from Lot 18 along with other funds currently being held by the Monitor from the sale of other lots/homes on the Project will be enough to cover the $308,014.67 that Con-Drain is asking to be paid into Trust with Chaitons LLP (or into Court). Con-Drain is simply seeking to have the Monitor and Applicant comply with the original Orders of Justice Lack and Justice Gilmore as well as the CCAA Order so as to protect the $800,000 amount required by

those Orders to be paid into Trust until entitlement of those funds is determined on the merits by this Honourable Court.

22. To that end, the parties in the Con-Drain Non-Lien Action have exchanged productions and are in the process of scheduling examinations for discovery. It should also be noted the Monitor is taking no position in regards to Con-Drain's Motion for the protection of these funds and I direct the Court to paragraphs 54, 55, 56 and 57 of Jinnah's Affidavit included in the Monitor's Motion Record at pages 21 and 22.

23. I should also point out that Con-Drain will be receiving payment of $25,000 from its Lien action Settlement as incorporated in the Arbitrator's Award dated September 28, 2016. As such, the sum of $25,000 should be deducted from the amount to be paid into Trust pursuant to the aforementioned Orders. Attached to this my Affidavit and marked as **Exhibit "I"** is a copy of said Award along with the Arbitrator's Reasons.

24. As stated in paragraph 14 herein the Arbitration never dealt with Con-Drain's Non-Lien Action nor the Mandatory Orders of Justice Lack and Justice Gilmore in any way as they were not part of the Arbitrator's mandate. To that end, attached to this my Affidavit and marked as **Exhibit "J"** is a copy of Justice Newbould's January 8, 2015 Order directing the Reference/Arbitration to be conducted by the Arbitrator.

25. I make this Affidavit for no improper purpose.

SWORN before me at the City of Vaughan, on November 17, 2016.	
A Commissioner for taking affidavits	Nunzio Bitondo

This is Exhibit "A" referred to in

the Affidavit of Nunzio Bitondo

sworn before me, this 17

day of November, 2016

A Commissioner for Taking Affidavits

Court File No.
CV-13-115757-00

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	**THURSDAY, THE 15TH**
	)	
JUSTICE M. L. LACK	)	**DAY OF AUGUST, 2013**

BETWEEN:

CON-DRAIN COMPANY (1983) LIMITED

Plaintiff

- and -

SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., JACK GREENBERG, 2148990 ONTARIO INC., 2148993 ONTARIO INC., 2147650 ONTARIO INC. 2147681 ONTARIO INC., PUCCINI MORTGAGE CORP., 53 PUCCINI MORTGAGE CORP., 388242 ONTARIO LIMITED, DAPAUL MANAGEMENT LIMITED, NASTELL INVESTMENTS LIMITED and CASTLE LANE DESIGN GROUP INC.

Defendants

ORDER

THIS MOTION, made by the Plaintiff for a Mandatory Order and/or a Certificate of Pending Litigation, was heard this day at 50 Eagle Street, W., Newmarket, Ontario.

ON READING the Affidavit of Nunzio Bitondo, sworn August 13, 2013 and exhibits thereto, and the Affidavit of Cristina Neves, sworn August 24, 2013 and exhibits thereto, and upon reading the Consent of counsel for the Plaintiff and for Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148990 Ontario Inc., 2148993 Ontario Inc., 2147650 Ontario Inc. and 2147681 Ontario Inc., filed and upon hearing submissions from counsel for the Plaintiff,

1. **THIS COURT ORDERS** that the Plaintiff's Motion is adjourned pursuant to the Timetable attached hereto as Schedule "A", which Timetable may be varied on consent of all parties without further Order of the Court.

2. **THIS COURT ORDERS** that no closing of the nineteen (19) lots (more particularly described in Schedule "B" hereto and hereinafter defined as the "Lots") shall proceed other than in accordance with the terms as set out herein.

3. **THIS COURT ORDERS** that within seven (7) days from the date of this Order, Silver Streams shall provide the Plaintiff with a list of the scheduled closing dates for the Lots.

4. **THIS COURT ORDERS** that on any closing of the Lots the net proceeds received on closing shall be paid into Court, or into Trust if agreed to by all parties in writing, up to a maximum of $800,000.00. Such net proceeds shall be calculated as the balance of the purchase price after payment of necessary closing legal fees, real estate commissions, mortgage discharge payments to the Bank of Montreal, payment to the necessary trades in an amount to be agreed to by the Plaintiff acting reasonably, and applicable HST, which funds shall remain in Court or in Trust until further Order of this Honourable Court or Consent of the parties herein.

5. **THIS COURT ORDERS** that in conjunction with the terms set out in paragraph 4 above, the parties herein shall execute the necessary documents to allow any and/or all closings of the Lots to take place, including but not limited to, the partial Discharges of the Plaintiff's Notice and Claim for Lien registered on August 9, 2013, at the Plaintiff's own expense, to be provided immediately prior to any closing as contemplated herein.

15

6. **THIS COURT ORDERS** that once the sum of $800,000.00 has been paid into Court or into Trust, Con-Drain shall forthwith consent to the withdrawal of paragraphs 4 and 5 herein as it relates to payment of any further net proceeds into Court.

7. **THIS COURT ORDERS** that costs of all parties are reserved to the Judge hearing the Plaintiff's Motion on the merits.

ML 8. THIS COURT ORDERS THAT THIS MOTION IS OTHERWISE ADJOURNED TO SEPT. 26, 2013 AT 9:30 A.M.

Myers J

SCHEDULE "A"

TIMETABLE FOR PLAINTIFF'S MOTION

1. The Defendants shall provide their Responding materials on or before August 30, 2013;
2. The Plaintiff shall provide its Reply materials, if any, on or before September 5, 2013;
3. Cross-examination of the Affiants shall take place during the week of September 9, 2013;
4. The Plaintiff's Motion shall be returnable on Thursday, September 26, 2013.

SCHEDULE "B"

PIN 03206 - 3484 LT
LOT 1, PLAN 65M4331; SUBJECT TO AN EASEMENT IN GROSS OVER PTS 1 & 2
65R33105 AS IN LB43081;
TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3485 LT
LOT 2, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3486 LT
LOT 3, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3487 LT
LOT 4, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3488 LT
LOT 5, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3495 LT
LOT 12, PLAN 65M4331; SUBJECT TO AN EASEMENT IN GROSS OVER PT 8
65R33105 AS IN YR1611262; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3497 LT
LOT 14, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3499 LT
LOT 16, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3501 LT
LOT 18, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3502 LT
LOT 19, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3503 LT
LOT 20, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3504 LT
LOT 21, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3505 LT
LOT 22, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3506 LT
LOT 23, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3507 LT
LOT 24, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3508 LT
LOT 25, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3418 LT
LOT 1, PLAN 65M4249; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3440 LT
LOT 23, PLAN 65M4249; SUBJECT TO AN EASEMENT IN GROSS OVER PT 2,
65R32917 AS IN YR1620823; TOWN OF RICHMOND HILL

PIN 03206 – 3441LT
LOT 24, PLAN 65M-4249, SUBJECT TO AN EASEMENT IN GROSS PT 3,
65R-32917 AS IN YR1620823, TOWN OF RICHMOND HILL
RICHMOND HILL

CON-DRAIN COMPANY (1983) LIMITED Plaintiff	and	SILVER STREAMS HOMES INC. et al. Defendants	Court File No: CV-13-115757-00

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at NEWMARKET

O R D E R

Koskie Minsky LLP
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

Jeffrey Long LSUC #: 32602V
Tel: 416-595-2125
Fax: 416-204-2892

Lawyers for the Plaintiff

18

19

This is Exhibit "B" referred to in

the Affidavit of Nunzio Bitondo

sworn before me, this 17

day of November, 2016

A Commissioner for Taking Affidavits

CITATION: Con-Drain Company v. Silver Streams Homes, 2013 ONSC 7176
NEWMARKET COURT FILE NO.: CV-13-115757-00
DATE: 20131120

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Con-Drain Company (1983) Limited, Plaintiff /Moving Party

and

Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., Jack Greenberg, 2148990 Ontario Inc., 2148993 Ontario Inc., 2147650 Ontario Inc., 2147681 Ontario Inc., Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited and Nastell Investments Limited and Castle Lane Design Group Inc., Defendants/Responding Parties

BEFORE: The Honourable Madam Justice C.A. Gilmore

COUNSEL: Jeffrey J. Long, for the Plaintiff

Stephen Schwartz, for the Defendants, Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148990 Ontario Inc., 2148993 Ontario Inc., 2147650 Ontario Inc., and 2147681 Ontario Inc.
Marco Drudi, for the Defendants, Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited, Nastell Investments Limited and Castle Lane Design Group Inc.

HEARD: October 15, 2013

ENDORSEMENT

Overview

[1] The plaintiff/moving party seeks an order continuing the August 15, 2013 injunction order of Lack J., and requests the $800,000 paid into trust with Chaitons LLP be paid into court until trial, further order of the court or consent of the parties.

[2] In the alternative, the plaintiff requests an order that a certificate of pending litigation ("CPL") be granted in respect of any remaining lots/homes on the residential project in question, located in Richmond Hill ("the project"), which remaining properties are lots 18, 23, 24 and 25. In the further alternative, the plaintiff seeks an order pursuant to rule 45.02 of the *Rules of Civil Procedure* to preserve the $800,000 by way of funds paid into court or otherwise secured.

[3] The issue to ultimately be determined (although not in the context of this motion) is whether the plaintiff is entitled to immediate payment of the $800,000 in priority to the defendants' mortgages. The $800,000 represents the net proceeds received on recent closings of certain lots/homes, located in phase three of the project.

Background Facts

[4] On February 9, 2010, the plaintiff registered two construction liens against title to the lands owned, at that time, by the co-defendants, 2148990 Ontario Inc., 2148993 Ontario Inc., 2147650 Ontario Inc. and 2147681 Ontario Inc. (hereinafter "the owners"). The builder/developer of the lands is Silver Streams Homes Inc. and Silver Streams Home (Puccini) Inc. ("Silver Streams"). The sole officer, director/shareholder and operating mind of Silver Streams and the owners is Mr. Imran Jinnah. One of the liens was registered by the plaintiff against phase one of the subject lands in the principal amount of $998,098.46 ("the phase one lien"). The other lien was registered by the plaintiff as against phase two in the principal amount of $930,120.27 ("the phase two lien").

[5] The services and materials provided by the plaintiff that formed the basis of the liens were provided to the co-defendant Silver Streams. The plaintiff provided earthworks, underground services, roads, curbs, asphalt and related labour and materials to the project, and by the end of 2009 they were owed almost $2,000,000 for work performed but for which Silver Streams was unable to make payment.

[6] The co-defendants, Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, DaPaul Management Limited, Nastell Investments and Castle Lane Design Group Inc. ("the secondary lenders") were mortgagees under various mortgages registered against title to the subject lands (hereinafter the "secondary mortgages").

[7] The co-defendant, Mr. Jack Greenberg, is a solicitor who at all material times acted on behalf of Silver Streams during his dealings with the plaintiff and its solicitor, Mr. Jeffrey Long. Mr. Greenberg is also an officer/director and solicitor of the secondary lenders.

[8] After the registration of the liens, a settlement agreement was entered into between Silver Streams and the plaintiff on March 31, 2010. The secondary lenders were not parties to the settlement agreement, although they were aware of it.

[9] The settlement agreement entitled the plaintiff to an immediate payment of $550,000. As well, Silver Streams signed an irrevocable direction authorizing and directing its solicitor to "deduct from the closing proceeds, otherwise payable to the undersigned (Silver Streams)...the sum of $50,000...and to pay same to Con-Drain." An irrevocable direction was provided from Silver Streams and an irrevocable direction was signed by Mr. Greenberg, directing the $50,000 payments, plus interest, from each of the future closings on phase one and phase two of the project. In exchange, the plaintiff was required to discharge its two claims for lien. The plaintiff's claims in the within action arise from the terms of the settlement agreement as between the plaintiff and Silver Streams.

[10] The secondary lenders take the position that in the course of discussions between the plaintiff and Silver Streams, through Mr. Greenberg and Mr. Long, the plaintiff fully understood that the phase one and phase two liens were subject to mortgages including the mortgages of the secondary lenders. They rely on email correspondence from Mr. Greenberg to Mr. Long

advising that the plaintiff's liens were subject to $9,600,000 of prior financing. When the plaintiff requested registration of a first mortgage against ten lots in the subject lands to secure their payment, Mr. Greenberg, on behalf of Silver Streams, advised that Silver Streams could not comply, and as such, the secondary lenders take the position that the plaintiff was fully aware that its settlement agreement would not be given priority over the secondary mortgages of the secondary lenders.

[11] The plaintiff takes the position that Mr. Greenberg made a clear representation as to the plaintiff's priority over any secondary lenders and Silver Streams for the balance owing to the plaintiff, based on the terms of settlement of March 31, 2010 and an email from Mr. Greenberg, in which he acknowledged that the plaintiff would stand in second position and makes no mention that the plaintiff would not be paid the required $50,000 plus interest from future closings because of monies to be paid to secondary lenders or other trades, as now suggested by Mr. Greenberg in his affidavit.

[12] The secondary lenders take the position that the parties to the settlement agreement were the plaintiff and Silver Streams, and that the agreement was signed on behalf of Silver Streams by Mr. Greenberg, and on behalf of the plaintiff by Mr. Long. Therefore, the secondary lenders are not bound by the terms of the settlement agreement. Further, the settlement agreement directs the solicitor for Silver Stream to "deduct from the closing proceeds **otherwise payable** to the undersigned [Silver Streams] the sum of $50,000...and to pay same to Con-Drain."

[13] Further, as part of the settlement agreement, and in the event of a default of payment, the plaintiff obtained consents to judgments from the owners and Mr. Jinnah personally. The secondary lenders submit that there is nothing which precludes the plaintiff from taking out the judgments and enforcing them.

[14] At no time did the plaintiff attempt to make the secondary lenders a party to the settlement agreement or insist on seeking priority over them. The secondary lenders rely on email correspondence, dated January 17, 2011, to counsel for the plaintiff sent by Mr. Greenberg confirming that the plaintiff's phase two lien was subject to the secondary mortgages in favour of the secondary lenders. The plaintiff did not object to the confirmation of priority of the secondary mortgages as against title to the subject lands at the time. The phase two lien was subsequently discharged without security.

[15] Subsequently, the plaintiff received the initial $550,000 payment required by the settlement agreement and began to receive the $50,000 payments plus interest from the various closings as they took place. The plaintiff submits it would obviously never have discharged its lien if it was not going to receive the $50,000 plus interest from closings going forward.

[16] In early 2012, Silver Streams experienced financial difficulty and Mr. Jinnah and Mr. Greenberg contacted the plaintiffs to discuss a revision of the settlement terms. The plaintiff agreed to revise the settlement terms such that they would be paid $50,000 plus interest from each of the first ten closings on phase three of the subdivision instead of being paid from

closings on phase two. While this revision delayed payment to the plaintiff, they accepted that the revision was necessary due to financing issues.

[17] The terms of the revised settlement were confirmed in the April 16, 2012 email from Mr. Greenberg to Mr. Long. Specifically, that email sets out a proposal as follows,

> My client would like the option to be able to move your client's lien from 15 lots in phase 2 under the second plan to the aforesaid 15 lots on the BMO lands, which we suggest would be better security for your client, which liens would be subject only to a first mortgage for no more than $3,000,000 (whether BMO or a private mortgage). Currently your client's lien is subject to at least $9,600,000 of prior financing… On each closing, until your client is paid out, your client would receive $50,000 from the closing proceeds from each sale in return for a lifting of the lien from such lot. Pro-rated and proportionate interest would be added to the discharge amount. My client would provide an irrevocable direction to my firm to make the aforesaid payment from the closing proceeds, and my firm will undertake to make the payment as well, as long as my firm is acting on the closing and there are sufficient funds. If my client changes law firms for closing purposes, he will advise you and he will provide the same irrevocable direction to that law firm… My client will agree to replace the existing lien on phase two lands with a mortgage in the amount of the balance owed to your client to cover the shortfall between my client's indebtedness to your client and the amount of your client's liens.

[18] The secondary lenders take the position that the plaintiff cannot rely on the contents of the April 16, 2012 email as they were not a party to it and none of the representations made in it were made on their behalf. The mortgages registered by the secondary lenders went into default in February 2013. The plaintiff received its last $50,000 payment and applicable interest on March 11, 2013, which was after the default on the secondary mortgages. Up until March 11, 2013, thirty-four lots/homes closed and the plaintiff received the required $50,000 payments, along with applicable interest. These payments were made from Mr. Greenberg's trust account and flowed from the sale proceeds, as required by the settlement agreement.

[19] At the time the settlement agreement was entered into, the plaintiff was owed $3,334,002.07 by Silver Streams. Of the plaintiff's current claim of $800,000, the amount of $291,552.89 is interest, which it is claiming from Silver Streams.

[20] Subsequent to default on the secondary mortgages and the payment to the plaintiff on March 11, 2013, there were nine closings which took place on Phase 3 for which the plaintiff did not receive payment. The plaintiff only became aware of this because one of the homes which closed was sold to a family member of someone known to the plaintiff. Thereafter, Mr. Jinnah

confirmed that the closings had taken place in June and July of 2013 and that a decision had been made that no payment would be made to the plaintiff.

[21] At a meeting held at the plaintiff's offices on August 6, 2013, Mr. Greenberg admitted that the sum of approximately $1,200,000 was paid to Mr. Greenberg's secondary lender companies on account of their mortgages and that no amount was paid to the plaintiff from the nine closings. Mr. Greenberg is the president and sole shareholder of all of the secondary lender companies, save and except for Castle Lane. Mr. Greenberg's wife is the other officer and director of that company.

[22] Given the alleged "secret" closings, the plaintiff's position is that Mr. Greenberg and the other defendants breached the settlement agreement and their obligation to pay the plaintiff on the closings by unilaterally deciding to pay the secondary lenders in direct contravention of both Mr. Greenberg's personal undertaking and his client's irrevocable direction. A document provided by Mr. Greenberg confirms that $1,239,000 was paid by Mr. Greenberg to the secondary lenders from the June and July 2013 closings. The amount owing to the plaintiff as of July 31, 2013 and admitted by Mr. Jinnah on his cross-examination, was principal of $679,179.88 and interest of $116,704.80, for a total of $794,881.68. The additional $94,836.71 relates to work recently performed by the plaintiff and for which they have registered a claim for lien against the eighteen remaining lots.

[23] According to the secondary lenders, Mr. Greenberg honoured his personal undertaking by deducting from closing proceeds otherwise payable to Silver Streams, the sum of $50,000 and paying the same to the plaintiff. He was **not** obligated to pay the sum of $50,000 irrespective of the financial constraints faced by Silver Streams or before the first mortgagee or the secondary lenders. To interpret the undertakings as suggested by the plaintiff is to ignore the term "otherwise payable" and to provide the plaintiff priority when such priority was not agreed to by Mr. Greenberg. The secondary lenders, although not parties to this settlement agreement, were aware of this and took no issue with the contents of the agreement. In summary, the secondary lenders take the position that there is no factual basis for any of the plaintiff's claims against them, as they negotiated a settlement agreement, which entitled them to effectively an unsecured judgment against Silver Streams and Mr. Jinnah personally, but did not negotiate an agreement which entitled them to priority over the secondary lenders.

The Current Motion

[24] On August 15, 2013, an order was obtained from Lack J., which protects the $800,000 presently owing to the plaintiff and directed that the plaintiff's motion be returnable on September 26, 2013. The motion date was adjourned to October 15, 2013 on consent.

[25] The August 15, 2013 order of Lack J. required the $800,000 to be paid into trust with Chaitons LLP, solicitors for Silver Streams. The current motion is to determine whether or not the plaintiff is entitled to a continuation of Lack J.'s existing injunction and an order that the $800,000 be paid into court pending the determination of the action at trial. While Silver Streams does not claim entitlement to the $800,000 and admits owing money to the plaintiff and

the secondary lenders, they object to the order sought because interest continues to accrue under the mortgages and monies owed to the plaintiff, for which the Silver Streams may be responsible. The interest is significant.

[26] It should be noted that Mr. Shawn Tock attended this motion, but did not participate. Mr. Tock represents Re/Max Realtron Realty Inc. Brokerage (hereinafter "Re/Max"), who has commenced an action in Toronto against the owners. On September 24, 2013, the plaintiff in that case, Re/Max, moved to have funds paid into court based on its reasonable expectation that they would be paid commissions on closing. Re/Max argued that the owner had chosen to use funds from the closing of sales to pay unsecured creditors rather than Re/Max. Newbould J. ordered that "the vendor/owner is entitled to pay (1) all secured lenders and any lien claimant sufficient amount to permit each sale to close; (2) applicable HST; and (3) legal fees for the closing." All other proceeds of each sale were to be held in trust by Chaitons LLP to be paid out only on the consent of the parties or further court order.

The Positions of the Parties

The Plaintiff

[27] The plaintiff takes the position that it is entitled to a continuation of Lack J.'s order, until the priority issue between it and the secondary lenders is adjudicated at trial. With respect to the test for a Mareva injunction, the plaintiff argues that the threshold to establish a serious issue to be tried is low and so long as the court is satisfied that the claim is neither vexatious nor frivolous, a detailed review of the merits is not required.

[28] With respect to irreparable harm, this may be measured other than in monetary terms and an examination into the nature of the harm suffered, rather than its magnitude is required.

[29] Regarding the balance of convenience, the court must consider which party will suffer the greater harm from granting or refusing the injunction pending final determination at trial. The plaintiff submits that it has satisfied all three prongs of the test.

[30] The plaintiff alleges fraudulent misrepresentation. It submits that Mr. Greenberg's representation as counsel, president and sole agent for the secondary lenders that the plaintiff would have priority over the secondary lenders and owner, and the subsequent breach of that representation by allowing payouts from the phase three closings to be paid to parties other than the plaintiff is a violation of Mr. Greenberg's representation to maintain the plaintiff's priority of payment.

[31] Alternatively, the plaintiff seeks a CPL on the grounds that they have a claim in fraud allowing them the right to trace funds, or alternatively, to claim property on constructive trust principles.

