

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

BUDUCHNIST CREDIT UNION LIMITED

Applicant

- and -

**2321197 ONTARIO INC., CARLO DEMARIA, SANDRA DEMARIA,
2321198 ONTARIO INC., SASI MACH LIMITED, VICAR HOMES LTD. and
TRADE CAPITAL FINANCE CORP.**

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

**NOTICE OF MOTION
(returnable April 17, 2020)**

The Applicant, Buduchnist Credit Union Limited (“**BCU**”), will make a motion to the Honourable Mr. Justice Penny on Friday, April 17, 2020 at 10:00 a.m. at a court house location in Toronto, Ontario to be determined and advised.

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

THE MOTION IS FOR AN ORDER:

1. Directing and authorizing KSV Kofman Inc. (“**KSV**”), in its capacity as Receiver of the Properties (as defined below), to make the following distributions:
 - (a) a distribution of the net sale proceeds generated from the closing of the court-approved sale transaction in respect of the real property municipally known as 87 Elm Grove Avenue, Richmond Hill, Ontario (the “**Elm Property**”) to BCU;
 - (b) a distribution of the net proceeds generated from the collection of rent and closing of the court-approved sale transaction in respect of the real property municipally

known as 46 Puccini Drive, Richmond Hill, Ontario (the “**Puccini Property**”) to BCU;

- (c) a distribution of the net proceeds generated from the collection of rent and closing of the court-approved sale transaction in respect of the real property municipally known as 6216 Fifth Line, Egbert, Ontario (the “**Cottage Property**”, and collectively with the Elm Property and the Puccini Property, the “**Properties**”) to BCU and in the event there are any surplus net proceeds to which Carlo Demaria (“**Carlo**”) would be entitled then a distribution of such surplus to the Sheriff pursuant to BCU’s consent judgments against Carlo and the Writs of Seizure and Sale in respect thereof;
- 2. Quantifying BCU’s costs in respect of the receivership of the Cottage Property pursuant to the terms of the Third Amended and Restated Receivership Order dated February 22, 2019 in order to determine the total amount owing to BCU that is distributable to it from the net proceeds of the Cottage Property;
- 3. Costs of this motion on a full indemnity basis in accordance with the terms of BCU’s security; and
- 4. Such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

The Receivership Proceedings

- 1. Pursuant to orders of the Court made on November 13, 2018, on application made by BCU, KSV was appointed as Receiver of the Elm Property (the “**Receivership Order**”) and as interim receiver of the Puccini Property;
- 2. On December 4, 2018, the interim receivership of the Puccini Property was converted to a receivership;

3. On January 17, 2019, the Receivership Order was amended to include the Cottage Property;
4. The Receiver has sold the Elm Property, the Puccini Property and the Cottage Property, and prior to sale realized rental monies from the Puccini Property and the Cottage Property. The Receiver has net proceeds available for distribution as set out in its Interim Statement of Receipts and Disbursements attached as Schedule “A”;

The Elm Property

5. The Elm Property is comprised of land and a new vacant residential home the construction of which was not complete. At the time the Receiver was appointed, 2321197 Ontario Inc. (“**197**”) was the registered owner of the Elm Property;
6. Pursuant to the Commitment Letter, dated January 29, 2016, and the Line of Credit Loan Agreement, dated January 29, 2016 (together, the “**197 Loan Agreements**”), BCU advanced a demand loan to 197 in the principal amount of \$2,200,000 (the “**197 Loan**”);
7. Repayment of the 197 Loan is guaranteed by Carlo pursuant to a Guarantee and Postponement of Claim, dated January 29, 2016;
8. The 197 Loan is secured by a charge/mortgage in the principal amount of \$2,200,000, registered in favour of BCU against the Elm Property on February 5, 2016 (the “**Elm Mortgage**”);
9. On May 6, 2015, the Ontario Superior Court issued an Order (the “**Mareva Order**”) in the proceeding of *Trade Capital Finance Corp. v. Peter Cook et al.*, bearing Brampton Court File No. CV-15-2110-00. 197 is not an original Mareva Defendant nor is it one of the additional Mareva Defendants added by subsequent amendment to the Mareva Order made on March 24, 2016. Prior to the within receivership proceedings, the Mareva Plaintiff, Trade Capital Finance Corp. (“**Trade Capital**”), was aware of the Elm Property and of the Elm Mortgage but failed to notify BCU that it took the position that the Elm Property was frozen by the Mareva Order;