[32] As a further alternative, the plaintiff seeks to have the $800,000 paid into court pursuant to rule 45.02 of the *Rules of Civil Procedure* on the basis that they have the right to a specific fund, that there is a serious issue to be tried regarding the plaintiff's claim to that fund, and that

the balance of convenience favours granting the relief sought in relation to that fund. The Court of Appeal in *Sadie Moranis Realty Corporation v. 1667038 Ontario Inc.*[1] said as follows, "Where the plaintiff has a serious prospect of ultimate success and there is something compelling the plaintiff's side of the scales, such as a real concern that the defendant will dissipate the specific fund, that is sufficient to outweigh the defendant's freedom to deal with his or her property."

The Secondary Lenders

[33] The secondary lenders take the view that the order of Lack J. is not a consent order as they did not participate. However, they also concede that they have not brought a motion to set aside that order. They support the endorsement of Newbould J., from September 24, 2013 in the Re/Max matter, and feel that is the appropriate way with which to deal with future closings. The secondary lenders strenuously object to the $800,000 being paid into court or for the plaintiffs to have any specific priority in future sales, as this is akin to giving an unsecured creditor priority over secured lenders.

[34] Further, the settlement agreement was negotiated by sophisticated parties with the assistance of their counsel. The agreement stipulated that the $50,000 plus interest to be paid to the plaintiff was to be paid from funds "otherwise payable." The secondary lenders interpret that to mean that secured creditors would receive those funds otherwise payable. Further, the plaintiff received security by way of a consent to judgment against the builders and Mr. Jinnah and there is no evidence that such a judgment cannot be enforced.

[35] There is no evidence that the secondary lenders are bound by the settlement agreement undertaking or direction. At the time of negotiating the agreements, the plaintiff could have sought more security, but it did not. The plaintiff has already received a substantial amount of what is owed to them. This is a monetary claim and not the type of claim that would be considered irreparable harm under the test for an injunction.

[36] The secondary lenders deny that a specific fund was created by the order of Lack J. If that were the case, then every interim order which ordered funds to be paid into court would be characterized in that manner.

[37] With respect to the balance of convenience, the affected parties are purchasers, subcontractors, preferred creditors, and Re/Max. Interest continues to accumulate on funds kept from the secured lenders. The secondary lenders' priority must be recognized.

Silver Streams

[38] Silver Streams does not claim entitlement to the money as it is not a stakeholder. However, as interest continues to accrue on the lenders and the plaintiff's money, Silver Streams agrees that the matter must be heard on an expedited basis. The project must continue and the

[1] 2012 ONCA 475 at para 18.

endorsement of Newbould J. provides a reasonable mechanism for that to happen. The secondary lenders were not present with respect to Lack J.'s order, and a new order going forward is necessary in which allows the project to continue and recognizes the priority of secured lenders.

Analysis and Ruling

[39] It is this court's view that the threshold has been met to continue the injunctive relief ordered by Lack, J. In terms of the required test I find that there are serious issues to be tried. Clearly a trial is required to determine some of the many issues that have arisen as a result of Mr. Greenberg's actions in relation to the settlement agreement, the interpretation of the term "otherwise payable" in the settlement agreement and the alleged "breaches" of the irrevocable direction and personal undertaking. Transparency was intended by the settlement agreement and there is therefore some concern as to why payouts would be made without the plaintiff being advised.

[40] As for the issue of irreparable harm it is difficult at this stage to measure the magnitude of the harm. However, it is clear, that if the $800,000 were released, it would be immediately disbursed to the secondary lenders. This may cause irreparable harm if it is found to be in contravention of the settlement agreement and Mr. Greenberg's undertaking. While there is interest accruing, that is always going to be an issue where there is default and insufficient money to go around.

[41] As the $800,000 fund potentially contains amounts which could also be found to be owed to the secondary lenders, the plaintiff, Re/Max and other unsecured creditors, I do not see that the balance of convenience would be offended by paying it into court.

[42] Given all of the above and the serious allegation of fraudulent misrepresentation, this court takes a cautious view and I order that the $800,000 be paid into court pending trial.

[43] As the funds will be paid into court, there is no need for a CPL or an order under Rule 45.02 of the *Ruled of Civil Procedure*.

[44] Future closings to be dealt with in the method set out in Newbould J.'s endorsement of September 24, 2013, in which the vendor (Silver Streams) is to pay (1) all secured lenders and any lien claimant to date a sufficient amount to permit each sale to close, (2) applicable HST, and (3) legal fees for the closing. All other proceeds of each sale are to be held in trust by Chaitons LLP, to be paid out only on the consent of the parties or further court order.

[45] A pre-trial date to be arranged through the trial co-ordinator as soon as possible.

[46] If the parties cannot agree on costs, I will receive written submissions on a seven day turnaround, commencing with the plaintiff, followed by responding submissions from the defendants, then reply submissions, if any, commencing fourteen days from the date of release of this endorsement. Cost submissions shall be no more than two pages in length, exclusive of any costs outline or offers to settle. All costs submissions shall be delivered via email through my

assistant at jennifer.beattie@ontario.ca. If no costs submissions are received within 35 days of the date of release of this endorsement the costs issue shall be deemed to have been settled between the parties.

C. Gilmore J.

Justice C.A. Gilmore

Released: November 20, 2013

This is Exhibit "C" referred to in

the Affidavit of Nunzio Bitondo

sworn before me, this 17

day of November, 2016

A Commissioner for Taking Affidavits

IRREVOCABLE DIRECTION

TO: JACK GREENBERG or any other solicitor acting for the undersigned in connection with the sales described below

RE: ANY SALE OF ANY LOT IN THE PUCCINI DRIVE RESIDENTIAL SUBDIVISION PHASES 1 AND 2, TOWN OF RICHMOND HILL

FOR GOOD AND VALUABLE CONSIDERATION, THE UNDERSIGNED hereby irrevocably authorizes and directs you to deduct from the closing proceeds otherwise payable to the undersigned in connection with any of the aforesaid sales the sum of $50,000.00 plus any accrued and unpaid interest thereon at CIBC Prime plus 3% per annum and to pay same to Con-Drain Company (1983) Ltd. within three (3) business days after the aforesaid closing and for so doing this shall be your full and sufficient and irrevocable authority.

THE UNDERSIGNED further undertakes to advise any solicitor replacing Jack Greenberg and acting for the undersigned in connection with the foregoing sale(s) of the aforesaid irrevocable direction and to provide the same irrevocable direction to such replacement solicitor(s).

DATED this 31st day of March 2010.

SILVER STREAMS HOMES INC.

PER: Imran Jinnah

Imran Jinnah-President

I have authority to bind the Corporation

2010-023/direction

IRREVOCABLE UNDERTAKING

TO: CON-DRAIN COMPANY (1983) LTD.

AND TO: KOSKIE MINSKY LLP, its solicitors

RE: IRREVOCABLE DIRECTION DATED MARCH 31, 2010 ("DIRECTION") BY SILVER STREAMS HOMES INC. TO THE UNDERSIGNED IN CONNECTION WITH ANY SALE OF ANY LOT IN THE PUCCINI DRIVE RESIDENTIAL SUBDIVISION PHASES 1 AND 2, TOWN OF RICHMOND HILL

FOR GOOD AND VALUABLE CONSIDERATION, THE UNDERSIGNED hereby undertakes to comply with the attached Direction and to immediately advise you if the undersigned has been replaced as the solicitor for Silver Streams Homes Inc. in connection with the aforesaid sales.

DATED this 31st day of March 2010.

JACK GREENBERG

2010-023/undertaking

This is Exhibit "D" referred to in

the Affidavit of Nunzio Bitondo

sworn before me, this 17

day of November, 2016

A Commissioner for Taking Affidavits

Law Offices of
Jack Greenberg

Delivered by e-mail

April 16, 2012

KOSKIE MINSKY LLP
Barrister & Solicitors
Suite 900, 20 Queen St. W.
Toronto, Ontario M5H 3R3

Attention: Mr.Jeffrey L. Long

Dear Sirs:

Re: Con-Drain Company (1983) Ltd. ("Con-Drain") – Settlement Agreement concerning Puccini Drive Subdivision with Silver Streams Homes Inc. ("Silver") Your File No. 10/0376

In connection with the above matter and our recent discussion concerning the recent arrangement between our clients, I am pleased to confirm as follows:

1) Silver Streams shall pay $50,000 plus interest to Con-Drain from the closings of 7 of the larger homes on the current Second Plan of Subdivision (which are in Phase 2) which is close to being completed (Schedule A of Lot numbers and present closing dates will be forwarded later) such that the amount outstanding thereafter will be about $500,000.00 and the balance of the Phase 2 closings will not require any payments;
2) Silver Streams shall also pay $50,000 plus interest to Con-Drain on the same terms from the first 10 closings on the Third Plan of Subdivision (which plan is in Phase 1 & 2 and which will be registered shortly) to retire the balance of the indebtedness to Con-Drain (The said 10 lots are set out in Schedule B which will be forwarded shortly);
3) For the purposes of clarity, it is agreed that the above-mentioned 10 lots in the Third Plan of Subdivision are covered by my client's prior Irrevocable Direction and my Undertaking from the original settlement.

I trust this is satisfactory.

Yours truly,

Jack Greenberg
JG/mmm/2010-023/c10

Suite 204, 181 Eglinton Avenue East, Toronto, Ontario, M4P 1J4 Tel: (416) 485-8833 Fax: (416) 485-3246
E-Mail: jackgreenberg@greenberglawyers.ca

This is Exhibit "E" referred to in

the Affidavit of Nunzio Bitondo

sworn before me, this 17

day of November, 2016

A Commissioner for Taking Affidavits

CV-13-115757-00

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CON-DRAIN COMPANY (1983) LIMITED

Plaintiff

- and -

SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., JACK GREENBERG, 2148990 ONTARIO INC., 2148993 ONTARIO INC., 2147650 ONTARIO INC. 2147681 ONTARIO INC., PUCCINI MORTGAGE CORP., 53 PUCCINI MORTGAGE CORP., 388242 ONTARIO LIMITED, DAPAUL MANAGEMENT LIMITED, NASTELL INVESTMENTS LIMITED and CASTLE LANE DESIGN GROUP INC.

Defendants

NOTICE OF ACTION

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the statement of claim served with this notice of action.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this notice of action is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $3,500.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and $400.00 for costs and have the costs assessed by the court.

Date August 15, 2013

Issued by D. Van Weasen
Local registrar

Address of court office: 50 Eagle St. W.
Newmarket, ON L3Y 6B1

TO: SILVER STREAMS HOMES INC.
103 Naughton Drive
Richmond Hill, ON L4C 8B3

AND TO: SILVER STREAMS HOMES (PUCCINI) INC.
103 Naughton Drive
Richmond Hill, ON L4C 8B3

AND TO: JACK GREENBERG
181 Eglinton Ave. E., Suite 204
Toronto, ON M4P 1J4

AND TO: 2148990 ONTARIO INC.
103 Naughton Drive
Richmond Hill, ON L4C 8B3

AND TO: 2148993 ONTARIO INC.
103 Naughton Drive
Richmond Hill, ON L4C 8B3

AND TO: 2147650 ONTARIO INC.
103 Naughton Drive
Richmond Hill, ON L4C 8B3

AND TO: 2147681 ONTARIO INC.
103 Naughton Drive
Richmond Hill, ON L4C 8B3

AND TO: PUCCINI MORTGAGE CORP.
181 Eglinton Ave. E., Suite 204
Toronto, ON M4P 1J4

AND TO: 53 PUCCINI MORTGAGE CORP.
181 Eglinton Ave. E., Suite 204
Toronto, ON M4P 1J4

AND TO: 388242 ONTARIO LIMITED
181 Eglinton Ave. E., Suite 204
Toronto, ON M4P 1J4

AND TO: DAPAUL MANAGEMENT LIMITED
181 Eglinton Ave. E., Suite 204
Toronto, ON M4P 1J4

AND TO: NASTELL INVESTMENTS LIMITED
181 Eglinton Ave. E., Suite 204
Toronto, ON M4P 1J4

AND TO: CASTLE LANE DESIGN GROUP INC.
181 Eglinton Ave. E., Suite 204
Toronto, ON M4P 1J4

CLAIM

1. The Plaintiff claims:

(a) damages in the amount of $800,000.00 for breach of contract, breach of the personal Undertaking of Jack Greenberg, breach of trust, breach of the *Construction Lien Act* Trust Provisions, breach of fiduciary duty, misappropriation of funds, unjust enrichment, conspiracy, fraud, negligent and fraudulent misrepresentations by the Defendants jointly and severally;

(b) damages in the amount of $800,00.00 for conversion of the said funds misappropriated by the Defendants;

(c) punitive and exemplary damages in the sum of $500,000.00;

(d) an interim and/or permanent Mandatory Order requiring the sum of $800,000.00 be paid into Court from the net proceeds received on closing of the remaining nineteen (19) lots located on the residential project in question. Such net proceeds to be the balance of the purchase price "<u>after payment</u>" of necessary closing legal fees, real estate commissions and mortgage discharge payments to the Bank of Montreal, and shall remain in Court until further Order of this Honourable Court or Consent of the parties herein;

(e) an Order that a Certificate of Pending Litigation be granted in respect of the remaining 19 Lots on the residential project in question, the legal description for same is set forth in Schedule "A" attached hereto;

(f) a declaration that the Defendants hold the misappropriated funds as constructive trustees for the benefit of the Plaintiff;

(g) a declaration that the Defendants hold the Plaintiff's funds in a constructive or resulting trust for the benefit of the Plaintiff;

39

(h) an equitable tracing Order tracing the funds misappropriated by the Defendants;

(i) an Order enjoining and restraining the Defendants from disposing any of the Plaintiff's funds held as constructive trustees by the Defendants for the Plaintiff's benefit;

(j) a declaration that the Defendants have been unjustly enriched at the expense of the Plaintiff by virtue of the misappropriation of funds and must disgorge all funds misappropriated;

(k) pre-judgment and post-judgment interest on the above noted sum from June 26, 2013 in accordance with the terms of the contracts entered into between the parties, or in the alternative, in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(l) costs of the action payable on a full indemnity basis;

(m) any Harmonized Sales Tax which may be payable on any amount pursuant to the *Excise Tax Act*, R.S.C., 1995, c. E-15, as amended, or any other legislation enacted by the Government of Canada; and

(n) such further and other relief as counsel may advise and this Honourable Court may deem just.

2. The Plaintiff proposes that this action be tried in the City of Newmarket, Ontario.

15

August ~~13~~, 2013

Koskie Minsky LLP
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

Jeffrey Long LSUC #: 32602V
Tel: 416-595-2125
Fax: 416-204-2892

Lawyers for the Plaintiff

SCHEDULE "A"

PIN	03206 - 3484 LT LOT 1, PLAN 65M4331; SUBJECT TO AN EASEMENT IN GROSS OVER PTS 1 & 2 65R33105 AS IN LB43081; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3485 LT LOT 2, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3486 LT LOT 3, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3487 LT LOT 4, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3488 LT LOT 5, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3495 LT LOT 12, PLAN 65M4331; SUBJECT TO AN EASEMENT IN GROSS OVER PT 8 65R33105 AS IN YR1611262; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3497 LT LOT 14, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3499 LT LOT 16, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3501 LT LOT 18, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3502 LT LOT 19, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3503 LT LOT 20, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3504 LT LOT 21, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3505 LT LOT 22, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3506 LT LOT 23, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3507 LT LOT 24, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3508 LT LOT 25, PLAN 65M4331; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3418 LT LOT 1, PLAN 65M4249; TOWN OF RICHMOND HILL RICHMOND HILL
PIN	03206 - 3440 LT LOT 23, PLAN 65M4249; SUBJECT TO AN EASEMENT IN GROSS OVER PT 2, 65R32917 AS IN YR1620823; TOWN OF RICHMOND HILL
PIN	03206 – 3441LT LOT 24, PLAN 65M-4249, SUBJECT TO AN EASEMENT IN GROSS PT 3, 65R-32917 AS IN YR1620823, TOWN OF RICHMOND HILL RICHMOND HILL

CON-DRAIN COMPANY (1983) LIMITED Plaintiff	and	SILVER STREAMS HOMES INC. et al. Defendants	Court File No: CV-13-115757-00

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at NEWMARKET

NOTICE OF ACTION

Koskie Minsky LLP
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

Jeffrey Long LSUC #: 32602V
Tel: 416-595-2125
Fax: 416-204-2892

Lawyers for the Plaintiff

41

Court File No.: CV-13-115757-00

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CON-DRAIN COMPANY (1983) LIMITED

Plaintiff

- and -

SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., JACK GREENBERG, 2148990 ONTARIO INC., 2148993 ONTARIO INC., 2147650 ONTARIO INC. 2147681 ONTARIO INC., PUCCINI MORTGAGE CORP., 53 PUCCINI MORTGAGE CORP., 388242 ONTARIO LIMITED, DAPAUL MANAGEMENT LIMITED, NASTELL INVESTMENTS LIMITED and CASTLE LANE DESIGN GROUP INC.

Defendants

STATEMENT OF CLAIM
(Notice of Action issued on August 15, 2013)

1. The Plaintiff claims:

   (a) damages in the amount of $800,000.00 for breach of contract, breach of the personal Undertaking of Jack Greenberg, breach of trust, breach of fiduciary duty, misappropriation of funds, conspiracy, fraud and negligent or fraudulent misrepresentations payable by the Defendants jointly and/or severally;

   (b) a Mandatory Order requiring the sum of up to $800,000.00 be paid into Court or into Trust from the net proceeds received on the remaining nineteen (19) lots located on the project in question, after payment of necessary legal fees, real estate commissions, mortgage payments to the Bank of Montreal and reasonable payments to other trades until further Order of this Honourable Court;

(c) an Order declaring that the Plaintiff has a full priority over all of the Defendants to the $800,000.00 amount referenced in paragraphs 1 (a) and (b) above;

(d) in the alternative, an Order that a Certificate of Pending Litigation be granted in respect of the remaining 19 Lots on the residential project in question located in Richmond Hill, the legal description for same is set forth in Schedule "A" attached hereto;

(e) punitive damages in the sum of $500,000.00;

(f) pre-judgment and post-judgment interest on the above noted sum from June 26, 2013 in accordance with the terms of the Settlement entered into between the parties, or in the alternative, in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(g) costs of the action payable on a full indemnity basis;

(h) any Harmonized Sales Tax which may be payable on any amount pursuant to the *Excise Tax Act*, R.S.C., 1995, c. E-15, as amended, or any other legislation enacted by the Government of Canada; and

(i) such further and other relief as counsel may advise and this Honourable Court may deem just.

THE PARTIES

2. The Plaintiff, Con-Drain Company (1983) Limited (**"Con-Drain"**) is a company incorporated pursuant to the laws of the Province of Ontario and operates as an earthworks and servicing contractor from its head offices in Concord, Ontario.

3. The Defendants, Silver Streams Homes Inc. and Silver Streams Homes (Puccini) Inc. (**"Silver Streams"**) are companies incorporated pursuant to the laws of the Province of Ontario operating as builders and/or developers from their head offices in Richmond Hill, Ontario. At all material times, Silver Streams was the builder and/or developer of the residential homes constructed on the lands in question (the **"Project")**.

4. The Defendants, 2148990 Ontario Inc., 2148993 Ontario Inc., 2147650 Ontario Inc. and 2147681 Ontario Inc. (hereinafter collectively referred to as the **"Registered Owners"**) are companies incorporated pursuant to the laws of the Province of Ontario. At all material times, said companies were and/or are the **"Registered Owners"** of the Project lands. The Registered Owners are companies related to the Silver Streams companies in that they all share the same controlling mind and director/officer, namely, Imran Jinnah (**"Jinnah"**).

5. The Defendant, Jack Greenberg (**"Greenberg"**) is a lawyer residing in the Province of Ontario. At all material times, Greenberg was the lawyer for Silver Streams and the related Registered Owner companies. In addition, Greenberg is an officer, director and a controlling mind of the remaining corporate defendants described in paragraph #6 below.

6. The remaining corporate Defendants, namely, Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited, Nastell Investments Limited and Castle Lane Design Group Inc. (hereinafter collectively referred to as the **"Greenberg Companies"**) are companies incorporated pursuant to the laws of the Province of Ontario and are lenders and/or investors operating from their head offices in Toronto, Ontario. Greenberg is the sole officer and director and/or the controlling mind of the Greenberg Companies and is authorized to bind them.

7. The Greenberg Companies have mortgages registered against the Project, which mortgages are subsequent to a 1st mortgage registered in favour of the Bank of Montreal.

THE FACTS

8. Pursuant to its Contract in the sum of approximately $4.5 million including GST (the "Contract"), Con-Drain provided earthworks, underground services, roads, curbs, asphalt and all related labour and materials to the entire Project, being a residential construction project located in Richmond Hill. Con-Drain's Contract was with Silver Streams Homes Inc. and/or Silver Streams Homes (Puccini) Inc., the builder and developer of the Project.

9. Pursuant to the Contract, Con-Drain carried out its work and completed a substantial portion of same by late 2009. Unfortunately, Silver Streams did not have the funds available to pay Con-Drain for its work and was indebted to Con-Drain in the sum of approximately $2.0 million.

10. In any event, section 4.1 of the Contract required Silver Streams to pay Con-Drain within 15 days of receiving the return of security that Silver Streams had posted with the Town of Richmond Hill in the sum of approximately $1.2 million.

11. Contrary to the Contract provision mentioned above, Silver Steams improperly retained and/or misappropriated the security it received from the Town of Richmond Hill and wilfully neglected to pay said funds to Con-Drain.

12. In light of the above improper actions by Silver Streams, Con-Drain was required to register Claims for Lien in order to protect the substantial amounts owing for work performed on the Project at that time. As such, on February 9, 2010, Con-Drain registered two Claims for Lien against the Project, claiming $998,098.46 and $930,120.27, respectively.

13. Shortly after registration of Con-Drain's Claims for Lien, settlement negotiations took place with Greenberg and Jinnah. In fact, on or about March 31, 2010, a Settlement was entered into between the parties. The Settlement entitled Con-Drain to receive an immediate payment of $550,000.00. In addition, an Irrevocable Direction was provided by Silver Streams and an Irrevocable Undertaking was executed by Greenberg directing

payment to Con-Drain in the sum of $50,000.00 plus interest from each future closing until Con-Drain was paid in full, including interest.

14. In exchange, and as part of the Settlement, Con-Drain agreed to immediately discharge its two Claims for Lien.

15. Con-Drain received the $550,000.00 payment required by the above noted Settlement and began to receive $50,000.00 plus interest on the various closings as they proceeded to take place. In turn, Con-Drain discharged its two Claims for Lien and did so in strict reliance upon the Irrevocable Direction and Greenberg's Undertaking to pay Con-Drain proceeds from each closing.

16. The Settlement was performed by the parties until Silver Streams got into further financial trouble at some point in early 2012. At that time, Jinnah and Greenberg contacted Con-Drain to discuss revising the Settlement terms.

17. In order to assist Silver Streams in continuing to close the homes without undue delay and to avoid litigation, Con-Drain agreed to revise some of the Settlement terms. Part of the revision provided that Con-Drain would be paid $50,000.00 plus interest from the first ten (10) closings of homes constructed on the "Third Plan" of the Project (Plan 3). While doing so would delay payment to Con-Drain, which otherwise would have been paid in full on Plans 1 and 2, Jinnah and Greenberg advised the delay was necessary due to various financing issues with the first mortgage registered in favour of Bank of Montreal.

18. Con-Drain at all material times relied on the representations made by the Defendants that Con-Drain would receive the balance of funds owing from the first ten (10) closings on Plan 3. But for these representations, Con-Drain would not have agreed to the deferral in payment from the Plan 1 and 2 sales.

MISAPPROPRIATION OF FUNDS BY GREENBERG/JINNAH ET AL

19. From the commencement of the original Settlement in late March, 2010 until mid-March, 2013, there were approximately thirty-four (34) lots that closed from which Con-Drain received the required $50,000.00 payment along with applicable interest. All of those payments were made from Greenberg's trust account as required by the Settlement, the Irrevocable Direction and Greenberg's personal Undertaking.

20. Con-Drain pleads and relies upon the Settlement, the Irrevocable Direction and Greenberg's Undertaking as well as representations from Jinnah and Greenberg to comply with the terms of the Settlement in order to ensure full payment to Con-Drain. To that end, Con-Drain states the Defendants specifically owe a fiduciary duty, duty of care and are constructive trustees in respect of that portion of the closing proceeds payable to Con-Drain under the Settlement.

SECRET CLOSINGS AND DEFENDANTS' BREACHES

21. In April, 2013, Con-Drain inquired as to when the next set of closings were taking place as it was expected there would be numerous closings in the summer of 2013. Neither Jinnah nor Greenberg ever advised Con-Drain about the future closing dates.

22. Totally by coincidence, in late July it came to Con-Drain's attention that one of the lots in the Project had closed earlier that month. However, Con-Drain never received the Settlement payment and/or interest from Greenberg's office in respect of that closing.

23. Con-Drain immediately contacted Silver Streams/Jinnah and was advised that nine (9) or ten (10) lots had closed in June and July but that Greenberg had unilaterally decided no amount would be paid to Con-Drain notwithstanding the Irrevocable Direction from Silver Streams/Jinnah and Irrevocable Undertaking from Greenberg.

24. Con-Drain states the failure and/or intentional decision not to pay Con-Drain from the June and July, 2013 closing was a direct breach of the Irrevocable Direction, Irrevocable Undertaking and the Settlement obligations to pay Con-Drain.

25. In light of the above breaches and non-payment, Con-Drain demanded a meeting with Jinnah and Greenberg, which meeting was held at Con-Drain's offices on or about August 6th.

26. At the meeting, Greenberg admitted that funds were paid to the "Secondary Lenders" i.e. the Greenberg Companies who have mortgages registered "after" the Bank of Montreal's first mortgage. In fact, the Greenberg Companies received approximately $1.2 million dollars from the nine (9) secret closings, and other trades received over $800,000.00. Con-Drain received nothing.

27. Con-Drain states the above noted distribution of closing proceeds by the Defendants was a breach of the Settlement, a breach of trust, a breach of Greenberg's Undertaking and a breach fiduciary duty owed by Silver Streams and Greenberg to Con-Drain.

28. In addition, Con-Drain states that in light of all the above, Con-Drain has full priority over all of the Defendants to the $800,000.00 amount and seeks payment of same from the Defendants, jointly and/or severally.

BALANCE OWING TO CON-DRAIN

29. The balance presently owing to Con-Drain as of July 31, 2013, was the sum of $678,176.88 plus interest of $116,704.80 for a total owing in the sum of **$794,881.68.**

30. Of the above noted amount the sum of $94,836.71 relates to work recently performed by Con-Drain and approved by Silver Streams' engineer. In order to further protect Con-Drain's rights, on August 9, 2013, Con-Drain registered a Claim for Lien against eighteen (18) of the remaining lots in the sum of $94,836.71 and also registered a Notice against title to those lots.

31. Con-Drain believes that in light of the Settlements entered into with the parties herein along with the Irrevocable Direction from Silver Streams/Jinnah and the personal Undertaking of Greenberg, Con-Drain has an interest in the remaining lots up to the amount owing to Con-Drain and/or a constructive trust claim for that amount. Con-Drain has sought an Order requiring the amount owing be paid into Court or into Trust from the remaining closings so it can be protected and so as to prevent any further breaches and/or misuse of the closing proceeds by the Defendants.

32. In the alternative, Con-Drain seeks an Order for a Certificate of Pending Litigation in regards to the remaining lots.

CONCLUSION

33. Con-Drain also states the improper distribution of closing proceeds by Greenberg, Silver Streams and/or Jinnah from the nine (9) secret closings of over $1.2 million to the Greenberg Companies and over $800,000.00 to "other trades" instead of paying Con-Drain was a flagrant and intentional breach of the Settlement, breach of trust, breach of fiduciary duty and breach of duty of care for which those Defendants are jointly and/or severally liable.

34. Furthermore, Con-Drain states it has priority and is entitled to be paid in priority to the mortgages registered by the Greenberg Companies as Con-Drain began performing its work and entered into to the terms of the Settlement "prior to" the advances made by the Greenberg Companies. As a result, it is Con-Drain's position that all amounts still owing to it have priority to the Greenberg Company mortgages.

35. In addition, Greenberg's Undertaking is binding on the Greenberg Companies, who are identified in law with Greenberg and who are impressed with his knowledge and are liable for his wrongful conduct.

36. In addition or in the alternative, Con-Drain states the aforementioned amounts up to $800,000.00 are Trust Funds pursuant to the Trust provisions of the Construction Lien Act, R.S.O. 1990, c.C.30 and therefore payable to Con-Drain in priority to all of the Defendants.

37. In the further alternative, Con-Drain states the Greenberg Companies, which received approximately $1.2 million from the 9 secret closings in June and July, 2013, are constructive trustees in regards to those amounts and are holding those funds in trust for Con-Drain. As a result, all such funds must be repaid to Con-Drain up to the sum of $800,000.00 on the basis that same were clearly distributed to the Greenberg Companies in breach of the constructive trust and fiduciary duty owed to the Plaintiff by Silver Streams, Greenberg and/or the Greenberg Companies.

38. The Plaintiff proposes that this action be tried in the City of Newmarket, Ontario.

September 3, 2013

Koskie Minsky LLP
20 Queen Street West, Suite 900, Box 52
Toronto, ON M5H 3R3

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Lawyers for the Plaintiff

TO: SILVER STREAMS HOMES INC.
SILVER STREAMS HOMES (PUCCINI) INC.
2148990 ONTARIO INC.
2148993 ONTARIO INC.
2147650 ONTARIO INC.
2147681 ONTARIO INC.
c/o Stephen Schwartz
Chaitons LLP
5000 Yonge Street, 10th Floor
Toronto, ON M2N 7E9

AND TO: JACK GREENBERG
PUCCINI MORTGAGE CORP.
53 PUCCINI MORTGAGE CORP.
388242 ONTARIO LIMITED
DAPAUL MANAGEMENT LIMITED
NASTELL INVESTMENTS LIMITED
181 Eglinton Ave. E., Suite 204
Toronto, ON M4P 1J4

SCHEDULE "A"

PIN 03206 - 3484 LT
LOT 1, PLAN 65M4331; SUBJECT TO AN EASEMENT IN GROSS OVER PTS 1 & 2 65R33105 AS IN LB43081;
TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3485 LT
LOT 2, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3486 LT
LOT 3, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3487 LT
LOT 4, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3488 LT
LOT 5, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3495 LT
LOT 12, PLAN 65M4331; SUBJECT TO AN EASEMENT IN GROSS OVER PT 8 65R33105 AS IN YR1611262; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3497 LT
LOT 14, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3499 LT
LOT 16, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3501 LT
LOT 18, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3502 LT
LOT 19, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3503 LT
LOT 20, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3504 LT
LOT 21, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3505 LT
LOT 22, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3506 LT
LOT 23, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3507 LT
LOT 24, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3508 LT
LOT 25, PLAN 65M4331; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3418 LT
LOT 1, PLAN 65M4249; TOWN OF RICHMOND HILL
RICHMOND HILL

PIN 03206 - 3440 LT
LOT 23, PLAN 65M4249; SUBJECT TO AN EASEMENT IN GROSS OVER PT 2, 65R32917 AS IN YR1620823; TOWN OF RICHMOND HILL

PIN 03206 – 3441LT
LOT 24, PLAN 65M-4249, SUBJECT TO AN EASEMENT IN GROSS PT 3, 65R-32917 AS IN YR1620823, TOWN OF RICHMOND HILL
RICHMOND HILL

CON-DRAIN COMPANY (1983) LIMITED
Plaintiff

and

SILVER STREAMS HOMES INC. et al.
Defendants

Court File No: CV-13-115757-00

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at NEWMARKET

STATEMENT OF CLAIM
(Notice of Action Issued August 15, 2013)

Koskie Minsky LLP
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Toronto, ON M5H 3R3

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Tel: 416-595-2125
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Lawyers for the Plaintiff

52

This is Exhibit "F" referred to in

the Affidavit of Nunzio Bitondo

sworn before me, this 17

day of November, 2016

A Commissioner for Taking Affidavits

Court File No. CV-13-115757-00

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CON-DRAIN COMPANY (1983) LIMITED

Plaintiff

- and -

SILVER STREAMS HOMES INC.,
SILVER STREAMS HOMES (PUCCINI) INC., JACK GREENBERG,
2148990 ONTARIO INC., 2148993 ONTARIO INC.,
2147650 ONTARIO INC., 2147681 ONTARIO INC.,
PUCCINI MORTGAGE CORP., 53 PUCCINI MORTGAGE CORP.,
388242 ONTARIO LIMITED, DAPAUL MANAGEMENT LIMITED,
NASTELL INVESTMENTS LIMITED, CASTLE LANE

Defendants

This is the Cross-Examination of IMRAN JINNAH, herein, on his Affidavit sworn September 9, 2013, held at Network North Reporting & Mediation, 25 Sheppard Avenue West, Suite 1200 Toronto, Ontario, M2N 6S6, on September 18, 2013.

APPEARANCES:

Jeffrey J. Long — For the Plaintiff

Stephen Schwartz — For the Defendants, Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148990 Ontario Inc., 2148993 Ontario Inc., 2147650 Ontario Inc. and 2147681 Ontario Inc.

Christos Papadopoulos — For the Defendants, Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited, Nastell Investments Limited, Castle Lane

Observer: Jack Greenberg

INDEX OF PROCEEDINGS

UNDERTAKINGS ARE NOTED ON THE FOLLOWING PAGES: 7, 8, 10, 17, 18, 27, 31, 32
THERE WERE NO UNDER-ADVISEMENTS, REFUSALS OR EXHIBITS NOTED

D I S C L A I M E R

NOTE: The above-noted indices are provided for ease of reference only and are not to be relied upon in any manner whatsoever by the parties hereto or any third party.

--- WHEREUPON PROCEEDINGS COMMENCED At 1:10 P.M.

IMRAN JINNAH, AFFIRMED

CROSS-EXAMINATION BY MR. LONG:

1 Q. Please state your full name for the record?

A. Imran Jinnah.

2 Q. And you swore an Affidavit in regards to these proceedings. Correct?

A. Yes.

3 Q. And do you have a copy of that Affidavit with you today?

A. Yes.

4 Q. Did you swear that Affidavit on September 9, 2013, if you would take a look at the signing page?

A. Yes.

5 Q. Did you read that Affidavit and the contents of that Affidavit before you signed it?

A. Yes, that's correct.

6 Q. It's your position today that the contents of that Affidavit are accurate?

A. Yes, they are.

7 Q. Just so we can clarify. There are a number of Defendants, in this proceeding?

A. Yes.

8 Q. I'll go through the Defendants to just clarify for the record which ones you're here

representing: Silver Streams Homes Inc.?

A. Yes.

9 Q. What is your position of that company?

A. I'm the owner of that company. I have a hundred per cent of those shares.

10 Q. Are you the sole officer and director?

A. Yes.

11 Q. The next company Silver Streams Homes (Puccini) Inc.?

A. I'm the owner of that company, also.

12 Q. And you are the sole officer, director and shareholder of that company?

A. Yes, I am.

13 Q. The next company, Defendant, is 2148990 Ontario Inc. Are you the sole officer, director and shareholder of that company?

A. Yes, I am.

14 Q. And the next company is 2148993 Ontario Inc. Are you the sole officer, shareholder and director of that company?

A. Yes, I am.

15 Q. The next one is 2147650 Ontario Inc. Are you the sole officer, director and shareholder of that company?

A. Yes, I am.

16 Q. And the next company defendant is 2147681 Ontario Inc. Are you the sole officer, director and shareholder of that company?

A. Yes, I am.

17 Q. Are you an officer, director or shareholder of any of the other corporate Defendants?

A. No, I'm not.

18 Q. Just for the record, because there are a lot of Defendants, counsel, what I'd like to do is for the two Silver Streams companies I'm going to refer to them as the "Silver Streams companies." And for the four companies that start with 214 Ontario Inc., I'll call them the "214" companies. If I need to refer to any companies specifically, I'll do so. But, otherwise, we'll use the names the Silver Streams companies for the two Silver Streams Defendants; and, the 214 companies for the two 214 Ontario Inc.?

A. No problem.

19 Q. And am I correct to understand that the corporate offices for the Silver Streams companies and the 214 companies is the 103 Naughton Drive address in Richmond Hill?

A. That's correct.

20 Q. Is that your home address?

A. It used to be a principal residence.

21 Q. Is it a home or is it an office?

A. It's a home.

22 Q. I'd like to turn you, sir, to paragraphs 7 and 9 of your Affidavit. Why don't you take a moment to read those?

A. Okay.

23 Q. So in there you acknowledge that Silver Streams received $1.2 million from the Town of Richmond Hill. Correct?

A. That's correct.

24 Q. And that was in late 2009, that's what it says?

A. Yes. Okay.

25 Q. November/December, 2009?

A. Yes, that is correct.

26 Q. And you agree with me, sir, that Silver Streams contract with Con-Drain requires those amounts to be paid to Con-Drain within 15 days of their being received by Silver Streams?

A. I don't have that contract in front of me, but I have to look at that to confirm that.

27 Q. Would you undertake to look at the contract?

A. Yes, I do.

--- UNDERTAKING

MR. PAPADOPOULOS: You just have the first few pages, counsel, if that is what you are looking for?

MR. LONG: I think it's in my client's material.

MR. SCHWARTZ: I think it's only the first two pages.

BY MR. LONG:

28 Q. You'll undertake to review the contract and advise me if you agree that the $1.2 million received from Richmond Hill is to be paid to Con-Drain within 15 days of being received by Silver Streams?

A. Yes, I will undertake to do that.

--- UNDERTAKING

BY MR. LONG:

29 Q. And you'll agree with me in late 2009 when Silver Streams received the $1.2 million from the town it did not pay that amount to Con-Drain, at that time?

A. Yes, it did not.

30 Q. It did not. And, in fact, in about February of 2009 Con-Drain registered claims for lien against the property. Is that correct?

A. That's correct.

31 Q. You go on in paragraph 7 of your Affidavit near the end of the paragraph: Silver Streams paid Con-Drain $500,000 from those funds. I haven't asked the

question yet. Do you see that?

A. Yes.

32 Q. That $500,000 that you say was paid to Con-Drain wasn't paid until March or April, 2010 after Con-Drain registered its claim for lien, correct?

A. That's correct, it was part of the deal.

33 Q. It was part of the March 2010 settlement?

A. Yes.

34 Q. But you didn't pay Con-Drain the $500,000 before they registered their claim for lien in February, 2009?

A. That's correct.

35 Q. And then in paragraph 9 you say (as read): The remaining funds received from the town were used by Silver Streams to pay for necessary project-related expenses. So they weren't used to pay Con-Drain, correct?

A. Yes. They were not paid to Con-Drain, at that time.

36 Q. $1.2 million you received, you are saying $500,000 was paid to Con-Drain; the other $700,000 was not paid to Con-Drain?

A. Yes, that's correct.

37 Q. And you say it was used to pay necessary related expenses. What expenses did you use?

A. We used that to pick up the Building Permits; pay the levies to the town and pick up the Building Permits.

38 Q. When you say, "we?"

A. I use the term "we" generally. It's me. I made the decision to pay the levies, to pick up the Building Permits and to the Town of Richmond Hill.

39 Q. And when was that done?

A. I have to get the exact date. I think it was between November and February, somewhere around that time. I have to, again, look at my records and let you know exactly which date we paid.

40 Q. So between November, 2009 and February, 2010 is when you used the $700,000 from the Town of Richmond Hill?

A. Yes.

41 Q. Would you just undertake to check your records to confirm those dates are accurate?

A. I'll confirm.

--- UNDERTAKING

BY MR. LONG:

42 Q. And did you discuss the use of those $700,000 for those purposes with your counsel, Mr. Greenberg?

A. No. He was not available, at that time. We hadn't discussed it with him.

43 Q. Did any of the $700,000, the balance of the $1.2 million from the town, was any of that paid to the Bank of Montreal or to any of the secondary lenders, the other Defendants, in this proceeding?

A. No.

44 Q. Why was it that you didn't discuss this $1.2 million received from the town with Mr. Greenberg?

A. There was no need to. I mean, I did not need his legal counsel to make a business decision.

45 Q. What about the $500,000 that you received from the town at the time in November/December, 2009? You say you paid $500,000 to Con-Drain in March or April of 2010. But what did you do with the $500,000 when you received it from the town, forget the $700,000?

A. It was sitting in the bank account.

46 Q. Just sitting in the bank. And you didn't discuss with Mr. Greenberg your contractual obligations to pay that money to Con-Drain?

A. No, I did not seek his legal advice.

47 Q. If you would take a moment and just read paragraphs 10, 11 and 12 of your Affidavit?

A. Okay, I read it.

48 Q. Let's just go to the pleadings for a second, the style of cause. Can you turn to the front page. The other Defendants that I haven't referenced yet, I'm going

to reference them now, there are six other corporate Defendants. And I'll just reference them for the record. It's Puccini Mortgage Corp., 53 Puccini mortgage Corp., 388242 Ontario Limited, DaPaul Management Limited, Nastell Investments Limited and Castle Lane Design Group Inc., do you see those?

A. Yes, I saw them.

49 Q. You said you are not an officer, director or shareholder of any of those companies?

A. Yes.

50 Q. For the record, and just for ease of reference, counsel, I am going to, I think it's referenced in the materials, call those corporate defendants the "secondary lenders." Who brought the secondary lenders to you to invest in the project?

A. We are talking about 2008 financial emergency. What was happening I was getting some funds from Harbour Mortgage, which is a western Canadian company, and they were going to give us money to carry on with the project and the financial crisis happened. In fact, five years ago to the date Lehman Brothers, and all those things, and all the lenders walked away and I was in a desperate situation to move the project along. And, at that time, you know, I made everybody aware that I needed funds, not only Mr. Greenberg but everybody that, you know, I'm desperate for funds and I was knocking at everybody's doors. And at that time he helped me with the first mortgage, at that time.

51 Q. When you say he "helped" you with the first mortgage?

A. He had some investors and he put the deal together.

52 Q. So that was my question: Was it Mr. Greenberg who brought you these secondary lenders, who introduced you to them and who brought them to the table?

A. I never actually met any of the investors, so I've never really met any of the investors to date.

53 Q. So is Mr. Greenberg your main contact on behalf of the investors, the secondary lenders?

A. Yes. He represents from the investor side. He is my main contact.

54 Q. You've never met them?

A. I never met them.

55 Q. When you are dealing with the secondary lender group, you're dealing through Mr. Greenberg. Is that correct?

A. That's correct.

56 Q. And he's also counsel for the secondary lender group and he's the representative that you deal with?

A. I'm not sure if he's counsel for them. He was handling the situation for them.

57 Q. And when you were negotiating the mortgage terms with the secondary lenders were you dealing with Mr. Greenberg on that basis?

A. Yes.

58 Q. In those negotiations was he also your lawyer, as well as the representative for the secondary lenders?

A. As far as all the borrowing is concerned, second, third, fourth, which you are representing second mortgages, I had independent legal advice. So I was seeking independent legal advice from another lawyer.

59 Q. Who is that?

A. Michael Wade.

60 Q. W-A-D-E?

A. W-A-D-E, yes. I'm pretty bad at spelling, so I will confirm that.

61 Q. You said you're not sure whether Mr. Greenberg is counsel for the secondary or was counsel for the secondary lenders when you were negotiating the mortgages?

A. Yes. So it was one thing representing them, you know putting the deal together. But I don't know if he was their legal counsel. That's why I say I'm not sure about that fact.

62 Q. As far as you knew he was their agent, the person negotiating for the secondary lenders. But you don't know if he was also their legal representative?

A. Yes, I was not aware of that.

63 Q. Did you know at the time that Mr. Greenberg was the president or an officer and director of those secondary lender companies?

A. I never looked at the Articles of Incorporation of those companies. So I know he was the signing authority, like he was signing on those things. But I'm not sure what percentage of the shares he owned, or was he the owner. I never asked for the ownership documents.

64 Q. Did Mr. Greenberg ever tell you that he was present of the secondary lender companies, that he was an officer and director?