The Puccini Property

10. The Puccini Property is a residential property. At the time the Receiver was appointed, 2321198 Ontario Inc. (“**198**”) was the registered owner of the Puccini Property;
11. Pursuant to the Line of Credit Mortgage Loan Agreement and Statement of Disclosure, dated February 17, 2015, the Mortgage Loan Offer, dated February 17, 2015, and the Line of Credit Mortgage Loan Agreement and Statement of Disclosure, dated October 20, 2015 (collectively, the “**198 Loan**”), BCU made loan advances to 198;
12. The 198 Loan is secured by a charge/mortgage in the principal amount of \$2,500,000 (the “**Puccini Mortgage**”), registered in favour of BCU against the Puccini Property on February 27, 2015;
13. Repayment of the Puccini Mortgage is guaranteed by Carlo pursuant to a Guarantor Clause, dated February 26, 2015;
14. The obligations of 198 to BCU are also secured by a General Security Agreement, dated February 17, 2015. On September 20, 2018, BCU registered a financing statement pursuant to the *Personal Property Security Act* (Ontario) against 198 over all collateral classes except “consumer goods”;
15. The Puccini Mortgage and advances of funds under the Line of Credit Mortgage Loan Agreement secured by the Puccini Mortgage pre-date the Mareva Order. More than seven months after the registration of the Puccini Mortgage, the Mareva Order was registered against the Puccini Property on September 29, 2015, notwithstanding that 198, the registered owner of the Puccini Property, is not an original Mareva Defendant nor is it one of the additional Mareva Defendants added by subsequent amendment to the Mareva Order made on March 24, 2016. Prior to the within receivership proceedings, Trade Capital did not notify BCU of its registration of the Mareva Order against the Puccini Property nor did it notify BCU that it took the position that the Puccini Property was frozen by the Mareva Order and there should be no further advance of funds under the Puccini Mortgage;

The Cottage Property

16. The Cottage Property consists of four acres of land and a cottage residence in Egbert, Ontario. At the time the Receiver was appointed, Carlo and Sandra Demaria (“**Sandra**”) were the registered owners of the Cottage Property;
17. BCU holds a charge/mortgage registered on April 28, 2006 against the Cottage Property securing the principal amount of \$317,240 (the “**Cottage Mortgage**”). All funds advanced by BCU under the Cottage Mortgage were fully advanced on or about the date the Cottage Mortgage was registered, which was almost a decade before the Mareva Order was made;
18. On June 18, 2015, the Mareva Order was registered against the Cottage Property;

Sale of the Properties

19. The Receivership Order authorized the Receiver to conduct sales processes and enter into sales agreements in respect of the Properties;
20. Pursuant to an Approval and Vesting Order dated February 27, 2019 (the “**Puccini AVO**”), the Court approved a transaction (the “**Puccini Sale**”) for the sale of Puccini Property pursuant to an Agreement of Purchase and Sale dated February 3, 2019. Paragraph 4 of the Puccini AVO provides that, for the purposes of determining the nature and priority of Claims (as defined in the Puccini AVO), the net proceeds of the Puccini Sale shall stand in the place and stead of the Puccini Property;
21. Pursuant to an Approval and Vesting Order dated March 29, 2019 (the “**Elm AVO**”), the Court approved a transaction (the “**Elm Sale**”) for the sale of the Elm Property pursuant to an Agreement of Purchase and Sale dated February 7, 2019. Paragraph 4 of the Elm AVO provides that, for the purposes of determining the nature and priority of Claims (as defined in the Elm AVO), the net proceeds of the Elm Sale shall stand in the place and stead of the Elm Property;
22. Pursuant to an Approval and Vesting Order dated July 25, 2019 (the “**Cottage AVO**”), the Court approved a transaction (the “**Cottage Sale**”) for the sale of the Cottage Property

pursuant to an Agreement of Purchase and Sale dated June 26, 2019. Paragraph 4 of the Cottage AVO provides that, for the purposes of determining the nature and priority of Claims (as defined in the Cottage AVO), the net proceeds of the Cottage Sale shall stand in the place and stead of the Cottage Property;