A. He was signing, but I'm not aware in what capacity he was signing. I knew he was representing those people. It never occurred to me to ask him. But I was more concerned in getting the funds to run the project than anything else.

65 Q. So that's whether you asked him. I'm asking you whether he told you he was the president of those companies?

A. I don't recall, sir.

66 Q. Do you know if Mr. Greenberg is one of the investors or shareholder of those secondary lender companies?

A. That information was not given to me. What I received was a lump sum number. I never knew who the investors were, what the percentage of shares were. None of that information was given to me for any of the loans that was registered in those mortgages. And I was not interested in that, either.

67 Q. Please look at paragraph 8 of your Affidavit. You say in paragraph 8 that Con-Drain was to complete its contract work in approximately six weeks. Is that set out in the contract with Con-Drain anywhere?

A. There was a bar chart developed by the engineer. To give you a little bit of background, we worked with Masong Song, who was the engineer, who developed the scope of work based on which Con-Drain quoted. The contractual work wasn't supposed to go on more than six weeks. Con-Drain started the work.

68 Q. Does it say that in the contract?

A. I'm not sure, I have to look at the contract.

69 Q. I would suggest to you, sir, that the contract schedule, the construction schedule, provides that the contract works will take approximately one year.

Do you know that to be correct, or you don't recall?

A. I have to look at that.

70 Q. Would you undertake to look at Silver Streams' contract with Con-Drain, specifically the construction schedule, and to advise me the time line that it sets out for the completion of the Con-Drain's work?

A. Okay. I will undertake that.

--- UNDERTAKING

BY MR. LONG:

71 Q. And you don't recall whether that time line says that it's approximately one year for that work to be completed or not?

A. I recall the six weeks because it was developed by the engineer, we worked it out. And the engineer was supervising the whole thing. To be honest, if Con-Drain was supposed to take such a long time I would not have given the contract to Con-Drain.

72 Q. Was it your belief at the time when you entered into the contract with Con-Drain that four and a half million dollars of servicing work would be completed in six weeks?

A. Some of the work was internal, some of the work was external. You know, you had to urbanize Puccini. And that work has nothing to do with us registering the Agreement and getting our Building Permits. That work Con-Drain could have taken another two years, that would have delayed our project. But what happened was that the internal work, which wasn't very extensive, the site is very efficiently designed, there is only if you look at the lay out for the detached homes it's not a bunch of roads going in, it's very simple, it's only two roads criss-crossing. So if you look at the monetary terms, part of it was outside, part of it was inside and it was very efficiently designed for the work to be finished. And I do believe if Con-Drain had kept up with the manpowers they had initially provided and not take it out to their own projects because the market had picked up, this work would have been finished and I would not have been in this problem.

73 Q. You've undertaken to review the contract, provide me with what it says in regards to the construction time line for the completion of Con-Drain's work?

A. I undertake that. And I will also try to find the engineer's bar chart, also, it should be in the house.

--- UNDERTAKING

BY MR. LONG:

74 Q. Sure. I want to move closer to this time

frame, to 2013 now. Is it true, sir, that you told Nunzio Bitondo that in regards to the closings which took place in June and July of 2013 it was Mr. Greenberg who decided how those closing proceeds are being distributed. Did you tell that to Mr. Bitondo?

A. I did not say it in those words.

75 Q. What words did you say it to Mr. Bitondo?

A. The closing proceeds were distributed according to the contract which was signed with Con-Drain. So the primary lender, the Bank of Montreal, gets paid first. The secondary mortgages get paid. And then the net proceeds come to me out of which I'm supposed to pay Con-Drain. Now, when we signed the deal with Con-Drain there was enough profit in the project to satisfy the primary lender, the Bank of Montreal, the secondary lenders and also to pay Con-Drain. Because the project was delayed to such an extent that amount started depleting at the last end we were not being able, because there was no money coming to us that we could pay Con-Drain. That's why the money was not given to Con-Drain.

76 Q. Don't you agree in April of 2012 your settlement with Con-Drain was revised, such that Con-Drain was now going to get $50,000 plus interest on the first ten closing on Plan 3? That's the revised

agreement, correct?

A. Yes, that's correct.

77 Q. And I assume that was done on the basis that things were changed; you were having some financial difficulties in 2012 so that Con-Drain couldn't get paid on some of the Plan 2 or Plan 1 closings. And you moved the final payments to Con-Drain to be paid from Plan 3. Correct?

A. No. The Phase 2, the ten closings which were the first from Phase 2 were mostly done because the Bank of Montreal decided, to my surprise, to keep $75,000 from each closing as cash collateralization. That threw our numbers off drastically, because we were anticipating getting those $75,000. Because the bank was also secured in Phase 3 them to cash collateralize the LC in the end, which they had done for us in the previous. So when we started closing the Phase 2 homes the bank, and to my surprise, decided: Okay, we're going to be $75,000 from every closing. That threw our numbers off totally.

78 Q. So you went to Con-Drain and you revised the Agreement, right?

A. Yes. What had happened, also, to give you the whole picture, our deal with Con-Drain was to pay them $50,000 for every closing, according to the Agreement.

79 Q. Plus interest?

A. Plus interest.

80 Q. You said the "Agreement," just for the record, that's the March, 2010 Agreement?

A. That is the March, 2010 Agreement. Before I went to Nunzio about a week or two weeks, Nunzio will confirm that when he comes in today, I paid a million dollars lump sum to Con-Drain through a Bank of Montreal refinancing bringing their loan down drastically to a very smaller amount. That was the basis that -- you know, because this was a money that Con-Drain was not even thinking about getting; they were thinking about getting all the money on the closing of the homes. This million dollars was an accelerated payment from our side to Con-Drain.

81 Q. And it was part of the re-negotiations?

A. No, it was not part of the negotiations. I first gave the million dollars without anything. And then as a request I went to Nunzio, as a request, which he agreed based on a performance. And, for the record, when we did the deal with Con-Drain we owed them $3.2 million, something like that, we brought it down to $600,000 after which $885,000 was additional work done by Con-Drain. And $111,000 was the interest secured, which comes to around $800,000 outstanding.

82 Q. Right. And that is the amount outstanding today?

A. So our performance was extremely good from $3.2 million to $600,000, we had shown that we were paying them down. So once I had paid a million dollars, which was not supposed to be paid and which could have been paid to the second mortgagees which they were gracious about for it to go to Con-Drain, then I went to Nunzio: No conditions, it was not a give or take.

83 Q. Why do you say that the second mortgagees were gracious to let the million dollars go to. You say you never spoke to the second mortgagees?

A. What I mean Jack Greenberg, the representative.

84 Q. So Jack Greenberg told you it's okay to pay that million dollars to Con-Drain?

A. He agreed to that payment. When the Bank of Montreal gave us the million dollars he agreed not to take it to the second mortgagees but for Con-Drain to get it.

85 Q. Thank you. But let's be clear. You agree with me that under the Con-Drain contract, Con-Drain is not supposed to get paid under these lot closings. There was no contract term --

MR. SCHWARTZ: Sorry, you said, "under the

Con-Drain contract." Do you mean under the contract settlement?

BY MR. LONG:

86 Q. The construction contract. It wasn't negotiated anywhere in that contract with Silver Streams that Con-Drain was to get paid on closing of the lots, right, that wasn't the deal?

A. I agree.

87 Q. Con-Drain is supposed to get paid as they do their work. They submit their draws, Masong Song approves it and they get paid, right, that is the contract term for payment?

A. No. Con-Drain had given us a delayed payment, at that time. You can confirm that were Nunzio.

88 Q. I'll let your counsel ask him the questions. Thank you?

A. But Con-Drain was willing to not get cash payment as per their invoices, but give me a credit term. Now the credit term was either six months or one year, I don't recall but I could check my documents.

89 Q. That is in the contract?

A. That is in the contract or in the email. It can be confirmed by the engineer.

90 Q. I'm talking about the original contract terms?

A. I'm talking about the total overall discussion.

MR. SCHWARTZ: He asked two different questions. Just listen to his question.

THE DEPONENT: I am not sure. I have to look at the contract.

BY MR. LONG:

91 Q. We know from the original contract that Con-Drain is supposed to get, I'm telling you, my read of the contract is that Con-Drain is supposed to get $1.2 million when it comes back from the Town of Richmond Hill. I'm also asking you, maybe you need to undertake to look at that contract to see whether Con-Drain was to get paid on regular draws or whether it was supposed to get paid from closings? I suggest to you, sir, it was not set up under that Agreement that Con-Drain be paid in this format that has evolved under these negotiations that money be paid on closing, that was something that was negotiated as this project evolved?

A. That I agree.

92 Q. Perhaps just put it to the witness, counsel, in fairness. In the Plaintiff's Motion Record at tab H?

MR. SCHWARTZ: In the first one?

BY MR. LONG:

93 Q. The Plaintiff's original Motion Record, tab 8, is what I'm calling the "revised settlement" with Con-Drain with the terms set out in Mr. Greenberg's letter of April 16, 2012. Have you seen that letter before?

A. What is the date on this?

94 Q. It says in the top right-hand corner: April 16, 2012.

A. It is small.

95 Q. Yes, it is small. Do you recall seeing this letter agreement back in April, 2012?

A. Yes, I've seen this letter.

96 Q. And this is the result of the negotiations in March or April, 2012 with Con-Drain and yourself and Mr. Greenberg; this was what I'm calling the "revised settlement" on how the balance of funds owing to Con-Drain would be paid. Is that correct?

A. That's correct.

97 Q. That's your understanding?

A. Yes. That's correct.

98 Q. I'll go back. We were talking about the proceeds paid on the June and July, 2013 closings. Who decides how much gets paid to the particular trades, how is that decided and who decides that?

A. Who decides what gets paid to the trades?

99 Q. On the closings that happened already? In the nine closings in June and July, 2013, who decides and how is it decided what amount gets paid or got paid to the various trades on those closings?

A. So the trades get paid while the construction is being done. So they don't wait until the end. Some of the payment gets paid in the end.

100 Q. What funds are being used to pay the trades on an ongoing basis?

A. Throughout this project Bank of Montreal has provided construction financing for Phase 1, Phase 2 and Phase 3. So the entire construction part of the thing goes through the cost consultant to a request for draw, and the Bank of Montreal then provides a request for draw with a holdback and from those funds we pay the contractors.

101 Q. And the Bank of Montreal is retaining the holdback of that construction financing?

A. Yes, the Bank of Montreal follows the guidelines as per the term sheet.

102 Q. What is the construction financing holdback presently maintained by the Bank of Montreal, how much is that today?

A. I will have to check.

103 Q. Will you undertake and advise me as to what's

the, I guess it's the 10% statutory holdback that's been retained by the Bank of Montreal on the construction financing as close to today as you can ascertain. Would you provide me with that?

A. I can provide you with that.

--- UNDERTAKING

BY MR. LONG:

104 Q. And when does that get paid out to you?

A. Actually, this is a little weak. This depends on the cost consultant, when he makes the report. It depends on what he advises the bank and how much time has elapsed. So I have to check on how that's done.

105 Q. Would you let me know how and when that amount is to be paid?

A. I will look into that and I will find that out.

--- UNDERTAKING

BY MR. LONG:

106 Q. Thank you. Just for clarifying the undertaking: To advise, speak to your cost consultant or the bank, check your documents and advise me when the 10% statutory holdback amount being retained by the Bank of Montreal is to be released to Silver Streams?

A. Okay.

107 Q. And I understand that on the nine closings

that took place in June and July of 2013 which, just for the record, those were all on Plan 3. Correct?

A. That's correct.

108 Q. And were those the first nine closings on Plan 3?

A. That's correct.

109 Q. The secondary lenders were paid certain amounts from those closings. Correct?

A. That's correct.

110 Q. And who decided how much and which secondary lenders would be paid on those land closings, was it you or was it Mr. Greenberg?

A. So each mortgage, the second mortgage, the third mortgage, as you are calling it the "secondary lenders" was supposed to get a stipulated amount from the closings. There was not enough money even to pay the entire committed amount to the secondary lenders to get the clearance.

111 Q. When? For these nine closings?

A. Yes. Because what the bank does is they take accelerated payments against the land. So whatever they've advanced towards the land they don't divide it by the number of lots and they take it; they accelerate the payments taking their money upfront, which creates a cash shortage in the front and a cash excess in the end.

That's how the banks do it.

112 Q. So there will be less money taken by the bank on the final closings?

A. They will be actually paid off. So what the bank does is if there are 25 homes being built, they won't be paid out on the last lot, they want to be paid out by the 16, 17th lot from the land part. So there was a shortage even to pay the secondary lenders, the secondary mortgagees. Now, if the secondary mortgages would not have consented to allow us to close we would not have even be able to close these transactions.

113 Q. And who did you speak to to negotiate the amounts to be paid to the secondary lenders on these nine closings?

A. The goal of --

114 Q. No, who did you speak to?

A. Well, Mr. Greenberg and me, you know, we're in touch. And I was aware that there's not enough money.

115 Q. So you on your behalf and Mr. Greenberg on behalf of the secondary lenders, that's who discussed what amounts would be paid to the secondary lenders from these nine closings on Lot 3?

A. I did not direct: Okay, this is going to go to this much and this is going to go to this much. I did not do that direction.

116 Q. Who did that, who decided who was going to get paid?

A. I'm not aware how the transaction transpired. I'm not aware of the detailed mechanics of the final amount, how it was done.

117 Q. So do you not know how much from each of these land closings was paid to which of the secondary lenders, "yes" or "no?"

A. No.

118 Q. That was done by Mr. Greenberg?

A. Yes.

119 Q. Did he not provide you with a report after the closing, who got paid what monies?

A. From each of the?

120 Q. From those nine closings?

A. He always provides a report after the closing, maybe two or three or four days. I don't read everything.

121 Q. Would you undertake to provide me with the reports of which secondary lenders got paid what amounts on these nine closings from June and July, 2013?

A. I will undertake to do that.

122 Q. Thank you. I'm not asking you to produce something. I'm just saying: Find the reports you got

from Mr. Greenberg and produce copies of those?

A. Okay.

--- UNDERTAKING

BY MR. LONG:

123 Q. Do you know if the secondary lenders were paid a particular amount on each of the closings that took place on Plans 1 and 2?

MR. SCHWARTZ: Sorry. Can you say that again?

BY MR. LONG:

124 Q. The secondary lenders' mortgages were also registered on Plans 1 and 2 as well as Plan 3. Correct?

A. That's correct.

125 Q. Most of the closings for Plans 1 and 2 have taken place already, correct?

A. Except two.

126 Q. And I'm asking you: Were the secondary lenders paid certain amounts from closings of the lots on Plan 1 and Plan 2?

A. I have to check that. I have to verify that, how that deal was done. How the closings were done.

127 Q. Because those closings have taken place?

A. Those closings have taken place.

128 Q. I'm wondering were certain parts of the closing proceeds paid to the secondary lenders on the

Plan 1 closings and the Plan 2 closings?
A. I will check that.
129 Q. Will you undertake to check your records and let me know?
A. I do.
--- UNDERTAKING
BY MR. LONG:
130 Q. As far as you're aware, when did the secondary lender mortgages go into default?
A. February of this year.
131 Q. What happened?
A. Well, basically the tenure expired and we are in default of all the mortgages as of February of this year.
132 Q. If that's the case, you know the Notices of Power of Sale were issued or served on August 12th, right? You received copies of those?
A. Yes. The Power of Sale was issued on August 12th. Yes.
133 Q. But you're saying the mortgages went into default in February?
A. Yes.
134 Q. Do you know why Power of Sale notices weren't issued back in February?
A. We did receive notices that the mortgages

have expired.

135 Q. Yes?

A. But it goes to the advantage of the lenders for the project to complete, for the closings to happen so they can get paid out.

136 Q. Right?

A. So all of us, myself and Mr. Greenberg, understood that we have to close the homes for the bank to get paid down and then the mortgages to get paid down. And that's why the corporation was there.

137 Q. It was agreed back in February of 2013 that even though the mortgages had expired or were in default that you'd would hold off on enforcing, or the secondary lenders would hold off on enforcing the mortgages to allow the homes to be completed and sold and then for the sale proceeds to flow. Is that correct?

A. Yes, that's correct.

138 Q. Is that confirmed in some agreement the terms of that extension?

A. No.

139 Q. It's just a verbal discussion between yourself and Mr. Greenberg, correct?

A. You can say it's a discussion, or it's the only logical.

140 Q. It's an agreement that you had a discussion

about, and you agreed to hold off -- or, sorry, the secondary lenders agreed to hold off enforcing their mortgages?

A. Yes, the writing was pretty much on the wall. The only way to get this was to complete the homes.

141 Q. So a pragmatic solution?

A. A pragmatic solution. I agree to that.

142 Q. Again, you know that Con-Drain registered a Claim for Lien and a Notice on Title about August 9th, I think it was the Friday or the Thursday, August 8th or 9th, 2013?

A. It's always the Friday. Yes.

143 Q. And you know that on the Monday Mr. Greenberg served Notices of Power of Sale, this is August 12th?

A. That's correct.

144 Q. That was on behalf of the various secondary lender's mortgages?

A. Yes.

145 Q. Did he talk about why those Notices of Power of Sale were now being issued?

A. No, he did not talk to me about that.

146 Q. So were you surprised when you received those Notices of Power of Sale from Mr. Greenberg?

A. I was actually more surprised at the lien because I thought we could, you know, we had a good relationship with Con-Drain and we had showed performance with Con-Drain. That surprised me more than anything else, the lien.

147 Q. But you're aware that Mr. Bitondo was not told about when those nine closings in July or June of 2013 were taking place. You knew that, right?

A. We knew that. But we did go from there was a possible solution which could have been accepted by Con-Drain.

148 Q. That was a meeting in August?

A. In August.

149 Q. What I'm saying to you is: Con-Drain wasn't told about the June or July 9th closings on Plan 3. Correct?

A. I was not obliged to tell them.

150 Q. They weren't told?

A. They weren't told.

151 Q. Was it your understanding did Con-Drain expected to be paid for the first ten closings on Plan 3 based on the April 16, 2012 letter agreement?

A. They were expected to get paid. Their funds were available from my proceeds.

152 Q. When did you tell them that funds would not be available from the nine closings in June and July, 2013?

A. I'm not sure I was obliged to tell them when the closings were happening.

153 Q. That's not what I asked you. When did you tell Con-Drain that funds would not be available from the nine closings on Plan 3 that took place in June and July?

A. During my conversation with Nunzio I told him that the funds are basically going to the mortgagees so that the mortgagees could release the lots for closing.

154 Q. And that discussion was after the nine closings had already occurred, correct?

A. Yes, that's correct.

155 Q. And the meeting almost immediately after that, I think it was August 6th, is when you had a meeting, that was a 'without prejudice' meeting, I'm not going to discuss the contents?

A. Yes.

156 Q. That discussion is after the closing?

A. That is after the closing, that's correct.

157 Q. Do you know if any of the secondary lender funding was used for the townhouse lands immediately to the east of the subdivision lands, the project lands?

A. The secondary mortgages were blanket mortgages over the entire project.

158 Q. So is the answer "yes" that some of the

secondary lender funds were used for the townhouse lands?

A. Yes, some of it.

159 Q. Sorry?

A. Yes, that's correct.

160 Q. Do you know how much?

A. I would have to do some serious tabulation.

161 Q. I'm just asking you if you know how much. If you don't know, you don't know?

A. I don't know.

162 Q. I understand. What is your position as to when Con-Drain will be paid the balance owing? If you say they didn't have to be paid from those nine closings that took place, what is your position as to when Con-Drain is to be paid the balance owing, the $800,000?

A. What is my position?

163 Q. Yes. You are not disputing the amount owing?

A. No, there is no dispute on the amount owing.

164 Q. When do you say it's to be paid to Con-Drain?

A. Well, based on the current situation of the project -- am I allowed to talk about the Offer?

MR. SCHWARTZ: No.

BY MR. LONG:

165 Q. No Offers. When do you say Con-Drain will be paid the $800,000 it's owing?

A. The way the project is going if the Power of Sale is executed and I lose this project, I don't know how Con-Drain is going to get paid.

MR. LONG: Subject to any questions arising from your answers to undertakings, those are my questions for today.

MR. SCHWARTZ: Thank you.

--- WHEREUPON PROCEEDINGS ADJOURNED AT 2:02 P.M.

****

I hereby certify the foregoing to be a true and accurate transcript of my computerized shorthand notes, to the best of my skill and ability.

Asterid Anshan

D. Anshan, CSR RPR

This is Exhibit "G" referred to in

the Affidavit of Nunzio Bitondo

sworn before me, this 17

day of November, 2016

A Commissioner for Taking Affidavits

NETWORK
REPORTING & MEDIATION

One First Canadian Place
100 King Street West, Suite 3600
Toronto, ON M5X 1E3

Court File No. CV-13-115757-00

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CON-DRAIN COMPANY (1983) LIMITED

Plaintiff

- and -

SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., JACK GREENBERG, 2148990 ONTARIO INC., 2148993 ONTARIO INC., 2147650 ONTARIO INC., 2147681 ONTARIO INC., PUCCINI MORTGAGE CORP., 53 PUCCINI MORTGAGE CORP., 388242 ONTARIO LIMITED, DAPAUL MANAGEMENT LIMITED, NASTELL INVESTMENTS LIMITED, CASTLE LANE

Defendants

This is the Cross-Examination of JACK GREENBERG, herein, on his Affidavit sworn September 9, 2013, held at Network North Reporting & Mediation, 25 Sheppard Avenue West, Suite 1200 Toronto, Ontario, M2N 6S6, on September 18, 2013.

APPEARANCES:

Jeffrey J. Long — For the Plaintiff

Christos Papadopoulos — For the Defendants, Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited, Nastell Investments Limited, Castle Lane

INDEX OF PROCEEDINGS

UNDER-ADVISEMENTS ARE NOTED ON THE FOLLOWING PAGES:
13
THERE WERE NO UNDER-TAKINGS, REFUSALS OR EXHIBITS NOTED

D I S C L A I M E R

NOTE: The above-noted indices are provided for ease of reference only and are not to be relied upon in any manner whatsoever by the parties hereto or any third party.

--- WHEREUPON PROCEEDINGS COMMENCED AT 2:24 PM

JACK GREENBERG, AFFIRMED

CROSS-EXAMINATION BY MR. LONG:

1 Q. Please state your name for the record?

A. Jack Greenberg.

2 Q. And you are one of the Defendants named in the action?

A. Correct.

3 Q. And you have also sworn an Affidavit on September 9, 2013 in regards to the Plaintiff's motion. Correct?

A. Yes, on behalf of the secondary lenders.

4 Q. And just for the record, in this examination transcript the defendant companies that are being defined as the "secondary lenders" are Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, DaPaul Management Limited, Nastell Investments Limited and Castle Lane Design Group Inc. And what is your position with those companies, the secondary lenders?

A. I'm the President and a director.

5 Q. And who are the other officers and directors of those companies, or are you the sole officer and director?

A. Other than Castle Lane I am the sole director and officer.

6 Q. And who is the other officers, directors of Castle Lane?

A. My wife.

7 Q. And who are the shareholders of, let's start with Puccini Mortgage Corp.?

A. I am.

8 Q. You are. And 53 Puccini Mortgage Corp.?

A. I am.

9 Q. And 388242 Ontario Limited?

A. I am.

10 Q. DaPaul Management Limited?

A. I am.

11 Q. Nastell Investments Limited?

A. I am.

12 Q. And Castle Lane Design Group Inc.?

A. Those shares are 50/50 between my wife and I.

13 Q. I thought I saw an Affidavit from someone who was a 7% shareholder?

A. In these companies? No.

14 Q. Look at tab 2 of the Responding Motion Record of the secondary lenders from Mr. Drudi's office if you would?

A. Okay.

MR. PAPADOPOULOS: It's the Affidavit of

Mr. Kassum, K-A-S-S-U-M.

BY MR. LONG:

15 Q. What company is he a shareholder of?

A. He's not a shareholder of any of them.

16 Q. So when he says in paragraph 2 (as read): I'm a participant in the mortgage loan held by Puccini Mortgage Corp., what does that mean?

A. It means that each of these corporations are trustee corporations holding the mortgage loan in Trust for a group of investors that participate in different amounts. Mr. Kassum is a participant in two of those loans, as indicated in his Affidavit.

17 Q. Thank you. And did you read, sir, your Affidavit of September 9th before you swore same?

A. Yes.

18 Q. And is it your position that the contents of the Affidavit are true and accurate?

A. Yes.

19 Q. If you would, sir, look at your Affidavit?

A. I have it in front of me.

20 Q. Paragraph 2 you say you're the solicitor and continue to act on behalf of the defendant companies that we've called the secondary lenders?

A. Yes.

21 Q. And, in fact, you're the only contact, I take

it, for the secondary lenders insofar as any negotiations with Mr. Jinnah, Silver Streams and the 214 company Defendants. Correct?

A. That's right.

22 Q. So that any of the lending negotiations between the secondary lenders and the 214 companies or Silver Streams were discussed with you on behalf of the secondary lenders?

A. That's right.

23 Q. And with Mr. Jinnah on behalf of Silver Streams and the 214 companies?

A. Right.

24 Q. And he didn't know whether the secondary lenders had their own independent counsel, or whether you were counsel for them as well as their contact?

A. I'm counsel for them.

25 Q. And then in paragraph 3 of your Affidavit you say that you've acted and continue to act for. And we've talked about this before, and I guess just to clarify the record, there are two Silver Streams company defendants, they are Silver Streams Homes Inc. and Silver Streams Homes (Puccini) Inc. And I'm going to call those companies the "Silver Streams companies" for this examination. And then there are four companies that are related to Silver Streams and they all start with 214,

and they have different numbers, and they're Ontario Inc. companies. I'm going to call those defendants the "214 companies." Okay?

A. Okay.

26 Q. You sat through Mr. Jinnah's cross-examination. Correct?

A. Yes.

27 Q. And do you agree with him when he says that it was you who brought the secondary lender companies to him back in 2008 when the market got difficult?

A. He was seeking financing, he was unable to secure it, he asked me if I could do something for him and I was able to arrange these loans.

28 Q. And did you, in fact, syndicate the investors that form the lenders behind these secondary lender companies?

A. Yes.

29 Q. And do you get a fee for doing that?

A. Yes.

30 Q. And of the investor groups behind the secondary lender companies are they, different investors have different percentages based on how much they've advanced?

A. Yes.

31 Q. Are you also an investor in those

investments?

A. In some of them.

32 Q. In some of them. I don't need to know how much, I don't want to. Are they related to the particular secondary lender companies that you could tell me which companies you've invested funds into?

A. I'm not sure.

33 Q. You're not sure. But some of them?

A. Some of them, definitely. You asked me about a fee. The fee is paid by the borrower.

34 Q. So Silver Streams or 214 would have paid your fee for syndicating the investments?

A. That's right.

35 Q. As legal counsel for the secondary lenders you provided them with legal advice in regards to the project and investing in the project?

A. Yes.

36 Q. Look at paragraph 4 of your Affidavit, if you would?

A. Okay.

37 Q. From 4A through 4F you describe the various secondary lender mortgages and the dates and the registration numbers and the amounts. Correct?

A. That's right.

MR. PAPADOPOULOS: Other than, I believe, to be clear, Castle Lane Design Group Inc.

BY MR. LONG:

38 Q. That was going to be my question. I don't see Castle Lane described between 4A and 4F of your Affidavit?

MR. PAPADOPOULOS: Could that have been because they were brought in after?

THE DEPONENT: No. Castle Lane only has a blanket second mortgage on two of the lots in Phase 1. Yes, in Phase 1. In Plan 1, Phase 1.

BY MR. LONG:

39 Q. I thought also Castle Lane's mortgage is registered on some of the lots on Plan 3?

A. No. Just on those two lots.

40 Q. That's a three and a half million dollar mortgage?

A. No, it's $400,000 now.

41 Q. But its principal registered amount was three and a half million dollars?

A. It was originally 3.5.

42 Q. Million?

A. Million. And then it was repaid through closings of three of the lots, because it was on five lots. And then Mr. Jinnah got financing from Home Trust, I believe, on two of the lots which are his inventory lots, and didn't have enough money to close the deal and pay off the 3.5 so Castle Lane stayed in for $400,000 as a second mortgage blanket on those two lots.

43 Q. And that's two of the unsold lots on Phase 1, on Plan 1?

A. Yes.

44 Q. You're a shareholder of Castle Lane?

A. Yes.

45 Q. Are you an investor in Castle Lane, as well?

A. What does that mean?

46 Q. Are you one of the investors that put up funds that flow through Castle Lane?

A. Oh, in that loan. You're talking about in that loan.

47 Q. Through Castle Lane's three and a half million dollar registered mortgage?

A. It's only $400,000, that's all that's left on it. But there are Notices amending the principal amount that's registered on title.

48 Q. But when the three and a half million dollar mortgage was registered, I'm assuming three and a half dollars was advanced by Castle Lane?

A. Yes, it was.

49 Q. Were you one of the investors that advanced

some of that three and a half million dollars from Castle Lane?

A. I believe so.

50 Q. Did Castle Lane receive any payments from the recent nine closings on Plan 3?

A. No.

51 Q. So all of its repayment were from closings on Plan 1 or 2?

A. No, only Plan 1. Its mortgage was specific to five lots.

52 Q. In paragraphs 4A through F you state in each paragraph that the particular mortgage you described was fully advanced by a certain date and how much was advanced?

A. That's right.

53 Q. You don't provide any proof of those advances. So what I'd like you to undertake is to provide me with some evidence that the advances you state in your Affidavit in paragraphs 4A through F were, in fact, advanced on the dates they were advanced?

MR. PAPADOPOULOS: How is that relevant, counsel, with respect to the issues on the Motion?

MR. LONG: Because what he says in the very next paragraph at 4G is that these aren't construction financing. This is a priority fight. And so he's saying at 4G none of the money was using for construction financing, it was all advanced on these dates under these mortgages. But nothing is produced to support that claim. So I'm challenging: Were those monies advanced? When were they advanced? Because he says in his Affidavit they were but there is no documentation. I'm challenging the statement by Mr. Greenberg as to when and how much those monies or if those monies were advanced as set out in his Affidavit.

MR. PAPADOPOULOS: But would you agree, counsel, that there would only be a priority dispute if the liens in question had not been discharged?

MR. LONG: No.

MR. PAPADOPOULOS: Why not?

MR. LONG: Because any advance, in my view, any advance regarding monies owing to Con-Drain who started work on the project in 2008 and then monies received to pay those lenders, those are all trust monies. And Mr. Greenberg is well-aware of Con-Drain having started, you know mortgage advances and priorities under Section 78 deal with when the first lien arose. So, A, I think it's relevant when you come to priority; B, I think it's relevant as to whether these are construction funds. And I'll get into that in a second. And, C, it's his statement that these monies were advanced and when they were advanced without any documentation. Certainly, he's the one whose got the documentation. It should be easy to show either a cancelled cheque or a bank statement. Otherwise, you're not letting me challenge the content of his Affidavit.

MR. PAPADOPOULOS: I understand the last point with respect to testing the evidence set out of the Affidavit. My point is, and I don't think you answered my question: Given that the liens have been discharged, how is this a priority dispute?

MR. LONG: A, there is still a lien on title now for $94,000.

MR. PAPADOPOULOS: That is not the subject matter of the Motion.

MR. LONG: The $94,000 is included in the $800,000. And the lien is included in the Plaintiff's Motion Record. And the priority of the $800,000 claim by the Plaintiff includes $94,000.

MR. PAPADOPOULOS: I'll take that question under-advisement, at this point.

--- UNDER-ADVISEMENT

BY MR. LONG:

54 Q. Okay. Let me know quickly about your position, though, counsel, since we're under some time constraints. All right. Turn to paragraph 4 g) of your

Affidavit?

A. Yes.

55 Q. Therein, at the bottom of page 5 and 6 of the Responding Motion Record, you say that (as read): None of the previously registered mortgages, and we're calling those the "secondary lender mortgages," were construction mortgages. And the funds in those advances were advanced from time-to-time for non-construction purposes, including the following. So the first one is: Purchase expired vendor take-back financing. Can you explain that to me?

A. When Mr. Jinnah acquired these lands some of the vendors took back mortgages as security for part of the purchase price that wasn't paid. And those mortgages had a term on them, and they matured at different times.

56 Q. Which vendor take-back mortgages are you referring to?

A. I'm talking about the ones when he bought the land.

57 Q. No. Let's be fair. You have project lands that are part of this Motion in these proceedings, and then there is the townhouse lands immediately to the east?

A. Townhouse lands are part of this whole project. You cannot distinguish between them, it's one big project.

58 Q. No. You say that. I am distinguishing because there is a separate contract between Silver Streams and Con-Drain for the townhouse lands versus the for the contract for the residential subdivision?

A. When he acquired the lands, all the lands, I think they were made up of six or seven vendors, it's contiguous land, bought the land. Then through his planner and everything, he went through the developer process and created Phase 1, Phase 2 and Phase 3. Phase 3 is the townhouse project. So my position is it's all one big parcel of land. If you want to segregate the townhouses that's your prerogative, but that's not the way it worked. So what I'm getting at is, and I didn't act for him on the acquisition so I can't remember exactly who took back financing, who didn't. But I know that there were several of those vendors that he originally bought the land from that took back financing, that ultimately expired and it was refinanced through some of these loans.

59 Q. Well, the only one of the vendor take-back mortgages where you've put in a document to support the statement you just made is the Alexandris lands, and that's the $1.15 million take-back mortgage that was ultimately paid out or refinanced through 53 Puccini

Corp.?

A. The mortgage was purchased. But there was another purchase on, I believe it's 56-58 Puccini. I think the vendor's name was Greco, it was a mortgage of almost 2.2 which was similarly purchased and then got subsumed in the DaPaul mortgage.

60 Q. What was the total purchase price for the lands? I segregate them between the residential subdivision part of the lands and the townhouse lands?

A. But you can't do that.

61 Q. Tell me what was the total purchase price for the lands?

A. I'm unfortunately going to have to guess, because I didn't act on the acquisition, but I believe the purchase price was somewhere around 11.3, 11.5. In that neighbourhood.

62 Q. And you would have those numbers in your file, on this matter?

A. I didn't act on it. But I know that if you go back through the title you can actually trace what he actually paid for it from the original vendors.

63 Q. How much of the secondary mortgage financing was used to refinance vendor take-back mortgages?

A. Well, Carevest provided him with financing for some of the acquisition. And I think that was about

$7 million.

64 Q. They're not one of the secondary lenders?

A. No, they're not. But they were paid off by the secondary lender mortgages. When that loan matured, because it matured as did a number of the vendor take-back mortgages that was refinanced through the secondary loans. So Carevest was about $7 million --

65 Q. Is there any documentation that you have to substantiate --

MR. PAPADOPOULOS: Well, let him finish the answer.

BY MR LONG:

66 Q. Finish your answer?

A. Carevest was on title as a first mortgagee on some of the lands. There were vendor take-back mortgages on some of the lands. I know for a fact 56, 58 Puccini was 2.2, I believe. Something like that. The Alexandris mortgage is one of them. And there was also a mortgage on 68 to 70 Puccini, which was $2.5 million, but we didn't take that one out. I knew that one existed. I can't remember if there are any other vendor take-back mortgages, but they were refinanced with some of these loans.

67 Q. And you put in the documentation for the Alexandris refinancing of the $1.15 million. I don't see

anything for the Carevest or the 56 or 58 Puccini mortgage. Can you undertake to provide me with the documentation to support your position that both the Carevest and the 56 and 58 Puccini mortgages were taken out by the secondary lenders?

MR. PAPADOPOULOS: Can we go off the record for a second?

--- OFF THE RECORD

BY MR. LONG:

68 Q. We've had some helpful discussions off the record about the mortgages described in paragraphs 4A through 4F of Mr. Greenberg's Affidavit. What I'm looking for, counsel, is something to establish and substantiate the contents of those paragraphs as sworn by Mr. Greenberg regarding the amounts advanced, why they were advanced and when they were advanced. So what did you give me by way of documentation that will substantiate the comments in your Affidavit, Mr. Greenberg?

A. I can give you a Trust Ledger that shows the amounts advanced, where they went to and where applicable Discharge Statement for repayment of a loan if that was the case; or purchase of a loan if that was the case.

69 Q. And I'll accept your undertaking, and subject to any ambiguities resulting from that, that is

sufficient?

MR. PAPADOPOULOS: Okay. To be clear on the record, that deals with your earlier question that I took under-advisement. We can treat that as being satisfied. Agreed?

MR. LONG: Okay.

MR. PAPADOPOULOS: Or I should say subsumed within what Mr. Greenberg just said.

BY MR. LONG:

70 Q. Yes. We were looking at paragraph 4G and you were explaining to me about the first item of a purchasing expired vendor take-back financing. You explained that to me. The next point you say the funds from the secondary lenders were used for is: Refinance financing obtained to acquire the lands, initially?

A. Right, that's Carevest.

71 Q. That is Carevest. Then you say to provide interest reserves. What does that relate to?

A. Monies were paid into an interest reserve account to cover interest payments accruing under the mortgages, deducted from the mortgage advance.

72 Q. For the secondary lender mortgages or the bank mortgages?

A. The secondary lender mortgages.

73 Q. And then you've got: To pay costs of the

financings. What does that mean?

A. That's the lender fee, the management fee and the legal fees to perform the work to complete the transaction.

74 Q. And then you've got: Working capital for the builder/developer. What's that?

A. Whatever was left over either went to the developer, which would have been the Silver Streams companies. I think, actually, it always went to Silver Streams Homes (Puccini) Inc. or as it directed. And sometimes there was a payment made either directly to either the Town of Richmond Hill or the Region of York to cover development charges or levies, or something. I'm not sure, quite frankly, what it was.

75 Q. Do you recall how much was attributed to this working capital for the builder/developer?

A. Each one would have been a function of each loan, I don't recall right now. But it will show up on the Trust Ledger that you're going to get.

76 Q. Thank you. If you look at tab B of your Affidavit there's a copy of the Charge in favour of DaPaul Management Limited?

A. Yes.

77 Q. It's page 32 of the Responding Motion Record. I see the principal amount of $5.5 million. Do you see

that?

A. Yes.

78 Q. And the interest rate is 11%?

A. Yes.

79 Q. And then it says that the balance due date is December 16, 2010. You heard Mr. Jinnah's evidence about the mortgages having come due in February of 2013. Can you just explain to me how the mortgages were extended, the secondary lender mortgages?

A. They were extended from time-to-time because the funding was not available or the plan was not registered, or he wasn't closing the sales. And that's how it was done.

80 Q. Does that apply for each of the secondary lender mortgages?

A. Yes, because they all matured at different times. When those maturities came up they were kind of conglomerated to one maturity date which is February, 2013. That was the last maturity date.

81 Q. And were they interest only?

A. Yes.

82 Q. With the principal to be paid out in full at the end or on the closing?

A. Well, both because there are partial discharge payments required under the terms of the mortgages on sales. And if the mortgage matured and regardless of the closing then whatever the balance was due, at that time, would get paid or was due.

83 Q. Look at paragraph 12 of your Affidavit. Take a moment just to read that paragraph?

A. Yes.

84 Q. You say (as read): At no time were any of the, I'll call them "secondary lenders," because that's what we're calling them, were investors involved in any discussions or settlement with the Plaintiff nor agreed to be bound by the terms. However you've stated already that you're counsel for those investors, the secondary lenders and that you are, in fact, even are one of the investors. Correct?

A. That's right.

85 Q. So did you ever tell the other investors about the negotiations with Con-Drain or the agreements with Con-Drain?

A. There was no need to, they weren't a party to those negotiations. When I met with you and Mr. Bitondo and Mr. Jinnah * I was there solely as solicitor for Silver Streams and its companies.

86 Q. Is the answer, no, you never told the investors about the agreements with Con-Drain?

A. Not at that time, no.

87 Q. Did you ever tell the investors about the Claims for Lien registered by Con-Drain against the lands in February of 2010?

A. No.

88 Q. And when we talk about "other investors," are we talking about ten people or a hundred people? Give me just a general idea, five people?

A. It's somewhere between 10 and 15.

89 Q. As president and as counsel for these secondary lenders you didn't feel it necessary to tell them of Con-Drain's Claims for Lien registered in February, 2010?

A. No, because they were subordinate; there was no priority issue.

MR. PAPADOPOULOS: When you say "they", you mean the Claims for Lien for Con-Drain?

THE DEPONENT: Yes.

BY MR. LONG:

90 Q. I want to go to just, for a second, counsel, I don't know if you were involved in this or not, if you look at tabs, start with tab M of the Affidavit?

A. Of my Affidavit? Yes.

91 Q. This is an email exchange to myself and yourself of January, 2011. Do you see that?

A. Yes, I do.

92 Q. You'll agree that this exchange was done in the process of the settlement negotiations going on, at that time?

A. Well, of course.

93 Q. And you've got 'Without Prejudice' at the top of your email?

A. Yes.

94 Q. These are part of the settlement negotiations. I'm just wondering and it applies also for N and O, and let me finish the point for the regard, counsel?

A. Yes.

95 Q. And then P and Q. Is there a reason why these 'Without Prejudice' emails and documents were included when they're clearly, as you just said, part of the settlement negotiations in 2011?

A. Well, we need to clarify your question. Because when you say: They were part of the settlement negotiations? The answer is: No, they were not.

96 Q. They represent settlement negotiations, look at the content?

A. No, they don't. I disagree. What they represent are discussions concerning the implementation and the execution of the Settlement Agreement, because that's exactly what we are talking about here.

97 Q. You don't believe that these emails and those documents relate to settlement negotiations that were ongoing in 2011?

A. They related to the settlement that had been already negotiated in March of 2010, and the implementation of that Settlement Agreement. That's what these emails relate to. This is not a further settlement, or an amendment of that. This is part and parcel of either a clarification or implementation. That's all it did. We weren't negotiating terms here. This particular exchange related to the argument about the payment of the $100,000 referred to in that letter.

98 Q. So that's why your position is they're included in the materials?

A. Right.

MR. PAPADOPOULOS: I think they're included in the materials, and the witness can confirm this, in order to highlight the fact that your client was aware of the fact that the secondary loans were in place and had priority.

THE DEPONENT: And that your client knew about them.

BY MR. LONG:

99 Q. My client is not denying he knew about certain of the loans. He's certainly not acknowledging

they had priority to Con-Drain's money that was owing, or the priority to payment to Con-Drain under the Settlement Agreement. But we'll let the judge decide that issue?

A. Right. The reason they're here is because your client denies having any knowledge. And my reason for including them is two points: One, to clearly indicate that you were told about them, at least at this time; and you already knew about them, both you and your client.

100 Q. You'll agree with me this exchange of emails starting with tab M are dated January, 2011. Correct?

A. Of course.

101 Q. And the Settlement Agreement with Con-Drain was done in March of 2010, about nine months earlier. Correct?

A. That's right.

102 Q. Go to paragraph 35 of your Affidavit?

A. And I suggest you take a look at the documents under tab --

103 Q. I get to ask the questions, counsel?

A. Sorry. Yes, I'm sorry.

104 Q. Take a look at paragraphs 35 and 36 of your Affidavit.

A. I'm sorry, 35?

MR. PAPADOPOULOS: 35 and 36. Take a moment to read them.

THE DEPONENT: Just give me a second?

BY MR. LONG:

105 Q. Yes?

A. Yes.

106 Q. You say in there that no one requested that the Settlement Agreement provided that the Plaintiff's claims rank in priority to the secondary lenders. But are you suggesting that neither the March, 2010 settlement or the April, 2012 settlement provides that Con-Drain gets paid $50,000 plus interest from each closing, in the first case Plans 1 and 2; in the second case, the first ten closings of Plans 3?

A. My position is you have to look at who signed the document, and Silver Streams signed the documents together with Con-Drain. Or you on behalf of Con-Drain or I on behalf of Silver Streams signed the documents for those parties. So between those parties that was their deal. But the secondary lenders were never part of that deal. So for you to suggest that Con-Drain somehow leap frogs into priority over the secondary lenders when they're not even party to the documents, they were never party to the documents, never signed anything is, in my opinion, ludicrous.

107 Q. I want to challenge that. Let's look at the

Plaintiff's Motion Record, tab H. And we'll look at your letter, dated April 16, 2012?