23. Each of the Puccini Sale, the Elm Sale and the Cottage Sale has been completed and the Receiver holds the net proceeds of the sales available for distribution as set out in Schedule "A";

Stay Extension Agreement and Consent Judgments

24. Pursuant to a Stay Extension Agreement dated November 26, 2019, among BCU, 197, 198, Carlo, Sandra and Vicar Homes Ltd.:
 - (a) 197 and Carlo irrevocably acknowledged and conceded: (i) the validity and enforceability of the Elm Mortgage; (ii) that the Elm Mortgage secures the indebtedness due and owing to BCU; (iii) that the Elm Mortgage is in default and is therefore enforceable; and (iv) that BCU is entitled to judgment against 197 as mortgagor and borrower and against Carlo as guarantor under the Elm Mortgage;
 - (b) 198 and Carlo irrevocably acknowledged and conceded: (i) the validity and enforceability of the Puccini Mortgage; (ii) that the Puccini Mortgage secures the indebtedness due and owing to BCU; (iii) that the Puccini Mortgage is in default and is therefore enforceable; and (iv) that BCU is entitled to judgment against 198 as mortgagor and borrower and against Carlo as guarantor under the Puccini Mortgage;
 - (c) Carlo and Sandra irrevocably acknowledged and conceded: (i) the validity and enforceability of the Cottage Mortgage; (ii) that the Cottage Mortgage secures indebtedness due and owing to BCU; (iii) that the Cottage Mortgage is in default and is therefore enforceable; and (iv) that BCU is entitled to judgment against Carlo and Sandra as mortgagors and borrowers under the Cottage Mortgage; and
 - (d) Sandra executed an irrevocable quit claim, release and direction with respect to

any surplus proceeds of the Cottage Sale to which she may be entitled after payment in full of the Cottage Mortgage and directing payment of her entitlement to BCU (the “**Cottage Direction**”);

25. Pursuant to the Stay Extension Agreement, 197, 198, Carlo and Sandra have executed consents to judgment in respect of their obligations to BCU under the Elm Mortgage, the Puccini Mortgage and the Cottage Mortgage (collectively, the “**Consents to Judgment**”) pursuant to which BCU is now taking out consent judgments against 197, 198 and Carlo and will register Writs of Seizure and Sale in respect thereof;

Proposed Distribution

26. BCU holds first-ranking charges against the net proceeds of the Elm Sale, the Puccini Sale and the Cottage Sale;
27. As at December 7, 2019, the indebtedness owing to BCU was:
 - (a) in respect of the Elm Mortgage, approximately \$2,413,959.87, plus interest and costs which continue to accrue (an amount well in excess of the net proceeds of sale available for distribution);
 - (b) in respect of the Puccini Mortgage, approximately \$2,759,240.52, plus interest and costs which continue to accrue (an amount well in excess of the net proceeds available for distribution); and
 - (c) in respect of the Cottage Mortgage, approximately \$207,393.29, plus interest and costs which continue to accrue;
28. Additionally, in respect of the Cottage Property:
 - (a) pursuant to the Cottage Direction, BCU is entitled to a distribution of any surplus net proceeds from the Cottage Property to which Sandra would be entitled ; and
 - (b) a distribution of any surplus net proceeds from the Cottage Property to which Carlo would be entitled ought to be made to the Sheriff pursuant to the consent

judgments being taken out against Carlo in accordance with the Consents to Judgment and the Writs of Seizure and Sale against Carlo in respect thereof;

29. BCU seeks an Order directing and authorizing the Receiver to make (i) a distribution of the net proceeds of the Elm Property, the Puccini Property and the Cottage Property to BCU, and (ii) to the extent there are any surplus proceeds of the Cottage Property to which Carlo would be entitled such surplus to be distributed to the Sheriff;

Other Grounds

30. Rule 37 of the *Rules of Civil Procedure* (Ontario); and
31. Such further and other grounds as counsel may advise and this Honourable Court may permit.