MR. PAPADOPOULOS: You don't want to go to the March documents first?

MR. LONG: No.

THE DEPONENT: Sorry, which document now? You want me to look at April 16, 2012?

BY MR. LONG:

108 Q. This is your letter signed by you addressed to myself?

A. Yes.

109 Q. You agree this sets out the terms of the, I'm calling it "revised settlement" from 2012?

A. Yes, in connection with Silver Streams and Con-Drain.

110 Q. I understand?

A. Right.

111 Q. And read item number 2 there, would you?

A. Item number 2, yes.

112 Q. Just read it for the record?

A. "Silver Streams shall also pay $50,000 plus interest to Con-Drain on the same terms from the first 10 closings on the Third Plan of Subdivision (which plan is in Phase 1 and 2 and which will be registered shortly) to retire the balance of the indebtedness to Con-Drain.

(The said 10 lots as set out in Schedule B will be forwarded shortly);"

113 Q. Is it your position that unless there are, what you're calling, "net proceeds" payable to Silver Streams as determined, presumably, by you, you are the one who determined the closing proceeds?

MR. PAPADOPOULOS: Hold on a second. Are there a few questions in there and if so can you break it up?

BY MR. LONG:

114 Q. Sure. Are you suggesting that Con-Drain doesn't automatically get paid from each of the first ten closings on Plan 3 on my reading from item 2 in that letter?

A. Okay. Well, I read all of that letter under tab H which also includes paragraph 3, that says specifically, that the: ".....prior Irrevocable Direction and my Undertaking from the original settlement." is applicable.

MR. PAPADOPOULOS: And it starts with: "For the purposes of clarity, ..."

THE DEPONENT: Right. And if you go to those documents --

MR. PAPADOPOULOS: Tab G.

THE DEPONENT: Tab G of your client's --

MR. PAPADOPOULOS: Of the Motion Record.

THE DEPONENT: Of your client's Motion Record? Here it is.

MR. PAPADOPOULOS: Do you want the undertaking and the direction? The direction is at page 62 of the Plaintiff's Motion Record, and the undertaking is at page 63. They're right here, Mr. Greenberg.

THE DEPONENT: So, first of all, if you look at the March 31, 2010 letter you'll see clearly that I wrote the letter on behalf of my client, Silver Streams, directed to you on behalf of your client Con-Drain. Because it says here in the first line (as read): Between our respective clients. And if you go to paragraph four of that same letter you'll see that it refers to the fact, that (as read): Silver Streams shall deliver an Irrevocable Direction to me or any other solicitor acting on the sale of the lots irrevocably directing such solicitor to deduct $50,000 plus prorated proportionate interest thereon from the closing proceeds of such sale otherwise payable to Silver, which is a defined term. And if you go to the Irrevocable Direction, you will see on the second page I signed it on behalf of Silver Streams only.

MR. PAPADOPOULOS: He's looking at page 56 of the Motion Record.

THE DEPONENT: Your client's Motion Record.

MR. PAPADOPOULOS: On page 60 of the Plaintiff's Motion Record we have Mr. Long's signature.

THE DEPONENT: Right. And then if you go to the next document, which is the Irrevocable Direction from Silver Streams, not the secondary lenders.

MR. PAPADOPOULOS: Which is page 62 of the Plaintiff's Motion Record.

THE DEPONENT: Right. In the second line it says, clearly, that (as read): The undersigned, Silver Streams, hereby irrevocably authorizes and directs you, Jack Greenberg, to deduct from the closing proceeds otherwise payable to the undersigned in connection with any of the aforesaid sales the $50,000. Et cetera. And then there is my undertaking to comply with that very Direction. So the answer is if there is no money payable to Silver Streams, there is no money payable to your client.

MR. LONG: I understand.

THE DEPONENT: And I have no obligation.

BY MR. LONG:

115 Q. All the purchase proceeds from any purchaser for the full amount of the price of a home, every home, was payable to Silver Streams under the contract between Silver Streams and the purchaser. Correct?

A. No.

116 Q. The Agreement of Purchase and Sale for every home, let me finish. Okay. Who were the Agreements of Purchase and Sale with between builder and person? Who was the builder, the vendor on the Agreements of Purchase and Sale?

MR. PAPADOPOULOS: Mr. Long, you're neglecting to read the word, "otherwise."

THE DEPONENT: And it says, "closing proceeds."

BY MR. LONG:

117 Q. You want to say it's net closing proceeds, I say it says closing proceeds. We can agree to disagree, I'm asking a question?

A. Thank you.

118 Q. Who is the vendor on all of the agreements?

A. Silver Streams.

119 Q. So all the purchaser's funds under that contract are payable to Silver Streams, right?

A. Yes. Well, in gross terms under the terms of the agreement. But the obligation, and you know and I know that we're talking about closing proceeds which means net closing proceeds after you pay them.

MR. PAPADOPOULOS: It doesn't say "net closing proceeds." But that's certainly your position. It says: "Closing proceeds otherwise payable."

BY MR. LONG:

120 Q. I say all the purchase proceeds are payable to Silver Streams. How they get distributed thereafter, obviously you have a difference of opinion?

A. Yes.

121 Q. I understand that, and that's what the judge is going to decide. Paragraph 47 of your Affidavit. Please take a moment to read it. Mr. Greenberg's Affidavit, paragraph 47?

A. Yes.

122 Q. You're aware that Bank of Montreal has obligations under the Construction Lien Act in regards to Section 78, holdback obligations under its financing. Correct?

A. Construction financing. I believe so. Yes. Sure.

123 Q. You say in paragraph 47, that: Any amounts under the claim for lien by Con-Drain are subordinate to priority of Bank of Montreal?

MR. PAPADOPOULOS: Which claim for lien are you talking about?

BY MR. LONG:

124 Q. The lien, I believe, being spoken about in paragraph 47 is the recently registered claim for lien by Con-Drain and its Notice?

MR. PAPADOPOULOS: The 2013 lien?

BY MR. LONG:

125 Q. Right. I suggest to you that lien has priority to some of the banks?

A. That's a legal argument.

126 Q. But you've said in 47 that it's not prior to the Bank of Montreal's mortgage, I suggest to you that statement is not quite accurate or at least needs to be determined by the court?

MR. PAPADOPOULOS: I think Mr. Greenberg put it succinctly, that's a legal position. It's a comment you are making.

MR. LONG: I'm challenging the statement of Mr. Greenberg in paragraph 47 when he claims the bank's mortgage has priority to Con-Drain's lien, when we all know the bank has certain obligations under the Construction Lien Act.

MR. PAPADOPOULOS: It's a question of whether priority exists pursuant to the provisions of the Act.

MR. LONG: Thank you.

THE DEPONENT: Vis a vis Bank of Montreal?

MR. PAPADOPOULOS: Yes.

THE DEPONENT: Not against secondary lenders?

MR. PAPADOPOULOS: Yes.

MR. LONG: I also take issue with your suggestion that balance of monies advanced by the secondary lenders to the builder don't constitute construction financing and, therefore, have holdback obligations. You haven't told me how much was paid to the builder, but you said monies were given to the builder for use by the builder.

MR. PAPADOPOULOS: Are you talking about in relation to the 2013 lien?

MR. LONG: Yes.

MR. PAPADOPOULOS: So what is the question? Because his last answer and my last statement was in regard to any priority over BMO.

BY MR. LONG:

127 Q. Right. I'm suggesting that the Con-Drain lien also has priority to the second lender advances, insofar as any of those advances were used by the builder for construction finance?

MR. PAPADOPOULOS: The 2013 lien?

THE DEPONENT: Pursuant to the Act. At best you would have a holdback obligation, at best, assuming they were construction financing. Am I correct?

MR. PAPADOPOULOS: Deficiency holdback.

THE DEPONENT: Yes, deficiency holdback.

MR. LONG: Pursuant to the Act and the interpretation of the Act. We agree.

MR. PAPADOPOULOS: We agree that it's an issue that has to be disposed of by the court.

MR. LONG: Right.

MR. PAPADOPOULOS: Why don't we agree to disagree?

BY MR. LONG:

128 Q. Who decided to serve the Notices of Power of Sale for the secondary lenders on Monday, August 12th?

A. I did.

129 Q. Why?

A. To protect our position.

130 Q. And when you say "our position" who are you referring to?

A. Their position. The mortgages. The secondary lender's position.

131 Q. Well, you are one of the investors in the secondary lender mortgages. Right?

A. Yes.

132 Q. So it's your position, too. Right?

A. Yes. It's globally, of course. Yes.

133 Q. And were those sent out in response to your being served on the Friday before August 9th the Con-Drain Claim for Lien and the Notice that had been registered on title?

A. Well, the mortgages were already in default. That triggered my decision to enforce the provisions of the mortgage and protect the position of the mortgages.

134 Q. That doesn't answer my question. Did you send out the Notices of Power of Sale on Monday, August 12th in response to receiving a copy of Con-Drain's Lien and Notice provided to you on Friday, August 9th?

A. Not just that. I just explained to you that the mortgages were in default, and in order to protect the position of the secondary lenders I issued Powers of Sale provision under the terms of the mortgages.

135 Q. But you will agree with me, and Mr. Jinnah said, those mortgages were in default since February 2013, correct?

A. That's right.

136 Q. Had Con-Drain not registered a lien for its Notice would you not have served the notice?

MR. PAPADOPOULOS: That's speculative. Do you want to answer it Mr. Greenberg?

THE DEPONENT: No, it's speculation.

BY MR. LONG:

137 Q. Did you tell the investors that you've served Notices of Power of Sale?

A. No.

138 Q. Why not?

A. I'm the administrator of the mortgages, I was trying to protect positions.

139 Q. So it's really your ability to decide how

these mortgages get enforced and when they get enforced. Correct?

A. I have the ability to enforce them, yes.

140 Q. The authority, sorry?

A. Yes, I have the authorization to do that.

MR. LONG: Subject to any questions arising from your answers to undertakings given today, those are my questions. Thank you.

--- WHEREUPON PROCEEDINGS ADJOURNED AT 3:25 P.M.

****

I hereby certify the foregoing to be a true and accurate transcript of my computerized shorthand notes, to the best of my skill and ability.

As Per D. Anshan

D. Anshan, CSR RPR

This is Exhibit "H" referred to in

the Affidavit of Nunzio Bitondo

sworn before me, this 17

day of November, 2016

A Commissioner for Taking Affidavits

132

Court File No. 12-10362-00-CL

3 25

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 17TH
	)	
JUSTICE NEWBOULD	)	DAY OF DECEMBER, 2013

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.

the "Applicants"

INITIAL ORDER

THIS APPLICATION, made by Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148993 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc. and 2147650 Ontario Inc. (collectively, the "**Applicants**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Imran Jinnah sworn December 11, 2013 and the Exhibits thereto (the "**Jinnah Affidavit**"), the Proposed Monitor's Report to the Court and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicants, Grant Thornton Limited (as the proposed Monitor), counsel for Bank of Montreal, counsel for Foremost Mortgage Corporation, counsel for the private secured lenders, counsel for certain lien claimants, counsel for the Corporation of the Town of Richmond Hill, and such other counsel as are present, no one else appearing although duly served as appears from the affidavit of service of Lynn Lee sworn December 12, 2013 and on reading the consent Grant Thornton Limited to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practicedirections/toronto/#Commercial_List) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant Rule 16.04 of the *Rules of Civil Procedure*. Subject to Rule 3.01(d) of the *Rules of Civil Procedure* and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL <[www.grantthornton.ca/silverstreams]>.

3. **THIS COURT ORDERS** that the E-Service List Keeper and the WebHost (as such terms are defined in the Protocol) for the purpose of this proceeding shall be the Monitor.

3A. **THIS COURT ORDERS** that the sum of $491,985.33, plus interest accrued thereon, being held in trust by Chaitons LLP pursuant to the orders of the Honourable Madam Justice Lack dated August 15, 2013 and the Endorsement of the Honourable Madam Justice Gilmore dated November 20, 2013 in the Con-Drain Company (1983) Limited action bearing Newmarket court file no. CV-12-115757-00 (the "Con-Drain Action") shall be maintained in trust by Chaitons LLP until further court order or consent of the parties to the Con-Drain Action, and the determination of whether the above noted funds form Property, as defined in paragraph 5 of the Initial Order, shall be determined at a late date.

APPLICATION

4. **THIS COURT ORDERS AND DECLARES** that the Applicants are affiliated debtor companies to which the CCAA applies.

POSSESSION OF PROPERTY AND OPERATIONS

5. **THIS COURT ORDERS** that, subject to paragraph 17 the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property. The Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

6. **THIS COURT ORDERS** that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges.

7. **THIS COURT ORDERS** that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course on and after the date of this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the completion of Phases II and III of the Puccini Project (as defined in the Jinnah Affidavit) including, without limitation, payments on account of insurance, maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

8. **THIS COURT ORDERS** that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants.

9. **THIS COURT ORDERS** that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. **THIS COURT ORDERS** that the Applicants shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their business or operations,

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deems appropriate;

(c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing; and

(d) complete the construction and sale of the remaining 10 homes in Phases II and III of the Puccini Project with the approval of the Monitor in respect of all sales made in the ordinary course of the Applicants' business and otherwise with prior Court approval,

all of the foregoing to permit the Applicants to proceed with the completion of Phases II and III of the Puccini Project (the "**Restructuring**").

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

11. **THIS COURT ORDERS** that until and including January 16, 2014, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court, including the action commenced in Newmarket, Ontario by Con-Drain Company (1983) Limited against certain Applicants and others bearing Court File Number CV-13-115757-00.

NO EXERCISE OF RIGHTS OR REMEDIES

12. **THIS COURT ORDERS** that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

13. **THIS COURT ORDERS** that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

14. **THIS COURT ORDERS** that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be

agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

15. **THIS COURT ORDERS** that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

16. **THIS COURT ORDERS** that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION

17. **THIS COURT ORDERS** that the Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicants after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

APPOINTMENT OF MONITOR

18. **THIS COURT ORDERS** that Grant Thornton Limited is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs

of the Applicants with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

19. **THIS COURT ORDERS** that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination, to the DIP Lender (as defined below) and its counsel on a periodic basis of financial and other information as agreed to between the Applicants and the DIP Lender which may be used in these proceedings including reporting on a basis to be agreed with the DIP Lender;

(d) advise the Applicants in the preparation of the Applicants' cash flow statements and reporting, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis or provided to the Court as required;

(e) to assist the Applicants with the Restructuring;

(f) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicants, to the extent that is necessary to adequately assess the Applicants' business and financial affairs or to perform its duties arising under this Order;

(g) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(h) perform the tasks requested to be performed by the Monitor under the DIP Term Sheet;

(i) to advise and assist the Applicants in their negotiations with their stakeholders;

(j) perform such other duties as are required by this Order or by this Court from time to time; and

(k) in the name and/or for the benefit of the Applicants, to exercise control over the receipts, disbursements and bank accounts of the Applicants and receive and collect all monies and accounts of the Applicants in respect of the Property.

20. **THIS COURT ORDERS** that, subject to paragraph 17(k) of this Order, the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

21. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of

any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

22. **THIS COURT ORDERS** that the Monitor shall provide any creditor of the Applicants and the DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

23. **THIS COURT ORDERS** that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

24. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, incurred both before and after the making of this Order, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a monthly basis upon receipt of an invoice.

25. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

26. **THIS COURT ORDERS** that the Monitor, counsel to the Monitor and the Applicants' counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000 as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of

these proceedings. The Administration Charge shall have the priority set out in paragraphs 31 and 33 hereof.

DIP FINANCING

27. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility from Sandall Investments Limited (the "**DIP Lender**") in order to finance the Applicants' working capital requirements, including the cost of completing Phases II and III of the Puccini Project and the costs of these proceedings, provided that borrowings under such credit facility shall not exceed the principal amount of $1,000,000 unless permitted by further Order of this Court.

28. **THIS COURT ORDERS** that such credit facility shall be on the terms and subject to the conditions set forth in the term sheet among the Applicants and the DIP Lender dated as of December 11, 2013 (the "**Term Sheet**"), filed.

29. **THIS COURT ORDERS** that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Term Sheet or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

30. **THIS COURT ORDERS** that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Charge**") on the Property, which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP Lender's Charge shall have the priority set out in paragraphs 31 and 33 hereof.

31. **THIS COURT ORDERS** that, notwithstanding any other provision of this Order:

(a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the DIP Lender's Charge, the DIP Lender may immediately terminate the facility and, upon seeking an Order of the Court on 5 days notice to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Term Sheet, Definitive Documents and the DIP Lender's Charge, including without limitation, to apply to this Court for the appointment of a receiver over the Property; and

(c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver, receiver and manager or lien trustee of the Applicants or the Property.

32. **THIS COURT ORDERS AND DECLARES** that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

33. **THIS COURT ORDERS** that the priorities of the Administration Charge and the DIP Lender's Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000); and

Second – DIP Lender's Charge.

34. **THIS COURT ORDERS** that the filing, registration or perfection of the Administration Charge or the DIP Lender's Charge (collectively, the "**Charges**") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

35. **THIS COURT ORDERS** that each of the Administration Charge and the DIP Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges, construction

liens (whether or not perfected or preserved) and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person.

36. **THIS COURT ORDERS** that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Administration Charge or the DIP Lender's Charge, unless the Applicants also obtain the prior written consent of the Monitor, the DIP Lender and the beneficiaries of the Administration Charge, or further Order of this Court.

37. **THIS COURT ORDERS** that the Administration Charge, the Term Sheet, the Definitive Documents and the DIP Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the DIP Lender thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Term Sheet or the Definitive Documents shall create or be deemed to constitute a breach by the Applicants of any Agreement to which they are a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the Term Sheet, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents; and

(c) the payments made by the Applicants pursuant to this Order, the Term Sheet or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

SERVICE AND NOTICE

38. **THIS COURT ORDERS** that the Monitor shall (i) without delay, publish in the Toronto Star or the Globe and Mail a notice containing the information prescribed under the CCAA, (ii) within five days after the date of this Order, (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder.

39. **THIS COURT ORDERS** that the Applicants and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

40. **THIS COURT ORDERS** that the Applicants, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its website at www.grantthornton.ca/silverstreams.

GENERAL

41. **THIS COURT ORDERS** that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

42. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, a trustee in bankruptcy or a lien trustee of the Applicants, the Business or the Property.

43. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

44. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

45. **THIS COURT ORDERS** that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

46. **THIS COURT ORDERS** that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

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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.

Court File No. 13-10362-00-CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at TORONTO

INITIAL ORDER

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Lawyers for the Applicants

Doc#2886374v1

148

This is Exhibit "I" referred to in

the Affidavit of Nunzio Bitondo

sworn before me, this 17

day of November, 2016

A Commissioner for Taking Affidavits

Court File No. 13-10362-00CL

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., 2148893 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC., and 2147650 ONTARIO INC.

Duncan W. Glaholt, Referee	)	**Wednesday, the 28th day of September, 2016**
	)	
	)	

FINAL REPORT/AWARD
(Pursuant to the *Construction Lien Act*)

IN ACCORDANCE WITH the judgment of reference of The Honourable Mr. Justice Newbould dated 8 January 2015, (the "Judgment of Reference") a Partial Report/Award issued in this matter on 11 August 2016, reproduced at Schedule "A", attached;

UPON READING submissions regarding facility costs by counsel for Argo Lumber Inc. and Newmar Window Manufacturing Inc. dated 15 August 2016, by counsel for the Medi Group of Lien Claimants on 16 August 2016 and by counsel for the Private Mortgagees dated 15 August 2016; submissions regarding 25 July 2016 costs by counsel for Silver Streams Homes Inc. on 17 August 2016 and by counsel for Argo Lumber and Newmar Window dated 23 August 2016; and submissions regarding Bank of Montreal's costs by counsel for the Bank of Montreal dated 15 August 2016 amended 26 August 2016, by counsel for the Private Mortgagees dated 9 September 2016; reply submissions by counsel for the Bank of Montreal on 16 September 2016; reply submissions by counsel for the Private Mortgagees on 17 September 2016; and further reply costs submissions by counsel for the Bank of Montreal on 21 September 21 September 2016:

1. **I FIND AND DECLARE** that the Partial Report/Award, Schedule 'A' attached, is affirmed and incorporated by reference into this Final Report/Award.

2. **I FIND AND DECLARE** that the amount of costs to which the Bank of Montreal is entitled pursuant to paragraph 8 (b) of the Partial Report/Award, fixed and assessed by me inclusive of all fees, disbursements and taxes, is $50,000.

3. **I ORDER** that any and all other claims for interest and costs arising from this reference are dismissed.

4. **I ORDER** that the following payments be made forthwith by the Monitor in the following priority:

   a) *First in priority*, the Monitor shall pay the Lien Claimants the amounts found due and owing to them as set out in my Partial Report/Award, Schedule A hereto, and upon payment each Lien Claimant's corresponding lien shall be discharged, the certificate of action, if any, shall be vacated, and its lien action, if any, together with all crossclaims, if any, shall be dismissed without costs;

   b) *Second in priority*, the Monitor shall pay the Bank of Montreal, $50,000 in full satisfaction of the Bank of Montreal's costs of this reference;

   c) *Third in priority*, the Monitor shall pay to "Jack Greenberg, in Trust for Private Mortgagees", the balance of the funds held with respect to the subject lands and premises, up to but not exceeding the sum of $11,960,703.22.

   d) *Fourth*, any surplus remaining in the Monitor's hands after payments as above, if any, shall be retained by the Monitor subject to further disposition by the Court.

Dated at Toronto, this 28th day of September 2016

Duncan W. Glaholt
Referee

SCHEDULE A

Court File No. 13-10362-00CL

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., 2148893 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC., and 2147650 ONTARIO INC.