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

1. Affidavits of Oksana Prociuk previously sworn on November 6, 2018, November 20, 2018, November 30, 2018, and to be sworn, and the exhibits attached thereto;
2. The pleadings and proceedings herein; and
3. Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

January 10, 2020

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Lawyers for Buduchnist Credit Union Limited

TO: SERVICE LIST

SERVICE LIST
(as at January 10, 2020)

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AND TO:	<p>LAX O’SULLIVAN LISUS GOTTLIEB LLP 145 King Street West, Suite 2750 Toronto, ON M5H 1J8</p> <p>Andrew Winton Tel: (416) 644-5342 Fax: (416) 598-3730 awinton@lolg.ca</p> <p>Philip Underwood Tel: (416) 645-5078 punderwood@lolg.ca</p> <p><i>Lawyers for the Respondents, 2321197 Ontario Inc., Carlo Demaria, 2321198 Ontario Inc., and Vicar Homes Ltd. in respect of the following real properties:</i></p> <ul style="list-style-type: none"><i>(a) 87 Elm Grove, Richmond Hill, Ontario (“Elm Property”);</i><i>(b) 211 Woodland Acres Crescent, Richmond Hill, Ontario (“Woodland Property”);</i><i>(c) 46 Puccini Drive, Richmond Hill, Ontario (“Puccini Property”); and</i><i>(d) 6216 Fifth Line RR #1, Egbert, Ontario (“Cottage Property”).</i>

AND TO:	<p>SANDRA DEMARIA 211 Woodland Acres Crescent Vaughan, ON L6A 1G1 sandra@vapz.com <i>Respondent in respect of the Woodland Property and the Cottage Property</i></p>
AND TO:	<p>LOOPSTRA NIXON LLP 135 Queens Plate Drive, Suite 600 Etobicoke, ON M9W 6V7 Michael McWilliams Tel: (416) 748-4766 Fax: (416) 746-8319 mmcwilliams@loonix.com Peter W.G. Carey Tel: (416) 748-4774 pcarey@loonix.com Christopher Lee Tel: (416) 748-5117 clee@loonix.com <i>Lawyers for the Respondent, Trade Capital Finance Corporation, in capacity as Plaintiff named in Mareva Order, registered against Woodland Property, Puccini Property and Cottage Property</i></p>
AND TO:	<p>KSV KOFMAN INC. 150 King Street West, Suite 2308 Toronto, ON M5H 1J9 David Sieradzki Tel: (416) 932-6030 dsieradzki@ksvadvisory.com <i>Receiver</i></p>
AND TO:	<p>CHAITONS LLP 5000 Yonge Street North York, ON M2N 7E9 George Benchetrit Tel: (416) 218-1141 george@chaitons.com <i>Lawyers for KSV Kofman Inc.</i></p>

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Schedule "A"

87 Elm Grove Avenue, 46 Puccini Drive and 6216 Fifth Line
Interim Statement of Receipts and Disbursements
 For the period November 13, 2018 to August 15, 2019
 (CAD\$)

	<u>46 Puccini Dr.</u>	<u>87 Elm Grove Ave.</u>	<u>6216 Fifth Line</u>
<i>Receipts</i>			
Sale proceeds	2,250,000	1,750,000	405,000
Extension fees paid by Purchaser	26,000	-	-
Advances from BCU under Receiver's Borrowings Charge	20,000	45,000	5,000
Rental income	23,453	-	3,850
Interest	3,459	2,869	33
Total Receipts	<u>2,322,912</u>	<u>1,797,869</u>	<u>413,883</u>
<i>Disbursements</i>			
HST remitted to CRA on new residential home (87 Elm Grove only)	-	204,089	-
Real estate commissions (including HST)	108,056	72,744	20,594
Property taxes	18,226	6,199	368
Maintenance and contractor costs	12,985	18,680	3,432
Professional fees (Receiver and legal counsel)	49,870	38,264	22,921
Repayment of receivership advances to BCU (principal and interest)	21,161	45,385	-
HST on disbursements	8,441	7,632	3,682
Other sundry expenses	2,907	2,470	2,558
Total Disbursements	<u>221,646</u>	<u>395,462</u>	<u>53,554</u>
Balance in Receiver's accounts and/or Term Deposits	<u><u>2,101,266</u></u>	<u><u>1,402,407</u></u>	<u><u>360,329</u></u>

Note: This statement has been prepared on a cash basis and excludes accrued obligations (if any).

BUDUCHNIST CREDIT UNION LIMITED
Applicant

- and -

2321197 ONTARIO INC. et al.
Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

NOTICE OF MOTION
(returnable April 17, 2020)

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