Duncan W. Glaholt, Referee)))	**Wednesday, the 11th day of August, 2016**

PARTIAL REPORT/AWARD

(Pursuant to Section 62(1)(b) and Form 21 of the *Construction Lien Act*)

IN ACCORDANCE WITH the judgment of reference of The Honourable Mr. Justice Newbould dated 8 January 2015, (the "Judgment of Reference") the trial of the actions referred to on Schedule "A" attached, commenced on 11 July, 2016, at the City of Toronto, Ontario, in the presence of counsel for the Lien Claimants Pilbro III Inc., Medi Group Incorporated, Cardell Flooring Ltd., Foremont Drywall Inc., 1382479 Ontario Inc., 1382503 Ontario Inc., 2203579 Ontario Inc. cob Foremont Drywall Contracting, Canadian Concrete Forming Limited, Pave Plumbing & Heating Inc., E.D. Carpenters Ltd., Solo Electric Ltd., 1865721 Ontario Inc., GM Exterior Inc., Giancola Aluminum Contractors Inc., counsel for the Lien Claimants Argo Lumber Inc. and Newmar Window Manufacturing Inc., counsel for Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited, Nastell Investments Limited and Castle Lane Design Group Inc. (the "Private Mortgagees"), and counsel the Bank of Montreal, all claims against Home Trust Company having been dismissed on consent without costs by order dated 29 June 2015, the claim by Trudel & Sons Roofing having been dismissed on consent without costs by order dated 29 June 2015, and the claims against Foremost

Mortgage Holding Corporation having been dismissed on consent without costs by order dated 9 September 2015;

AND UPON READING THE EVIDENCE FILED, including the Affidavit of Andreas Havenga sworn 24 March 2015 and exhibits thereto, filed on behalf of Argo Lumber Inc.; the affidavit of Lou D'Ambrosio sworn 24 March 2015 and exhibits thereto, filed on behalf of Newmar Window Manufacturing Inc.; the affidavit of Nunzio Bitondo sworn 30 March 2015 and exhibits thereto, filed on behalf of Con-Drain Company (1983) Limited); the affidavit of Tony Pileggi sworn 12 March 2015 and exhibits thereto, filed on behalf of Pilbro III Inc.; the affidavit of Dominic Montemurro sworn 24 March 2015 and exhibits thereto, filed on behalf of Medi Group Incorporated; the affidavit of Gord Ellis sworn 13 March 2015 and exhibits thereto, filed on behalf of Cardell Flooring Ltd.; the affidavit of Mary Montagner sworn 19 March 2015 and exhibits thereto, filed on behalf of Foremont Drywall Inc., 1382479 Ontario Inc., 1382503 Ontario Inc., 2203579 Ontario Inc. cob Foremont Drywall Contracting; the affidavit of Pat Lamanna sworn 17 March 2015 and exhibits thereto, filed on behalf of Canadian Concrete Forming Limited; the affidavit of Pat Di Stefano sworn 17 March 2015 and exhibits thereto, filed on behalf of Pave Plumbing & Heating Inc.; the affidavit of Sam Dibacco sworn 13 March 2015 and exhibits thereto, filed on behalf of E.D. Carpentry Limited; the affidavit of Sandy Ragno sworn 16 March 2015 and exhibits thereto, filed on behalf of Solo Electric Ltd.; the affidavit of Ismail Parmaksizoglu sworn 16 March 2016 and exhibits thereto, filed on behalf of 1865721 Ontario Inc.; the affidavit of John Giancola sworn 23 March 2015 and exhibits thereto, filed on behalf of GM Exterior Inc.; the affidavit of John Giancola sworn 23 March 2015 and exhibits thereto, filed on behalf of Giancola Aluminum Contractors Inc.; the affidavit of Munira Budhdeao sworn 8 July 2016 and exhibits thereto, filed on behalf of Argyle Hardwood & Flooring Ltd.; and the affidavit of Jack Greenberg sworn 27 March 2015 and exhibits thereto, along with the supplementary affidavit of Jack Greenberg sworn and filed 14 July 2016 filed on behalf of the Private Mortgagees;

AND ON READING THE PLEADINGS AND PROCEEDINGS HEREIN AND CONSENTS FILED, including the consents of the Private Mortgagees, the Bank of Montreal, and the Lien Claimants Labourers' Union of North America Local 183 Members' Benefit Trust Fund, 1865721

Ontario Inc., Paris Kitchens, a Division of The Sanderson-Harold Company Limited, Con-Drain Company (1983) Ltd., Argo Lumber Inc., Newmar Window Manufacturing Inc., King-Con Construction Corporation, 669857 Ontario Inc. o/a Alma Mechanical, Cardell Flooring Limited, Foremont Drywall Inc. et al. carrying on business as Foremont Drywall Contracting, Solo Electric Limited, 1865721 Ontario Inc., GM Exteriors Inc., Pilbro III Inc., Medi Group Incorporated, Canadian Concrete Forming Limited, Pave Plumbing & Heating Inc., E. D. Carpenters Limited, and Giancola Aluminum Contractors Inc., filed, no-one appearing for Renova Recycling or Argyle Hardwood & Flooring Ltd. (although not a Lien Claimant, a motion was filed on behalf of Argyle Hardwood & Flooring Ltd. and is dealt with herein), or any of the Schedule C claimants as identified in the Judgment of Reference;

AND UPON HEARING THE SUBMISSIONS OF COUNSEL attending, including submissions made on 14 July 2016 on behalf of the lien claimants Argo Lumber and Newmar Mechanical;

1. **I FIND AND DECLARE** that each of the persons named in Column 1 of Schedule A to this Partial Report/Award has a lien under the *Construction Lien Act* as against the lands described in Schedule "C" attached, in the amount shown opposite their names in Column 4 of Schedule A, constituting a charge under section 21 of the *Construction Lien Act* upon the holdback required to be retained by the defendant-owners Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc., for which the said defendant-owners are jointly and severally personally liable to the Lien Claimants

2. **I FIND AND DECLARE** that each of the persons named in Column 1 of Schedule A to this Partial Report/Award is entitled to personal judgment in the amount set opposite their names in Column 6 of Schedule A.

3. **I FIND AND DECLARE** that the deficiency in holdback required to be kept by the Defendant Owners, Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc., under the *Construction Lien Act* with respect to each Lien Claimant is the amount set out in Column 4 of

Schedule A, and that each said Lien Claimant has priority over each of the claims of each of the Private Mortgagees to the extent of such deficiency in holdback.

4. **I FIND AND DECLARE** pursuant to paragraph 2(c) of the Judgment of Reference, that Argyle Hardwood & Flooring Ltd. shall have personal judgment only as against the parties listed in Column 6 of Schedule B, for the amount set forth in Column 5 of Schedule B.

5. **I FIND AND DECLARE** that the amounts owed as of June 25th, 2016 by the parties listed in Column 7 of Schedule A to Puccini Mortgage Corp. is $1,612,338.61, to 53 Puccini Mortgage Corp. is $3,279,784.31, to 388242 Ontario Limited is $1,566,246.61, to Nastell Investments Limited $4,875,419.77, and to Castle Lane Design Group Inc. is $626,914.92 for an aggregate amount of $11,960,703.22.

6. **I ORDER** that all claims by all parties against the defendant Bank of Montreal be and the same are hereby dismissed, on consent, without costs.

7. **I ORDER** that the following payments be made forthwith by the Monitor in the following priority:

a) *First in priority*, the Monitor shall pay the Lien Claimants the amounts found due and owing to them for deficiency in holdback as set forth in Column 4 of Schedule A, and upon payment each Lien Claimant's corresponding lien shall be discharged, the certificate of action, if any, shall be vacated, and its lien action, if any, together with all crossclaims, if any, shall be dismissed without costs;

b) *Second in priority*, the Monitor shall pay the Bank of Montreal, or as it may in writing direct, the Bank of Montreal's costs of this reference fixed and assessed by me inclusive of all fees, disbursements and taxes according to the procedure set out in the consent of the Private Mortgagees and Bank of Montreal annexed as Schedule D hereto;

c) *Third in priority,* the Monitor shall pay to "Jack Greenburg, in Trust for Private Mortgagees", the balance of the funds held with respect to the subject lands and premises, up to but not exceeding the sum of $11,960,703.22.

d) *Fourth,* any surplus remaining in the Monitor's hands after payments as above, if any, shall be retained by the Monitor subject to further disposition by the Court.

8. **I FURTHER ORDER** that in view of the exceptional cooperation of counsel and parties in the resolution of this complex matter there shall be no further costs awarded to any party.

Dated at Toronto, this 11th day of August 2016

Duncan W. Glaholt
Referee

REVISED Schedule A Lien Claimants

Column 1 Name of person entitled to Construction Lien	Column 2 Principal	Col. 3 Costs	Column 4 Lien amount	Column 5 Interest (non-lienable)	Column 6 Personal Judgment (claim and interest)	Column 7 Primary Debtor
Con-Drain Company (1983) Limited Lien reg. as: YR2016863 Court File No. CV-13-116355-00	[Incl.]	[Incl.]	$25,000.00	$3,522.99	$98,359.70	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
Pilbro III Inc. Lien reg. as: YR2056986 Court File No. CV-13-116840-00	[Incl.]	[Incl.]	$91,798.91	$19,763.85	$574,117.67	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
Medi Group Incorporated Lien reg. as: YR2057173 Court File No. CV-13-116838-00	[Incl.]	[Incl.]	$99,714.00	$18,598.79	$540,273.79	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
Cardell Flooring Ltd. Lien reg. as: YR2057568	[Incl.]	[Incl.]	$24,663.34	$3,384.17	$98,306.27	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc.,

Column 1 Name of person entitled to Construction Lien	Column 2 Principal	Col. 3 Costs	Column 4 Lien amount	Column 5 Interest (non-lienable)	Column 6 Personal Judgment (claim and interest)	Column 7 Primary Debtor
Court File No. CV-13-116835-00						2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
Foremont Drywall Inc./1382479 Ontario Inc./1382503 Ontario Inc./2203579 Ontario Inc./c.o.b. Foremont Drywall Contracting Lien reg. as: YR2057675 Court File No. CV-13-116837-00	[Incl.]	[Incl.]	$61,261.57	$15,493.60	$450,071.53	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
Canadian Concrete Forming Limited Lien reg. as: YR2057676 Court File No. CV-13-116834-00	[Incl.]	[Incl.]	$60,619.39	$7,708.03	$223,909.71	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
Pave Plumbing & Heating Inc. Lien reg. as: YR2057677	[Incl.]	[Incl.]	$26,198.70	$8,103.82	$235,406.77	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990

Column 1 Name of person entitled to Construction Lien	Column 2 Principal	Col. 3 Costs	Column 4 Lien amount	Column 5 Interest (non-lienable)	Column 6 Personal Judgment (claim and interest)	Column 7 Primary Debtor
Court File No. CV-13-116839-00						Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
E. D. Carpenters Ltd. Lien reg. as: YR2058240 Court File No. CV-13-116836-00	[Incl.]	[Incl.]	$19,527.89	$11,717.90	$340,391.91	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
Solo Electric Ltd. Lien reg. as: YR2058688 Court File No. CV-13-116841-00	[Incl.]	[Incl.]	$30,362.23	$6,644.27	$193,008.43	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
1865721 Ontario Inc. Lien reg. as: YR2059379 Court File No. CV-13-116833-00	[Incl.]	[Incl.]	$20,575.55	$3,262.82	$94,781.37	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.

159

Column 1 Name of person entitled to Construction Lien	Column 2 Principal	Col. 3 Costs	Column 4 Lien amount	Column 5 Interest (non-lienable)	Column 6 Personal Judgment (claim and interest)	Column 7 Primary Debtor
GM Exterior Inc. Lien reg. as: YR2062198 Court File No. CV-13-117058-00	[Incl.]	[Incl.]	$9,451.58	$1,628.42	$48,187.62	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
Giancola Aluminum Contractors Inc. Lien reg. as: YR2062199 Court File No. CV-13-117059-00	[Incl.]	[Incl.]	$16,265.36	$2,888.23	$85,467.23	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
L.I.U.N.A. Local 183 et al. Lien reg. as: YR2050961	[Incl.]	[Incl.]	$7,500.00	$787.70	$23,355.71	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
Argo Lumber Inc. Lien reg. as: YR2048904 Court File No. CV-13-116990-00 Newmar Window Manufacturing Inc.	[Incl.]	[Incl.]	<u>$140,000.00 collectively</u>	<u>$0</u>	<u>$0</u>	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario

760

Column 1 Name of person entitled to Construction Lien	Column 2 Principal	Col. 3 Costs	Column 4 Lien amount	Column 5 Interest (non-lienable)	Column 6 Personal Judgment (claim and interest)	Column 7 Primary Debtor
Lien reg. as: YR2050277 Court File No. CV-13-116991-00						Inc., and 2147650 Ontario Inc.
King-Con Corporation Lien reg. as: YR2049079 Court File No. CV-116857-00	[Incl.]	[Incl.]	$15,000.00	$3,724.56	$108,298.79	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
The Sanderson-Harold Company Ltd., Paris Kitchens Lien reg. as: YR2058638 Court File No. CV-15-539365	[Incl.]	[Incl.]	$45,000.00	$7,282.91	$211,152.91	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
669857 Ontario Inc. o/a Alma Mechanical Lien reg. as: YR2060246 Court File No. CV-13-117214-00	[Incl.]	[Incl.]	$25,000.00	$3,733.38	$112,020.38	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
TOTALS			**$717,938.52**			

161

Column 1 Name of person entitled to Construction Lien	Column 2 Principal	Col. 3 Costs	Column 4 Lien amount	Column 5 Interest (non-lienable)	Column 6 Personal Judgment (claim and interest)	Column 7 Primary Debtor

Schedule B Non-lien claims, personal judgment only

Column 1 Name of person entitled to personal judgment only	Column 2 Principal	Column 3 Costs	Column 4 Interest	Column 5 Personal judgment amount (claim and interest)	Column 6 Primary Debtor
Argyle Hardwood & Flooring Ltd.	$129,516.11	0	$4,226.95	$133,743.06	Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148893 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc., and 2147650 Ontario Inc.
TOTAL:				$133,743.06	

SCHEDULE C Legal Description

1. Lot 1, Plan 65M4249, Town of Richmond Hill; PIN: 03206-3418 (LT)
2. Lot 23, Plan 65M4249, Town of Richmond Hill; PIN: 03206-3440 (LT)
3. Lot 24, Plan 65M4249, Town of Richmond Hill; PIN: 03206-3441 (LT)
4. Lot 18, Plan 65M4331, Town of Richmond Hill; PIN: 03206-3502 (LT)
5. Lot 19, Plan 65M4331, Town of Richmond Hill; PIN: 03206-3502 (LT)
6. Lot 20, Plan 65M4331, Town of Richmond Hill; PIN: 03206-3503 (LT)
7. Lot 22, Plan 65M4331, Town of Richmond Hill; PIN: 03206-3505 (LT)
8. Lot 23, Plan 65M4331, Town of Richmond Hill; PIN: 03206-3506 (LT)
9. Lot 24, Plan 65M4331, Town of Richmond Hill; PIN: 03206-3507 (LT)
10. Lot 25, Plan 65M4331, Town of Richmond Hill; PIN: 03206-3508 (LT)

SCHEDULE D

Court File No.: CV-13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES CREDITORS ARRANGEMENT ET. AL
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.

CONSENT

THE PARTIES HERETO, Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited, Nastell Investments Limited, Castle Lane Design Group Inc and Bank of Montreal, by their lawyers, consent to the Procedural Order attached hereto and certify that no party to this proceeding is under any legal disability.

Date: 19/13/2014

Drudi Alexiou Kuchar LLP
7050 Weston Road, Suite 610
Vaughan, Ontario L4L 8G7

Marco Drudi
Tel: (905) 850-6116 / Fax: (905) 850-9146

Lawyers for Puccini Mortgage Corp.. 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited, Nastell Investments Limited, Castle Lane Design Group Inc.

165

Date: July 13, 2016

Aguecci & Calabretta per AF

Agueci & Calabretta
5700 Yonge Street
Suite 1100,
North York, Ontario,
Lawyers for Bank of Montreal

Court File No.: CV-13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENTS 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.

PROCEDURAL ORDER # ____

An issue has arisen between the Bank of Montreal and the Private Mortgagees regarding the costs claimed by the Bank of Montreal in relation to this Reference and the source of the funds to pay such costs.

On the Consent of the Defendants Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited, Nastell Investments Limited and Castle Lane Design Group Inc. and the Bank of Montreal,

1. I hereby direct that the Monitor pay, on a without prejudice basis, from the funds held by the Monitor, after payment of the amounts found to be payable to the Lien Claimants from said funds, but before payment of the amounts owed to the Defendants, Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Dapaul Management Limited, Nastell Investments Limited and Castle Lane Design Group Inc.(the "Private Mortgagees), the legal costs incurred by Bank of Montreal ("BMO") arising in relation to this Reference which have not been otherwise reimbursed, on the following terms and conditions:

   (a) By no later than August 15, 2016, BMO shall deliver to the Monitor, and to the lawyers for the Private Mortgagees, copies of all Accounts received by BMO and to be paid by the Monitor (the "Accounts");

(b) By no later than August 15, 2016, BMO will provide to the Private Mortgagees, and file with me, a Bill of Costs, the dockets of the lawyers involved in the Accounts and, where requested, will provide to the Private Mortgagees copies of the invoices/receipts for disbursements;

(c) The payment of the funds to BMO will be without prejudice to the rights of the parties herein and BMO will execute a reimbursement agreement in favour of the Private Mortgagees wherein BMO agrees to reimburse the Private Mortgagees after costs are fixed by me should I reduce the Accounts/Bill of Costs;

(d) I will set a date for the half-day hearing on the costs to be heard not later than September 15th, 2016. Where the amount paid by the Monitor pursuant to this Order to BMO exceeds the amount of costs I order payable to BMO, BMO shall remit the excess payment to the Private Mortgagees within 15 days from my finding; however, if at the time of my finding the Monitor has not yet paid the costs of BMO, then the Monitor shall pay to BMO, from the fund, the amount I order payable to BMO as costs; and

(e) Within 10 days from receipt of the payment by the Monitor to BMO, BMO is to register a discharge of their Mortgage on Lot 18, M-Plan 65M4331.

ALL OF WHICH IS ORDERED AND DIRECTED THIS ________ DAY OF JULY, 2016

____
DUNCAN W. GLAHOLT, REFEREE

Court File No. 13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
In the matter of a reference under the *Construction Lien Act*, R.S.O. 1990, c. C.30 as amended
And in the matter of R. 54, Ontario Rules of Civil Procedure

DUNCAN W. GLAHOLT, Referee

Date:	**28 September 2016**
File:	13-10362-00CL
Title:	**In the Matter of a Plan of Compromise or Arrangement of Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148993 Ontario Inc., 2147681 Ontario Inc. and 2147650 Ontario Inc.**

REASONS
28 September 2016

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[1] On 11 August 2016, I issued reasons for a Partial Award/Report of the same date. The original intent of issuing a Partial Award/Report was to allow monies to flow to the Lien Claimants while relatively small residual issues of costs as between the Private Mortgagees and the Bank of Montreal were resolved.

[2] Then matters became somewhat more complicated. Although I had reduced my own account up to and including 11 August 2016 by $13,783.95, such that there were no Referee costs beyond the initial deposits ordered by Justice Newbould on 8 January 2015, two additional costs-related disputes emerged:

a. Facility costs: Counsel for Argo and Newmar wrote on 15 August 2016 taking issue with costs of the reporter's facility in which we conducted our hearings. This position was supported by counsel for the Lien Claimants on 16 August 2015, and opposed by counsel for the Private Mortgagees on 15 August 2015. The bill from the reporter's facility amounts to $3,888.52 and covers the period 11 to 14 July 2016. I deal with this issue under the heading "Facility costs" below.

b. 25 July 2016 costs: Counsel for the Silver Streams defendants wrote on 12 August 2016 seeking leave to make submissions on the costs of an attendance arranged for 25 July 2016 to hear argument on the claim of Argo and Newmar for full indemnity costs in the amount of $8,500. I deal with this issue under the heading "25 July 2016 costs" below.

[3] Finally, there is the executed issue of costs as between the Private Mortgagees and the Bank of Montreal:

a. The Bank of Montreal's revised bill of costs filed 26 August 2016 claimed $375,855.00 for fees, $1,409.57 for disbursements and HST, for a total of $426,125.72.

b. The Private Mortgagees made "Cost Submissions" on 9 September 2016.

c. The Bank of Montreal made "Reply Costs Submissions" on 16 September 2016. These "Reply Costs Submissions" prompted an email to me and the bank's counsel from counsel for the Private Mortgagees on Saturday, 17 September 2016, providing reply submissions under 12 headings keyed to the paragraph numbers in the Bank of Montreal's "Reply Costs Submissions".

d. This was followed on Monday, 19 September 2016 by an unsolicited telephone call to me from the Bank of Montreal's lawyer, in the absence of counsel for the Private Mortgagees, wishing to make 'reply' submissions to the Private Mortgagees' Saturday, 17 September 2016 email. *Ex parte* contact like this strongly discouraged, even for simple scheduling matters like this, however I felt it best at this stage to bring closure to these proceedings in short order, without a further expensive round of submissions on the need for reply. I advised counsel for the Private Mortgagees and the Bank of Montreal that I would consider only genuine reply by the Bank of Montreal, to be received no later than close of day Wednesday 21 September 2016.

e. The Bank of Montreal's "Further Reply Costs Submissions" arrived on Wednesday 21 September 2016.

[4] I have carefully considered all submissions made and all arguments advanced. I have thoroughly read all briefs and all exhibits. Any failure on my part to specifically recite or describe any such argument, brief, exhibit or conclusion in these Reasons does not change the fact that they were all carefully read and considered by me in reaching my conclusions. I have specifically excluded any consideration whatsoever of anything said to me by counsel for the Bank of Montreal in their unsolicited call to my office on 19 September 2016.

Facility costs

[5] At paragraph 37 of my Reasons on the Partial Award/Report, I noted my understanding that "[a]*ll facility costs prior to the 25 July 2016 hearing of the Argo and Newmar*

interest hearing were to be borne, I understand, in some consensual fashion by the Lien Claimants and Private Mortgagees."

[6] Counsel for Argo and Newmar, supported by counsel for the "Medi Client" lien claimants, points to paragraph 4 of the Order of Justice Newbould dated 8 January 2015, directing this reference, and paragraph 26 of the Initial Order dated 17 December 2013, providing that any additional "costs of the Referee" were secured by an Administration Charge and are to be paid by the Monitor. This of course begs the question as to whether the facilities costs were "costs of the Referee", or costs to be borne in some consensual fashion by the parties.

[7] Counsel for the "Medi Client" lien claimants pointed out that as some lien claimants attended the hearing and some did not, but all benefited from the settlement, saddling any particular group of lien claimants with even this small amount would be unfair and *"quite frankly . . . difficult to collect at this point."* In 26 July 2016 submissions, the point was made (among others) that the hire of a hearing room was a necessary incident and unavoidable cost of retaining a Referee, as "[i]*t is not as if the hearing could have been conducted in a phone booth*", and that the whole sense of the settlements reached was that the Lien Claimants have no further responsibility for costs.

[8] In response, counsel for the Private Mortgagees noted that the Administrative Charge was just that, security for payment, not a pre-determination of responsibility for costs, a jurisdiction which the Judgment of Reference granted to me as Referee.

[9] In order that the reporter's business not be inconvenienced by this debate, I paid their bill in full myself in the amount of $3,888.52 on 13 September 2016, merely as a courtesy to the reporter who had accommodated our on-again, off-again week of adjournments leading up to the settlement.

[10] On balance, I am persuaded by the arguments made by the Medi Client group of lien claimants that costs beyond the $100,000 deposit are to be borne by the Monitor, and that the settlements were intended to cut off any further exposure of the Lien Claimants for costs. Therefore I will record the $3,888.52 as a disbursement in my final bill to the Monitor to be issued following release of my Final Award.

25 July 2016 costs

[11] Counsel for the Silver Streams defendants wrote on 17 August 2016 claiming full indemnity costs of $8,500 inclusive of fees, taxes and disbursements, or partial indemnity costs of $5,300, for opposing the cost and interest claims of Argo and

Newmar. A 19 July 2016 "without prejudice" offer of judgment in the amount $1,500, all inclusive, against the Silver Streams defendants, in favour of Argo and Newmar, plus personal judgment for *Courts of Justice Act* interest of approximately $12,000 was included with these submissions.

[12] Counsel for Argo and Newmar responded by letter on 23 August 2016 citing *McDonald v. Anishinabek Police Service* [2007] O.J. No. 424 for the proposition that "costs of costs" are generally not awarded except in unusual circumstances, which in their view did not exist in this case. It was argued that there are no circumstances in this case to support a claim for substantial indemnity costs. In addition, the quantum of costs was challenged on various grounds.

[13] While the Silver Streams defendants prevailed on the issue of costs and interest, their offer of judgment involved credits that might have required clarification and it was not unreasonable therefore that the Argo and Newmar costs claim proceed. As provided at paragraph 8 of my Partial Report/Award, the exceptional cooperation of counsel and parties in the resolution of this complex matter argues strongly in favour of no further costs being awarded to any party especially on issues of costs. No costs are awarded to the Silver Streams defendants on the Argo and Newmar claims for costs and interest in this reference.

BMO costs claimed against the Private Mortgagees

[14] On 15 August 2016 I received copies of accounts and a Bill of Costs from lawyers for the Bank of Montreal current to 18 June 2016. A further account for the period 18 June 2016 to 22 August 2016 followed on 26 August 2016. The amount claimed on a full indemnity scale was $426,125.72 inclusive of fees, disbursements and taxes.

[15] On 8 September 2016, I received costs submissions from the Private Mortgagees, which I would summarize as follows:

a. As to liability:

i. The settlement in which the Bank of Montreal participated was on a "without costs" basis, and the Bank of Montreal neither sought nor obtained costs against the Lien Claimants. This restricts any claim that the bank may have for costs to matters exclusively at issue between the Bank of Montreal and the Private Mortgagees.

ii. There were no cross-claims or other matters directly in dispute between the bank and the Private Mortgagees. Any proceedings that increased costs, such as the November 2015 application to compel Bank of Montreal records and answer undertakings, were initiated by the Lien Claimants, not the Private Mortgagees.

b. As to scale and quantum:

   i. Scale cannot be determined by reference mortgage documents to which the Private Mortgagees were not parties.

   ii. Nothing in the Private Mortgagee's conduct on this reference displaces the presumption of partial indemnity costs. In fact the conduct of this matter as between the Private Mortgagees and the Bank of Montreal was one of marked cooperation throughout this matter.

   iii. The fees claimed in the amount of $375,855.00 are disproportionate to the stake the bank had in the matters at issue and the bank's peripheral role in the whole process. This claim is three times the fees of the lawyers for the Private Mortgagees who held the labouring oar. Moreover, the Bank of Montreal's claim includes significant non-reference related time entries (such as the collateral Tarion proceedings before Justice Wilton-Siegel), leaving about $130,000 of fees related to the reference, at most.

   iv. Rates and time charged were also challenged.

c. It is the Private Mortgagee's submission that no costs should be awarded to the Bank of Montreal, or, if awarded, on a partial indemnity basis only, in the amount of $40 – 45,000 plus disbursements of approximately $1,500 and associated taxes.

[16] The Bank of Montreal's "Reply Cost Submissions" advanced arguments I would summarize as follows:

a. The bank relies upon its standard charge terms with its borrower, Silver Streams, entitling it to indemnity. The bank also relies upon its acknowledged priority over the Private Mortgagees. The bank argues that it can simply tack any costs of recovery onto its mortgage debt, *"thereby in effect binding third parties who are subsequent in priority on title so as to lessen their security in the project."*

b. The bank argues that as long as there was *any* possibility that the Private Mortgagees might take priority over the Lien Claimants in a way that would leave the Bank of Montreal exposed for deficiency in holdback, there was sufficient adversity in interest between the bank and the Private Mortgagees to ground an award of costs. This argument is repeated a number of ways throughout the bank's submissions.

c. The bank argues that until the Private Mortgagees conceded some priority to the Lien Claimants on 8 July 2016 (the bank calls this a *"seismic shift"*) the bank had no choice but to participate. This argument, also made in a variety of ways in the Reply Cost Submissions, is that priority should have been conceded sooner, and that this conduct justifies an award of costs in favour of the bank as against the Private Mortgagees.

d. The bank states that "[a]*s a consequence of the tactics employed by the Private Mortgagees in causing BMO to be kept in this litigation, the Private Mortgagees were able to negotiate favourable settlements with all of the lien claimants . . ."* The bank views the Private Mortgagee's defence of the lien claims as a mere gambit to force down their settlement value at the hearing itself. The bank says that it had no involvement in the settlements made between the Private Mortgagees and the Lien Claimants, and alleges that it was "excluded" from those negotiations.

e. The bank relies upon s. 86 of the *Construction Lien Act* to claim substantial indemnity costs, and Rule 57.01(1) as to the factors I should consider in assessing quantum on that scale. As to quantum, the bank argues carefully each of the considerations enumerated in Rule 57.01. I have considered all of these most thoroughly. Each allegation by the Private Mortgagees as to quantum is discussed and counter-argued.

f. The bank is also of the view that my jurisdiction extends to costs incurred outside of this Reference, relating to the underlying CCAA process, since this Reference was *"ordered to ensure that nay security it is entitled to is preserved (be it PPSA security or otherwise)."*

[17] The Private Mortgagees' email of 17 September 2016 advanced arguments which I would summarize as follows:

a. The Private Mortgagees further develop their "lack of adversity in interest" argument: neither Silver Streams nor the Private Mortgagees challenged the Bank of Montreal mortgages, or cross-claimed in any respect against the Bank of Montreal; in fact it was the Lien Claimants that alleged deficiency in holdback priority and those claims were settled on consent without costs.

b. The Private Mortgagees deny any agreement of any kind that the Bank of Montreal be entitled to any costs, on any scale, at any time. There is no evidence to support any representations by the Private Mortgagees as to deficiency in holdback, or entitlement to the Fund held by the Monitor, for costs or otherwise. Similarly there is no evidence on the record to support an exercise of discretion under s. 86 of the *Construction Lien Act*.

c. The Private Mortgagees concede that they did not involve the Bank of Montreal in the settlements made with the Lien Claimants, but argue that this "*supports that the Private Mortgagees never looked to BMO to assist in financing the settlement of the Lien Claimants*". In response to the allegation that the bank was actively excluded from the settlement process, the Private Mortgagees point to docket entries that "*confirm the many hours spent by counsel discussing the file and the settlement.*"

d. As to quantum, the Private Mortgagees note that there were no CCAA issues in this Reference, that the bank in reality had no exposure, and that all they really had to do was to produce proper accounting of their advances.

e. As to proportionality, it is noted that there was no 'special deal' between counsel for the Private Mortgagees and client, or with Mr. Greenberg, that the client was billed and that the client paid these bills. A comparative analysis with the accounts rendered to the Private Mortgagees and to Argo and Newmar for example, is said to show the excessive nature of the claims being advanced by the Bank of Montreal.

[18] Finally, on 21 September 2016 I received unexpectedly comprehensive "Further Reply Costs Submissions" from the Bank of Montreal, in twelve enumerated paragraphs, which I would summarize as follows:

a. The bank emphasizes in several ways, in several places, that it is <u>not</u> seeking costs against the Private Mortgagees, as such, but rather against the "Security" (the amount now held by the Monitor).

b. While acknowledging that the Private Mortgagees did not claim to rank ahead of the bank, they did claim priority over the Lien Claimants, thereby arguably exposing the bank to reimbursement of the Lien Claimants under Reimbursement Agreements. The nub of the bank's argument here seems to be that while the Security was in the aggregate face amount of the liens themselves, the bank's risk was with respect to lienable costs awarded beyond that amount.

c. The timing of the settlement is put in issue once again, this time supported by four emails among counsel, some marked "without prejudice", from the 5 – 9 July 2016 period. This is again said to be a "seismic shift" in the Private Mortgagees' position on the eve of trial which was *"part and parcel of* [a] *strategy to keep pressure on the lien claimants"*, as the bank *"would be arguing strenuously that the lien claimants had priority over the Private Mortgagees to the Security"*.

d. The bank argues its consent, Schedule D to the Partial Report/Award, as an agreement to entitlement to costs. The form of procedural order attached , paragraph 1, contemplates that after payment of the amounts found due to the Lien Claimants, and before payment to the Private Mortgagees, payment be made of *"the legal costs incurred by the Bank of Montreal ("BMO") arising in relation to this Reference which have not been otherwise reimbursed"*.

e. The bank renews its s. 86 arguments.

[19] My ruling on this final costs issue is as follows:

a. I reject any suggestion of improper conduct by any counsel or party in this reference. There is no evidence of any such conduct. It is not unusual for complex lien matters to end up settling "on the courthouse steps". As I noted in my initial reasons, the conduct of all counsel in advancing all issues in this matter was exemplary. Their ability to get together to consent to this reference illustrates a level of cooperation that was sustained throughout the entire proceeding. There is no basis for application of s. 86 sanctions against any party or counsel.

b. It is the Lien Claimants who brought the bank into this litigation and kept the bank in this litigation. There was no cross-claim by the Private Mortgagees against the bank. For the most part, the bank simply supported the priority position taken by the Lien Claimants, a point emphasized in the bank's own Further Reply Costs Submissions. All possible costs claimable by or against the Lien Claimants were settled and must be excluded from any costs as between the Private Mortgagees and the Bank of Montreal.

c. The bank was involved in some fashion in the settlements being reached, as appears from contemporary docket entries. By way of example only, on 5 and 6 July 2016, just days before the hearing:

    i. July 5, 2016: "Correspondence from Sonja Turajlich enclosing Offer to Settle from Argo Lumber Inc, and Newmar Window Manufacturing Co."

    ii. July 5, 2016: "Correspondence from Emilio Bisceglia to Marco Drudi regarding settling the Arbitration/Reference with Bank of Montreal."

    iii. July 5, 2016: "Telephone discussion with James Klein regarding settlement with B.M.O."

    iv. July 6, 2016: "Receipt and review of offer to settle by clients of Emilio Bisceglia and Jim Klein."

    v. July 6, 2016: "Several discussions with client regarding proposed settlement of the Arbitration as between Bank of Montreal and those lien claimants represented by Jim Klein, Emilio Bisceglia and Jeff Long."

    vi. July 6, 2016: "Four page correspondence to client attaching Offer to Settle as negotiated with counsel to lien claimants but not counsel to Private Mortgagees; . . ."

    vii. July 6, 2016: "Telephone discussion with Greg Fedoryn regarding my correspondence, the Offer to Settle and our counter-offer."

d. I cannot see on the record before me in this case any occasion on which the Private Mortgagees caused the Bank of Montreal to incur costs unrelated to the claims advanced by the Lien Claimants. Costs incurred by the bank related in whole or in part to the conduct of the CCAA proceedings must also be excluded. They are not within my remit.

e. With respect to costs not related to the defence of the Lien Claims and not related in whole or in part to the conduct of the CCAA proceedings, I believe that over the course of this proceeding no more than 20% of the bank's claim related to achieving the overall settlement of this matter justifying an award of costs. This recovery should be on a partial and not substantial indemnity basis. As the full indemnity claimed was $426,125.72 inclusive of fees, disbursements and taxes, I fix and assess the bank's partial indemnity costs in this matter at

177

$50,000, inclusive of all fees, disbursements and taxes to date, to be paid out of the Security in priority to the Private Mortgagees.

[20] My jurisdiction is confined to this Reference, and I do not purport to limit what any party may claim in the CCAA or other proceedings for that matter.

[21] My Final Report/Award incorporating the above findings and the earlier Partial Report/Award will issue accordingly.

Duncan W. Glaholt, Referee
28 September 2016

This is Exhibit "J" referred to in

the Affidavit of Nunzio Bitondo

sworn before me, this 17

day of November, 2016

A Commissioner for Taking Affidavits

179

Court File No. 13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	) THURSDAY, THE 8TH
	)
JUSTICE NEWBOULD	) DAY OF JANUARY, 2015

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

ORDER

THIS MOTION, made by Grant Thornton Limited, in its capacity as the Court-appointed monitor of the Applicants (in such capacity, the "**Monitor**"), for an Order, among other things, referring the construction lien claims and other related issues in these proceedings (collectively, the "**Construction Claims**") to a referee (the "**Referee**"), and referring the action bearing Court File No. CV-13-115757-00 (the "**Con-Drain Action**") to a Judge of the Commercial List, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Seventh Report of the Monitor dated December 19, 2014, the consent of lien claimants (the "**Lien Claimants**") #s 1 through 11 (as more specifically listed and identified in **Schedule "A"** attached hereto), the consent of the Private Mortgagees and the Mortgagees (as listed in **Schedule "B"** attached hereto), and the consent of the proposed Referee, and on hearing the submissions of counsel for the Monitor, counsel for the Applicants, ~~counsel for certain of the Lien Claimants, counsel for certain of the Private Mortgagees, and counsel for certain of the Mortgagees,~~ no one appearing for the unsecured claimants (the "**Unsecured Claimants**") (as more specifically listed and identified in **Schedule "C"** attached hereto) (together with the Lien Claimants, the "**Claimants**") or any other person on the service list, although duly served as appears from the affidavit of Susy Moniz sworn December 22, 2014, filed,

1. **THIS COURT ORDERS** that the time for service and filing of the notice of motion and the motion record is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that the following issues with respect to the Construction Claims be and are referred to Duncan Glaholt, who shall act as the Referee:

(a) the validity and, if necessary, quantum, of the Construction Claims filed by the Claimants;

(b) the determination of whether the Private Mortgagees are Statutory Owners (as defined in the *Construction Lien Act*, R.S.O. 1990, c. C.30, as amended (the "**Act**")), and, if so, the determination of their liability as Statutory Owners to the Lien Claimants;

(c) the liability of the Private Mortgagees and Mortgagees with respect to any deficiency in holdback to the claims of the Lien Claimants;

(d) the determination of priorities as amongst the Claimants regarding their claims as against the Claimants, the Private Mortgagees and Mortgagees; and

(e) any ancillary or peripheral issues that need to be determined in order for the Referee to properly complete its mandate, including any and all issues regarding interest and costs.

3. **THIS COURT ORDERS** that the Referee's determination in respect of the issues enumerated in paragraph 2 above shall be set out in a report (the "**Report/Award**"), which shall be served on the Service List in these proceedings and filed with the Court, and that the Report/Award shall bind any and all affected parties without further confirmation by this Court. For greater certainty, each and every party that filed a claim against one or more of the Applicants in the present proceedings shall be deemed to be an affected party of the

Report/Award. Notwithstanding the foregoing, any and all affected parties shall maintain their right to appeal the Report/Award to the Divisional Court in accordance with the Act.

4. **THIS COURT ORDERS** that the anticipated costs of the Referee, up to the amount of $100,000.00, shall be funded equally, and in advance of the Referee commencing its mandate, by the Private Mortgagees (50%) and the Lien Claimants (50%, such that costs shall be borne by each Lien Claimant on a pro rata basis, as calculated in **Schedule "A"** hereto), and that any additional costs of the Referee shall be secured by the Administration Charge (as defined in the Initial Order issued on December 17, 2013 in these proceedings) and paid by the Monitor (collectively, the "**Referee's Costs**"). Notwithstanding the above, the Referee shall maintain the right to assess costs in the Report/Award against any party, including, without limitation, the right to reallocate the Referee's Costs, and any such assessment shall attract the same deference and appeal rights as provided in paragraph 3 of this Order.

5. **THIS COURT ORDERS** that should a Lien Claimant refuse or neglect to pay its pro rata share of costs (a "**Defaulting Lien Claimant**"), then any other Lien Claimant shall be at liberty to advance the costs payable by the Defaulting Lien Claimant and shall be entitled to twice the amount advanced, which repayment shall form a first charge against any sums found to be due and payable to the Defaulting Lien Claimant and which sum shall be repaid before the Defaulting Lien Claimant receives any proceeds under this process.

6. **THIS COURT ORDERS** that the Con-Drain Action shall be transferred from the Superior Court of Justice in Newmarket, Ontario and shall be heard by a Judge of the Superior Court ~~Commercial List~~ in Toronto, separate from the present proceedings and without the participation of the Monitor, but that the funds in dispute in the Con-Drain Action, which are currently held in the trust account of Chaitons LLP (the "**Chaitons Trust Account**"), shall not be released or distributed from the Chaitons Trust Account without a further Order of this Court sitting in the context of the present proceedings.

NMJ.

JAN 8 2015

NMJ.

SCHEDULE "A"

	Lien Claimant	Court File No.	Lien Amount ($)	Lien Registration No.	% of Total Lien Amount Claimed by all Lien Claimants
1.	Con-Drain Company (1983) Limited	CV-13-116355-00	94,837	YR2016863	2.6%
2.	Pilbro III Inc.	CV-13-116840-00	554,354	YR2056986	15.5%
3.	Medi Group Incorporated	CV-13-116838-00	521,675	YR2057173	14.6%
4.	Cardell Flooring Ltd.	CV-13-116835-00	94,922	YR2057568	2.6%
5.	Foremont Drywall Inc.; 1382479 Ontario Inc.; 1382503 Ontario Inc.; 2203579 Ontario Inc. c/o Foremont Drywall Contracting	CV-13-116837-00	434,578	YR2057675	12.1%
6.	Canadian Concrete Forming Limited	CV-13-116834-00	216,202	YR2057676	6.0%
7.	Pave Plumbing & Heating Inc.	CV-13-116839-00	227,303	YR2057677	6.3%
8.	E.D. Carpenters Ltd.	CV-13-116836-00	328,674	YR2058240	9.2%
9.	Solo Electric Ltd.	CV-13-116841-00	186,364	YR2058688	5.2%
10.	1865721 Ontario Inc.	CV-13-116833-00	91,519	YR2059379	2.6%
11.	GM Exterior Inc.	CV-13-117058-00	46,559	YR2062198	1.3%
12.	Giancola Aluminum Contractors Inc.	CV-13-117059-00	82,579	YR2062199	2.3%
13.	Renova Recycling (2000) Inc.	CV-14-117811-00	29,392	YR2060384	0.8%
14.	Trudel & Sons Roofing Ltd.	CV-14-117658-00	31,745	YR2073073	0.9%
15.	L.I.U.N.A. Local 183 et al. (Massimo Digiovani as agent)	CV-13-117071-00	22,568	YR2050961	0.6%

16.	Argo Lumber Inc.	**CV-13-116990-00**	**135,060**	**YR2048904**	**3.8%**
17.	Newmar Window Manufacturing Inc.	**CV-13-116991-00**	**67,793**	**YR2050277**	**1.9%**
18.	The King-Con Corporation	**CV-13-116857-00**	**104,574**	**YR2049079**	**2.9%**
19.	The Sanderson-Harold Company Ltd. (Paris Kitchens)	**Not available as at the date hereof**	**203,870**	**YR2058638**	**5.7%**
20.	669857 Ontario Inc. o/a Alma Mechanical	**CV-13-117214-00**	**108,287**	**YR2060246**	**3.0%**
		TOTAL	**3,582,855**		**100.00%**

SCHEDULE "B"

Private Mortgagees

1. Puccini Mortgage Corp.
2. DaPaul Management Limited
3. 388242 Ontario Limited
4. 53 Puccini Mortgage Corp.
5. Nastell Investments Limited
6. Castle Lane Design Group Inc.

Mortgagees

1. Bank of Montreal
2. Foremost Mortgage Holding Corporation
3. Home Trust Company

SCHEDULE "C"

	Claimant	Amount ($)
1.	J.S. Construction	18,750
2.	Benzi General Contracting	6,106
3.	Krcmar Surveyors Ltd.	9,287
4.	Quality Door Systems Inc.	20,724
5.	ConelCo Utility Contractors	3,073
6.	MAS Engineering (part of Cole Engineering)	4,379
7.	J.J. Home Products	28,670
8.	TorOnCa Fence and Deck	24,860
9.	Dream Work Canada Inc. o/a Stone Factory	91,435
10.	General Home Built-In Systems Ltd.	33,594
11.	ConelCo Utility Contractors	3,073
12.	Argyle Flooring*	*129,516
	TOTAL	373,467

*Denotes a late claim filed after the deadline of February 14, 2014.

186

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 HOME (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

Court File No. CV-13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

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Lawyers for Grant Thornton Limited, in its capacity as the Court-appointed Monitor of the Applicants

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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.

Court File No.: 13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at **TORONTO**

RESPONDING AND CROSS-MOTION RECORD OF CON-DRAIN COMPANY (1983) LIMITED
(Returnable November 29, 2016)

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KM-2446212v1